Property and the Private in a Sharia System

BRINKLEY MESSICK

I

As we commonly employ it, the private-public distinction is a Western one, anchored in the history of the rise of modern states and societies and in the economic and legal transformation of Europe. As such, the private-public distinction is closely associated with the advent of the Western capitalist property regime. This private-public distinction subsequently came into significance in Muslim societies in the Middle East, North Africa, the Indian subcontinent, and Southeast Asia, but at differing times and in differing degrees because of the regional and local specifics of imperial, colonial, and national histories.

With what did this in-coming distinction articulate in Muslim societies? The story of the preexisting systems, again, is one of great difference from place to place. The case I will examine—highland Yemen around the middle of the twentieth century—involves a history distinct from most Muslim societies since the Yemeni state was independent from 1919. This part of Yemen did not go through the various sorts of changes—including the introduction or extension of the Western public-private distinction—that were associated with direct or indirect colonial (or mandate) rule by a Western power. There are two major qualifications to this relative isolation: directly to the south, from the 1830s, the highlands were in contact with the British colonial enclave at the port of Aden, and, in the decades prior to 1919, highland Yemen

was a distant and often rebellious province of the Ottoman Empire in its final decades.

In contemporary Yemen, forms of the public-private distinction are firmly entrenched. The 1962 revolution marked the local appearance of the nation-state and, with it, the beginning of the continual elaboration of new public institutions. A distinction must be made, however, between the basic differentiation of "private" and "public," the categories of the individual and of society as separate from the state, notions which go back to Roman law, and the related, but more complicated Habermasian idea of the "public sphere." "The bourgeois public sphere," Habermas writes (1989: 27), "may be conceived above all as the sphere of private people come together as a public. . . ."[1]

Here I sketch a different genealogy of the private, focusing on an association with a particular property regime based in Sharia (Islamic law). Centered on the individual (a legal figure I will call the Sharia subject), the complex private relations based on this property regime do not stand in the same sort of historical dichotomous relation with a notion of the "public," either in the sense of private individuals "come together" or in that of the nation-state. In Yemen, the polity of the midcentury period was a type of Islamic state, one based on the Sharia in ideology and in application, and headed by a classical form of jurist-leader, a figure known as an imam. Prior to the twentieth century, and prior to the nearly 50-year Ottoman interlude (1872-1919), this Yemeni form of a Sharia-based Islamic polity had a thousand-year history in the highlands.

In the late twentieth century, commercialization in Yemen would culminate in internationally familiar private forms such as Pizza Hut franchises. What sort of antecedents existed, at the level of highland property relations, for these later capitalist transformations? At midcentury, highland society was agrarian, based primarily on settled plow and hoe cultivation and the associated property regime was almost exclusively one of individual ownership. Mountainous, elaborately terraced and watered by regular

summer monsoon system rains, highland Yemen was unlike the physical settings of many other Muslim societies where, in the premodern era, either riverine cultivation or nomadic pastoralism had predominated. The Sharia-based property regime in highland Yemen also was unlike those in many historical contexts where ultimate title was vested in the state, as in much of the Ottoman Empire (for example, *miri* property), or that involved significant forms of collective holding (for example, *musha`* property) at the village or tribal level. There was very little state land in Yemen, except for the properties confiscated from the family of the imam after the revolution of 1962. The most direct antecedent of Pizza Hut, however, was coffee, the highland cash crop that was one of the first international commodities. At the same time, the specificity of the relative isolation of highland Yemen at midcentury cannot be overemphasized. In this same period, Egypt, for example, already had large-scale capitalist firms and banks, a stock exchange, and labor unions.

As I turn to a more detailed survey of this indigenous "private" system based on individual ownership, I want to consider whether it might properly be described as a form of capitalism. The general analytic possibility of other capitalisms goes back to Max Weber, and has been given forceful new exposition by Arjun Appadurai (1986). Citing the foundational study, *Islam and Capitalism* by Maxime Rodinson (1973), Middle East historian Patricia Crone writes that "it is well known that premodern capitalism flourished in medieval Islamic society," and she also notes that, in its commercial dimensions, Islamic law may be "described as advanced by the standards of its time of emergence" (1999: 255).

Before the recent appearance in the highlands of full-blown relations of international capital and of the characteristic Western distinctions between public and private, was the prior local system best understood as another form of capitalism? Pre-industrial and premodern (although chronologically in the twentieth century), yes, but another form of capitalism nevertheless? An indigenous capitalist system, as opposed to what was commonly assumed to

have been the preceding system throughout the non-West, namely, either a system of total difference, an Asiatic mode of production or an Oriental despotism, or a system with a history analogous to the transition that occurred in the West—that is, one involving an indigenous form of feudalism.[2]

Elsewhere in the region, nineteenth- and twentieth-century economic history has been marked by significant waves of "privatization." In his classic study of the modern economic history of the Middle East, Charles Issawi understood the switch from subsistence to cash crops as one that also involved, in general terms, "the breakdown of the system of communal or tribal ownership of land and its replacement by individual ownership" (1966: 9). Political economists have understood such shifts as watershed moments that mark the subsumption of specific parts of the region into the world system of capitalist market relations.[3] Later work has sought to identify the relevant internal dynamics that in many cases predated the direct impacts of colonial rule (Gran, 1998). Concerning property relations in particular, Kenneth Cuno (1980: 245; cf. 1992) has traced the late-eighteenth-century transformations in Egypt that "led to the appearance of forms of private ownership of land." In the Ottoman Empire around the mid-nineteenth century, lands with ultimate title held by the sultan began to be converted to individual titles and the new deeds were submitted for registration while formerly collectively held lands in village and tribal areas also were privatized. In Yemen, in contrast to all such cases, there could be no watershed of "privatization," no transformation to individual ownership, since private holdings already were at the foundation of the venerable indigenous system.

This midcentury Yemeni "capitalism" was mercantile, based on notions of capital and of the commodity, but it was not limited to commerce, to a restricted "capitalist sector" (Rodinson, 1973: 54). Although not without subsistence dimensions, this also was an agrarian capitalism in the sense that it was based on private land ownership. Agrarian production at midcentury was based on animal traction and manual labor. In technology, this capitalism was

craft-based and not industrial, although there were imports of world manufactures. Exports consisted of agrarian and pastoral products, although Yemeni coffee had long since lost is initial world monopoly. Although trucks began to replace mountain-going camel caravans by 1960, paved roads were not built in the highlands until the 1970s. The national electric grid was instituted by 1990. Wage labor and a market for real estate existed but were little developed and issues of status and honor also structured interaction in the marketplace. Formal institutions of banking, credit, and insurance did not exist as such, and complex commercial relations involved partnerships and a form of *commenda* rather than corporate forms. Contracts, notably those for the alienation and lease of individually owned property, were elaborated in legal doctrine and commonly used in practice, but they took the form of past-oriented, executed contracts rather than that of modern, future-oriented, executory contracts.[4] There also was no full "freedom of contract" in the Western sense and "religious" rules constrained permissible "sale objects." Inheritance was partible, although daughters received half the shares of sons, and there were different types of endowments that, like Western trusts, were either for the benefit of family members or for the support of "public" institutions such as mosques and instruction.

If the circa 1950 highland Yemeni political economic system may be appropriately characterized as a form of indigenous capitalism, the question then would be, How do two types of capitalism interrelate? Much more would have to be said about how they differ, of course, but presumably their interaction would be something more complex than the simple, inexorable, and thoroughgoing "dissolution," as Marx famously put it, of the indigenous mode of production.

Sharia Capitalism

At midcentury in Yemen, a comparatively unusual match obtained as the property scheme on the ground roughly approximated the property scheme envisioned in Sharia doctrine. Across

the domains of usage to be discussed below, beginning with the rights pertaining to individuals and their bodies in connection with injury and death, to commercial dealings, the institutions of state revenue, landed property transactions, tenancy arrangements associated with agrarian production, marriage relations, and family estates, the terms of Sharia doctrine were also the relevant terms of political economic practice. The most dramatic instance of this match is the category of individual ownership of immovable property, or *milk,* which is the quintessential form of property in the doctrine and, historically, the predominant form in the highlands. How different the highlands were in this respect, again, from the Ottoman Empire, where the non-Sharia category of *miri* was the characteristic type of landed holding,[5] or from Iran, where *milk* (*molk* in Persian) likewise was a minor form of holding. The highlands also were different from places such as Morocco, where *milk* holdings did exist but were associated only with towns, their immediately surrounding cultivated areas, and a few oases. Morocco was also where a wave of privatization, a *milk*-ization, occurred, as the Sharia property system was extended into the countryside, in many instances under colonial pressure.

In Yemen, the Sharia provided the language for the mode of production. By "Sharia" I refer to the doctrinal literature of the *fiqh,* the humanly authored jurisprudence of Sharia law. This specialist literature uses technical terminologies, categories, and analytic procedures that were developed in relatively hermetic fashion by the Muslim jurists of many lands over many centuries. At the same time the *fiqh* also is a local phenomenon, and at mid-century in Yemen this involved the study, interpretation, and application of specific works, and it also involved the issuance of problem-oriented doctrinal "choices" by the ruling imams. This legal discourse of the *fiqh* provided the "language" of late agrarian age usage not directly, in the full form of its substantive and procedural models, but rather in the sense that its terms and categories were appropriated, minus virtually all of the attending technicalities, as the terms and categories of practice. Thus, "con-

tract," "commodity," "individual ownership," "sale," "lease," "marriage," "inheritance," endowment," and many other such terms were common both to the doctrine and to highland practice. In each applied, subinstitutional instance, however, specific Sharia terminologies and doctrinal forms were wedded to greater or lesser amounts of local customary content, as was understood to necessarily always be the case with respect to the Sharia as an active historical presence in the world. The very detailed considerations of the doctrine became relevant on the ground only with the interventions of legal specialists. This sometimes occurred in the work of notaries, and more often and more systematically when conflicts were posed as questions to the mufti or litigated before a Sharia judge. At the same time, the extent of the Sharia system was in some respects limited to that of the state and its courts, and both within the sphere of the state and beyond the pale there were "tribal" and other competing forms of conflict resolution. While the Sharia provided the common language for the highland mode of production, the doctrinal literature itself also represented an exceedingly complex ideology, at once legal and religious, involving chapter after chapter of "ruling ideas."

It may be noted also that contemporary Muslim thought in the new field of "Islamic economics" draws heavily on the *fiqh* paradigm. In his study of Muhammad Baqer as-Sadr (d. 1980), a major figure in this field, Chibli Mallat explains that in the absence of a classical Muslim economics this new "Islamic economics" based itself instead on the institutions of the Sharia tradition. For as-Sadr and others, "Islamic law is the preferred way to Islamic economics" (Mallat, 1993: 122). It must be noted, however, that many such thinkers reject the association of the sort of economy envisioned in this "Islamic economics" with Western capitalism. Both as-Sadr and Seyyed Mahmood Taleqani (1983) see an Islamic economy as a third way between Western capitalism and socialism, although a closer affinity to capitalism also is recognized. According to an encyclopedia entry on "Capitalism and Islam" (Bianchi, 1995: 254), "Islamic traditions have been most conducive to the

development of indigenous capitalism and most hostile to the importation of communism."

I approach the Sharia-expressed property relations of midcentury highland Yemen using three levels of written legal texts. At the highest level, which is the restricted preserve of the jurists, is Sharia doctrine itself, the works of *fiqh*. This jurisprudence of the period—which notably includes a commentary written between 1938 and 1947 on an authoritative fifteenth-century treatise—constituted the overarching ideology of the property regime and the period Islamic state. Aside from the basic notion of the "inviolability of property" (*'ismat al-amwal*) in the Sharia (Shawkani, A.H. 1390, vol. 4: 206), the doctrine provides models for both the range of substantive undertakings and for court processes. Extending this doctrine and bridging gaps between theory and practice, Yemeni imams, including those who ruled in the twentieth century, issued sets of personal doctrinal "choices" that were designed to guide court judges in particular areas of the law where there were recurrent conflicts.

At the lowest textual level and as widespread in incidence as the doctrine was socially restricted were the routine property documents of ongoing, mostly uncontested practice. These included ordinary real-estate sale documents, marriage contracts, endowment instruments, wills, and estate inheritance papers. Included also were the ubiquitous legal contracts for agrarian production relations. Such *ijara* contracts embodied the terms that brought together the propertied few, the landowners, and the many, their tenants and sharecroppers. Located between these textual extremes of high doctrine and the common instrument, and middling also in terms of their numbers, were the judgments of Sharia courts. In such formal judgments the patterned conflicts and some of the underlying contradictions of the property system were expressed, contested, and ruled upon, again, sometimes following the guidance of an imamic "choice."

II

The Private Individual

In what follows, I trace a historical legal individual, a local Sharia subject, across several domains of the highland Yemeni political economy. The first such domain concerns the individual in terms of the physical legal body. Related issues concern what are collectively termed "the injuries." One of these, murder, brings to the fore a set of rights that center on the body and person of the Sharia subject. In this time and place murder was not a "crime" in the modern sense and, likewise, the relevant doctrine was not part of "criminal" law, a category that, although not unknown, was not operative in Yemen (or in the local Sharia) before the 1962 revolution. In the Sharia frame of reference, the relevant broader distinction was between what are known as the "rights of God" and the "rights of a human." Murder falls in the latter category, together with a wide spectrum of Sharia-construed property rights. The lesser injuries are analyzed as analogous to damage to a commodity.

The "rights of God" principally are treated in a standard chapter on the Hudud (sing. *hadd*). An individual *hadd* is defined technically as "a bodily punishment and satisfaction of a right of God Almighty" (al-`Ansi, 1993, vol. 4: 207). These Hudud are the acts, five in number, for which specific punishments are set in the Quran. Exclusive authority for the implementation of these Hudud as punishments is vested in the imam as the head of the Islamic state (417). Punishment for these acts included both the this-worldly bodily punishments set in the Quran and also punishments in the "afterlife." Some have seen the Hudud as an embryonic "public" law. Murder, by contrast, is treated in another standard chapter, on "Injuries."

While the two chapters on the Hudud and the Injuries are relatively distinct in terms of the Sharia classification of "rights of God" versus the "rights of a human," in modernity they have been

collapsed together to provide Sharia-based building materials for the new category, "criminal law," and for these dimensions of modern public rights. Prior to this, however, in a legal setting such as highland Yemen at midcentury, murder was not a public crime. One aspect of this was the fact that in a murder case from 1960, the claim was brought, not by a state prosecutor, an office that did not exist as such, but, privately, by the deceased's father and mother. The notion of "public" responsibility and prosecutorial authority would not be elaborated legally until 1977, with the institution of the Niyaba (Messick, 1983). In this era there also was no state-recognized bar, and no formal training and certification of lawyers, who did not yet exist as a public profession. In the prerevolutionary Yemeni Sharia system, although the state provided the forum for litigation (and, in the event of a ruling for retaliation, the executioner), and although it was the responsibility of the imam to issue the final order for an execution, individual and family interests remained paramount in the decision to go to court and in the conduct of the case.

It is claimed that the key historical achievement of the Quran-based Sharia law of homicide was that it reduced the sphere of legal retaliation to the perpetrator of the homicide alone, thus helping to combat the endless cycle of multiple retribution killings which characterized feuding in the pre-Islamic past (Schacht, 1964: 185; Anderson, 1951). As a particular instance of the individualism that runs throughout this legal corpus, the doctrine focuses on individual responsibility for killing (provided there was only one killer), a responsibility anchored analytically in the Sharia subject's intent to kill. Such analyses based on intent, or consent, structured the entire spectrum of the applied jurisprudence (Messick, 2001). Sharia constructions of individual identity also coexisted with the rights of social collectivities, including those of the Sharia subject's legal relatives. If the premodern, precitizen individualism of the Sharia subject was conditioned by various sorts of familial ties, each of these "families,"

including the configurations of kin relevant in relations of marriage and inheritance, also had its characteristic tensions.

Landed Property

In the highland elevations, in terraced valleys, wadi systems, and mountain slopes, grains such as sorghum and wheat were cultivated on the basis of fairly regular annual summer rains produced by the monsoon. Secondarily there were irrigated crops, including greens and fruits, coffee and qat. Each of the thousands upon thousands of terraces, large and small, was a named and documented property.

Both of the fundamental legal constructs, the already mentioned *milk,* the term for individually owned property, and the concept of *mal,* a thing of economic value, or commodity, find explicit formal articulation within the frame of the sale contract.[5] Paradigmatic with respect to the group of contract forms in the doctrinal corpus, the contract of sale also is crucial in another analytic sense. As the pivotal applied legal mechanism for the transfer of immovable real property (and moveable trade goods), the sale contract is the main site for the articulation of legal structures that together comprise the late agrarian and mercantile form of Sharia capitalism. With reference to *milk* we approach the local history of private landed property; with reference to *mal* that of the commodity form. In the postrevolutionary transformation of Yemeni society, *milk* and *mal* would remain in place, their lexemic continuities concealing a variety of changes.[6]

Limiting the classical Sharia contract of sale, and thus the wider field of possible property, are doctrinal conditions that define a permissible "sale object." According to one such list (Nawawi, n.d.) a legal "sale object" must be characterized by:

- "purity" (*tahara*), meaning, in cited examples, neither a dog nor wine may be sold;
- "usefulness" (*naf'*), excluding the sale of useless insects and wild animals, as well as that of two grains of wheat;

- "capacity for delivery" (*imkan taslimihi*), eliminating the sale of an escaped animal, property that has been usurped by another, parts of things such as swords or vases that are non-partible, and property in pledge;
- "ownership," *milk,* on the part of the seller;
- "knowledge" (*al-`ilm bihi*), a requirement of exact specification that eliminates such vaguely characterized objects as "one of the two pieces of clothing" or "a roomful of wheat."

A condensed version (Abu Shuja`, 1894: 312-313) states that "it is legal to sell all things pure, individually owned, and useful, and it is illegal to sell objects either impure or non-useful." The Yemeni interpretive school official under the imams gives equivalent conditions for the two *mals*, the two commodities, that figure in the exchange carried out in a sale contract. They must be: 1) known; 2) legally possible to own; and 3) legally possible to sell one for the other. Further, 4) the "sale object" must be extant among the *milk* properties of the seller, and 5) it must be permissible to sell the "sale object." Of course, the existence of such ideal technical features did not mean that no one in Yemen ever purchased wine. *Milk* involved individual property rights that could be acquired, alienated, leased, and inherited. In many Muslim societies, both Western colonizers and, later, development experts, discussed how, compared to ideally "full," "complete," or "unlimited" forms of Western private property, *milk* property rights also could be restricted, either by the famous "dead hand" of the trustlike pious endowment (*waqf*) or by rights of preemption (*shuf`a*). The bodies of legal doctrine concerning *waqf* and *shuf'a* represent two further distinctive features of real property relations in the classical Sharia imaginary. With the imperial-age advent of Westerners in the Muslim lands, these two areas of Sharia law came to be viewed as the main legal impediments to the acquisition and exercise of free individual ownership rights in real property—that is, from some colonial vantage points, to the securing of title to land for *colon* settler populations.

In doctrinal terms, the key first point about endowments is that they had to be created out of property that originally had been *milk;* that is, the genealogy of endowment property goes back not to a form of common or collective property, a characteristic feature of many precapitalist contexts, but to the Islamic form of individual ownership. A second point is that, since these endowments were made in perpetuity—"until God inherits the earth," as Yemeni endowment instruments state—they effectively constituted a form, actually several distinct forms, of collective and inalienable property holdings by families or communities. Third, prior to the rise of nation-states, endowments administrations for the nonfamilial type carried out many functions that would be considered "public," including the funding of educational institutions and water systems.

Preemption meant that a third party, the preemptor, if the appropriate circumstances obtained, would receive a property that had been sold, after compensating the buyer for the full price paid. As preemption was a legal arena of well-known abuses and stratagems, both Imams Yahya and Ahmad issued several personal opinions each concerning the application of *shuf'a* law in their courts. Preemption claims may arise in variously defined situations of close ownership proximity. A classic type of claim arises in the aftermath of succession to an estate, following the application of Sharia inheritance law. When one of the resulting joint owners of a property sells his or her fractional inheritance share to an outside third party, the sale may be preempted by another of the joint-owning heirs.

In general, however, preemption is not so much an encumbrance acting upon an existing owner as it represents a potential obstacle in the path of a new owner. Preemption is not, in theory, a threat to the seller's capacity to alienate his property, and, in fact, without a successful sale the right of preemption cannot be exercised. Preemption rights thus have no bearing on whether a given property may be sold, except in so far as potential buyers may be driven away by the prospect of any purchase they transact

being preempted. Although indirect, this last prospect may constitute a serious block, and in this larger sense the system of *milk* property relations and, within it, an individual owner's capacity to dispose, were importantly conditioned by Sharia-based rights of preemption.

The general rationale offered for the existence of the preemption mechanism is that it represents a defense against the entry of an unknown or undesired individual into a close ownership relation—with all the uncertainty, even danger, this was thought to entail. In the realm of real property relations, the law of preemption stages a confrontation between the interests of the individual versus the interests of various contiguous others and collectivities. Where the individual stands for the interests of a pure (agrarian capitalist) regime of unfettered acquisition and alienation of privately owned real estate, rights of preemption can be a channel for the expression of countervailing interests, based on physical proximities and situational solidarities, mainly of kinship and, by extension, "tribe," but also of neighbors, and even allies and clients. This system works in both directions, however. While contiguous owners may retain important potential rights concerning the disposition of the Sharia subject's property, this individual reciprocally holds similar potential rights pertaining to the properties of these others. As a distinctive type of individual property owner, then, the Sharia subject is, in part, defined by such opposed and also reciprocal interests.

Production Relations

While the "private" property regime centered conceptually on *milk*, a category of individual ownership of immoveable property, and on the concept of *mal*, the commodity, the associated system of agricultural production was based on lease contracts between landlords and tenant sharecroppers.

Like the capitalist and the wage laborer, the venerable Western analytic pair, the *malik* and the *sharik*, the landowner and the tenant of the late agrarian age in the highlands, are best

understood relationally and historically. Like the modern capitalist-wage laborer relationship, agrarian tenancies were contractually based. In both instances, however, as Engels famously remarked, the contracting parties are made equal on paper. An analysis of agrarian tenancy thus must attempt to account for a relationship characterized by both conceptual equality and enacted inequality. As conceived in the doctrine, the Sharia subject is, among other things, a potentially contracting individual who may indifferently assume the legal roles of lessor and lessee. By contrast, for the historical Sharia subjects of the midcentury highlands, these roles typically marked dominance and subordinance.

How have Muslim jurists conceived of the key relation, as Marx would put it, between the owners of the conditions of production and the direct producers? In the case of cultivable land, the quintessential condition of agrarian production, relations between landowners and either share-cropping tenants or paid workers, are represented by legal forms associated with the *ijara,* or lease/hire contract. Like the sale contract, which structures exchanges of both land and commercial goods—that is, of both immovable and moveable categories of property—*ijara* has an importance that extends well beyond the sphere of agrarian tenancy. The same contract form that underpinned the lease of cultivable terraces and buildings, including private houses and commercial establishments such as shops, warehouses, and the public bath, also was the basic legal form for the hire of services, from tailoring to construction labor.

The *ijara* lease/hire contract was fundamental to an understanding of Sharia capitalism and to prerevolutionary production in Yemen specifically in two distinct ways. It represented the general contractual form for engaging both land and labor, the principal production factors of the agrarian-era economy. Such leases were the legal means to bring together land and labor for cultivation, and what was leased was the use of the productive capacity of the land. As the informal rubric of Yemeni work contracts, *ijara*

also covered craft production of many types and the general hire of temporary labor, which also included men paid by share-cropping tenants, or by owners directly cultivating their own plots, to assist at various stages of the growing cycle or at harvest time. In such hire of services *ijaras*, what was hired was human labor power.

Ijara is founded upon the Sharia conception of the usufruct (*manfa`a*), or use right. Abu Shuja` (1894: 386) writes that "everything that can be made use of with the continued existence of the thing itself is legal to lease [or hire]." The commentator provides as examples a house, which can be inhabited, and a riding animal, which can be ridden. In the case of agricultural leases, the usufruct object of the transaction is the productive capacity of the land as distinct from the land itself; in services, it is labor power as distinct from the worker. Adjusted for the very different circumstances of a historically and legally distinct form of "capitalism," the hire side of this Sharia contract is well characterized in a statement by Marx (1964: 99): "what capital appropriates is not the laborer but his labor—and not directly, but by means of exchange." In the lease/hire contract the use right, either of the productive capacity of land or of the labor power of the laborer, is "commodified" in something approximating the modern sense.

The custom of each region dictated not only the specific fractional share of the harvest that local landlords received, but also the general obligations of the tenant to the owner with respect to the land held in the lease. In one region, the lease instruments specificed that it was customary for the landlord to receive one-quarter of the harvest yield. Customary also were two additional in-kind payments to the landlord, one of a specified amount of extra labor and the other a specified quantity of clarified butter.

Referring to the capitalist transformation of Europe, Marx (1967, vol. 3: 788) observes that in-kind rent was "a mere tradition carried over from an obsolete mode of production and

managing to prolong its existence as a survival. Its contradiction to the capitalist mode of production is shown by its disappearance of itself from private contracts, and its being forcibly shaken off as an anachronism, wherever legislation was able to intervene. . . ." In the Yemeni case and in other Muslim settings, in contrast, the older "mode[s] of production," going back over a millennium, already contained many significant premodern "capitalist" forms that would not simply become "obsolete" on the Western model. In Yemen, as opposed to a simple historical succession of such forms, in-kind and money rents coexisted, both in long-established legal conceptions and in equally venerable local practices.

While in violation of the doctrinal principle that requires a terminal date for the contract, the customary opened-ended design of local leases fit the social circumstances of many of the relationships represented. Many such associations between landlord and tenant were enduring, spanning not merely lifetimes but generations. Just as landed wealth was inherited, so rights of tenancy on particular plots were rights passed from fathers to sons. Tenancy could be held through the deaths of one or both of the original contractors. The legal forms for a contractually "free labor" were available in the doctrine, but the predominant form of agrarian work in this region of the highlands exhibited a lack of the sort of labor circulation that would be characteristic of a developed labor market. Leases were marked by father-to-son tenancy continuities. The most important postrevolutionary transformation in the realm of work in the highlands, entailing nothing less than the birth of "labor" in a developed (if dependant) capitalist sense, would involve breaking these crucial links of occupational reproduction that structured agrarian life in favor of individual wage-labor opportunities in nearby Saudi Arabia and elsewhere.

At midcentury, tenants and owners actively undertaking cultivation themselves relied primarily on their own labor and that of their family members, and potentially also on the cooperation of

other relatives or exchanges with neighbors (Tutwiler and Carapico, 1981: 19, 75-6). The hire of additional labor was nevertheless significant, especially at harvest time in cases where an individual had extensive acreage under cultivation. Harvest labor was an important phenomenon, for it represented the functioning of a marginal market for "free" labor within a productive system otherwise dominated by traditional tenancy and direct cultivation.

Commercial Property

Mal, the basic term introduced earlier, refers to commercial goods and to property or wealth in general, and also to money. As such, it is the legal term for a commodity, commercial or real, moveable or immovable. *Mal* also figures in important compound forms, one of which is *ra's al-mal,* or "[merchant's] capital." In the doctrine and among Yemeni merchants there were well-known forms for partnerships and for bringing together this capital and merchant labor.

Over many centuries, long-distance trade placed the Yemeni highlands in contact with the world. With their marketplaces and warehouses protected by walls and fortified gates, trading activity was as old as the towns themselves. Commerce in this prerevolutionary period in the highlands was intimately connected to agrarian production, the surpluses of which still represented the principal highland trade commodities. Agrarian production was equally fundamental to the economic organization of the state since the in-kind tithe (*zakat*) on this production constituted the principal form of state revenue. Commerce and the state, in turn, were related not only through taxes collected on the circulation of agricultural commodities and on imports and exports but also through the transforming of in-kind state revenues into cash. This phenomenon was common to premodern agrarian societies. In Indian Ocean societies, Chaudhuri writes, merchants and bankers "remained indispensable inter-

mediaries in converting agricultural surplus into disposable state income" (1985: 11).

Coffee was Yemen's modern cash-crop commodity and at the highest level of highland commerce it reigned supreme as the main highland export into the 1950s. This was despite the fact that Yemen's once unique place in the world market had long since been eclipsed, beginning with the advent of competing production by the Dutch in Java in the 1720s, and, somewhat later, the start of South American production. Since the decline of Mocha, the famous Red Sea coffee port, following its heyday in the seventeenth and eighteenth centuries, the venerable Indian Ocean port of Aden, under British rule since 1839, had become the primary regional center of international trade.

State Property

Another compound Sharia term derived from the concept of *mal* is *bayt al-mal,* the state treasury, literally, "the house of *mal.*" A venerable institution of this name existed in imamic Yemen. Its main functions centered on the management of the imamic state's intake and dispersal of grain, and also of some coffee revenues, both in the form of *zakat,* the Sharia-based tithe on agricultural production. The prerevolutionary *bayt al-mal* was to the agrarian order of the imamic state what the new Central Bank, created after the revolution, became to the cash-based commercial order of the succeeding republican state.

At midcentury, underground storage pits held the surpluses of agrarian production, including landlords' shares, endowment revenues, and the state tithe. Stored grain constituted the literal foundation of the old state. In the months immediately following the main fall harvest, long lines of donkeys bearing sacks of grain and other in-kind revenues such as pulses and coffee beans streamed into the towns. In the months after delivering the harvest surpluses, donkeys completed the cycle by delivering baskets of night soil from catchments in houses to the fallow terraces.

Where the institutions of "private" property were highly elaborated in the highlands, those of the "public" were not. This was not a contrasting pair of great salience. The patrimonially organized imamic state was extremely limited in its development as a set of public institutions. As noted earlier, endowments were the revenue basis for such institutions as mosques and also for what would later become typically "public" institutions, including schools and water systems. Even such open spaces as cemeteries began as private endowments. There was no "state" property as such. Other key public institutions included the imamate itself, a standing army (based on Ottoman models), and the Sharia court. Court records were public documents in a limited sense in that the records themselves actually were copies and since they were kept in the private residences of the judges and their secretaries. The originals of court-issued judgments and of all types of notarial instruments were held in private home archives by the individuals concerned. The first separate "public" buildings were built in the 1940s, but Sharia court in the era was held in the mornings in front of a judge's personal residence. The state offices of officials such as governors also were located in their residences and their administrations functioned as complex households.

Public spaces, in a prenational sense, included the large assembly mosques and smaller neighborhood mosques and the open areas of the marketplaces, although in the rural districts the sites of weekly markets were privately owned. There also was a "public" outdoor prayer space for the annual collective prayer and the Ottomans left a parade ground (*maidan*) in each of the major centers, which were used for executions and, after the revolution, for soccer matches. In these towns municipality administrations, also introduced under the Ottomans, carried out limited responsibilities in regulating the marketplace and in sanitation and policing, although there was no regular police administration. The space of the market streets and residential alleys was "public" in the sense that it was unowned. These arteries were the arena

for everyday male interaction, for a literal "coming together" of a "public," of the local "people" (*al-nas*), structured along status and gender lines, with the domestic sphere and the house representing the opposed female domain. Women also circulated in the markets to some extent and had their own separate female "public" networks of regular visiting and other afternoon events. The other global social conceptualizations of this era, or at least up to 1948, pertained to "the Muslims," or the Muslim community (*umma*), and the non-Muslim "People of the Book," the Jewish community of protected individuals (*dhimmis*). However, the modern construct of the "public" (*`amm*), expressed in connection with a long series of new institutions and a defining feature of the nation-state itself, would not attain significance in Yemen until after the 1962 revolution.

III

Mid-twentieth-century highland Yemen was a complex of private relations without the familiar counterpoint of an elaborated public domain or sphere. In actuality, it is a case without a notion of the private as such—that is, as part of any such fundamental dichotomy. What I have referred to as the "private" in the historically distinct and comparatively unusual Muslim world instance of highland Yemen in the middle of the twentieth century is a set of institutions surrounding the individual legal subject, institutions in which the formal terms of Sharia doctrine matched the informal categories of a significant range of economic practice. Foremost among these is the institution of individual ownership of property, moveable and immovable, commercial and agrarian, property that could be bought, sold, leased, and passed on to heirs. Such a form of property was a basic building block of a socioeconomic system that may be described as "capitalist," although at the same time it is in other

respects very different from modern industrial and wage-labor-based capitalism.

Notes

[1]This was a new domain, "whose decisive mark was the published word" (Habermas, 1989: 16). On this, see Messick (2002), a genealogical analysis of a contemporary Yemeni legal publication.

[2]For a detailed discussion and critique of these ideas, see Turner (1978).

[3]There are differences of opinion regarding the general timing. For Wallerstein (1974: 301), the boundaries of the capitalist "world-economy" in 1600 did not include the Ottoman Empire, of which Yemen was at the time a distant province. According to the chronology adopted by Wolf (1982: 298), all the world trade of this era was mercantilist in character, since the "capitalist mode of production did not come into being until the latter part of the eighteenth century."

[4]According to legal historians Tigar and Levy (1977: 15), "A contract to do a thing in the future is called executory, and underlies all modern commercial transactions. Prior to this, Roman law, like early Anglo-Saxon law and other early legal systems, had recognized only *executed* contracts, those that involved face-to-face dealings, with an exchange of the property concerned at the moment the deal was made and according to a prescribed form."

[5]Many other types of holdings existed, several of which involved life-grants and tax farms.

[6]See the articles on "Milk" (1993) and "Mal" (1991) in *The Encyclopedia of Islam.*

References

Abu Shuja`, Ahmad. *Matn* [Embedded in *Fath al-Qarib,* by al-Ghazzi]. Trans. L. W .C. Van Den Berg. Leiden: Brill, 1894.

Anderson, J. N. D. "Homicide in Islamic Law." *Bulletin of the School of Oriental and African Studies* 13 (1951): 811-828.

al-`Ansi, Ahmad b. Qasim. *Taj al-mudhhab li-ahkam al-madhhab.* 4 vols. Sana'a: Dar al-Hikma al-Yamaniyya, 1993 [1938-1947].

Appadurai, Arjun. *The Social Life of Things: Commodities in Cultural Perspective.* New York: Cambridge University Press, 1986.

Bianchi, Robert. "Capitalism and Islam." *The Oxford Encyclopedia of the Modern Islamic World.* Vol. 1. New York and Oxford: Oxford University Press, 1995: 254-257.

Chaudhuri, K. N. *Trade and Civilization in the Indian Ocean.* Cambridge: Cambridge University Press, 1985.

Crone, Patricia. "Weber, Islamic Law, and the Rise of Capitalism." *Max Weber and Islam.* Eds. Toby E. Huff and Wolfgang Schluchter. New Brunswick: Transaction Publishers, 1999.

Cuno, Kenneth M. "The Origins of Private Ownership of Land in Egypt: A Reappraisal." *International Journal of Middle East Studies* 12 (1980): 245-275.

———. *The Pasha's Peasants: Land, Society and Economy in Lower Egypt, 1740-1858.* Cambridge: Cambridge University Press, 1992.

Gran, Peter. *Islamic Roots of Capitalism.* Syracuse: Syracuse University Press, 1998 [1979].

Habermas, Jurgen. *The Structural Transformation of the Public Sphere.* Trans. Thomas Burger. Cambridge: MIT Press, 1989.

Issawi, Charles. *The Economic History of the Middle East, 1800-1914.* Chicago: University of Chicago Press, 1966.

"Mal." *The Encyclopedia of Islam.* 2d ed. Vol. VI. Leiden: Brill, 1991.

Mallat, Chibli. *The Renewal of Islamic Law.* Cambridge: Cambridge University Press, 1993.

Marx, Karl. *Pre-Capitalist Economic Formations.* New York: International Publishers, 1964.

———. *Capital.* Vol. 3. New York: International Publishers, 1967.

Messick, Brinkley. "Prosecution in Yemen: The Introduction of the *Niyaba.*" *International Journal of Middle East Studies* 15 (1983): 507-518.

———. "Indexing the Self: Intent and Expression in Islamic Legal Acts." *Islamic Law and Society* 8 (2) (2001): 151-178.

———. "Cover Stories: A Genealogy of the Legal-Public Sphere in Yemen." Workshop on the Public Sphere in Islam. Florence, European University, March 20-24, 2002.

"Milk." *The Encyclopedia of Islam.* 2d ed. Vol. VII. Leiden: Brill, 1993.

Nawawi, Muhyi al-Din. *Minhaj al-Talibin.* Cairo: Dar Ihya' al-kutub al-`arabiyya, n.d.

Rodinson, Maxime. *Islam and Capitalism.* Trans. Brian Pearce. New York: Pantheon, 1973.

Schacht, Joseph. *An Introduction to Islamic Law.* Oxford: Clarendon Press, 1964.

Shawkani, Muhammad b. `Ali. *Al-sayl al-jarrar.* 4 vols. Cairo, A.H. 1390.

Taleqani, Seyyed Mahmood. *Islam and Ownership.* Lexington, Ky: Mazda Publishers, 1983.

Tigar, Michael E., with Madeleine R. Levy. *Law and the Rise of Capitalism.* New York: Monthly Review Press, 1977.

Turner, Brian. *Marx and the End of Orientalism.* London: George Allen and Unwin, 1978.

Tutwiler, Richard, and Sheila Carapico. *Yemeni Agriculture and Economic Change.* Sana'a: American Institute for Yemeni Studies, 1981.

Wallerstein, Immanuel. *The Modern World-System.* New York: Academic Press, 1974.

Wolf, Eric R. *Europe and the People without History.* Berkeley: University of California Press, 1982.