

Legal Practice in the Malikite Law of Procedure

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A. Introduction: The Sharia and Legal Practice

The Sharia (shar·c'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 practice¹ 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 considerations². The origin of Islamic law is seen in the discussion of umayyad legal practice and administration³. 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¥ã).⁴ The concept of the Sharia becoming more rigid with the passage of time⁵ has been increasingly debated of late. Recent studies indicate that change was indeed reflected in the Sharia,⁶ especially through the legal opinions (fatãwã) of the muft¥n⁷.

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 (uṣūl literature) and monographs concerning special legal topics, short manuals for legal studies and very extensive reference law texts (furūq literature), as well as various manuals of legal practice (especially adab al-qāḍī literature) including books of legal formularies (shurūḥ literature) and extensive collections of sentences (a'kāṁ literature) and legal opinions (fatāwā literature)⁸. 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 quḍāt, muftīn or other officials⁹. The qāḍī decided the outcome of lawsuits and in this way formed legal precedents, whereas the muftī only offered legal opinions. Thus he also influenced legal relationships as his opinions were often observed by the qāḍī 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 furūq 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 professionals¹⁰.

Initially, legal practice influenced the Sharia in so far as it had permeated into the Koran or *ʿad·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 *ʿad·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 6th/12th 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 *Mudawwana* 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 **Ibn al-Qāsim**¹¹, both parties are plaintiffs (*mudda^cʿn*), the owner concerning the claimed surplus (*faʿla*)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-Qāsim** presents the following opinion (qaul) of **Mālik**: A man travelling to **Ifr•qiyā**¹³ recognises an animal in **Fusāā**¹⁴ 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 (ʿaqq) 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•qiyā**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•qiyā**, thereby causing **Ibn al-Qāsim** 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-Qāsim reports on the following regulation in the same text. **Mālik** was presented a case in which a slave confessed (iqrār) to having stepped forcibly on a child's toe, amputating it and causing much bleeding. **Mālik's** opinion was that the slave's confession would be acceptable in the case of a recent injury¹⁶. 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 (āalāq). **Ibn al-Qāsim** tells us that **Mālik** 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 testimony¹⁷. 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' nẓn** 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 qauluhumā) as the mandate has been acknowledged¹⁸. 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 *Muwaāāa'*, **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 (shāhid) 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 witness¹⁹, 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 oath²⁰.

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 qā' 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 (mauhāb lahu) sues the giver (wāhib) for delivering the refused gift (hiba)²¹. - If the witnesses testify, the qā' 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 qāḍī will ask if the plaintiff is known to have sold the animal or to have given it away²². - The qāḍī records the testimonies in a book (d•wān). Such is the case in a regulation of **Ibn al-Qāsim** in which the qāḍī dies or is dismissed between questioning the witnesses and pronouncing his judgement²³. - 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 qāḍī 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. **Mālik**'s opinion, reported by **Ibn al-Qāsim**, is that the qāḍī should ask all parties (khaṣmān), if they have any further arguments are to be brought forth²⁴. **Ibn Rushd** in the *Bidāya* regulates that a judgement (ḥukm) be passed only after fixing a time-limit (Ēarb al-ajl) for all the parties to present their arguments²⁵. Such prescriptions guarantee the parties' hearing at court. **Mālik** 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 qāḍī needs a legal assistant. For example, in the *Muwaḥḥa*, **Mālik** discusses at length the litigation between pledgee (murtahin) and pledger (rāhin), in the case of the pledge (rahn) having perished. If the qāḍī's dispensation of justice requires determination of the pledge's value, the qāḍī will first ask the pledgee to describe the pledge and to swear on the description, before asking experts (ahl al-baṣar, ahl al-mā^c rifa) to estimate the value of the pledge²⁶. In the *Mudawwana*, **Ibn al-Qāsim** relates **Mālik**'s opinion that in straightforward legal cases the oaths of housebound women can be taken at their home by the qāḍī's assistant²⁷.

The following regulation of **Ibn al-Qāsim** in the *Mudawwana* concerns the procedure for exchange of judges. It is very much a technical rule. If a qāḍī is dismissed or dies during a case after having heard the witnesses and written down their testimonies in

a book (d•wân), 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 rules²⁸: 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 (âĒlib) 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 off²⁹. - 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 quĒât following general procedural rules. The technical implementation of exchange of quĒât 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 (Ā 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 (mâl)³⁰. 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 *qā'ī* (kitāb al-*qā'ī*) became necessary. It makes an action possible when the plaintiff and the witnesses or - if the proceeding does not require a petition for judgement³¹ - only the witnesses live in a village far from the defendant. The *qā'ī* who has heard the witnesses notifies the *qā'ī* at the defendant's village of the testimonies as an aid to the latter in passing his judgement³². The contents of a *kitāb al-*qā'ī** can be witness evidence or judicial precedent. As in the previous example, the man travelling to **Ifr•qiyā** recognises his lost animal in **Fusāāā**. 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 recourse³³. With a letter from the *qā'ī* in **Fusāāā** he can prove to the *qā'ī* 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 interlocutory injunctions. In the following regulation of **Mālik** laid down by **Ibn al-Qāsim** 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 (*shāhid*, pl. *shuhūd*) or only a hearsay witness (*samā'c*)³⁴ - and the slave will be returned. In exchange he has to deposit the value (*q•ma*) 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 *qā'ī* of that village³⁵. As a rule, the giving of evidence before the *qā'ī* presupposes the presence of the claimed object³⁶. 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 qā'ī. According to **Ibn al-Qāsim** in the *Mudawwana*, this preliminary protection is realised in the claim for restitution by seizing the claimed object (•qāf). If a plaintiff sues for the restoration of his slave, brings a witness (shāhid) or hearsay witness (samā^c) and asserts further witnesses to be present (•uĕr) in the qā'ī's village, he may demand that the qā'ī seizes the slave until full evidence is brought. On the other hand, if it is „remote evidence (baiyina ba^c•da)³⁷ and the seizure of the slave may cause damage to the defendant (mudda^cā^calahi), the qā'ī allows the defendant to swear the purgative oath, before releasing him without a personal guarantor (kaḥ•l)³⁸. - 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 qā'ī will decide in his favour. However, we are not told whether the plaintiff is allowed to present his witnesses after such judgement, causing the qā'ī 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-Qāsim** in the *Mudawwana* relates that, as a rule, the witness testimony following the defendant's oath is not allowed even when the plaintiff (ālib), who knew the evidence, has made the defendant (maālib) swear because the witnesses were not present at court. But if the plaintiff explains to the qā'ī that he has „remote evidence“ (baiyina ghā'iba, baiyina ba^c•da) 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 oath³⁹.

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-Qâsim** in the *Mudawwana* presents the following regulation: In suing for retaliation (qibâß) because of injuries (jirâ`ât) or something else referring to the body, the defendant will be arrested on condition that the plaintiff (mudda^c) has already brought a witness (shâhid), asserts a „present evidence (baiyina`âËira)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 taken⁴¹. 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 *Mudawwana*, **Ibn al-Qâsim** discusses the following example: Witnesses (shuhÿd) 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 (zinâ), if he brings full evidence (baiyina) of his assertion⁴². 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 claim⁴³. 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-Qâsim's** discussion seems to be justified by practical reasons.

In the *Mudawana*, hearsay testimony (*shahādat as-samāʿ*) 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-Qāsim** relates two **Mālik** opinions. In early times, **Mālik** rejected such testimony, but according to his later opinion, such testimony was admissible. **Ibn al-Qāsim** begs to differ, admitting the testimony only on condition that the passer-by has overheard the utterance completely⁴⁴.

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-Qāsim seeks to secure the right to administer justice by stating in the *Mudawana* that the seat (*majlis*) of the *qāḍī* should neither be elevated nor screened, allowing ordinary men and women to come to him⁴⁵. This regulation is a necessary expedient because people would not otherwise approach⁴⁶. This right is based on an acceding experience of legal practice.

Several legal institutions and regulations exist to take the claimant's evidence. First, there is the hearsay witness (*shahādat as-samāʿ*). We find an example in the *Mudawana* taken by **Ibn al-Qāsim** from **Mālik**. 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 eyewitnesses⁴⁷, the proprietors are allowed to offer evidence for the legal basis (aḅl) of their ownership by the shahâdat as-samâ^c⁴⁸. In the same text, **Ibn al-Qâsim** reports the opinion of **Mâlik** concerning the admissibility of the shahâdat as-samâ^c with regard to charitable endowments: If the eyewitnesses for a charitable endowment (ʿubs) have died and only hearsay witnesses remain, the endowment will be valid. The precedent is that only hearsay witnesses (samâ^c) remained for the charitable endowments of the prophet's companions. **Ibn al-Qâsim** also reports that in Medina **Mâlik's** judgement is based on hearsay testimony⁴⁹.

The testimony of minors (shahâdat aḅ-ḅibyân) 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 them⁵⁰. These restrictions are based on the material consideration that the testimony of minors is less trustworthy than that of adults. **Ibn Rushd** states explicitly that minors must not be separated to prevent false testimony⁵¹. 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 evidence⁵². **Ibn Rushd** seems to refer to this necessity when he calls **Mâlik's** admission (ijâza) of minors' testimony concerning manslaughter an analogy based on common weal (qiyâs al-maḅlaʿa)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. **Ibn al-Qâsim** relates that the Medinan legal scholar **Rabʿa b. a. ʿAbdarraʿmân**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 (istihlâl) because this specific circumstance can be testified by women only⁵⁵. According to **Ibn Rushd**, the prevailing opinion is that female testimony is admissible only in claims concerning women's bodies (ʿuqûq al-abdân), especially delivery, labour and women's „defects“ (ʿuyûb)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 qasâma is necessary in order to render the plaintiff's claim successful. This procedure is used for claims of retaliation (qawad, qiḅâḅ) or blood money (diyya) in cases of murder and involuntary manslaughter through culpable negligence (qatl al-ʿamd bzw. qatl al-khaâʾ). 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 claim⁵⁷. **Mâlik** justifies this procedure in the Muwaââa' as follows: In the case of witness testimony (baiyina), 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 qasâma's responsibility to deter people from committing murder and manslaughter⁵⁸. Within the context of discussing the admissibility of the qasâma, **Ibn Rushd** also states in his Bidâya 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 sight⁵⁹.

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 (yam•n al-muddaʿâ ʿalaih) will be taken if the plaintiff is unable to present witness testimony (baiyina). According to the Malikites, an action (daʿwâ) can not be suc-

successful 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^cāwā), they would sue each other for blood-rights (dimā') and items of property (amwāl); it is the defendant who must swear the oath.“⁶⁰ 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 (khalāa, mukhālaāa, mulābasa) between plaintiff and defendant⁶¹. **Ibn Rushd** relates **Mālik's** reference to the common weal (maḥla' a) which requires a restriction of the defendant's oath to avoid suing even if their actions were not justified⁶². According to **Ibn al-Qāsim**, the same reason stands for the defendant's oath not to be allowed, if the buyer (mushtar•) of a slave accuses the seller (bā'i^c) 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 (zinā) or mental deficiency⁶³. Obviously, it is necessity to protect slave merchants against unjustified legal action.

Legal practice also created the pronouncement of witness integrity (tazk•ya) through the function of the muzakk•, 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 qāḏ•. Tyan states, with reference to the Egyptian historian **al-Kind**⁶⁴, that the Egyptian qāḏ•, **Jauth b. Sulaimān**⁶⁵, introduced a procedure by which the qāḏ• admits a witness only on the condition that his integrity is proved and established by an official pronouncement (tazk•ya)⁶⁶. Based on historical sources, the qāḏ• had assistants, known as muzakk•n⁶⁷, to investigate the integrity of witnesses. These innovations were introduced firstly into the Mudawwana. According to

Mālik's opinion as quoted in this text, witnesses whose integrity (ʿadāla) is well known to the qāʿi do not require a pronouncement of their integrity. But if the qāʿi has no information about an individual, he will question others⁶⁸. The assistant is first mentioned by **Ibn al-Qāsim**, who states that the qāʿi should choose a man to investigate the witness⁶⁹.

Testimony which is suspected of subjectivity is not admitted⁷⁰. According to the *Mudawwana*, the legal scholars **Ibn Shihāb**⁷¹ and **Yaʿyā b. Saʿd**⁷² of Medina, members of the generation following that of the prophet's companions, thought that in the times of the „honest ancestors“ the testimonies (shahādāt) 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 *Mudawwana*, **Ibn al-Qāsim's** opinion is that if the party against whom testimony is given does not know his right to accuse the witness of unrighteousness, the qāʿi must explain it to him. He may have knowledge regarding the witness's integrity⁷⁴. In order to justify this regulation, **Ibn al-Qāsim** draws an analogy from a regulation **Mālik** once told him: **Ibn al-Qāsim** asked **Mālik** if the qāʿi would immediately decide in favour of the plaintiff (mudda^c) when the defendant (mudda^c ʾalaihi) refused to take the oath (yam·n), or if he should ask the plaintiff to swear first. **Mālik** stated that the qāʿi 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. **Mālik** allowed that the Medinan legal practice

of transmitting the oath to the plaintiff was rejected by many legal scholars, especially the Hanafites⁷⁶.

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 *ʿād•th* 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 *Muwaāāa'* we find extensive historical legal practice in the form of a *ʿād•th*, 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 (*sunna*) and practice (*ʿamal*) of law in Medina, accompanied by a gloss⁷⁷. The predominance 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 *Muwaāāa'*, historical legal practice still corresponded to the current legal practice of that age.

What was once current legal practice permeated into the *Mudawwana* through the *masā'il-character*⁷⁸ and enormous size of the lawbook. *Sa' n¶n* 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 *Mudawwana* 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 law schools (*madhāhib*). It contains basic rules and related legislation only⁷⁹. 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 testimony⁸⁰, 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 actions⁸¹. The *qā'ĕ*'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 *qasāma* 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 *quĒāt*, 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.

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¹⁾ Coulson, N. J., *A History of Islamic Law*, Edinburgh 1964, 82; id., „The State and the Individual in Islamic Law“, in: *International and Comparative Law Quarterly*, No. 6 (1975), 57; cp. Goldziher, I., „Muhammedanisches Recht in Theorie und Wirklichkeit“, in: *Zeitschrift für vergleichende Rechtswissenschaft*, No. 8 (1889), 406, 409; Bousquet, G.-H., *Du droit musulman et son application effective dans le monde*, Algiers 1949, 7.

²⁾ Noth, A., „Die Scharia - das religiöse Recht des Islam - Wandlungsmöglichkeiten, Anwendung und Wirkung“, in: Fikentscher, W., Franke, H., and Köhler, O., (ed.), *Entstehung und Wandel rechtlicher Traditionen*, Freiburg and München 1980, 415; Watt, W. M., Welch, A. T., *Der Islam*, Teil I: Mohammed und die Frühzeit - Islamisches Recht - Religiöses Leben, Stuttgart, Berlin, Köln, Mainz 1980, 233.

³⁾ Schacht, J., *The Origins of Muhammadan Jurisprudence*, Oxford 1950, 190 ff; Watt, *Islam*, 240; Hallaq, W. B., „From *fatwās* to *furᵑc*: Growth and Change in Islamic substantive Law“, in: *Islamic Law and Society*, No. 1,1 (1994), 29, 30; critically Burton, J., *An Introduction to the Ōad•th*, Edinburgh 1994, XXII.

⁴⁾ Schacht, J., *An Introduction to Islamic Law*, Oxford 1964, Reprint Honkong 1984, 75, 210.

⁵⁾ Schacht, *Introduction*, 75; cp. Sjukijajnen, L., *Musulmanskoje pravo*, Moskau 1986, 94 f.

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

Musulman“, in: Studia Islamica, No. 7 (1957), 115 ff; Johansen, B., „Eigentum, Familie und Obrigkeit im hanafitischen Strafrecht“, in: Die Welt des Islams, No. 19 (1979), 1 ff; id., The Islamic Law on Land Tax and Rent, London etc., 1988; Ziadeh, F. J., „Compelling Defendant’s Appearance at Court in Islamic Law“, in: Islamic Law and Society, No. 3,3 (1996), 305 ff; Jokisch, B., Islamisches Recht in Theorie und Praxis, Berlin 1996, 261.

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

⁸⁾ A survey is given by Spuler, B. (ed.), Handbuch für die Orientalistik, 1. Abteilung, 3. Ergänzungsband: Orientalisches Recht, Leiden and Köln 1964, 237 ff.

⁹⁾ For example, **Asad b. al-Furāt** (d. 213/828), **Sa’ nẓn b. Sa’ d** (d. 189/854), **‘sā b. Sahl** (d. 486/1093) and **Ibn Rushd** - grandfather (d. 520/1126) and grandson (d. 595/1198) - were quĒāt. For example, **Mālik b. Anas** (d. 179/796) and **Ibn a. Zaid al-Qairawān** (d. 386/996) were muftẓn. Other offices were held, for example, by **Ibn al-Labbād** (d. 333/944; ma ālim office) and **‘Abdalmalik b. Óab·b** (d. 238/852; first muft·, then part of the shẓrā).

¹⁰⁾ For example, **Mālik b. Anas** (d. 179/796), **Asad b. al-Furāt** (d. 213/828), **‘Abdalmalik b. Óab·b** (d. 238/852), **Sa’ nẓn b. Sa’ d** (d. 189/854), **Ibn a. Zaid al-Qairawān** (d. 386/996), **Ibn Rushd**, grandfather (d. 520/1126) and grandson (d. 595/1198).

¹¹⁾ Student of **Mālik** and transmitter of the *Muwaāāa’*, teacher of **Sa’ nẓn**, d. 191/806.

¹²⁾ Cp. **Sa’ nẓn**, Al-Mudauwana al-kubrā, Reprint of the Edition of Kairo in 1323 H, Bagdad, without year, Part IV, 485, cp. also 484.

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

¹⁴⁾ Former town in the area of present Kairo.

¹⁵⁾ Cp. **Sa’ nẓn**, I. c., VI 183.

¹⁶⁾ Cp. **Sa’ nẓn**, I. c., VI 373 f.

¹⁷⁾ Cp. **Sa’ nẓn**, I. c., III 43.

¹⁸⁾ Cp. **Sa’ nẓn**, I. 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, Malikitische Verfahrensrecht, Frankfurt/Main etc. 1997, 304 ff.

²⁰⁾ Cp. **Mālik**, Kitāb al-Muwaāāa’, Recension of **Ya’ yā b. Ya’ yā al-Maßmẓd**, Edition of **Mu’ ammad Fu’ād ‘Abdalbāq**, Kairo 1370/1951, 725.

²¹⁾ Cp. **Sa’ nẓn**, I. c., VI 86.

²²⁾ Cp. **Sa’ nẓn**, I. c., VI 170.

²³⁾ Cp. **Sa’ nẓn**, I. c., V 145 f.

²⁴⁾ Cp. **Sa’ nẓn**, I. c., V 132, VI 284.

²⁵⁾ Cp. **Ibn Rushd**, Bidāyat al-mujtahid wa-nihāyat al-muqtaßid, Edition of **‘Abd al-Óal·m Mu’ ammad ‘Abd al-Óal·m**, 2nd Edition, Kairo 1403/1983, Part II 582.

²⁶⁾ Cp. **Mālik**, I. c., 730, 732.

²⁷⁾ Cp. **Sa' nẏn**, I. c., V 135 f, 200.

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.

²⁹⁾ Cp. **Sa' nẏn**, I. c., V 145 f.

³⁰⁾ Cp. **Sa' nẏn**, I. c., VI 182 f.

³¹⁾ Such is the case in claims of God ('uqʔq allāh) like the most 'udʔd. See Scholz, Verfahrensrecht, 469, 471, 484 ff.

³²⁾ Cp. **Sa' nẏn**, I. c., VI 259 f; **Ibn Ruḡd**, I. c., II 576.

³³⁾ Cp. **Sa' nẏn**, I. c., VI 183.

³⁴⁾ Concerning the hearsay witness see Scholz, Verfahrensrecht, 201 ff.

³⁵⁾ Cp. **Sa' nẏn**, I. c., V 183.

³⁶⁾ See Scholz, Verfahrensrecht, 209.

³⁷⁾ I. e. the witnesses do not stay in the **qāĒ's** village, so that they cannot be heard in short time.

³⁸⁾ Cp. **Sa' nẏn**, I. c., V 183 f. - Concerning the personal guaranty (kafāla bi-n-nafs) see Sachau, E., Muhammedanisches Recht nach schafitischer Lehre, Stuttgart and Berlin 1897, 405 ff., and Gentz, J., „Die Bürgschaft im islamischen Recht nach **al-Kāsān**“, in: Zeitschrift für vergleichende Rechtswissenschaft, No. 62 (1960), 85, 151 f and 155 f.

³⁹⁾ Cp. **Sa' nẏn**, I. c., V 175, 137.

⁴⁰⁾ I. e. the witnesses are staying in the **qāĒ's** village, so that they can be heard in short time.

⁴¹⁾ Cp. **Sa' nẏn**, I. c., V 182.

⁴²⁾ Cp. **Sa' nẏn**, I. c., VI 202.

⁴³⁾ Cp. **Sa' nẏn**, I. c., VI 202.

⁴⁴⁾ Cp. **Sa' nẏn**, I. c., V 169, 132 f.

⁴⁵⁾ Cp. **Sa' nẏn**, I. c., V 144.

⁴⁶⁾ Cp. **Sa' nẏn**, I. c., V 144.

⁴⁷⁾ Cp. **Sa' nẏn**, I. c., V 171 f, 192, 194.

⁴⁸⁾ Cp. **Sa' nẏn**, I. c., V 172, 192, 194.

⁴⁹⁾ Cp. **Sa' nẏn**, I. c., V 171.

⁵⁰⁾ Cp. **Mālik**, I. c., 726 f; **Sa' nẏn**, I. c., V 163 f; **Qairawān**, **Ar-Risāla**, in: Bercher, L. (ed. a. transl.), La Risāla ou Epître sur les éléments du dogme et de la loi de l'Islām selon le rite mālikite par Aboʔ Mu' ammad ʿAbdallāh Ibn Ab- Zaid al-Qayrawān, Traduction française, 8th Edition, Algier 1980, 264; **Ibn Rushd**, I. c., II 568.

⁵¹⁾ Cp. **Ibn Rushd**, I. c., II 568.

⁵²⁾ This is also supposed by Schacht, Origins, 218.

⁵³⁾ Cp. **Ibn Rushd**, I. c., II 568.

⁵⁴⁾ **Rab^c a b. a. ^cAbdarra^c mán Farr^{kh} at-Taim^c**, d. 132-143/749-760.

⁵⁵⁾ Transmitted via **Ibn Wahb**. Cp. **Sa^c n^{yn}**, I. c., V 157 f, 161. Cp. also **Sa^c n^{yn}**, I. c., III 45.

⁵⁶⁾ Cp. **Ibn Rushd**, I. c., II 571.

⁵⁷⁾ Such is the procedure according to the Malikites, see Scholz, Verfahrensrecht, 388 ff.

⁵⁸⁾ Cp. **Málik**, I. c., 880.

⁵⁹⁾ Cp. **Ibn Rushd**, I. c., II 523.

⁶⁰⁾ Cp. **Ibn Rushd**, I. c., II 527. The ^cad^cth was transmitted via **Ibn ^cAbbás** and quoted by **Muslim** in "Í a^c · ·".

⁶¹⁾ Cp. **Málik**, I. c., 725 f; **Sa^c n^{yn}**, I. c., V 136 f, 174 ff; **Qairawán^c**, I. c., 260; **Ibn Rushd**, I. c., II 580.

⁶²⁾ Cp. **Ibn Rushd**, I. c., II 580.

⁶³⁾ Cp. **Sa^c n^{yn}**, I. c., IV 328 f.

⁶⁴⁾ Tyan, É., Histoire de l'organisation judiciaire en pays d'Islam, 2nd Edition, Leiden 1960, 238 f.

⁶⁵⁾ 140/757-144/761.

⁶⁶⁾ Cp. Tyan, I. c., 238 f.

⁶⁷⁾ Cp. Tyan, I. c., 240 Fn. 3.

⁶⁸⁾ Cp. **Sa^c n^{yn}**, I. c., V 144 f, 202.

⁶⁹⁾ Cp. **Sa^c n^{yn}**, I. c., VI 290.

⁷⁰⁾ Cp. **Málik**, I. c., 720; **Sa^c n^{yn}**, I. c., V 152; **Qairawán^c**, I. c., 262 f; **Ibn Rushd**, I. c., II 569.

⁷¹⁾ **Ibn Shiháb az-Zuhr^c**, d. 124/742.

⁷²⁾ **Ab^c Sa^c d Ya^c yá b. Sa^c d b. Qais al-Anbâr^c**, ^cumayyad qâ^cĒ in Medina and ^cabbasid qâ^cĒ in Irak, d. 143/760.

⁷³⁾ Cp. **Sa^c n^{yn}**, I. c., V 155; chains of traditio-

ners: **Ibn Wahb - Y^{yn}us b. Yaz^c d - Ibn Shiháb**, **Ibn Wahb - Ya^c yá b. Ayy^{nb} - Ya^c yá b. Sa^c d**.

⁷⁴⁾ Cp. **Sa^c n^{yn}**, I. c., VI 283 f.

⁷⁵⁾ Cp. **Sa^c n^{yn}**, I. c., VI 284. Cp. also the opinion of **Ibn a. Óázim**, a student of **Málik**, in **Sa^c n^{yn}**, I. c., V 137, 174.

⁷⁶⁾ Cp. Scholz, Verfahrensrecht, 347 ff.

⁷⁷⁾ Cp. Schacht, J., in EI¹ and EI² zu "**MÁLIK B. ANAS**"; Cottart in EI² zu "**MÁLIK IYYA**"; Muranyi, M., „Religiöse Literatur in arabischer Sprache“, in: Helmut Gätje (ed.), Grundriß der Arabischen Philologie, Part 2, Wiesbaden 1987, 299, 313. Concerning the relationship between ^camal and ^cad^c see Dutton, Y., „Sunna, Óad^cth and Madinan^c Amal“, in: Journal of Islamic Studies, No. 4 (1993), 7; id., „Amal versus Óad^cth 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 El² zu "MASÂ'IL WA-ADJWIBA").

⁷⁹⁾ Brunschvig, R., „Averroès juriste“, in: Études d’orientalisme dédiées à la mémoire de Lévi-Provençal, Part I, Paris 1962, 35, 41.

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.