An Introduction to Islamic Law presents a broad account of our present knowledge of the history and of the outlines of the system of Islamic law. It is intended in the first place not for specialists, although it is hoped that it will attract students to this particularly rewarding branch of Islamic studies, but for readers interested in history, social sciences, and comparative law. Islamic law is the key to understanding the essence of one of the great world religions, it still casts its spell over the laws of contemporary Islamic states, and it is in itself a remarkable manifestation of legal thought.

From the reviews:

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Joseph Schacht, who died in 1969, was Professor of Arabic and Islamics at Columbia University, New York.

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ISBN 0-19-825473-3
9 780198 254737

Clarendon Press is the academic imprint of
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JOSEPH SCHACHT

CLARENDON PAPERBACKS

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BY
JOSEPH SCHACHT

CLARENDON PRESS · OXFORD

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford OX2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Athens Auckland Bangkok Bogotá Buenos Aires Calcutta
Cape Town Chennai Dar es Salaam Delhi Florence Hong Kong Istanbul
Karachi Kuala Lumpur Madrid Melbourne Mexico City Mumbai
Nairobi Paris São Paulo Singapore Taipei Tokyo Toronto Warsaw
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in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

ISBN 0-19-825473-3
9 10
Printed in Great Britain
by Biddles Short Run Books
King's Lynn

PREFACE

THIS book contains an account of our present knowledge of the history and of the outlines of the system of Islamic law. It is intended for two groups of readers: students of history, social sciences, and comparative law on the one hand, and on the other, students of Arabic who might wish to embark upon this particularly important and attractive branch of Islamic studies. Islamic law provides us with a remarkable example of the possibilities of legal thought and of human thought in general, and with a key to understanding the essence of one of the great world religions. This book is concerned with the unique historical phenomenon of Islamic law as such, and not with the contemporary laws of those countries in the Near East and elsewhere where Muslims live. I am writing as a student of Islam and of that manifestation of Islam which is Islamic law, and not as a lawyer, or a comparative lawyer, or a sociologist. Nevertheless, as a student of the history of Islam, I have tried to refer the development of Islamic law to the development of Islamic society, and to integrate the historical and systematic sections of this book as far as the present state of our knowledge allows. In order to keep my account within reasonable limits, I have had to restrict myself to the history of Islamic law within the orthodox or Sunni community, leaving aside the separate developments of Shiite and Ibāḍī law, and to choose, in the systematic section, the doctrine of one of the orthodox schools of law, the Ḥanafī; I have, however, not hesitated to extend the bibliographies to all orthodox schools and to Shiite and Ibāḍī law.

The bibliography forms an essential part of this book; it is intended for both groups of its potential readers, but I have not aimed at bibliographical completeness. In particular, I have omitted those publications which are now of historical interest only, or do not add substantially to what has been said in the text, or fall short of present scholarly standards; I have been selective, too, with regard to the writings of modern lawyers on technical points of Islamic law as applied in

contemporary practice. I trust that the short indications of the main Arabic sources, both in the historical and in the systematic section, will be sufficient for students of Arabic; for the sake of other readers of this book, I have referred to translations of Arabic texts to the widest possible extent. Those publications which in my opinion are particularly useful for further study of the subjects in question have been marked by an asterisk, and those which I consider indispensable, by a dagger; it goes without saying that these indications do not imply any derogatory comment on the other titles included in the bibliography.

I have covered substantially the same field in two previous publications, *Esquisse d'une histoire du droit musulman*, Paris, 1953, for the historical section, and *G. Bergsträsser's Grundzüge des islamischen Rechts*, Berlin and Leipzig, 1935, for the systematic section. The present book, not merely a restatement but the result of continuous work on the subject over a number of years, is intended to supersede both. I should like to acknowledge the courtesy of the Middle East Institute in Washington in allowing me to draw on the text of my contribution to the volume *Law in the Middle East*.

J. S.

February 1964

PREFACE TO THE SECOND IMPRESSION

In this second impression, I have made only very few minor changes, but have brought the bibliography up to date.

J. S.

July 1965

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1

INTRODUCTORY

THE sacred Law of Islam[1] is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects; it comprises on an equal footing ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules. It is with these last that this book is concerned. This restriction is historically and systematically justified;[2] it must, however, be kept in mind that the (properly speaking) legal subject-matter forms part of a system of religious and ethical rules.

Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself. The very term *fiḳh*, 'knowledge', shows that early Islam regarded knowledge of the sacred Law as the knowledge *par excellence*. Theology has never been able to achieve a comparable importance in Islam; only mysticism was strong enough to challenge the ascendancy of the Law over the minds of the Muslims, and often proved victorious. But even at the present time the Law, including its (in the narrow sense) legal subject-matter, remains an important, if not the most important, element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western ideas. Apart from this, the whole life of the Muslims, Arabic literature, and the Arabic and Islamic disciplines of learning are deeply imbued with the ideas of Islamic law; it is impossible to understand Islam without understanding Islamic law.

Islamic law is a particularly instructive example of a 'sacred law'. It is a phenomenon so different from all other forms of law—notwithstanding, of course, a considerable and inevitable number of coincidences with one or the other of them as far as

[1] *sharī'a, shar'*, the sacred Law; *fiḳh*, the science of the *sharī'a*; *faḳīh* (pl. *fuḳahā'*), the specialist in *fiḳh*.

[2] Cf. below, pp. 112, 200 f.

subject-matter and positive enactments are concerned—that its study is indispensable in order to appreciate adequately the full range of possible legal phenomena. Even the two other representatives of a 'sacred law' which are historically and geographically nearest to it, Jewish law and Canon law, are sensibly different.

Both Jewish law and Canon law are more uniform than Islamic law. The history of Jewish law, it is true, shows a break between the law of a sovereign state and that of the Dispersion, but the spirit of the legal matter in the later parts of the Old Testament is already very close to that of the Talmud. Islam, on the other hand, represented a radical breakaway from Arab paganism; Islamic law is the result of a scrutiny, from a religious angle, of legal subject-matter which was far from uniform, comprising as it did the various components of the laws of Arabia and numerous elements taken over from the peoples of the conquered territories. All this was unified by being subjected to the same kind of scrutiny the impact of which varied greatly, being almost non-existent in some fields, and in others originating novel institutions. This inner duality of legal subject-matter and religious norm is additional to the outward variety of legal, ethical, and ritual rules which is typical of a 'sacred law'. Jewish law was buttressed by the cohesion of the community, reinforced by pressure from outside; its rules are the direct expression of this feeling of cohesion, leading to the rejection of all dissentients. Canon and Islamic law, on the contrary, are dominated by the dualism of religion and state, where the state is not, in contrast with Judaism, an alien power but the political expression of the same religion. But their antagonism took on different forms; in Christianity it was the struggle for political power on the part of a tightly organized ecclesiastical hierarchy, and Canon law was one of its political weapons. Islam, on the other hand, was never a 'Church', Islamic law was never supported by an organized power, consequently there never developed a real trial of strength; there merely existed a discordance between the sacred Law and the reality of actual practice of which the regulations framed by the state formed part, a gap more or less wide according to place and time, now and then on the point of being closed but continually reasserting itself.

There were two important changes of direction within the

history of Islamic law; one was the introduction at an early date of a legal theory which not only ignored but denied the existence in it of all elements that were not in the narrowest possible sense Islamic, and which reduced its material sources to the Koran and the example of the Prophet;[1] the second, which began only in the present century, is modernist legislation on the part of contemporary Islamic governments, which does not merely restrict the field in which the sacred Law is applied in practice but interferes with the traditional form of this law itself.[2] Again this interference does not take the form of a struggle for power between competing organizations, it poses itself not in the terms of replacing the sacred by a modern secular law but of renovating its traditional form, and the postulate that Islam as a religion ought to regulate the sphere of law as well, remains unchallenged.

Neither is Islamic law uniform at any point of its development. From the outset the subject-matter out of which it was created varied from place to place, and these geographical differences account for much of the divergencies between the ancient schools of law. Some of the later schools of law perpetuated some of their predecessors, while other later schools arose from differences in the principles and methods of legal reasoning. The sects of the Ibāḍīs and of the Shiites, too, developed their own legal systems. Within orthodox Islam, however, the strongly pronounced 'catholic instinct' of Islam led to the recognition of the four surviving later schools as equally valid alternate interpretations of the sacred Law.

Islamic law came into being and developed against a varied political and administrative background. The lifetime of the Prophet was unique in this respect; it was followed by the turbulent period of the Caliphs of Medina (9–40 of the hijra, A.D. 632–61). The rule of the Umayyads, the first dynasty in Islam (41–132 of the hijra, A.D. 661–750), represented, in many respects, the consummation of tendencies which were inherent in the nature of the community of the Muslims under the Prophet. During their rule the framework of a new Arab Muslim society was created, and in this society a new administration of justice, an Islamic jurisprudence, and, through it, Islamic law itself came into being. The Umayyads were

[1] Cf. below, Chapter 9. [2] Cf. below, Chapter 15.

overthrown by the ʿAbbāsids, and the early ʿAbbāsids attempted to make Islamic law, which was then still in its formative period, the only law of the state. They were successful in so far as the *ḳāḍīs* were henceforth bound to the sacred Law, but they did not succeed in achieving a permanent fusion of theory and practice, of political power and sacred Law. There followed the gradual dismemberment of the Islamic Empire to which it is, in the nature of things, difficult to assign definite dates but which was well on its way about the year 300 of the hijra or about A.D. 900. Now Islamic law profited from its remoteness from political power; it preserved its stability and even provided the main unifying element in a divided world of Islam. The modern period, in the Western sense of the term, saw the rise of two great Islamic states on the ruins of the previous order, the Ottoman Empire in the Near East and the Mogul Empire in India; in both empires in their hey-days (the sixteenth and the seventeenth century respectively) Islamic law enjoyed the highest degree of actual efficiency which it had ever possessed in a society of high material civilization since the early ʿAbbāsid period. The symbiosis, in the wake of Western political control, of Islamic law and of Western laws in British India and in Algeria (starting in the eighteenth and in the nineteenth century respectively), gave birth to two autonomous legal systems, Anglo-Muhammadan law and *Droit musulman algérien*. Finally, the reception of Western political ideas in the Near East has provoked, in the present century, an unprecedented movement of modernist legislation.

Although Islamic law is a 'sacred law', it is by no means essentially irrational; it was created not by an irrational process of continuous revelation but by a rational method of interpretation, and the religious standards and moral rules which were introduced into the legal subject-matter provided the framework for its structural order. On the other hand, its formal juridical character is little developed; it aims at providing concrete and material norms, and not at imposing formal rules on the play of contending interests. It has, therefore, not easily lent itself to the technical treatment applied to it by modern lawyers in the majority of contemporary Islamic states. It possesses a pronounced private and individualistic character; it is, in the last resort, the sum total of the personal privileges and duties of all

individuals. One of the most striking features of traditional Islamic law is the casuistical method which is closely connected with the structure of its legal concepts, and both are the outcome of an analogical, as opposed to an analytical, way of thinking which pervades the whole of it. Islamic law represents an extreme case of a 'jurists' law'; it was created and developed by private specialists; legal science and not the state plays the part of a legislator, and scholarly handbooks have the force of law. This became possible because Islamic law successfully claimed to be based on divine authority, and because Islamic legal science guaranteed its own stability and continuity. The traditionalism of Islamic law, typical of a 'sacred law', is perhaps its most essential feature. These considerations on the nature of Islamic law will be developed in greater detail in the last chapter of this book.[1]

The scholarly investigation of Islamic law is still in its beginnings. This comes partly from the infinite variety and complexity of the subject, partly from its position on the borderline between Islamic and legal studies, and partly from two unexpected developments which have occurred in the present generation; on the one hand, our ideas concerning the early history of Islamic law have undergone a considerable change and whole new horizons have been opened for research, and on the other, modern legislation in a number of Islamic countries has added, after a long period of near-immutability, a new and, as yet, unfinished chapter to its more than millenary history.

[1] Cf. below, Chapter 26.

HISTORICAL SECTION

2

THE PRE-ISLAMIC BACKGROUND

1. THE legal institutions of Arabia in the time of Muhammad were not altogether rudimentary. There was, first, the customary law of the majority of the Arabs, the Bedouins, which, though primordial in character, was by no means simple in its rules and in their application. It is known to us to a limited extent, and in its general character rather than in its details, through pre-Islamic and early Islamic poetry and through the tales of the tribes. The comparable conditions which have survived among the Bedouins of modern times enable us to control the information of the literary sources. Whereas investigation of cases and evidence are dominated by sacral procedures, such as divination, oath, and curse, the positive law of the ancient Arabs is decidedly profane, matter-of-fact, and informal; even their penal law is reduced to questions of compensation and payment.

2. Mecca, however, was a trading city in (admittedly modest) commercial relations with South Arabia, Byzantine Syria, and Sassanian Iraq; the city of Ṭā'if was another centre of long-distance trade, and Medina was the chief town of an intensively cultivated group of oases of palm-trees with a strong colony of Jews, probably mostly Arab converts. It is likely that these and perhaps other towns in Arabia possessed laws more highly developed than those of the Bedouins. We can form some idea of the character of commercial life in Mecca and of the kind of law which it presupposes, including the technique of loans with interest. An important source of information on commercial law and practice in Mecca in the time of Muhammad is provided by the Koran, in its extensive use of commercial technical terms, many of which are legally relevant. This customary commercial

law of Mecca was enforced by the traders among themselves, in much the same way as was the Law Merchant in Europe. There are some traces of agricultural contracts, which may be postulated for Medina, too. It must not be assumed, however, that the outlines of the Islamic law of property, contracts, and obligations formed already part of the customary law of the pre-Islamic Arabs; the reasoning on which this assumption was based has been invalidated by more recent research into the history of Islamic law.

3. The law of personal status and family, of inheritance, and criminal law were dominated, both among the Bedouins and among the sedentary population, by the ancient Arabian tribal system. This system implied the absence of legal protection for the individual outside his tribe, the absence of a developed concept of criminal justice and the reduction of crimes to torts, the responsibility of the tribal group for the acts of its members, and therefore blood feuds, mitigated by the institution of blood-money. All these features and institutions, more or less deeply modified by Islam, have left their traces in Islamic law.

The relations of the sexes in pre-Islamic Arabia were characterized not so much by polygamy, which certainly existed, as by the frequency of divorce, loose unions, and promiscuity, which sometimes make it difficult to draw a line between marriage and prostitution. There were differences in the law of family and marriage between Mecca and Medina, and no doubt other places as well. Slavery and concubinage with slave women were taken for granted.

4. The absence of an organized political authority in Arab society, both Bedouin and sedentary, implied the absence of an organized judicial system. This does not mean that private justice or self-help prevailed in settling disputes concerning rights of property, succession, and torts other than homicide. In these cases, if protracted negotiation between the parties led to no result, recourse was normally had to an arbitrator (*ḥakam*). The arbitrator did not belong to a particular caste; the parties were free to appoint as *ḥakam* any person on whom they agreed, but he was hardly ever the chief of the tribe. A *ḥakam* was chosen for his personal qualities, for his reputation, because he belonged to a family famous for their competence in deciding disputes, and above all, perhaps, for his supernatural powers which the

parties often tested beforehand by making him divine a secret. Because these supernatural powers were most commonly found among soothsayers (*kāhin*), these last were most frequently chosen as arbitrators. The parties had to agree not only on the choice of an arbitrator, but on the cause of action, the question which they were to submit to him. If the *ḥakam* agreed to act, each party had to provide a security, either property or hostages, as a guarantee that they would abide by his decision. The decision of the *ḥakam*, which was final, was not an enforceable judgment (the execution had indeed to be guaranteed by the security), but rather a statement of right on a disputed point. It therefore became easily an authoritative statement of what the customary law was, or ought to be; the function of the arbitrator merged into that of a lawmaker, an authoritative expounder of the normative legal custom or *sunna*. The arbitrators applied and at the same time developed the *sunna*; it was the *sunna*, with the force of public opinion behind it, which had in the first place insisted on the procedure of negotiation and arbitration. This concept of *sunna* was to become one of the most important agents, if not the most important, in the formation of Islamic law.

5. The technical terminology of the customary law of the pre-Islamic Arabs has, as is only natural, to a considerable extent survived in the technical terminology of Islamic law. The converse, however, is not the case, and Islamic legal terms must not without positive proof be assumed to go back to the pre-Islamic period. No comprehensive study of pre-Islamic legal terminology has been undertaken so far. Ancient technical terms have often acquired, in Islamic law, a modified, more narrowly defined, or even definitely different meaning, as have *ajr* and *rahn*; or they have lost their connexion with former symbolic acts, as has *ṣafḳa*; or they have become isolated, archaic survivals, as has *'uhda*; or they refer to institutions which Islamic law does not, or does not fully, recognize, as do *maks*, *'umrā*, and *ruḳbā*; or they have completely dropped out of use as technical terms, as has *malasā* (the reverse of *'uhda*).

6. It is doubtful whether the customary law of pre-Islamic Arabia contained elements of foreign origin; if it did, they do not seem to have survived into Islamic law.[1] Through their

[1] The foreign elements which do exist in Islamic law entered into it in the first century of the hijra.

contacts with the Byzantines on the Syrian frontier the pre-Islamic Arabs came indeed to know a number of Graeco-Latin terms and institutions, most of which were military and administrative, though some belong to the sphere of law. In this way the Greek term for robber, λῃστής, entered the Arabic language as a loan-word, *liṣṣ* (with variants *laṣṭ*, *liṭ*, and *luṭ*), but although the Koran, and after it Islamic law, punishes the crime of highway robbery, the term for it, *ḳaf' al-ṭarīḳ*, is a post-Koranic development, and robbery was in any case not regarded as a crime by the pre-Islamic Arabs. Again, the Arabic verb *dallas*, 'to conceal a fault or defect in an article of merchandise from the purchaser', is derived from Latin *dolus*; the word entered Arabic through the channel of commercial practice at an early date, but it did not become a technical term for fraud in early Islamic law.[1]

The use of written documents is well attested for the pre-Islamic period and for the time of Muhammad, and it continued without interruption into Islamic law, although its theory took no notice of it. The Arabs were familiar with the use of written documents in the surrounding countries of sedentary civilization, and the practice seems to have come to them both from Syria and from Iraq.

The legal institutions of ancient South Arabia, which belong to a different civilization, hardly seem to have influenced those of the (Northern) Arabs. On occasion, however, they enable us to establish or confirm the pre-Islamic character of certain institutions, such as the rule of two witnesses and the contract of *muḥāḳala*.

[1] The term *arabūn* (and variants), from Greek ἀρραβών, 'earnest money, *arrha*', notwithstanding the great antiquity of the institution in the laws of the Near East, is attested in Arabic not earlier than the second century of the hijra, when the institution was rejected by Islamic law.

3

MUHAMMAD AND THE KORAN

1. MUHAMMAD had emerged in Mecca as a religious reformer, and he protested strongly when his pagan countrymen regarded him as merely another soothsayer (*kāhin*). Because of his personal authority he was invited to Medina in A.D. 622 as an arbiter in tribal disputes, and as the Prophet he became the ruler-lawgiver of a new society on a religious basis, the community of Muslims, which was meant to, and at once began to, supersede Arabian tribal society. Muhammad's rejection of the character of a *kāhin* brought with it the rejection of arbitration as practised by the pagan Arabs, inasmuch as the arbitrators were often soothsayers (sura iv. 60). Nevertheless, when he acted as a judge in his community, Muhammad continued to act in the function of a *ḥakam*, and the Koran prescribed the appointment of a *ḥakam* each from the families of the husband and of the wife in the case of marital disputes (sura iv. 35). Whenever the Koran speaks of the Prophet's judicial activity (sura iv. 105 and elsewhere), the verb *ḥakama* and its derivatives are used, whereas the verb *ḳaḍā*, from which the term *ḳāḍī* was to be derived, refers in the Koran regularly not to the judgment of a judge but to a sovereign ordinance, either of Allah or of the Prophet. (It also occurs in connexion with the Day of Judgement, but then it denotes a judgment only in the figurative sense.) In a single verse both verbs occur side by side (sura iv. 65): 'But no, by thy Lord, they will not (really) believe until they make thee an arbitrator (*yuḥakkimūka*) of what is in dispute between them and find within themselves no dislike of that which thou decidest (*ḳaḍayta*), and submit with (full) submission.' Here the first verb refers to the arbitrating aspect of the Prophet's activity, whereas the second emphasizes the authoritative character of his decision. This isolated instance is the first indication of the emergence of a new, Islamic idea of the administration of justice. Muhammad attached indeed great importance to being

appointed by the believers as a *ḥakam* in their disputes, though the insistence of the Koran on this point shows that the ancient freedom in the choice of a *ḥakam* still prevailed; Muhammad, too, reserved to himself the right of the ancient *ḥakam* to refuse to act (sura iv. 59; v. 42; xxiv. 48–51). His position as a Prophet, however, backed in the later stages of his career in Medina by a considerable political and military power, gave him a much greater authority than could be claimed by an arbitrator; he became a 'Prophet-Lawgiver'. But he wielded his almost absolute power not within but without the existing legal system; his authority was not legal but, for the believers, religious and, for the lukewarm, political.

2. The legislation of the Prophet, too, was an innovation in the law of Arabia. Generally speaking, Muhammad had little reason to change the existing customary law. His aim as a Prophet was not to create a new system of law; it was to teach men how to act, what to do, and what to avoid in order to pass the reckoning on the Day of Judgement and to enter Paradise. This is why Islam in general, and Islamic law in particular, is a system of duties, comprising ritual, legal, and moral obligations on the same footing, and bringing them all under the authority of the same religious command. Had religious and ethical standards been comprehensively applied to all aspects of human behaviour, and had they been consistently followed in practice, there would have been no room and no need for a legal system in the narrow meaning of the term. This was in fact the original ideal of Muhammad; traces of it, such as the recurrent insistence on the merits of forgiveness, in a very wide meaning of the word, are found in the Koran,[1] and the abandonment of rights is consequently treated in detail in Islamic law. But the Prophet eventually had to resign himself to applying religious and ethical principles to the legal institutions as he found them.

Thus we find in the Koran injunctions to arbitrate with justice, not to offer bribes, to give true evidence, and to give full weight and measure.[2] Contracts are safeguarded by commands to put them in writing, to call witnesses, to give

[1] Sura ii. 263; iii. 134; iv. 149; xvi. 126; xxiv. 22; xlii. 37, 40, 43; lxiv. 14.

[2] Sura iv. 58; v. 42; vi. 152. — ii. 188. — ii. 283; iv. 135; v. 8; xxv. 72; lxx. 33. — vi. 152; xvii. 35; lv. 8 f.; lxxxiii. 1–3.

securities (*rahn*, as a guarantee and material proof) when there is no scribe available—all pre-Islamic practices which the Koran endorses—or, in general, by the command to fulfil one's contracts and, especially, to return a trust or deposit (*amāna*) to its owner.[1] This command is typical of the ethical attitude of the Koran towards legal matters. Even the prohibitions of a certain game of hazard (*maysir*) and of taking interest (*ribā*),[2] though directly concerned with certain types of legal transactions, are not meant to lay down legal rules regulating the form and effects of these transactions, but to establish moral norms under which certain transactions are allowed or forbidden. The idea that such transactions, if they are concluded notwithstanding the prohibition, are invalid and do not create obligations, does not, as yet, appear in the Koran. It was left to Islamic law to establish, beside the scale of religious qualifications, a second scale of legal validity (see below, pp. 121 f). The same attitude governs the Koranic law of war and booty, and the whole complex of family law. The law of war and booty is primarily concerned with determining the enemies who must be fought or may be fought, how the booty is to be distributed (within the general framework of the rules laid down by pre-Islamic custom), and how the conquered are to be treated. Family law is fairly exhaustively treated in the Koran, albeit in a number of scattered passages (mostly in suras ii and iv); here again the main emphasis is laid on the question of how one should act towards women and children, orphans and relatives, dependants and slaves. The legal effects of an act that conforms to the rules are not mentioned and are, in fact, generally self-evident: for instance that a valid marriage, divorce, &c. takes place; but the legal effects of an act contrary to the rules, for instance the question of civil responsibility, are hardly envisaged either. Technical legal statements attaching legal consequences to certain sets of relevant facts or acts are almost completely lacking, as far as the law of obligations and of family is concerned. They exist, and are indeed almost indispensable, in

[1] Sura ii. 282 f. (cf. xxiv. 33). — ii. 177; iii. 76; iv. 58; v. 1; viii. 27; ix. 4, 7; xvi. 91 f.; xvii. 34; xxiii. 8; lxx. 32.

[2] Sura ii. 219; v. 90 f. — ii. 275–9; iii. 130; iv. 161; xxx. 39. *Ribā* is a special case of unjustified enrichment or, as the Koran expresses it, 'consuming (i.e. appropriating for one's own use) the property of others for no good reason' (*akl amwāl al-nās bil-bāṭil*), which is forbidden in sura ii. 188; iv. 29, 161; ix. 34.

the field of penal law. It is easy to understand that the normative legislation of the Koran incorporated sanctions for transgressions, but again they are essentially moral and only incidentally penal; the prohibition is the essential element, the provision concerning the punishment is a rule of action either for the agents of the newly created Islamic state or for the victim and his next of kin in matters of retaliation. The prohibition of theft is presumed known, and only the punishment is laid down (sura v. 38); conversely, drinking wine (sura ii. 219; iv. 43; v. 90 f.), the *maysir* game of hazard, and taking interest are prohibited without a penalty being fixed (unless it be punishment in Hell).[1] There are provisions concerning retaliation and blood-money, theft, sexual irregularity and false accusation of it, the procedure in these two cases, and highway robbery.[2]

The reasons for Koranic legislation on these matters were, in the first place, dissatisfaction with prevailing conditions, the desire to improve the position of women, of orphans, and of the weak in general, to restrict the laxity of sexual morals and to strengthen the marriage tie,[3] and, while eliminating blood-feuds altogether, to restrict the practice of private vengeance and retaliation; the prohibition of gambling, associated as this was with pagan worship, of drinking wine, and of taking interest constitutes, perhaps, the clearest break with ancient Arabian standards of behaviour. The prohibition of taking interest is no doubt inspired by Muhammad's acquaintance with Jewish doctrine and practice in Medina, rather than by any earlier reaction on his part to the commercial practice of the Meccans; and the extension of the principle of retaliation from homicide to causing bodily harm (sura v. 45) is based on what Muhammad had learned from the Jews about the Old Testament (Exod. xxi. 23–25; Lev. xxiv. 19 f.; Deut. xix. 21). Besides, it had become necessary to deal with new problems which had arisen in family law, in the law of retaliation, and in the law of war because of the main political aim of the Prophet—the

[1] The punishment for drinking wine in Islamic law is based not on the Koran but on traditions from the Prophet.

[2] Sura ii. 178 f.; iv. 92; v. 45; xvi. 126; xvii. 33 — v. 38. — iv. 15 f., 25; xxiv. 2–20. — v. 33 f.

[3] The reforms advocated by Muhammad in this field were more gradual, and the conditions with which he had to contend more intricate than what is assumed by the traditional Muslim interpretation of the Koranic passages in question.

dissolution of the ancient tribal organization and the creation of a community of believers in its stead. This is particularly clear in the encouragement of polygamy by the Koran (sura iv. 3). It is possible that some actual disputes made the need obvious.[1] This second need was, it seems, mainly responsible for the Koranic legislation on matters of inheritance, a subject which is farthest removed from the action of moral principles and most closely connected with the granting of individual rights.[2] Even here the Koranic legislation proceeds, chronologically, from recommending ethical rules of action to laying down definite regulations on how to proceed with regard to the estates of deceased persons, and even in its final enactments preserves the ethical element in the tendency to allot shares in the inheritance to persons who had no claim to succession under the old customary law.

This feature of Koranic legislation was preserved in Islamic law, and the purely legal attitude, which attaches legal consequences to relevant acts, is often superseded by the tendency to impose ethical standards on the believer.

[1] Some regulations were provoked by Muhammad's personal problems, such as the abolition of adoption with its ensuing impediment to marrying the adopted son's wife (sura xxxiii. 5, 37) and the rules concerning false accusation of unlawful intercourse (sura xxiv. 4–20).

[2] Sura viii. 72, 75; xxxiii. 6. — ii. 180–2, 240; iv. 19, 33. — iv. 7–14, 176.

4

THE FIRST CENTURY OF ISLAM

1. THE first three generations after the death of the Prophet (A.D. 632), or, in other words, the first century of Islam, are in many respects the most important, though because of the scarcity of contemporary evidence the most obscure, period in the history of Islamic law. In this period, many distinctive features of Islamic law came into being and nascent Islamic society created its own legal institutions. What little authentic evidence is available shows that the ancient Arab system of arbitration, and Arab customary law in general, as modified and completed by the Koran, continued under the first successors of the Prophet, the caliphs of Medina (A.D. 632–61). The caliphs, it is true, were the political leaders of the Islamic community after the death of the Prophet, but they do not seem to have acted as its supreme arbitrators, and there still remained room, at a slightly later period, for a poet to exhort his audience to choose their arbitrators from the tribe of the Prophet, the Ḳuraysh. In their function as the supreme rulers and administrators, though of course devoid of the religious authority of the Prophet, the caliphs acted to a great extent as the lawgivers of the community; during the whole of this first century the administrative and legislative activities of the Islamic government cannot be separated. This administrative legislation, however, was hardly, if at all, concerned with modifying the existing customary law; its object was to organize the newly conquered territories for the benefit of the Arabs. In the field of penal law, the first caliphs went beyond the sanctions enacted in the Koran by punishing with flogging, for instance, the authors of satirical poems directed against rival tribes, a form of poetic expression common in ancient Arabia. The introduction of stoning to death as a punishment for unlawful intercourse, which does not occur in the Koran and which is obviously taken from Mosaic law, also belongs to this

period.[1] The enforcement of retaliation and blood-money continued to depend on the initiative of the next of kin of the victim. The first caliphs did not appoint *ḳāḍīs* and in general did not lay the foundations of what later became the Islamic system of administration of justice; this is shown by the contradictions and improbabilities inherent in the stories which assert the contrary; the instructions which the caliph 'Umar is alleged to have given to *ḳāḍīs*, too, are a product of the third century of Islam.

2. Towards the end of the period of the caliphs of Medina the Islamic community was rent by political schisms, and the two 'heterodox' movements of the Khārijīs and of the Shī'a established themselves beside the 'orthodox' or Sunni majority. Except for the law of inheritance, where the particular beliefs of the 'Twelver' Shiites made necessary a system essentially different from that of the Sunnis from which it is derived, the positive doctrines of Islamic law as adopted by the Khārijīs and by the Shī'a do not differ from the doctrines of the Sunni schools of law more widely than these last differ from one another. From this it has been concluded that the essential features common to these several forms of Islamic law were worked out before the schism, i.e. earlier than the middle of the first century of Islam. But recent research has shown that the ancient sects of Islam, at the time they hived off from the orthodox community, could not have shared with the majority the essentials of a system of law which did not as yet exist. For some considerable time, and during the second and third centuries of Islam in particular, they remained in sufficiently close contact with the Sunni community for them to take over Islamic law as it was being developed in the orthodox schools of law, making only such modifications as were required by their particular political and dogmatic tenets, and elaborating their own legal theories which, however, are the real bases of their positive doctrines as little as the legal theory of the Sunnis is of theirs (cf. below, p. 115). Certain doctrines which in themselves were not necessarily either Shiite or Sunni became adventitiously distinctive for Shiite as against Sunni law. Examples are the approval of temporary marriage and the doctrine that the concubine who has borne a child to her owner may be sold. The Khārijī and

[1] The punishment for drinking wine, however, was still unsettled under the Umayyads.

the Shī'a movements represent the two extreme wings of the community of Muslims. Both groups originated in Iraq and were long active there. If their doctrines on technical points of law sometimes agree with each other and diverge from those of the Sunnis, this is because they are based on ancient opinions once current in Iraq which were later abandoned by the Sunnis.

3. At an early period the ancient Arab idea of *sunna*, precedent or normative custom, reasserted itself in Islam. The Arabs were, and are, bound by tradition and precedent. Whatever was customary was right and proper; whatever the forefathers had done deserved to be imitated. This was the golden rule of the Arabs whose existence on a narrow margin in an unpropitious environment did not leave them much room for experiments and innovations which might upset the precarious balance of their lives. In this idea of precedent or *sunna* the whole conservatism of the Arabs found expression. They recognized, of course, that a *sunna* might have been laid down by an individual in the relatively recent past, but then that individual was considered the spokesman and representative, the leader (*imām*) of the whole group. The idea of *sunna* presented a formidable obstacle to every innovation, and in order to discredit anything it was, and still is, enough to call it an innovation. Islam, the greatest innovation that Arabia saw, had to overcome this obstacle, and a hard fight it was. But once Islam had prevailed, even among one single group of Arabs, the old conservatism reasserted itself; what had shortly before been an innovation now became the thing to do, a thing hallowed by precedent and tradition, a *sunna*. This ancient Arab concept of *sunna* was to become one of the central concepts of Islamic law.

Sunna in its Islamic context originally had a political rather than a legal connotation; it referred to the policy and administration of the caliph. The question whether the administrative acts of the first two caliphs, Abū Bakr and 'Umar, should be regarded as binding precedents, arose probably at the time when a successor to 'Umar had to be appointed (23/644), and the discontent with the policy of the third caliph, 'Uthmān, which led to his assassination in 35/655, took the form of a charge that he, in his turn, had diverged from the policy of his predecessors and, implicitly, from the Koran. In this connexion, there appeared the concept of the '*sunna* of the Prophet', not yet identified with

any set of positive rules but providing a doctrinal link between the '*sunna* of Abū Bakr and 'Umar' and the Koran. The earliest, certainly authentic, evidence for this use of the term '*sunna* of the Prophet' is the letter addressed by the Khārijī leader 'Abd Allāh ibn Ibāḍ to the Umayyad caliph 'Abd al-Malik about 76/695. The same term with a theological connotation, and coupled with the 'example of the forebears', occurs in the contemporary treatise which Ḥasan al-Baṣrī addressed to the same caliph. It was introduced into the theory of Islamic law, presumably towards the end of the first century, by the scholars of Iraq.

4. It would seem natural to suppose that the explicit precepts of the Koran on legal matters were observed from the beginning, at least as far as turbulent Arab society in a time of revolutionary change was amenable to rules. It is indeed obvious that many rules of Islamic law, particularly in the law of family and the law of inheritance, not to mention worship and ritual, were based on the Koran from the beginning, and occasionally this can be positively proved. There are, for instance, two early decisions, which have survived into the later schools of law, concerning a question of divorce; one of them is based on the *textus receptus* of the Koran, and another on a variant reading. As the variant readings were officially abolished during the reign of the Umayyad caliph 'Abd al-Malik (65/685–86/705), it can be concluded that both doctrines had been formulated not later than the middle of the first century of Islam. On the other hand, any but the most perfunctory attention given to the Koranic norms, and any but the most elementary conclusions drawn from them, belong almost invariably to a secondary stage in the development of doctrine. That the thief should have been punished not by having his hand cut off as the Koran prescribes (sura v. 38) and Islamic law maintains, but by flogging as attested by St. John of Damascus (*floruit* between A.D. 700 and 750), merely shows the difficulty of enforcing a penalty which was unknown to the ancient Arabs. But there are several cases in which the early doctrine of Islamic law diverged from the clear and explicit wording of the Koran. One important example which has remained typical of Islamic law is the restriction of legal proof to the evidence of witnesses and the denial of validity to written documents. This contradicts an explicit ruling of the

Koran (sura ii. 282; cf. xxiv. 33) which endorsed the current practice of putting contracts into writing, and this practice did persist during the first century and later, and had to be reconciled with legal theory. The same John of Damascus mentions the insistence on witnesses, and on witnesses only, as a typical custom of the Saracens, and this, too, was probably established sometime about the middle of the first century of Islam.[1]

5. During the greater part of the first century Islamic law, in the technical meaning of the term, did not as yet exist. As had been the case in the time of the Prophet, law as such fell outside the sphere of religion, and as far as there were no religious or moral objections to specific transactions or modes of behaviour, the technical aspects of law were a matter of indifference to the Muslims. This attitude of the early Muslims accounts for the widespread adoption, if regarded from one angle, or survival, if regarded from another, of the legal and administrative institutions and practices of the conquered territories. Outstanding examples are the treatment of tolerated religions, the methods of taxation, and the institutions of *emphyteusis* and of *waḳf*.[2] The *waḳf* is a good example of the composite nature of the raw material of Islamic law and of the qualitatively new character which its institutions acquired; the *waḳf* has one of its roots in the contributions to the holy war which Muhammad had incessantly demanded from his followers in Medina, another in the pious foundations (*piae causae*) of the Eastern Churches, a third in the charities and public benefactions of the early Muslims, and a fourth, which came into prominence later, in the need of the new Islamic society to counteract some of the effects of its law of inheritance. The principle of the retention of pre-Islamic legal practices under Islam was sometimes even explicitly acknowledged, as in this passage of the historian Balādhurī (d. 279/892):

Abū Yūsuf held that if there exists in a country an ancient, non-Arab *sunna* which Islām has neither changed nor abolished, and people complain to the caliph that it causes them hardship, he is not entitled to change it; but Mālik and Shāfi'ī held that he may change it even if it be ancient, because he ought to prohibit (in similar

[1] For another example, see below, p. 202, n. 2.

[2] On the office of the 'inspector of the market' see below, p. 25.

circumstances) any valid *sunna* which has been introduced by a Muslim, let alone those introduced by unbelievers.[1]

Both opinions presuppose the retention of pre-Islamic legal practices as normal.

Hand in hand with the retention of legal institutions and practices went the reception of legal concepts and maxims, extending to methods of reasoning and even to fundamental ideas of legal science; for instance, the concept of the *opinio prudentium* of Roman law seems to have provided the model for the highly organized concept of the 'consensus of the scholars' as formulated by the ancient schools of Islamic law, and the scale of the 'five qualifications' (*al-aḥkām al-khamsa*; below, p. 121) was derived, albeit at a somewhat later date, from Stoic philosophy. The intermediaries were the cultured non-Arab converts to Islam who (or whose fathers) had enjoyed a liberal education, that is to say, an education in Hellenistic rhetoric which was the normal one in the countries of the Fertile Crescent of the Near East which the Arabs conquered. This education invariably led to some acquaintance with the rudiments of law, which was considered necessary for the orators who were also advocates, and useful for all educated persons. These educated converts brought their familiar ideas, including legal concepts and maxims, with them into their new religion. In fact, the concepts and maxims in question are of that general kind which would be familiar not only to lawyers but to all educated persons. In keeping with this, such parallels as exist between Islamic and Roman law often concern doctrines found in classical Roman (and in late Byzantine) law but not in the legislation of Justinian. This is not an isolated phenomenon. Talmudic and Rabbinic law, too, contains concepts and maxims of classical Roman law which entered it through the medium of popular Hellenistic rhetoric, and the same is the case, as far as can be seen, of Persian Sassanian law which itself came into contact with Talmudic law in Iraq. In Iraq, too, Islamic legal science was to come into being at the turn of the century, when the door of Islamic civilization had been opened wide to the potential transmitters of legal concepts and maxims, the educated non-Arab converts to Islam. That the early Muslim

[1] *Liber expugnationis regionum*, ed. M. de Goeje, Leiden, 1865, p. 448.

specialists in religious law should consciously have adopted any principle of foreign law is out of the question.

In this way concepts and maxims originating from Roman and Byzantine law, from the Canon law of the Eastern Churches, from Talmudic and Rabbinic law, and from Sassanian law, infiltrated into the nascent religious law of Islam during its period of incubation, to appear in the doctrines of the second century A.H.

The following features can with reasonable certainty be regarded as having entered Islamic law in this way: the maxim that 'the child belongs to the marriage bed' (*al-walad lil-firāsh*), which corresponds to the Roman maxim *pater est quem nuptiae demonstrant* and is often referred to, though it has no real part to play in Islamic law; the responsibility of the thief, to whom the Koranic punishment cannot be applied, for double the value of what he stole, an ancient doctrine soon abandoned in Islamic law; the transformation of the old Arabian and Koranic concept of security into that of a security for the payment of a debt which corresponds to the Roman *pignus*; the juridical construction of the contract of *ijāra* in which, following the model of the Roman *locatio conductio*, the three originally separate transactions of *kirā'* (corresponding to *l.c. rei*), *ijāra* proper (corresponding to *l.c. operarum*), and *ju'l* (corresponding to *l.c. operis*) were combined; the three concepts, important in the law of sale, of *makīl, mawzūn, ma'dūd* which correspond to *quae pondere numero mensura constant*; and the principle, derived from the Canon law of the Eastern Churches, that adultery creates an impediment to marriage, a principle which has only left traces in Sunni law but has been retained in 'Twelver' Shiite and in Ibāḍī (Khārijī) law.

Derived from Jewish law are the method of *ḳiyās*, together with its term which is a loan-word in Arabic, and other methods of legal reasoning, such as *istiṣḥāb* and *istiṣlāḥ*. Sometimes it can be doubtful whether a concept has entered Islamic law directly from Hellenistic rhetoric or by way of Jewish law. The influence of Jewish law is particularly noticeable in the field of religious worship.

From Sassanian law come the office of the 'clerk of the court' (*kātib*), who appears together with the *ḳāḍī* in the second half of the period in question, and the proposal, made in the first half of the second century of Islam, that the caliph should codify the

sunna, a proposal which, however, did not take root in Islamic law.

6. One of the most distinctive technical features of Islamic law, the juridical construction of contracts, possibly derived from ancient Near Eastern law and might have come to the Muslims through the medium of commercial practice in Iraq. The essential form of a contract in Islamic law consists of offer and acceptance (*ījāb* and *ḳabūl*) where offer and acceptance are taken not in their common and everyday meaning but as the essential formal elements which for the juridical analysis constitute a contract. The offer can always be withdrawn before it has been accepted, but once it has been accepted the contract has been concluded. This juridical construction, however, disagrees with the terminology because *ījāb*, making something *wājib*, means etymologically not 'to offer' but 'to make definite, binding, due', and this reflects a different, unilateral construction of the contract which is well known from other systems of law. It seems, therefore, that a unilateral construction was superseded by the bilateral one, probably at the same period at which the new juridical construction of the contract of *ijāra* (see above, section 5) prevailed. This bilateral construction of contracts is quite isolated among the laws of antiquity,[1] except for one type of the neo-Babylonian contracts of lease and marriage which is attested from the seventh century B.C. onwards until the end of cuneiform literature in the first century B.C. The possibility that this type of contract survived in Babylonia (Iraq), and that the juridical construction of contracts in Islamic law derives from there, calls for further investigation.

[1] Roman law, for instance, has no fixed technical terms for offer and acceptance. It is true that offer and acceptance express the agreement or *consensus* of the parties, but the so-called consensual contracts of Roman law differ essentially from the Islamic concept of contracts. The Koran (sura iv. 29) speaks of 'trade by agreement' (*'an tarāḍ*^{in}), but this is not used as a technical term, as appears from sura ii. 233, and the concept of agreement or *consensus* as such does not enter into the Islamic theory of contracts.

5

THE UMAYYAD ADMINISTRATION AND THE FIRST SPECIALISTS

1. We must now return to the middle of the first Islamic century, when the rule of the caliphs of Medina was supplanted by that of the Umayyads (A.D. 661–750). The Umayyads were not the adversaries of Islam that they were often made out to be by the Arab historians whose writings reflect the hostile attitude of the 'Abbāsids who in their turn supplanted them. On the contrary, it was the Umayyads and their governors who were responsible for developing a number of the essential features of Islamic worship and ritual, of which they had found only rudimentary elements. Their main concern, it is true, was not with religion and religious law but with political administration,[1] and here they represented the organizing, centralizing, and increasingly bureaucratic tendency of an orderly administration as against Bedouin individualism and the anarchy of the Arab way of life. Islamic religious ideal and Umayyad administration co-operated in creating a new framework for Arab Muslim society, which had been recruited indiscriminately from the Arab tribes and was spread thinly over the vast extent of the conquered territories. In many respects Umayyad rule represents the consummation, after the turbulent interval of the caliphate of Medina, of tendencies which were inherent in the nature of the community of the Muslims under the Prophet. This is the background against which there must be viewed the emergence of Islamic law, of an Islamic administration of justice, and of Islamic jurisprudence.

2. The administration of the Umayyads concentrated on waging war against the Byzantines and other external enemies, on collecting revenue from the subject population, and on paying subventions in money or in kind to the Arab beneficiaries;

[1] They were interested in questions of religious policy and theology in so far as these had a bearing on loyalty to themselves, i.e. on the internal security of the state.

these were the essential functions of the Arab Kingdom. We therefore find evidence of Umayyad regulations, or administrative law, mainly in the fields of the law of war and of fiscal law. The restriction of legacies to one-third of the estate, which goes back to an Umayyad regulation, has a fiscal implication because it meant that when a person died without known next of kin, two-thirds of the estate went to the public treasury.[1] The Umayyads did not interfere with the working of retaliation as it had been regulated by the Koran, but they tried to prevent the recurrence of Arab tribal feuds which threatened the internal security of the state, and they assured the accountancy for payments of blood-money, which were effected in connexion with the payment of subventions.[2] On the other hand, they supervised the application of the purely Islamic penalties, not always in strict conformity with the rules laid down in the Koran.

3. The Umayyads, or rather their governors, also took the important step of appointing Islamic judges or *ḳāḍīs*. The office of *ḳāḍī* was created in and for the new Islamic society which came into being, under the new conditions resulting from the Arab conquest, in the urban centres of the Arab Kingdom. For this new society, the arbitration of pre-Islamic Arabia and of the earliest period of Islam was no longer adequate, and the Arab *ḥakam* was supplanted by the Islamic *ḳāḍī*. This process is exemplified by the half-legendary figure of the so-called *ḳāḍī* Shurayḥ. The traditional opinion asserts, with some variants of detail, that he was the *ḳāḍī* of Kufa over a very long period and died at an incredibly old age. But the historical Shurayḥ was merely a *ḥakam* of the old style among the Arab tribes in the neighbourhood of Kufa. His activity coincided with the establishment and spread of Islam, and his legendary figure reflects the transition from the old to the new form of administration of justice. It was only natural that the *ḳāḍī* took over the seat and wand of the *ḥakam*, but, in contrast with the *ḥakam*, the *ḳāḍī* was a delegate of the governor. The governor, within the limits set

[1] The preference given to the beneficiaries of legacies over the treasury in Ḥanafī law is a later development.

[2] They also seem to have made some effort to mitigate the severity of the ancient Arabian *ḳasāma* by which a person suspected of murder could be put to death on the strength of the affirmatory oath of the next of kin of the victim; cf. below, p. 184, on the Ḥanafī doctrine; the other schools of Islamic law admit in varying degrees the possibility of retaliation on the basis of *ḳasāma*.

for him by the caliph, had full authority over his province, administrative, legislative, and judicial, without any conscious distinction of functions, and he could, and in fact regularly did, delegate his judicial authority to his 'legal secretary', the *ḳāḍī*. The governor retained, however, the power of reserving for his own decision any lawsuit he wished, and, of course, of dismissing his *ḳāḍī* at will. It is to these governors and their delegates, the judges, that John of Damascus refers as the law givers (*νομοθέται*) of Islam.

The jurisdiction of the *ḳāḍī* extended to Muslims only; the non-Muslim subject populations retained their own traditional legal institutions, including the ecclesiastical (and rabbinical) tribunals which in the last few centuries before the Muslim conquest had to a great extent duplicated the judicial organization of the Byzantine state. The Byzantine magistrates themselves, together with the other civil officers, had evacuated the lost provinces at the beginning of the Muslim conquest; but an office of local administration, the functions of which were partly judicial, was adopted by the Muslims: the office of the 'inspector of the market' (*ἀγορανόμος*, in Arabic *'āmil al-sūḳ* or *ṣāḥib al-sūḳ*, a literal translation) who had a limited civil and criminal jurisdiction; it was later, under the early 'Abbāsids, to develop into the Islamic office of the *muḥtasib*. Similarly, the Muslims took over from Sassanian administration the office of the 'clerk of the court' who became an assistant of the *ḳāḍī*; this was well known to the ancient authors.

The earliest Islamic *ḳāḍī*s, officials of the Umayyad administration, by their decisions laid the basic foundations of what was to become Islamic law. We know their names, and there exists a considerable body of information on their lives and judgments, but it is difficult to separate the authentic from the fictitious. Legal doctrines that can be dated to the first century of Islam are rare, but it is likely that some of the decisions which are attributed to those *ḳāḍī*s, and which are irregular by later standards, do indeed go back to that early period. At a slightly later date we can actually see how the tendency to impose an oath on the plaintiff as a safeguard against the exclusive use of the evidence of witnesses grew out of the judicial practice at the beginning of the second century of the hijra. The earliest Islamic *ḳāḍī*s gave judgment according to their own discretion,

or 'sound opinion' (*ra'y*) as it was called, basing themselves on customary practice which in the nature of things incorporated administrative regulations, and taking the letter and the spirit of the Koranic regulations and other recognized Islamic religious norms into account as much as they thought fit. The customary practice to which they referred was either that of the community under their jurisdiction or that of their own home district, and in this latter case conflicts were bound to arise. Though the legal subject-matter had not as yet been Islamicized to any great extent beyond the stage reached in the Koran, the office of *ḳāḍī* itself was an Islamic institution typical of the Umayyad period, in which care for elementary administrative efficiency and the tendency to Islamicize went hand in hand. It will become apparent from the subsequent development of Islamic law that the part played by the earliest *ḳāḍī*s in laying its foundations did not achieve recognition in the doctrine of legal theory which finally prevailed, and that the concept of judicial precedent, the authority of a previous judicial decision, did not develop.

The scene was set for a more thorough process of Islamicizing the existing customary law.

4. The work of the *ḳāḍī*s became inevitably more and more specialized, and we may take it for granted that from the turn of the century onwards (*c.* A.D. 715–20) appointments as a rule went to 'specialists', by which are meant not technically trained professionals but persons sufficiently interested in the subject to have given it serious thought in their spare time, either individually or in discussion with like-minded friends. The main concern of these specialists, in the intellectual climate of the late Umayyad period, was naturally to know whether the customary law conformed to the Koranic and generally Islamic norms; in other words, the specialists from whom the *ḳāḍī*s came increasingly to be recruited were found among those pious persons whose interest in religion caused them to elaborate, by individual reasoning, an Islamic way of life. Members of this group (such as Rajā' and Abū Ḳilāba) were among the familiars of the Umayyad caliphs from the last decades of the first Islamic century onwards. These pious persons surveyed all fields of contemporary activities, including the field of law; not only administrative regulations but popular practice as well. They

considered possible objections that could be made to recognized practices from the religious and, in particular, from the ritualistic or the ethical point of view, and as a result endorsed, modified, or rejected them. They impregnated the sphere of law with religious and ethical ideas, subjected it to Islamic norms, and incorporated it into the body of duties incumbent on every Muslim. In doing this they achieved on a much wider scale and in a vastly more detailed manner what the Prophet in the Koran had tried to do for the early Islamic community of Medina. As a result the popular and administrative practice of the late Umayyad period was transformed into the religious law of Islam. The resulting ideal theory still had to be translated into practice; this task was beyond the power of the pious specialists and had to be left to the interest and zeal of the caliphs, governors, *ḳāḍīs*, or individuals concerned. The circumstances in which the religious law of Islam came into being caused it to develop, not in close connexion with the practice, but as the expression of a religious ideal in opposition to it.

This process started from modest beginnings towards the end of the first century of the hijra; a specialist in religious law such as Ibrāhīm al-Nakha'ī of Kufa (d. 95 or 96 of the hijra, A.D. 713–15) did no more than give opinions on questions of ritual, and perhaps on kindred problems of directly religious importance, cases of conscience concerning alms tax, marriage, divorce, and the like, but not on technical points of law. The same is no doubt true of Ibrāhīm's contemporaries in Medina (see below, p. 31).

The pious specialists owed their authority and the respect in which they were held both by the public and by the rulers, to their single-minded concern with the ideal of a life according to the tenets of Islam, and they gave cautelary advice on the correct way of acting to those of their co-religionists who asked for it. In other words, they were the first *muftīs* in Islam. They often had occasion to criticize the acts and regulations of the government, just as they had to declare undesirable many popular practices, but they were not in political opposition to the Umayyad government and to the established Islamic state; on the contrary, the whole of the Umayyad period, until the civil war which heralded the end of the dynasty, was, at a certain distance, reckoned as part of the 'good old time'; its practice was idealized and opposed to the realities of the actual administration.

6

THE ANCIENT SCHOOLS OF LAW, THE OPPOSITION MOVEMENTS AND THE TRADITIONISTS

1. As the groups of pious specialists grew in numbers and in cohesion, they developed, in the first few decades of the second century of Islam, into the 'ancient schools of law'. This term implies neither any definite organization nor a strict uniformity of doctrine within each school, nor any formal teaching, nor again any official status, nor even the existence of a body of law in the Western meaning of the term. Their members, the 'scholars' (*'ulamā'*) or 'lawyers' (*fuḳahā'*), continued to be private individuals, singled out from the great mass of the Muslims by their special interest, the resultant reverence of the people, and the recognition as kindred spirits which they themselves accorded to one another. The more important ancient schools of law of which we have knowledge are those of Kufa and of Basra in Iraq, of Medina and of Mecca in Hijaz, and of Syria. Our information on the Kufians and on the Medinese is incomparably more detailed than that concerning the Basrians and the Meccans, but the picture gained from the first two schools can be taken as typical. Egypt did not develop a school of law of its own but fell under the influence of the other schools, particularly that of Medina. The differences between these schools were conditioned essentially by geographical factors, such as the difficulties of communication between their several seats, and local variations in social conditions, customary law, and practice, but they were not based on any noticeable disagreement on principles or methods.

The general attitude of all ancient schools of law to Umayyad popular practice and Umayyad administrative regulations was essentially the same, whatever their individual reactions to what they found. Apart from their common basic attitude, there

existed at that earliest stage of Islamic jurisprudence a considerable body of common doctrine which was subsequently reduced by increasing differentiation between the schools. This implies not that Islamic jurisprudence at the beginning was cultivated exclusively in one place, but that one place was the intellectual centre of the first theorizing and systematizing efforts which were to transform Umayyad popular and administrative practice into Islamic law. All indications go to prove that Iraq was this centre. The ascendancy of Iraq in the development of religious law and jurisprudence in Islam continued during the whole of the second century. Influences of the doctrine of one school on that of another almost invariably proceeded from Iraq to Hijaz, and not vice versa, and the doctrinal development of the school of Medina often lagged behind that of the school of Kufa. Beyond this the doctrines of the ancient schools of Medina and of Kufa reflect the social conditions prevailing in Hijaz and in Iraq respectively, where the society of Iraq appears as less archaic and more differentiated, but also more rigid in its structure than that of Hijaz.

2. An important aspect of the activity of the ancient schools of law was that they took the Koranic norms seriously for the first time. In contrast with what had been the case in the first century of Islam, formal conclusions were now drawn from the essentially religious and ethical body of Koranic maxims and applied not only to family law, the law of inheritance, and, of course, worship and ritual, but to those branches of law which were not covered in detail by the Koranic legislation. The zenith of the reception of Koranic norms into early Islamic law coincides with the rise of the ancient schools at the beginning of the second century of Islam.

3. The ancient schools of law shared not only a common attitude to Umayyad practice and a considerable body of positive religious law but the essentials of legal theory, not all of which were historically obvious or systematically self-evident. The central idea of this theory was that of the 'living tradition of the school' as represented by the constant doctrine of its authoritative representatives. This idea dominated the development of legal doctrine in the ancient schools during the whole of the second century of Islam. It presents itself under two aspects, retrospective and synchronous. Retrospectively it

appears as *sunna* or 'practice' (*'amal*) or 'well-established precedent' (*sunna māḍiya*) or 'ancient practice' (*amr ḳadīm*). This 'practice' partly reflects the actual custom of the local community, but it also contains a theoretical or ideal element so that it comes to mean normative *sunna*, the usage as it ought to be. This ideal practice, which was presumed constant though it in fact developed as Islamic ideas were imposed on the legal subject-matter, was found in the unanimous doctrine of the representative religious scholars of each centre, in the teaching of 'those whom the people of each region recognized as their leading specialists in religious law, whose opinions they accepted, and to whose decisions they submitted'.

It is only the opinion of the majority that counts; small minorities of scholars are disregarded. This consensus (*ijmā'*) of the scholars, representing the common denominator of doctrine achieved in each generation, expresses the synchronous aspect of the living tradition of each school. How this consensus works is described by an ancient scholar of Basra in the following terms: 'Whenever I find a generation of scholars at a seat of learning, in their majority, holding the same opinion, I call this "consensus", whether their predecessors agreed or disagreed with it, because the majority would not agree on anything in ignorance of the doctrine of their predecessors, and would abandon the previous doctrine only on account of a repeal [for instance in the Koran, which their predecessors had overlooked] or because they knew of some better argument, even if they did not mention it.' In the result, the decision on what constitutes normative practice is left to the last generation of the representatives of each school of law.

The consensus of the scholars is different from the consensus of all Muslims on essentials. This last, in the nature of things, covers the whole of the Islamic world but is vague and general, whereas the consensus of the scholars is geographically limited to the seat of the school in question, is concrete and detailed, but also tolerant and not exclusive, recognizing, as it does, the existence of other doctrines in other centres. Both kinds of consensus count as final arguments in the ancient schools of law, though the consensus of the scholars is of much greater practical importance and is the real basis of their teaching. It is only natural that the consensus of all Muslims should be regarded as

not subject to error; that the consensus of the scholars, too, should be so regarded is not equally obvious, and the whole highly organized concept seems to have been influenced from abroad.

4. Originally the consensus of the scholars was anonymous, that is to say, it was the average opinion of the representatives of a school that counted, and not the individual doctrines of the most prominent scholars. The living tradition of the ancient schools maintained this essentially anonymous character well into the second half of the second century of Islam. Nevertheless, the idea of continuity inherent in the concept of *sunna*, the idealized practice, together with the need to create some kind of theoretical justification for what so far had been an instinctive reliance on the opinions of the majority, led, from the first decades of the second century onwards, to the living tradition being projected backwards and to its being ascribed to some of the great figures of the past. The Kufians were the first in attributing the doctrine of their school to Ibrāhīm al-Nakha'ī, although this body of elementary legal doctrine had very little to do with the few authentic opinions of the historical Ibrāhīm. It rather represents the stage of legal teaching achieved in the time of Ḥammād ibn Abī Sulaymān (d. 120/738), the first Kufian lawyer whose doctrine we can regard as fully authentic. By a literary convention which found particular favour in Iraq, it was customary for a scholar or author to put his own doctrine or work under the aegis of his master. The Medinese followed suit and projected their own teaching back to a number of ancient authorities who had died in the last years of the first or in the very first years of the second century of Islam. At a later period, seven amongst them were chosen as representative; they are the so-called 'seven lawyers of Medina': Sa'īd ibn al-Musayyib, 'Urwa ibn al-Zubayr, Abū Bakr ibn 'Abd al-Raḥmān, 'Ubayd Allāh ibn 'Abd Allāh ibn 'Utba, Khārija ibn Zayd ibn Thābit, Sulaymān ibn Yasār, and Ḳāsim ibn Muḥammad ibn Abī Bakr. Hardly any of the doctrines ascribed to these ancient authorities can be considered authentic. The transmission of legal doctrine in Hijaz becomes historically ascertainable only at about the same time as in Iraq, with Zuhrī (d. 124/742) and with his younger contemporary Rabī'a ibn Abī 'Abd al-Raḥmān for Medina and with 'Aṭā' ibn Abī Rabāḥ for Mecca.

The process of going backwards for a theoretical foundation of Islamic religious law as it was being taught in the ancient schools did not stop at these relatively late authorities. At the same time at which the doctrine of the school of Kufa was retrospectively attributed to Ibrāhīm al-Nakha'ī, and perhaps even slightly earlier, that doctrine and the local idealized practice, which in the last resort was its basis, were directly connected with the very beginnings of Islam in Kufa, beginnings associated with Ibn Mas'ūd, a Companion of the Prophet. It was, however, not to Ibn Mas'ūd himself that reference was made in the first place, but to an informal group of 'Companions of Ibn Mas'ūd' who were, in some general way, taken to guarantee the authentic and uninterrupted transmission of the correct practice and doctrine in Kufa. At a secondary stage the general reference to the Companions of Ibn Mas'ūd gave rise to a formal and explicit reference to Ibn Mas'ūd himself, and a considerable body of early Kufian doctrine was attributed to him. Though this body of doctrine differed in a number of details from the general teaching of the Kufian school which went under the name of Ibrāhīm al-Nakha'ī, Ibrāhīm appears as the main transmitter of doctrine from Ibn Mas'ūd, and many opinions were projected back from Ibrāhīm still farther to Ibn Mas'ūd. The historical Ibrāhīm had not had personal contact with the historical Ibn Mas'ūd, but some members of the originally anonymous group of Companions of Ibn Mas'ūd were later identified as uncles of Ibrāhīm on his mother's side, and they formed a family link between the two authorities. Ibn Mas'ūd thus became the eponym of the doctrine of the school of Kufa. The corresponding eponym of the Meccans was Ibn 'Abbās, another Companion of the Prophet, and references to him, too, alternate with references to the Companions of Ibn 'Abbās. The two main authorities of the Medinese among the Companions of the Prophet were the caliph 'Umar and his son 'Abd Allāh ibn 'Umar. Each ancient school of law, having projected its doctrine back to its own eponym, a local Companion of the Prophet, claimed his authority as the basis of its teaching. This reference to the Companions of the Prophet was called *taḳlīd*, a term which was to gain a different meaning in the later theory of Islamic law.

5. One further logical step remained to be taken in the

search for a solid theoretical foundation of the doctrine of the ancient schools of law, and it was taken by the Iraqians who, very early in the second century of Islam, transferred the term '*sunna* of the Prophet' from its political and theological into a legal context, and identified with it the *sunna*, the idealized practice of the local community and the doctrine of its scholars. The term expressed an axiom but did not as yet imply the existence of positive information in the form of 'traditions' (which became prevalent later), namely that the Prophet by his words or acts had in any fact originated or approved the practice in question. This originally Iraqian concept of the *sunna* of the Prophet was taken over by the Syrians; their idea of living tradition was the uninterrupted practice of the Muslims, beginning with the Prophet, maintained by the first caliphs and by the later rulers, and verified by the scholars. The Medinese, on the other hand used this concept only rarely, whereas the Iraqians, in their turn, hardly used the term '*amal* for practice.

6. It was not long before various movements arose in opposition to the opinions held by the majorities in the ancient schools of law. In Kufa, for instance, where the name of Ibn Mas'ūd had become attached to the main stream of legal doctrine, any opinions which were put forward in opposition to the traditional doctrine of the majority had to invoke an equally high and possibly even higher authority, and for this purpose the name of the caliph 'Alī, who had made Kufa his headquarters, presented itself easily. The doctrines which in Kufa go under the name of 'Alī do not embody the coherent teaching of any individual group; all we can say is that, generally speaking, they represent opinions advanced in opposition to the living tradition, that is to the contemporary average teaching, of the school of Kufa. (There is no trace of a bias in favour of Shiite legal doctrines in these Iraqian traditions from 'Alī.) One group of doctrines attributed to 'Alī represents crude and primitive analogies, early unsuccessful efforts to systematize; they reflect the opinions of groups or individuals who were ahead of the majority of their contemporaries in Kufa in systematic legal thought. Another group of unsuccessful opinions ascribed to 'Alī shows a rigorous and meticulous tendency, and goes farther than the average doctrine of the Kufians in taking religious and ethical considerations into account. Unsuccessful

Iraqian opinions of this type, attributed to 'Alī, correspond almost regularly to doctrines attested in Medina, where most of them represent the common opinion. It is in keeping with the relatively retarded development of the Medinese school that a body of doctrines which remained unsuccessful in Kufa, where it could not overcome the already established tradition of a school of law, succeeded to a considerable extent in gaining recognition in Medina. Furthermore, in contrast with the opposition in Kufa, the opposition in Medina already reflected the activity of the Traditionists.

7. The movement of the Traditionists, the most important single event in the history of Islamic law in the second century of the hijra, was the natural outcome and continuation of a movement of religiously and ethically inspired opposition to the ancient schools of law. The schools of law themselves represented, in one aspect, an Islamic opposition to popular and administrative practice under the later Umayyads, and the opposition group which developed into the Traditionist movement emphasized this tendency. The main thesis of the Traditionists, as opposed to the ancient schools of law, was that formal 'traditions' (*ḥadīth*, pl. *aḥādīth*) deriving from the Prophet superseded the living tradition of the school. It was not enough for the ancient schools to claim that their doctrines as a whole were based on the teachings of the Companions of the Prophet who presumably knew the intentions of their master best, or even that their living tradition represented the *sunna* of the Prophet. The Traditionists produced detailed statements or 'traditions' which claimed to be the reports of ear- or eye-witnesses on the words or acts of the Prophet, handed down orally by an uninterrupted chain (*isnād*) of trustworthy persons. Hardly any of these traditions, as far as matters of religious law are concerned, can be considered authentic; they were put into circulation, no doubt from the loftiest of motives, by the Traditionists themselves from the first half of the second century onwards.

The Traditionists were not confined to Medina but existed in all the great centres of Islam where they formed groups in opposition to, but nevertheless in contact with, the local schools of law. They disliked all human reasoning and personal opinion which had become an integral part of the living tradition of the

ancient schools and which had, indeed, been a constituent element of Islamic legal thought from its very beginnings. Their own standards of reasoning were inferior to those of the ancient schools, as Shāfi'ī, at the end of the second century, had reason to complain. The traditions which they put into circulation were often systematically difficult. Their general tendency was towards strictness and rigorism, not, however, without exceptions. They were occasionally interested in purely legal issues, for reasons which now escape us, but they were mainly concerned with subordinating the legal subject-matter to religious and moral principles, expressed in traditions from the Prophet. There are, for instance, two traditions put into circulation by the Traditionists in Medina, according to which the Prophet had prohibited outbidding and certain practices which might create an artificial rise or fall in prices. Their aim was to make these practices illegal in the same way as, say, the taking of interest was illegal, so that contracts concluded in defiance of the prohibition would be invalid. These particular traditions, however, did not prevail with the Medinese, who, in common with the Iraqians, minimized them by interpretation, and the effort of the Traditionists to change the doctrine of the ancient schools of law remained unsuccessful in this case.

Initially the ancient schools of law, the Medinese as well as the Iraqians, offered strong resistance to the disturbing element represented by the traditions which claimed to go back to the Prophet.[1] It has often been presumed *a priori* that it was the most natural thing, from the first generation after the Prophet onwards, to refer to a real or alleged decision of his whenever a new problem presented itself. This was not the case. Traditions from the Prophet had to overcome strong opposition, and the polemics against them and in their favour extended over most of the second century of the hijra. At the same time it is obvious that once the authority of the Prophet, the highest after the Koran, had been invoked, the thesis of the Traditionists, consciously formulated, was certain of success, and that the ancient schools had no real defence against the rising tide of traditions from the Prophet. The best they could do was to minimize their import by interpretation, and to embody their

[1] The extreme opposition to the Traditionists is represented by the Mu'tazila (cf. below, p. 64, n. 2).

own attitude and doctrines in other alleged traditions from the Prophet, but this meant that the Traditionists had gained their point. Though the ancient schools of law were brought to pay lip-service to the principle of the Traditionists, they did not, however, necessarily change their positive legal doctrine to the full extent desired by this latter group. The Traditionists were sometimes successful in bringing about a change of doctrine, and when this happened the doctrine of the minority in opposition became indistinguishable from that of the majority of the school, so that it is not always possible to determine whether a particular doctrine originated in Traditionist circles or within the ancient schools of law; but they often failed, and we find whole groups of 'unsuccessful' Medinese and Iraqian minority doctrines expressed in traditions from the Prophet. It goes without saying that the interaction of legal doctrines and of traditions must be regarded as a unitary process, the several aspects and phases of which can be separated only for the sake of analysis. All this introduced inconsistencies into the teachings of the ancient schools of law, and these schools accepted traditions from the Prophet as authoritative only as far as they agreed with their own living tradition. The next step was to be taken by Shāfi'ī at the end of the second century of the hijra.

7

EARLY SYSTEMATIC REASONING; LAWYERS OF THE SECOND CENTURY

1. PARALLEL with the tendency of the early specialists and the ancient schools of law to Islamicize, to introduce Islamic norms into the sphere of law, went the complementary tendency to reason and to systematize. Reasoning was inherent in Islamic law from its very beginnings. It started with the exercise of personal opinion and of individual judgement on the part of the first specialists and *ḳāḍīs*. It would be a gratuitous assumption to regard the discretionary decision of the specialist or magistrate as anterior to the use of rudimentary analogy and the striving after coherence. Both elements are found intimately connected in the earliest period which the sources allow us to discern. Nevertheless, all this individual reasoning, whether purely discretionary and personal or inspired by an effort at consistency, started from vague beginnings, without direction or method, and moved towards an increasingly strict discipline.

Individual reasoning in general is called *ra'y*, 'opinion', in the particular meaning of 'sound, considered opinion'. When it is directed towards achieving systematic consistency and guided by the parallel of an existing institution or decision it is called *ḳiyās*, 'analogy', parity of reasoning. When it reflects the personal choice and discretionary opinion of the lawyer, guided by his idea of appropriateness, it is called *istiḥsān* or *istiḥbāb*, 'approval' or 'preference'. The term *istiḥsān* therefore came to signify a breach of strict analogy for reasons of public interest, convenience, or similar considerations. The use of individual reasoning in general is called *ijtihād* or *ijtihād al-ra'y*, and *mujtahid* is the qualified lawyer who uses it. These terms are to a great extent synonymous in the ancient period, and remained so even after Shāfi'ī. *Ra'y* and *istiḥsān* stem directly from the advisory, cautelary activity of the early specialists.

The oldest stage of legal reasoning is represented by Iraqian

doctrines, either discretionary decisions or crude and primitive conclusions by analogy. An old conclusion of this kind, which has survived in the Ḥanafī doctrine, was to demand a fourfold confession from the culprit before he incurred the *ḥadd* punishment for unchastity, by analogy with the four witnesses prescribed for this case by the Koran (sura xxiv. 4). This was originally merely the result of systematic reasoning, and not based on any tradition. The Iraqian opposition exaggerated the underlying tendency towards caution, and put into circulation a tradition to the effect that 'Alī had demanded a fivefold confession, but this doctrine remained unsuccessful. The original Iraqian doctrine spread into Hijaz and was put there under the aegis of the Prophet in a group of traditions. Nevertheless, the doctrine did not prevail in the school of Medina. The underlying conclusion by analogy provoked another, to the effect that the *ḥadd* punishment for theft could be applied only after a twofold confession from the culprit, by analogy with the two witnesses required in this case. This doctrine was again expressed in a tradition from 'Alī, and a number of Iraqians, including the *ḳāḍī* of Kufa, Ibn Abī Laylā, a contemporary of Abū Ḥanīfa, held it. Abū Ḥanīfa, however, argued that if a twofold confession were required, the first confession would already create a civil debt, and no *ḥadd* could take place after a civil debt had been incurred even if a second confession were made, and the doctrine that a single confession was sufficient in the case in question prevailed in the Ḥanafī school.

The minimum value of stolen goods, for the *ḥadd* punishment to be applicable, was fixed by some Iraqians, by a crude analogy with the five fingers, at five dirhams. The generally accepted doctrine in Iraq, however, fixed it arbitrarily at ten dirhams, and this has remained the Ḥanafī doctrine. This doctrine has to be regarded as the original opinion, and the analogical reasoning as a refinement which was finally unsuccessful. The minimum value of stolen goods provided the starting-point for fixing, by a crude analogy, the minimum amount of the nuptial gift (*mahr*) which was an essential element of the contract of marriage. Here, too, the original Iraqian decision was discretionary: 'We think it shocking', they said, 'that intercourse should become lawful for a trifling amount', and therefore 'Ibrāhīm al-Nakha'ī disapproved of a nuptial

gift of less than forty, and once he said of less than ten dirhams'. This discretionary decision was later modified, not for the better, by a crude analogy, according to which the use of part of the body of the wife by the husband ought not to be made lawful for an amount less than that legalizing the loss of a limb through the *ḥadd* punishment for theft, and the minimum amount of the nuptial gift was fixed at ten dirhams. This reasoning was expressed in a tradition from 'Alī. The last words of the statement attributed to Ibrāhīm are intended to put this later doctrine under his authority. A certain Iraqian who held that the minimum value of stolen goods for purposes of *ḥadd* was five dirhams, consistently fixed the minimum *mahr* at five dirhams too. The Medinese recognized originally no minimum amount of *mahr*; only Mālik, followed by the Mālikī school, adopted the principle of the analogical reasoning of the Iraqians, and starting from his own minimum value of stolen goods for the application of the *ḥadd*, which was ¼ dīnār = 3 dirhams, fixed the minimum *mahr* at the same amount. At the same time the Iraqians had found this crude analogy unsatisfactory, and fell back on the authority of traditions which had appeared in the meantime in favour of their doctrine, and this has remained the doctrine of the Ḥanafī school.

2. The results of this early systematic reasoning were not seldom expressed in the form of legal 'puzzles', or in the form of legal maxims or adages which were sometimes rhyming or alliterative. Some typical adages are: 'the child belongs to the marriage bed' (cf. above, p. 21); 'there is no divorce and no manumission under duress' (*lā ṭalāḳ wa-lā 'atāḳ fī ighlāḳ*); 'profit follows responsibility' (*al-kharāj bil-ḍamān*); 'the security takes the place of that for which it is given' (*al-rahn bi-mā fīh*, Iraqian; for the Ḥanafī doctrine, which is different, see below, p. 140), and, in favour of the opposite doctrine, 'the security is not forfeited' (*al-rahn lā yaghlaḳ*, Medinese). These maxims became a favourite mode of expressing legal doctrines, often, no doubt, with a didactic purpose, in a rough-and-ready form; others may have been originally popular proverbs and sayings. They are not uniform as to provenance and period, but many were formulated in the first half of the second century of the hijra, and they reflect a stage when legal doctrines were not yet systematically expressed in traditions, though most of them

gradually acquired the form of traditions. The possibility that some adage or other may even go back to the pre-Islamic period cannot be excluded *a priori*, but this must be positively proved—as has been done, so far, for one particular maxim (*al-walā' lil-kubr*, concerning the transmission of the right of the patron, *mawlā*, by inheritance) which reflects an archaic rule of agnatic succession.

The element of personal discretion and individual opinion in Islamic law was prior to the growth of traditions, particularly of traditions from the Prophet, but because of the success of the main thesis of the Traditionists, most of what had originally been discretionary decisions and the result of individual reasoning by the scholars was put into the mouth of the Prophet. A significant example of this is provided by the rules relating to the ancient contract of *muzābana*, the exchange of dried dates for fresh dates on the tree. This contract contravened the Koranic prohibition of *ribā*, 'excess', and was therefore generally rejected. But in order to enable poor people, who did not themselves possess palm-trees, to acquire fresh dates from the time they began to ripen, certain scholars allowed the exchange of strictly limited quantities of dried dates for estimated equal quantities of fresh dates on the tree. This was originally a discretionary decision (*istiḥsān*), of the same kind as Ibrāhīm al-Nakha'ī's discretionary opinion on the minimum amount of the nuptial gift. Both opinions, the uncompromising prohibition and the exception made for limited quantities, were put into the form of traditions from the Prophet, and in order to make the exception acceptable, the transaction envisaged by it was called by a technical term of its own, *bay' al-'arāyā*. This enabled the ancient schools as well as the Traditionists to harmonize the two groups of traditions, and the original discretionary element was eliminated from the doctrine.

3. The literary period of Islamic law begins about the year 150 of the hijra (A.D. 767), and from then onwards the development of technical legal thought can be followed step by step from scholar to scholar. For Iraq, successive stages are represented by the doctrine which must be credited to Ḥammād (d. 120/738), and by the doctrines of Ibn Abī Laylā (d. 148/765), of Abū Ḥanīfa (d. 150/767), of Abū Yūsuf (d. 182/798), and of Shaybānī (d. 189/805) respectively. The Syrian Awzā'ī

(d. 157/774) represents an archaic type of doctrine, and Mālik (d. 179/795) the average doctrine of the school of Medina in his time. During the whole of the second century of Islam, technical legal thought developed very rapidly from its beginnings, which were crude and primitive conclusions by analogy. It tended, first, to become more and more perfected. There is, secondly, an increasing dependence on traditions, as a greater number of traditions came into being and came to be accepted as authoritative. Thirdly, material considerations of a religious and ethical kind, which represented one aspect of the process of Islamicizing the legal subject-matter, tended to merge into systematic reasoning, and both tendencies became inextricably mixed in the result. All three tendencies culminated in Shāfi'ī (d. 204/820). The following examples are intended to illustrate the general trend of development.

Concerning a man who is married to more than four wives and adopts Islam, the earliest and seemingly most natural solution, that he may choose those four wives to whom he wishes to remain married, was that adopted by Awzā'ī. It was also expressed in a tradition from the Prophet. Mālik followed the same doctrine but specified that the Koranic prohibition (sura iv. 23) of marital relationships with two sisters simultaneously or with mother and daughter applied also here and limited the possible choices. The early Iraqians introduced systematic refinements. Abū Ḥanīfa declared: 'If the man was married to all his wives by one contract, and they all become Muslims, he becomes separated from all his wives.' Abū Yūsuf adduced systematic reasoning in favour of this doctrine and added: 'But if he was married by successive contracts, the first four marriages remain valid'; for this detail he also referred to Ibrāhīm Nakha'ī. The tradition in favour of the first doctrine was still 'irregular', and therefore unacceptable, in the time of Abū Yūsuf. Shaybānī, however, knew already a greater number of traditions from the Prophet and could not disregard them; but he retained the doctrine of Abū Ḥanīfa and Abū Yūsuf with regard to persons who had been members of tolerated religions; the result is very inconsistent. Shāfi'ī, under the spell of the traditions, returned completely to the oldest doctrine and supplied a good systematic argument.

It was an ancient Arab custom that the victors took the

womenfolk of their conquered enemies as concubines without caring much whether they were married women or not. This rough-and-ready practice continued in Islam, and Awzā'ī states correctly: 'Such was the practice of the Muslims, and thus decrees the Koran' (sura iv. 24). The Medinese accepted this practice unreservedly and merely drew the logical conclusion by formulating the legal principle that captivity (in the sense in which Islam recognized it; below, p. 127) dissolved the marriage tie. The Iraqians, however, reasoned that captivity as such did not dissolve the marriage tie, and consequently tried to introduce certain safeguards. Awzā'ī was partly influenced by Iraqian legal thought and, while endorsing the practice, regarded the marriage of captives as continuing valid after captivity, with the result that his doctrine became inconsistent. Abū Yūsuf criticized Awzā'ī's inconsistency, and Shāfi'ī's doctrine is still more thoroughly systematic than that of Abū Yūsuf. At the same time, Awzā'ī, Abū Yūsuf, and Shāfi'ī represent three successive stages of growing formal dependence on traditions.

The Koran says in sura xxiv. 33: 'And those in your possession who desire a writing, write it for them if you know any good in them, and give them of the wealth of Allah which He has given you.' The hearers were supposed to know the details of the transaction referred to, and strict interpretation of the passage suggests that it was not identical with the contract of manumission by *mukātaba* such as was elaborated later by the ancient lawyers in the second century of Islam. Their earliest efforts were arbitrary, such as the decision that the *mukātab* slave becomes free as soon as he has paid half the stipulated amount, or the decision, attributed to 'Aṭā' and probably authentic, that he becomes free as soon as he has paid three-quarters. Presumably authentic, too, is the information that 'Aṭā' considered it obligatory on the master to conclude a *mukātaba* contract with his deserving slave although 'Aṭā' agreed that he had no traditional authority for this doctrine; in other words, the implications of the Koranic passage began to be considered in the time of 'Aṭā'. Technically more polished are the opinions that the *mukātab* slave becomes free as soon as he has paid off his value—this seems to have been the current doctrine of the school of Kufa at one time; or that he becomes free *pro rata* of his payments—this doctrine seems to have been connected with