Legal Practice in the Malikite Law of Procedure

Dr. Peter Scholz


A. Introduction: The Sharia and Legal Practice

The Sharia (shar‘a) is usually defined as the ideal religious law of Islam. The practical application of the Sharia, however, is an open question for debate. The traditional opinion that Islamic law emerged from religious speculation and is completely detached from actual legal practice is replaced by a more careful and differentiated view. It is generally accepted that the Sharia is not to be equated with legal practice, although the two are often closely related. Obvious differences are dependent on spatial and temporal considerations. The origin of Islamic law is seen in the discussion of umayad legal practice and administration. Law evolved according to the social and economic variables of early abbasid times, as is clearly evident in the literature concerning legal devices (’iyal) and legal formularies (shur‘a). The concept of the Sharia becoming more rigid with the passage of time has been increasingly debated of late. Recent studies indicate that change was indeed reflected in the Sharia, especially through the legal opinions (fatâwâ) of the muftîn.

Two questions are central to the relationship between Sharia and legal practice: To what extent does the Sharia include the rules of legal practice? To what extent were the rules of the Sharia applied in practice? The first question refers to the ability of the Sharia to absorb and adapt to legal practice. The second question underscores the importance of the Sharia for legal practice. The two questions are not necessarily related. To the extent that legal practice has found its way into the Sharia, it is likely that the Sharia was applied in practice. However, a rule of the Sharia which evolved in practice in a specific place and time was not necessarily applied in another place or at another time. A rule of the Sharia applied in practice need not have evolved in practice. It can be of purely speculative origin. This essay will deal exclusively with the ability of the Sharia to ab-
sorb and adapt to legal practice, investigating specifically the incorporation of legal practice into the Sharia, using the Malikite law of procedure up to the 6th/12th century as an example.

The Sharia has been elaborated by legal scholars (fuqahā‘) and laid down in their writings. This literature embodies works of diverse dimension, genre and purpose, such as theoretical works of law (usūl literature) and monographs concerning special legal topics, short manuals for legal studies and very extensive reference law texts (fursūc literature), as well as various manuals of legal practice (especially adab al-qā‘ī• literature) including books of legal formularies (shur‘ā• literature) and extensive collections of sentences (a‘kām literature) and legal opinions (fatāwā literature). The existence of legal practice literature demonstrates that the Sharia could not be composed solely of theoretical speculations. Such literature presupposes the analysis and digestion of problems of legal practice, as well as its practical necessity.

It is likely that there exists a special relationship between literature and legal practice because the authors of these writings were not only legal scholars but also quā‘ät muftīn or other officials. The qā‘ī• decided the outcome of lawsuits and in this way formed legal precedents, whereas the muft• only offered legal opinions. Thus he also influenced legal relationships as his opinions were often observed by the qā‘ī• in settling disputes. Other officials applied the Sharia within the scope of their official activities, for example when exercising their juridical functions or exacting religious taxes. It is therefore improbable that scholars who solved legal questions speculatively and wrote a theoretical system of law would at the same time apply a different law in practice.

This essay seeks to investigate the extent to which legal practice permeated the fursūc literature. The uniformity of legal literature argues in favour of such influence. This is perhaps due to the fact that both theoretical and practical legal literature were written by the same authors who were often also legal professionals.
Initially, legal practice influenced the Sharia in so far as it had permeated into the Koran or \( \text{'ad\th} \). There cases and general practical proceedings are described from which institutions, regulations and single rules of law are derived. The legal practice which has influenced the Sharia in this way is static and historical in nature. The Koran and \( \text{'ad\th} \) are invariable texts of the first Islamic centuries and thus fall outside the remit of this study. Instead, attention will be drawn to the extent to which formerly current legal practice permeated the Sharia and the lawbooks. We shall attempt to understand the Sharia’s adjustment to various alterations in society over time. We have therefore examined the procedural regulations of the most important Malikite lawbooks up to the 6\textsuperscript{th}/12\textsuperscript{th} century for relevant material.

B. Analysis of the Malikite Procedural Law with regard to Legal Practice

I. Legal Institutions and Regulations close to Legal Practice

The close relationship of legal institutions and regulations to legal practice is demonstrated by various criteria. The description of irrelevant circumstances, complex and unusual details and technical subject matter all indicate practical origin of actual cases. Cases in lawbooks derive from legal practice, if their facts are based in reality. It is therefore important to also examine the specific details.

1. Irrelevant Circumstances

The \textit{Mudauwana} discusses a case in which a traveller maintains that he hired a horse or a camel to Mecca for the price of 100 Dirham. The owner of the animal maintains that a price of 200 Dirham only to Medina was agreed. According to an anonymous opinion reported by \textit{Ibn al-Qåsim}\textsuperscript{11}, both parties are plaintiffs (\textit{mudda\c{c}¥n}), the owner concerning the claimed surplus (\textit{fa\dd{e}la})\textsuperscript{12} of 100 Dirham, the traveller concerning the more distant city of Mecca. The case is described without specifically identifying the individuals involved. The exact tariff and destination are not intrinsic to the resolu-
tion of the case, but they considerably facilitate comprehension. We can therefore not conclude that these specifications demonstrate a basic in fact.

In another account, *Ibn al-Qâsim* presents the following opinion (*qaul*) of *Mâlik*: A man travelling to *Ifr qiyâ*\(^{13}\) recognises an animal in *Fusâd*\(^4\) as his own and claims it with supporting evidence (*baiyina*). The possessor defends himself, maintaining that he had purchased the animal in Syria. He asserts his right (*`aqq*) to return to Syria, in hope of obtaining regress from the vendor. If the claimant does not wish to wait for their return, he will have to nominate a representative to manage the case whilst he continues his journey to *Ifr qiyâ*.\(^{15}\) The essence of this case is the recognition of property in the possession of another at place A who asserts its sale from a third person at place B. The specifications of place A and place B facilitate comprehension. But the fact that the alleged owner recognises his animal on a journey to *Ifr qiyâ*, thereby causing *Ibn al-Qâsim* to create a supplementary regulation, is irrelevant to the comprehension of the case. It is therefore probable that this example is based on an actual case.

*Ibn al-Qâsim* reports on the following regulation in the same text. *Mâlik* was presented a case in which a slave confessed (*iqrâr*) to having stepped forcibly on a child’s toe, amputating it and causing much bleeding. *Mâlik’s* opinion was that the slave’s confession would be acceptable in the case of a recent injury\(^{16}\). The confession is credible as the bleeding indicates the slave truly caused injury. The case was presented in the abstract because the individuals involved were not identified. The only relevant facts are the slave’s confession and the child’s injury. The specifics of the bleeding and the resulting loss of the toe are to be considered incidental information to the judgement. Especially the loss of the toe seems to indicate that this case is not altogether an abstract invention.

In the *Mudauwana*, we find the discussion of a blind man’s testimony in a divorce case (ãalåq). *Ibn al-Qâsim* tells us that *Mâlik* allowed the testimony of a man who overheard his neighbour divorce his wife behind a wall. The witness was not able to see his neighbour, but identified him by his voice. Former scholars of the Hedschas, Irak
and Egypt also admitted such testimony. From this regulation, Ibn al-Qāsim concludes the admissibility of the blind man’s testimony in the divorce. Again we have an abstract example because the man and his neighbour are not individualised. In arriving at a judgement, it is irrelevant that the man divorcing his wife is a neighbour of the witness and that the witness cannot see him because a wall separates the estates. The specific details of the case make it more probable that the example is in fact based on legal practice.

In the same text, Sa‘n¥n ponders his decision in the case of an individual who asserts that two envoys did not obey the order to buy a special slave. Both envoys deny the accusations and no witnesses are available. It is the opinion of Ibn al-Qāsim, who remarks that he has had no information from Mālik, that the decisive assertion is that of the two envoys (al-qaul qauluhumå) as the mandate has been acknowledged. The case is discussed in the abstract. It is remarkable that there are two envoys. This fact is irrelevant for the solution or the comprehension of the case. Once again the case seems to be based on a factual occurrence.

2. Complex and Uncommon Details

One argument for the origin in legal practice of a case mentioned in lawbooks in that complex or uncommon facts cannot be explained by their systematic context. As a rule, these facts are indicative of a basis in fact rather than speculation.

For example, in the Muwa‘ā‘a’, Mālik describes a man who dies and bequeathes a claim in favour of his heirs and an obligation in favour of a third party. There is only one witness (shåhid) for every debt. The heirs (waratha) pretend their claim (dain) and the creditors bring their claim on the estate. The heirs have the right to take their oaths in addition to the testimony of their witness, but they do not exercise this right. The creditors are given the opportunity to take the oath in addition to the testimony of their witness in order for their claim will be accepted. Once the creditors’ claim
has been paid, the remainder of the estate will not be paid out to the heirs because they have not exercised their right of oath.\(^{20}\)

The specific facts of this case suggest its origin in legal practice. The heirs pretend a claim of the estate, the creditors bring a claim against the estate, both heirs and creditors have one witness apiece and the heirs refuse to take their oaths. The case is discussed in a separate chapter without any systematic or associative context. The facts and procedures described are obscure. It is not clear if the heirs’ debtor is to be identified with the creditors. The estate does not only consist of the bequeathed claim because a remaining part of the estate is mentioned after fulfilling the obligation. The proceedings as described are incomprehensible. Although the claims are not interdependent, they are made interdependent, so that the creditors will only be allowed to swear their plaintiffs’ oaths, if the heirs refuse to take their oaths, and the heirs will have no right on the rest of the estate, if the creditors’ claim has been paid. All these circumstances lend weight to the hypothesis that the regulation is based on an actual case which is described incompletely.

3. Technical Regulations

Technical regulations also take legal practice into account in serving the execution of dogmatically relevant regulations. On their own, they are of little dogmatic value, relating mostly to formal proceedings. Their origin in legal practice is therefore quite probable.

Some Mudauwana regulations concerning witness testimony are mainly technical in nature: If it is the responsibility of the plaintiff to give evidence in a lawsuit, the qaḥṣ will ask him to do so. Such is the case in an abstract example described by Ibn al-Qāsim in which the recipient of a gift (maḥṣblahu) sues the giver (wāhib) for delivering the refused gift (hiba)\(^{21}\). - If the witnesses testify, the qaḥṣ will ask additional questions as necessary. In another regulation of Ibn al-Qāsim, when the witness in a lawsuit testifies that the plaintiff is the rightful owner of disputed live-
stock, the qâ'E• will ask if the plaintiff is known to have sold the animal or to have given it away\textsuperscript{22}. - The qâ'E• records the testimonies in a book (d•wån). Such is the case in a regulation of Ibn al-Qâsim in which the qâ'E• dies or is dismissed between questioning the witnesses and pronouncing his judgement\textsuperscript{23}. - In such cases, it is necessary for the plaintiff to bring evidence and for the witnesses to testify. However, it is not important that the qâ'E• asks the plaintiff to furnish proof, that the testimony be complete or recorded in a register. The regulation is only concerned with the technical execution of the legal requirements.

With regard to pronouncing judgements, there are some technical prescriptions in the same text. Mâlik’s opinion, reported by Ibn al-Qâsim, is that the qâ'E• should ask all parties (khaßmân), if they have any further arguments are to be brought forth\textsuperscript{24}. Ibn Rushd in the Bidâya regulates that a judgement (˙ukm) be passed only after fixing a time-limit (Éarb al-ajl) for all the parties to present their arguments\textsuperscript{25}. Such prescriptions guarantee the parties’ hearing at court. Mâlik asks the parties for further arguments before deciding the case, whereas Ibn Rushd fixes a time-limit for the presentation of arguments.

Further technical regulations exist. In some cases the qâ'E• needs a legal assistant. For example, in the Muwaã'a', Mâlik discusses at length the litigation between pledgee (murtahin) and pledger (råhin), in the case of the pledge (rahn) having perished. If the qâ'E•'s dispensation of justice requires determination of the pledge’s value, the qâ'E• will first ask the pledgee to describe the pledge and to swear on the description, before asking experts (ahl al-baßar, ahl al-ma’rif) to estimate the value of the pledge\textsuperscript{26}. In the Mudauwana, Ibn al-Qâsim relates Mâlik’s opinion that in straightforward legal cases the oaths of housebound women can be taken at their home by the qâ'E•’s assistent\textsuperscript{27}.

The following regulation of Ibn al-Qâsim in the Mudauwana concerns the procedure for exchange of judges. It is very much a technical rule. If a qâ'E• is dismissed or dies during a case after having heard the witnesses and written down their testimonies in
a book (d•wån), the evidence will not necessarily have to be repeated before the new qâĒ•. In this case it has to be proved that the evidence was taken before the dismissal or death of the qâĒ• and registered in his book. If this cannot be proved, the suit will follow general rules: The defendant is given the opportunity to swear a purgative oath (yam•n) that the attested evidence was not taken. If the defendant swears, the hearing of the witnesses must be repeated. If he does not swear, the plaintiff (āālib) will have the right to swear that the attested evidence was taken. If he takes the oath, the hearing of the witnesses need not be repeated and the action will continue from where it left off. - The exchange of the qâĒ• after evidence has been taken does not necessarily require a second hearing of the witnesses. The case will continue if the evidence taken is ascertained by witness testimony or refusal of the defendant to give the oath in connection with the plaintiff’s oath. This regulation states only the continuation of the current action in the case of exchange of quĒ• following general procedural rules. The technical implementation of exchange of quĒ• is very important in the example discussed.

Here is a further example of Mudauwana regulations. The qâĒ• sustains the claim for the restitution of an animal. The condemned possessor now wants to sue the person who sold him the animal pretending to be the rightful owner. The place of jurisdiction is the village of the seller. According to Mâlik in this case the possessor pays the value (q•ma) of the animal to the qâĒ•. The qâĒ• deposits this amount of money with a person of honest character (‘adl). His seal is then placed on the animal’s neck and he writes to the qâĒ• of the vendor’s village that he has awarded the animal to such and such a person. The possessor may leave with the animal and sue the vendor in his village for the full repayment value (mål). The technical character of this regulation indicates its origin in legal practice.

4. Topics of Legal Practice

In the fur• works there are many regulations whose topic originates from legal practice or deals with its problems. None of these is of a particularly technical nature.
Procedural problems within legal practice often result from distance between the parties involved in a case. Therefore, a letter from the qâbîb (kitâb al-qâbîb) became necessary. It makes an action possible when the plaintiff and the witnesses or - if the proceeding does not require a petition for judgement only the witnesses live in a village far from the defendant. The qâbîb who has heard the witnesses notifies the qâbîb at the defendant’s village of the testimonies as an aid to the latter in passing his judgement.

The contents of a kitâb al-qâbîb can be witness evidence or judicial precedent. As in the previous example, the man travelling to Ifrîqiyah recognises his lost animal in Fusārah. He sues its possessor, brings witness testimony (baiyina) and wins the action. The possessor maintains that he purchased the animal in Syria. He has the right (aqq) to take the animal to Syria and sue the seller for recourse. With a letter from the qâbîb in Fusārah, he can prove to the qâbîb in Syria that he was condemned to give the animal back to its rightful owner.

The protraction of a lawsuit resulting from distance between the parties necessitates interlocutary injunctions. In the following regulation of Mâlik laid down by Ibn al-Qâsim in the Mudawwana, the plaintiff sustained an action for restitution. The object at issue is handed over with a security deposit until such time as he can bring full evidence: If suing for the restitution of a slave, incomplete evidence suffices - i.e. one rather than two direct witnesses (shâhid, pl. shuhûd) or only a hearsay witness (samâ) - and the slave will be returned. In exchange he has to deposit the value (qamâ) of the slave. This procedure enables the plaintiff to bring full evidence. Therefore, he is allowed to travel with the slave to the domicile of the witnesses to present full evidence to the qâbîb of that village. As a rule, the giving of evidence before the qâbîb presupposes the presence of the claimed object. If the plaintiff brings full evidence and the slave is awarded to him, he can reclaim the sum on deposit. If he is not able to support his claim with appropriate evidence, he must return the slave in exchange for the deposit. This regulation is appropriate in the case of the runaway slave, a common occurrence in legal practice. When the slave was found in a remote location, there was a practical necessity for such proceedings.
When absent witnesses had to testify at the court of the plaintiff, it was necessary to secure the plaintiff’s claim until the witnesses arrived before the qa‘ë•. According to Ibn al-Qåsim in the Mudauwana, this preliminary protection is realised in the claim for restitution by seizing the claimed object (qåf). If a plaintiff sues for the restoration of his slave, brings a witness (shåhid) or hearsay witness (samåc) and asserts further witnesses to be present (‘uÊ¥r) in the qa‘ë•’s village, he may demand that the qa‘ë• seizes the slave until full evidence is brought. On the other hand, if it is „remote evidence (baiyina baÇda)“ and the seizure of the slave may cause damage to the defendant (muddaÇalaihi), the qa‘ë• allows the defendant to swear the purgative oath, before releasing him without a personal guarantor (kafâ). - The slave is seized in order to ensure his presence at the oral hearing and secure the plaintiff’s claim. The seizure not only presupposes a sign like a single witness for the entitlement of the plaintiff’s claim but also „near evidence“ or the fact that there is no danger that the seizure causes a loss for the defendant. In the case of „remote evidence“ and damage threatening the defendant, the plaintiff has no possibility of securing his claim by seizure of the claimed object or taking a personal guarantor for the defendant. Rather, the procedure will continue following the general rules. If the defendant takes the purgative oath, the qa‘ë• will decide in his favour. However, we are not told whether the plaintiff is allowed to present his witnesses after such judgement, causing the qa‘ë• to reverse the judgment so that in the end the plaintiff wins the action.

An answer to this question is found in the general discussion of the admissibility of the plaintiff’s evidence after the defendant’s oath. In this context the practical problem of the distances between the plaintiff and the witnesses is also discussed. Concerning this question, Ibn al-Qåsim in the Mudauwana relates that, as a rule, the witness testimony following the defendant’s oath is not allowed even when the plaintiff (âalib), who knew the evidence, has made the defendant (maâ¥b) swear because the witnesses were not present at court. But if the plaintiff explains to the qa‘ë• that he has „remote evidence“ (baiyina ghå’iba, baiyina baÇda) and there is the risk that the debtor
(ghar•m) might disappear, or it takes too much time to present the witnesses, it will be admissible first to let the defendant take the oath and then to hear the witnesses. If the witnesses stay at a village at a distance of not more than three days’ travelling time, they will not be heard after the defendant’s oath.39

In the case of absent witnesses, the plaintiff’s claim is provisionally secured by arresting the defendant, especially in claims concerning the body of the defendant. Ibn al-Qāsim in the Mudauwana presents the following regulation: In suing for retaliation (qifåß) because of injuries (jirå˙åt) or something else referring to the body, the defendant will be arrested on condition that the plaintiff (muddå•) has already brought a witness (shåhid), asserts a „present evidence (baiyina ˙å Ëira)”40 and announces presentation in court the next day. If a man asserts that another has committed a ˙add crime and his witnesses can be presented by the next day, the accused will also be arrested. In neither case will a personal guarantor for the defendant or accused be taken.41 The arrest ensures that the defendant or accused will not escape retaliation or punishment.

Human mobility causes problems in legal practice when a party involved in a case is unknown at the place of jurisdiction. In the Mudauwana, Ibn al-Qāsim discusses the following example: Witnesses (shuh¥d) testify sexual intercourse between a man and a woman. The accused asserts that the woman is his wife or his slave, thereby entitling him to engage with her in intercourse, but the witnesses do not know this to be true. If all involved come from the village where the intercourse occurred, the man will not be punished for unchastity (zinå ), if he brings full evidence (baiyina) of his assertion.42 The fact that the witnesses know nothing about the marriage makes it probable that the man is untruthful. A wedding being a public event, the villagers would be aware of it. If the man and the woman come from another village, the man will not be punished either if the woman supports his claim.43 In this example, witness ignorance is not synonymous with an untruthful claim. Besides, it would be difficult for the accused to defend himself because he would hardly find witnesses for the fact of having married or purchased a slave in another village. So Ibn al-Qāsim’s discussion seems to be justified by practical reasons.
In the *Mudauwana*, hearsay testimony (*shahâdat as-sama*c) is discussed. Within this context, we find an example in which the problem of human imperfection is regulated by real life: A man overhears a legally relevant remark while passing by. Someone claims that another has killed or been unchaste or divorced from his wife. Later on, the overhearer is asked to testify to this utterance. The problem here is that overheard speech can be incomplete or taken out of context. *Ibn al-Qâsim* relates two *Mâlik* opinions. In early times, *Mâlik* rejected such testimony, but according to his later opinion, such testimony was admissible. *Ibn al-Qâsim* begs to differ, admitting the testimony only on condition that the passer-by has overheard the utterance completely\textsuperscript{44}.

### II. Legal Practice Arguments which Justify Legal Institutions and Regulations

The influence of legal practice in the Sharia can also be seen in the justification of institutions and regulations through the necessities of legal practice to some degree. This argument is often pronounced explicitly, but in some cases it can be inferred from circumstances. Legal institutions and regulations seek to protect rightful owners against loss and defendants against unjustified claims.

#### 1. Protection of the Owner against the Loss of a Right

*Ibn al-Qâsim* seeks to secure the right to administer justice by stating in the *Mudauwana* that the seat (*majlis*) of the qâEE• should neither be elevated nor screened, allowing ordinary men and women to come to him\textsuperscript{45}. This regulation is a necessary expedient because people would not otherwise approach\textsuperscript{46}. This right is based on an according experience of legal practice.

Several legal institutions and regulations exist to take the claimant’s evidence. First, there is the hearsay witness (*shahâdat as-sama*c). We find an example in the *Mudauwana* taken by *Ibn al-Qâsim* from *Mâlik*. In Medina there are many houses
whose original owners were universally known. The houses changed hands. As with the passage of time there are no more eyewitnesses\(^{47}\), the proprietors are allowed to offer evidence for the legal basis \((\text{afß})\) of their ownership by the \textit{shahådat as-samå}\(^{\text{c}18}\). In the same text, \textit{Ibn al-Qåsim} reports the opinion of \textit{Målik} concerning the admissibility of the \textit{shahådat as-samå}\(^{\text{c}}\) with regard to charitable endowments: If the eyewitnesses for a charitable endowment \((\text{`ubs})\) have died and only hearsay witnesses remain, the endowment will be valid. The precedent is that only hearsay witnesses \((\text{samå}^{\text{c}})\) remained for the charitable endowments of the prophet’s companions. \textit{Ibn al-Qåsim} also reports that in Medina \textit{Målik's} judgement is based on hearsay testimony\(^{49}\).

The testimony of minors \((\text{shahådat aß-ß ibånyân})\) has also to be mentioned here. The Malikites admit it in assault and partly in manslaughter between minors only immediately after the event and if no one has tried to influence them\(^{50}\). These restrictions are based on the material consideration that the testimony of minors is less trustworthy than that of adults. \textit{Ibn Rushd} states explicitly that minors must not be separated to prevent false testimony\(^{51}\). As long as the minors have not been separated following the quarrel and nobody has influenced them, their testimony will be considered as exceptionally trustworthy. Considering the distrust concerning the testimony of minors, it is difficult to explain why their testimonies are admitted at all in assault and partly in manslaughter cases. This could be expedient as in such circumstances adults are often not present. Assault and manslaughter claims could not be successful if the plaintiff is unable to offer evidence\(^{52}\). \textit{Ibn Rushd} seems to refer to this necessity when he calls \textit{Målik's} admission \((\text{ijåza})\) of minors’ testimony concerning manslaughter an analogy based on common weal \((\text{qiyyås al-maßla˙a})\)\(^{53}\).

According to Koran 2, 282, witness testimony must be given by two men or one man and two women. If testimony is given by female witnesses only, this regulation enables the party holding the burden of proof to testify, even if there are no male witnesses. \textit{Ibn al-Qåsim} relates that the Medinan legal scholar \textit{Rab• a. b. a. Abdarra˙ mân}\(^{54}\), a member of the generation following that of the prophet’s companions, admitted the
testimony of two women concerning the beginning of labour pains (istihlāl) because this specific circumstance can be testified by women only\(^55\). According to Ibn Rushd, the prevailing opinion is that female testimony is admissible only in claims concerning women’s bodies (‘uyṣ al-abdān), especially delivery, labour and women’s „defects“ (cuyṭb)\(^56\). Without female testimony, these facts cannot be proved because male witnesses are not available.

The continuous application of the pre-Islamic procedure of the qasāma is necessary in order to render the plaintiff’s claim successful. This procedure is used for claims of retaliation (qawad, qißâb) or blood money (diya) in cases of murder and involuntary manslaughter through culpable negligence (qatl al-camd bzw. qatl al-khaâb’). The relatives of the deceased have the right to demand vengeance. They swear fifty oaths of the defendant’s guilt to justify their claim. If the relatives do not swear, the clan of the defendant can swear fifty oaths on his innocence in order to reject the claim\(^57\). Mālik justifies this procedure in the Muwaḥḥid as follows: In the case of witness testimony (baiyīna), murders and manslaughters would increase and the „rights of blood“ (dimâ’) (claims for retaliation and blood-money) would be lost, because the crime was not committed in public. It is therefore qasāma’s responsibility to deter people from committing murder and manslaughter\(^58\). Within the context of discussing the admissibility of the qasāma, Ibn Rushd also states in his Bidāya that the traditional procedure (sunna) is designed to protect against murder and manslaughter (dimâ’). Whilst these crimes are numerous, witnesses are rare because such crimes are usually committed out of sight\(^59\).

2. Protection of the Defendant against Unjustified Claims

Legal practice is reflected in several institutions and regulations which serve to protect the defendant against unjustified claims. For example, the defendant’s oath (yamn al-mudda‘ā‘alaih) will be taken if the plaintiff is unable to present witness testimony (baiyīna). According to the Malikites, an action (da‘wā) can not be suc-
cessful by itself because a single action does not argue for the probability (shubha) of its justification. Ibn Rushd quotes the prophet: „If people were awarded their rights only because of their actions (da'awâ), they would sue each other for blood-rights (dimâ') and items of property (amwâl); it is the defendant who must swear the oath.“ The authenticity of this quotation, however, is doubtful. The defendant’s oath results from practical experience. If lawsuits were always successful, many unjustified lawsuits would result.

Legal practice determines both presuppositions and range of application for the defendant’s oath. According to the Malikites, the defendant’s oath is allowed only under the presupposition of specific contact (khalâa, mukhâlaâa, mulâbasa) between plaintiff and defendant. Ibn Rushd relates Målîk’s reference to the common weal (maṣla'â) which requires a restriction of the defendant’s oath to avoid suing even if their actions were not justified. According to Ibn al-Qâsim, the same reason stands for the defendant’s oath not to be allowed, if the buyer (mushtarâ) of a slave accuses the seller (bâ'iç) of having sold him a runaway or a mentally deficient slave. It would be to general detriment if this were allowed, because the buyer would make the seller swear one day concerning the runaway, the other day with regard to the theft (sariqa), then to unchastity (zinâ) or mental deficiency. Obviously, it is necessity to protect slave merchants against unjustified legal action.

Legal practice also created the pronouncement of witness integrity (tazkya) through the function of the muzakkî, which was then incorporated into the Sharia. A witness must be of honest character (cadl). In practice it is difficult to verify this, if the witness is unknown to the qa'ē. Tyan states, with reference to the Egyptian historian al-Kindî, that the Egyptian qa'ē, Jauth b. Sulaimân, introduced a procedure by which the qa'ē admits a witness only on the condition that his integrity is proved and established by an official pronouncement (tazkya). Based on historical sources, the qa'ē had assistants, known as muzakkîn, to investigate the integrity of witnesses. These innovations were introduced firstly into the Mudawwana. According to
Malik's opinion as quoted in this text, witnesses whose integrity (cadâla) is well known to the qaÉ• do not require a pronouncement of their integrity. But if the qaÉ• has no information about an individual, he will question others68. The assistant is first mentioned by Ibn al-Qâsim, who states that the qaÉ• should choose a man to investigate the witness69.

Testimony which is suspected of subjectivity is not admitted70. According to the Mudauwana, the legal scholars Ibn Shihâb71 and Ya`yâ b. Sâd72 of Medina, members of the generation following that of the prophet’s companions, thought that in the times of the „honest ancestors“ the testimonies (shahâdât) of father in favour of son, of son in favour of father, of brother in favour of brother and of husband in favour of wife were not suspect. They believed that human character deteriorated in a later period and therefore, with the passage of time, the testimonies of close relatives were no longer acceptable73. Obviously, it was necessary for legal practice to place restrictions on testimony in favour of relatives. This is justified by the decline in moral standards.

In legal practice, the parties involved in a case are often ignorant of their procedural rights. This may be due to legal ignorance or the variety of jurists’ legal opinions and their different interpretations. Thus it is the responsibility of the judge to clarify procedural rights. In the Mudauwana, Ibn al-Qâsim’s opinion is that if the party against whom testimony is given does not know his right to accuse the witness of unrighteousness, the qaÉ• must explain it to him. He may have knowledge regarding the witness’s integrity74. In order to justify this regulation, Ibn al-Qâsim draws an analogy from a regulation Malik once told him: Ibn al-Qâsim asked Malik if the qaÉ• would immediately decide in favour of the plaintiff (mudda`) when the defendant (mudda` alaihi) refused to take the oath (yâmn), or if he should ask the plaintiff to swear first. Malik stated that the qaÉ• had not to condemn the defendant until the plaintiff had been given the opportunity to swear an oath and this right had been explained to him. The parties were often ignorant that the oath was transmitted to the plaintiff after refusal by the defendant75. Malik allowed that the Medinan legal practice
of transmitting the oath to the plaintiff was rejected by many legal scholars, especially the Hanafites.76

C. Final Reflections

1. Legal Practice in Malikite Lawbooks

Legal practice permeated the lawbooks of the Sharia in various ways. Early legal practice has found its way into the Sharia from such legal sources as the Koran and ḍaḥīth to the degree that they included legal practice. Historical legal practice may still correspond to the current legal practice of that age but it can be out of date. However, formerly current legal practice, herein discussed, is incorporated into the lawbooks by the legal scholars. The extent of such incorporation depends inter alia on the type and extent of the lawbooks and on their intention. The Malikite law of procedure up to the 6th/12th century can be described through an examination of the four most important and fully edited Malikite lawbooks.

In the Muwaâ‘a‘ we find extensive historical legal practice in the form of ḍaḥīth, which was not investigated in this article, and to a lesser extent, the contemporary legal practice of the author. Such reference to legal practice is not surprising. It is the intention of this book to present a survey of the commonly accepted tradition (ṣunna) and practice (ṣamāl) of law in Medina, accompanied by a gloss. The predomination of historical over contemporary legal practice is based on the general local consensus which developed historically since the time of the successors of the prophet’s companions, the prophet’s companions, and occasionally the prophet himself. It seems reasonable to suppose that at the time of the Muwaâ‘a‘, historical legal practice still corresponded to the current legal practice of that age.

What was once current legal practice permeated into the Mudauwana through the masā’il-character and enormous size of the lawbook. Sa‘nīn presents a question and answer format. He asks Mālik’s opinion concerning a special legal problem or an
abstract case and Ibn al-Qāsim then answers with Mālik’s opinion, that of another jurist, or one of his own. The Sharia is not presented in a strictly systematic manner so that there is space for current legal problems. Furthermore, the casuistic style of regulation facilitates the permeation of current legal cases. Finally, the exorbitant size of the Mudauwana involves a greater output of regulations referring to legal practice.

In the Risāla of al-Qairawān• and the Bidāya of Ibn Rushd, the influence of formerly current legal practice on the law of procedure can be demonstrated only occasionally. The Risāla is just a short summary of Malikite doctrine which was originally didactic in intent. It almost exclusively contains general basic rules relating in some way to legal practice. The Bidāya belongs to ikhtilāf literature which presents the main disputes (ikhtilāfāt) in the great lawschools (madhāhib). It contains basic rules and related legislation only. Reference to legal practice is mostly to be found in Ibn Rushd’s explanations of the basis (sabab) of the dispute and the different arguments.

2. Legal Practice in Malikite Law of Procedure

In Malikite law of procedure, legal practice is most clearly reflected where legal institutions are explicitly or indirectly justified by their practical necessity. Thus the testimony of minors concerning injuries or manslaughter between their peers and the testimony of women concerning intimate facts are allowed, although minors and women are not regularly allowed to be witnesses. Such regulations ensure the success of the plaintiff’s claim. Contrary to the more restricted provisions of indirect testimony, hearsay testimony will be allowed if eyewitnesses do not exist. The pronouncement of witness integrity and the role of the legal assistant (muzakk•) also have their origins in legal practice. They represent the practical result of the dogmatic requirement of witness integrity. The defendant’s oath is, as a rule, considered necessary to protect the defendant from unjustified actions. The qāĒ•s letter serves to surmount the distance between the parties involved in a case and between these parties and the object sued for. The pre-
Islamic institution of the qasâma remains current because in legal practice it was difficult to offer evidence of manslaughter.

Numerous regulations or abstract case-regulations are likely also based on legal practice. These regulations concern the hearing of witnesses testimony and court procedure. They also refer to the testimony concerning the overheard statement of an unseen third party and the testimony of a witness suspected of false declarations because of his relationship to a party involved in the case. Furthermore, proceedings in special constellations probably derive from legal practice especially in exchange of quÊåt in cases of distance between the parties involved or between such a party and the object which is sued for, or when claims should be provisionally secured. Finally, there also exist rules of evidence which demonstrate their basis in an actual case. They mostly concern the proceeding when there are no witnesses.

Peter Scholz


6) Tyan, É., „Le notariat et le régime de la preuve par écrit dans la pratique du droit musulman“, in: Annales de la Faculté de Droit, Beyrouth, No. 2 (1945), 3 ff; id., „La Procédure du „Défaut“ en Droit

7) Hallaq, „From fatwås to furc“, 29 ff; Jokisch, Islamisches Recht, 11.


9) For example, Asad b. al-Furåt (d. 213/828), Sa˚n b. Sa˚d (d. 189/854), Sa˚ b. Sahl (d. 486/1093) and Ibn Rushåd - grandfather (d. 520/1126) and grandson (d. 595/1198) - were quåå. For example, Målik b. Anås (d. 179/796) and Ibn a. Zaid al-Qairawån˚ (d. 386/996) were muftåå. Other offices were held, for example, by Ibn al-Labbåd (d. 333/944; mårålim office) and 'Abd al-Malik b. 'Abåb (d. 238/852; first muftå, then part of the shårå).

10) For example, Målik b. Anås (d. 179/796), Asad b. al-Furåt (d. 213/828), 'Abd al-Malik b. 'Abåb (d. 238/852), Sa˚n b. Sa˚d (d. 189/854), Ibn a. Zaid al-Qairawån˚ (d. 386/996), Ibn Rushåd, grandfather (d. 520/1126) and grandson (d. 595/1198).

11) Student of Målik and transmitter of the Muwa˚åa˚', teacher of Sa˚n, d. 191/806.


13) Old name for the eastern part of the Maghreb.

14) Former town in the area of present Kairo.

15) Cp. Sa˚n, l. c., VI 183.

16) Cp. Sa˚n, l. c., VI 373 f.

17) Cp. Sa˚n, l. c., III 43.

18) Cp. Sa˚n, l. c., V 181.

19) As a rule, half evidence - i.e. testimony of one witness only - can be completed by the plaintiff’s oath, see Scholz, Malikitisches Verfahrensrecht, Frankfurt/Main etc. 1997, 304 ff.


21) Cp. Sa˚n, l. c., VI 86.

22) Cp. Sa˚n, l. c., VI 170.

23) Cp. Sa˚n, l. c., V 145 f.

24) Cp. Sa˚n, l. c., V 132, VI 284.


28) If the plaintiff is not able to give evidence for his assertion, the defendant will be allowed to take the purgative oath. If the defendant does not swear, the plaintiff will have the right to take an affirmative oath. If the plaintiff swears, he will win the action. See Scholz, Verfahrensrecht, 63.
31) Such is the case in claims of God (‟uqīq allāh) like the most udhd. See Scholz, Verfahrensrecht, 469, 471, 484 ff.
34) Concerning the hearsay witness see Scholz, Verfahrensrecht, 201 ff.
37) I. e. the witnesses do not stay in the qā‘ēs village, so that they cannot be heard in short time.
39) Cp. Sa‘nyn. l. c., V 175, 137.
40) I. e. the witnesses are staying in the qā‘ēs village, so that they can be heard in short time.
41) Cp. Sa‘nyn. l. c., V 182.
45) Cp. Sa‘nyn. l. c., V 144.
52) This is also supposed by Schacht, Origins, 218.
57) Such is the procedure according to the Malikites, see Scholz, Verfahrensrecht, 388 ff.
60) Cp. Ibn Rushd. l. c., II 527. The ‘ad.th was transmitted via Ibn ˙Abbās and quoted by Muslim in "Ia ROUND ".
61) Cp. Mālik. l. c., 725 f; Sa‘n nyn. l. c., V 136 f, 174 ff; Qairawān. l. c., 260; Ibn Rushd. l. c., II 580.
63) Cp. Sa‘n nyn. l. c., IV 328 f.
65) 140/757-144/761.
66) Cp. Tyan, l. c., 238 f.
67) Cp. Tyan, l. c., 240 Fn. 3.
69) Cp. Sa‘n nyn. l. c., VI 290.
70) Cp. Mālik. l. c., 720; Sa‘n nyn. l. c., V 152; Qairawān. l. c., 262 f; Ibn Rushd. l. c., II 569.
72) Ab¥ Sa‘d Ya‘y b. Sa‘d b. Qais al-Anṣârī, umayyad qāÆ• in Medina and abbasid qāÆ• in Irak, d. 143/760.
73) Cp. Sa‘n nyn. l. c., V 155; chains of traditio-
in Sa‘n nyn. l. c., VI 283 f.
77) Cp. Schacht, J., in Fi1 and Fi2 zu "MĀLIK B. ANAS"; Cottart in Fi2 zu "MĀLIKIYYA"; Mur-
80) Cp. Schacht, J., in Fi1 and Fi2 zu "MĀLIK B. ANAS"; Cottart in Fi2 zu "MĀLIKIYYA"; Mur-
81) Cp. Schacht, J., in Fi1 and Fi2 zu "MĀLIK B. ANAS"; Cottart in Fi2 zu "MĀLIKIYYA"; Mu-
82) Dutton, Y., „Sunna, Óad•th and Madinan Ŕal”, in: Journal of Islamic Studies, No. 4 (1993), 7; id., „ Ŕal versus Óad•th in Islamic Law: The Case of sadl al-yadayn (Holding One’s Hands by One’s Sides) when Doing the Prayer“ in: Islamic Law and Society, No. 3 (1996), 13 ff.
78) This means to be written in a question and answer format (cp. Daiber in EI² zu "MASÅ'IL WA-ADŶWĪBA").


80) See Scholz, Verfahrensrecht, 198 ff.

81) As a rule, the plaintiff who has no full evidence will only be able to win his action, if the defendant refuses to take his purgative oath. See Scholz, Verfahrensrecht, 347 ff and 355 ff.