THE ORIGINS OF Muhammadan Jurisprudence

JOSEPH SCHACHT

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PREFACE

THIS book is concerned with the origins of Muhammadan jurisprudence. I shall, of course, often have occasion to refer to examples taken from Muhammadan law, which is the material of Muhammadan jurisprudence. But the history of positive law in Islam as such, and the relationship between the ideals of legal doctrine and the practical administration of justice fall outside the scope of the present inquiry.

The sacred law of Islam is an all-embracing body of religious duties rather than a legal system proper; it comprises on an equal footing ordinances regarding cult and ritual, as well as political and (in the narrow sense) legal rules. In choosing the examples I shall concentrate as much as possible on the (properly speaking) legal sphere. This course not only recommends itself for practical reasons; it is also historically legitimate. For the legal subject-matter in early Islam did not primarily derive from the Koran or from other purely Islamic sources; law lay to a great extent outside the sphere of religion, was only incompletely assimilated to the body of religious duties, and retained part of its own distinctive quality. No clear distinction, however, can be made, and whenever I use the term Muhammadan law, it is meant to comprise all those subjects which come within the sacred law of Islam.

I feel myself under a deep obligation to the masters of Islamic studies in the last generation. The name of Snouck Hurgronje appears seldom in this book; yet if we now understand the character of Muhammadan law it is due to him. Goldziher I shall have occasion to quote often; I cannot hope for more than that this book may be considered a not unworthy continuation of the studies he inaugurated. Margoliouth was the first and foremost among my predecessors to make more than perfunctory use of the then recently printed works of Shāfi'ī; in reviewing the field which is surveyed here in detail he came nearest, both in his general attitude to the sources and in several important details, to my conclusions. Lammens, though his

writings rarely touch Muhammadan law and jurisprudence directly, must be mentioned in the preface to a book which is to a great part concerned with the historical appreciation of Islamic 'traditions'; my investigation of legal traditions has brought me to respect and admire his critical insight whenever his *ira et studium* were not engaged. In the present generation, Bergsträsser, with penetrating insight, formulated the main problems posed by the formative period of Muhammadan law and offered a tentative solution. Although my results are rather different from those which he might have expected, I must pay homage to the memory of my late teacher who guided my first steps in Muhammadan jurisprudence.

All my previous studies in Muhammadan law have led, in a way, to the writing of this book. But, when I came to write it, the refusal of the Egyptian authorities to allow me to return to my work and home in Cairo in 1939 deprived me of the use of my library at the time I needed it most. I particularly regret that I was thereby prevented from consulting the *Kitāb al-Ḥujaj* by Shaibānī, the *Kitāb al-Sunan* by Shāfi'ī, the *Kitāb al-Diyāt* by Abū 'Āṣim Nabīl, the *Muntaqā min Akhbār al-Aṣma'ī*, and the materials for my own editions, in varying stages of preparation, of the *History of the Judges* by Wakī', of the *Kitāb al-Aṣl* by Shaibānī, and of the *Kitāb al-Masā'il* by Ibn Ḥanbal. That I was able, notwithstanding this handicap, to use all essential texts, I owe mainly to the British Museum and to the Griffith Institute in Oxford, and to the unfailing courtesy and helpfulness of their staffs.

I wish to express my deepfelt gratitude to the Governing Body of St. John's College, Oxford, and to Mr. K. Sisam, formerly Secretary to the Delegates of the Clarendon Press, for the active interest they took in my studies in general and in this book in particular, and for the assistance they gave me. Professor F. de Zulueta has accompanied my studies in Muhammadan law and jurisprudence with sympathy and interest since the invitation given by him and by the late H. Kantorowicz to contribute to the projected *Oxford History of Legal Science* which unfortunately had to be abandoned. Dr. D.

Daube, of Gonville and Caius College, Cambridge, kindly enlightened me on points of Roman law, and Dr. S. Weinstock of Oxford most obligingly translated for me from the Hungarian a paper by Goldziher. Without the unfailing encouragement and help of Professor H. A. R. Gibb this book would hardly have been completed. Lastly, I wish to thank my wife for her truly invaluable aid in preparing the manuscript; to her I dedicate this book as a δόσις ὀλίγη τε φίλη τε.

I cannot do better than address the reader in the words of Shāfi'ī (*Risāla*, 59): 'I lost some of my books but have verified what I remembered from what is known to scholars; I have aimed at conciseness, so as not to make my work too long, and have given only what will be sufficient, without exhausting all that can be known on the subject.'

J. S.

OXFORD
April 1948

PREFACE TO THE FOURTH IMPRESSION

I HAVE made only a few small changes and additions, incorporating some of my more recent conclusions, but have not attempted to add to the book substantially. It remains a work of research that does not aim at giving a comprehensive account of legal science in the first few centuries of Islam. For a general picture of the development of Muhammadan jurisprudence as a whole, from its beginnings to modern times, I may refer the reader to my *Introduction to Islamic Law*, second impression, Oxford, 1966.

January 1967 J. S.

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PART I

THE DEVELOPMENT OF LEGAL THEORY

CHAPTER 1

THE CLASSICAL THEORY OF MUHAMMADAN LAW. THE FUNCTION OF TRADITIONS

THE classical theory of Muhammadan law, as developed by the Muhammadan jurisprudents, traces the whole of the legal system to four principles or sources: the Koran, the *sunna* of the Prophet, that is, his model behaviour, the consensus of the orthodox community, and the method of analogy.[1] The essentials of this theory were created by Shāfi'ī, and the first part of this book, which is concerned with the development of legal theory, centres in a study of Shāfi'ī's achievement.[2] Closely connected with and not second to his material contribution to Muhammadan jurisprudence, is the part Shāfi'ī played in the formation of technical legal thought: he carried it to a degree of competence and mastery which had not been achieved before and was hardly equalled and never surpassed after him. The fourth part of this book, therefore, is devoted to a study of technical legal thought in Shāfi'ī and his predecessors. The second part starts from the conclusions which can be drawn from Shāfi'ī's attitude to the second of the principles of law, the *sunna* of the Prophet as laid down in traditions, and aims at working out a method by which these legal traditions may be used for following the development of legal doctrine step by step through the still largely uncharted period before Shāfi'ī. The results so gained will enable us to realize that the starting-point of Muhammadan jurisprudence lies in the practice of the late Umaiyad period, and the third part of this book accordingly tries to trace the transmission of legal doctrine from its start down to the beginnings of the literary period.

Though Shāfi'ī laid down the essentials of the classical theory

[1] See Snouck Hurgronje, *Verspr. Geschr.* ii. 286–315: *Le droit musulman* (1898); Margoliouth, *Early Development*, 65 ff.; Schacht, in *E.I.* iv, s.v. *Uṣūl*.

[2] On Shāfi'ī, see Bergsträsser, in *Islam*, xiv. 76 ff.; Heffening, in *E.I.* iv, s.v.

of Muhammadan law, he did not say the last word with regard either to consensus or to analogy. Analogy was the last of the four principles to gain explicit recognition, and even after Shāfi'ī's time had to overcome much negative resistance and positive disapproval; the history of this process has been studied by Goldziher in one of his fundamental works which also contains an analysis of Shāfi'ī's contribution to legal theory.[1] As regards consensus, Snouck Hurgronje has made clear its all-important function as the ultimate mainstay of legal theory and of positive law in their final form:[2] the consensus guarantees the authenticity and correct interpretation of the Koran, the faithful transmission of the *sunna* of the Prophet, the legitimate use of analogy and its results; it covers, in short, every detail of the law, including the recognized differences of the several schools. Whatever is sanctioned by consensus is right and cannot be invalidated by reference to the other principles. Thus the classical doctrine, but we shall find that for Shāfi'ī consensus played a much more modest part. It is easy to see that the element of retrospective guarantee embodied in the classical doctrine of consensus is hardly compatible with the free movement and violent conflict of opinions, such as we witness in the creative period of Muhammadan law to which Shāfi'ī belongs.

We are therefore left, as far as Shāfi'ī and his predecessors and contemporaries are concerned, with two recognized material sources, the Koran and the *sunna*. We may take the importance of the Koranic element in Muhammadan law for granted, though we shall have to qualify this for the earliest period;[3] but for Shāfi'ī the *sunna* takes a place comparable to that filled by the consensus in the later system. It is one of the main results of the first part of this book, that Shāfi'ī was the first lawyer to define *sunnà* as the model behaviour of the Prophet, in contrast with his predecessors for whom it was not necessarily connected with the Prophet, but represented the traditional, albeit ideal, usage of the community, forming their 'living tradition' on an equal footing with customary or generally agreed practice. For Shāfi'ī, therefore, only the actions of the Prophet carry authority, and he admits on principle only traditions from the Prophet

[1] *Zâhiriten*; p. 20 ff. on Shāfi'ī.
[2] *Verspr. Geschr.* ii, loc. cit. and *passim*; *Mohammedanism*, 77–92.
[3] See below, p. 224 ff.

himself, although he still shows traces of the earlier doctrine by admitting traditions from the Companions of the Prophet, and opinions of their Successors and even later authorities as subsidiary arguments.

His predecessors and contemporaries, on the other hand, while certainly already adducing traditions from the Prophet, use them on the same level as they use traditions from the Companions and Successors, interpret them in the light of their own 'living tradition' and allow them to be superseded by it. Two generations before Shāfi'ī reference to traditions from Companions and Successors was the rule, to traditions from the Prophet himself the exception, and it was left to Shāfi'ī to make the exception his principle. We shall have to conclude that, generally and broadly speaking, traditions from Companions and Successors are earlier than those from the Prophet.

In the preceding paragraphs I have referred repeatedly to traditions from the Prophet and others. They are not identical with the *sunna* but provide its documentation, whether we take *sunna* with Shāfi'ī and the later theory as the model behaviour of the Prophet, or in its older meaning as the traditional usage of the community which is to be verified by reference to ancient authorities. All alleged information from the Prophet and others is couched in the form of single statements generally short, each preceded by a chain of transmitters (*isnād*) which is intended to guarantee its authenticity.[1] To serve this purpose the *isnād* must be uninterrupted and must lead to an original eye- or ear-witness, and all transmitters must be absolutely trustworthy. The criticism of traditions as practised by Muhammadan scholars was almost invariably restricted to a purely formal criticism of *isnāds* on these lines.

The traditions, mainly from the Prophet, that passed the more or less severe tests of this kind applied to them, were collected in the third century A.H. in a number of works, six of which were later invested with particular authority and form together the classical corpus of orthodox Muhammadan tradition. They are the works of Bukhārī, Muslim, Abū Dāwūd,

[1] The *isnād* always begins with the lowest authority and traces the transmission backwards, e.g. 'Shāfi'ī relates from [i.e. on the authority of] Mālik from Nāfi' from Ibn 'Umar that the Prophet . . . .' This is abbreviated in this book as 'Shāfi'ī—Mālik—Nāfi'—Ibn 'Umar—Prophet'.

Tirmidhī, Ibn Māja, and Nasā'ī. Other well-known collections of traditions, to which we shall have occasion to refer, are by Ibn Ḥanbal, Dārimī, Dāraquṭnī, and Baihaqī. This concentration of interest on traditions from the Prophet, and the almost complete neglect of traditions from Companions, not to mention Successors and later authorities, reflects the success of Shāfi'ī's systematic insistence that only traditions going back to the Prophet carry authority.

It is generally conceded that the criticism of traditions as practised by the Muhammadan scholars is inadequate and that, however many forgeries may have been eliminated by it, even the classical corpus contains a great many traditions which cannot possibly be authentic. All efforts to extract from this often self-contradictory mass an authentic core by 'historic intuition', as it has been called, have failed. Goldziher, in another of his fundamental works,[1] has not only voiced his 'sceptical reserve' with regard to the traditions contained even in the classical collections,[2] but shown positively that the great majority of traditions from the Prophet are documents not of the time to which they claim to belong, but of the successive stages of development of doctrines during the first centuries of Islam. This brilliant discovery became the corner-stone of all serious investigation of early Muhammadan law and jurisprudence,[3] even if some later authors, while accepting Goldziher's method in principle, in their natural desire for positive results were inclined to minimize it in practice.

The importance of a critical study of legal traditions for our research into the origins of Muhammadan jurisprudence is therefore obvious. This book will be found to confirm Goldziher's results, and to go beyond them in the following respects: a great many traditions in the classical and other collections were put into circulation only after Shāfi'ī's time; the first considerable body of legal traditions from the Prophet originated towards the middle of the second century, in opposition to slightly earlier traditions from Companions and other autho-

[1] *Muh. St.* ii. 1–274: 'Ueber die Entwickelung des Ḥadīth'; see p. 5 for a general statement of his thesis.

[2] Or, as Goldziher expresses it in *Principles*, 302: 'Judged by a scientific criterion, only a very small part, if any, of the contents of these canonical compilations can be confidently referred to the early period from which they profess to date.'

[3] Snouck Hurgronje, *Verspr. Geschr.* ii. 315.

rities, and to the 'living tradition' of the ancient schools of law; traditions from Companions and other authorities underwent the same process of growth, and are to be considered in the same light, as traditions from the Prophet; the study of *isnāds* often enables us to date traditions; the *isnāds* show a tendency to grow backwards and to claim higher and higher authority until they arrive at the Prophet; the evidence of legal traditions carries us back to about the year 100 A.H. only; at that time Islamic legal thought started from late Umaiyad administrative and popular practice, which is still reflected in a number of traditions.