# THE ORIGINS OF Muhammadan Jurisprudence

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## CHAPTER 10

# FINAL REMARKS ON LEGAL THEORY

WE found that the theory of the Iraqians was in several respects more highly developed than that of the Medinese, for instance with regard to the theory of traditions, the *sunna* of the Prophet, consensus, and *ijtihād*.[1] But the statement of Khaṭīb Baghdādī (xiv. 245 f.), that Abū Yūsuf was the first to compose books on the theory of law on the basis of the doctrine of Abū Ḥanīfa, is not confirmed by the old sources.

Later legal theory subsumes every relevant act under one of the 'five legal categories' which are: obligatory, recommended, indifferent, disapproved, and forbidden, and discusses the relationship between these categories and the concepts of validity, nullity, and intermediate degrees. The 'five categories' as such are as yet unknown to Shāfi'ī and his predecessors.

Shāfi'ī discusses several aspects of this subject in the whole of *Tr. VI* (pp. 265–7), in *Tr. VII*, 270, and in *Ris.* 48 f.; it is obvious that he does not know 'disapproved' as a separate category, and I do not remember having met *makrūh*, which is the term for it, in his writings. *Mustaḥabb*, which is a later term for 'recommended', occurs with this meaning in *Tr. III*, 25, but it is obvious from the context as well as from *Tr. VI* that it is not yet part of Shāfi'ī's technical terminology. Another term for 'recommended' is *sunna*, in later terminology strictly distinguished from '*sunna* of the Prophet'; Shāfi'ī seems to use it with this meaning in *Ikh.* 184, but again clearly not as part of his technical terminology. In *Ris.* 43 he distinguishes between 'obligatory proper' (*wājib*) and 'obligatory by choice' (*wājib fil-ikhtiyār*) which is the same as 'recommended'.[2] Muzanī's terminology is not more precise than that of his master.[3]

Shaibānī, too, has no fixed terms for 'recommended' and 'disapproved', and the tradition of the Ḥanafī school is presumably right when it holds that Shaibānī used the term *makrūh* as meaning 'forbidden'.[4] In *Muw. Shaib.* 225, Shaibānī, quoting a tradition from Ibn 'Umar, comments 'this is the *sunna*', but explains that one may also act differently; this shows that the two meanings of *sunna* were not yet clearly separated, and the same can be assumed for Shāfi'ī's usage in *Ikh.* 184.

[1] See above, pp. 29, 76, 87, 105.
[2] See also p. 322 (on *Tr. III*, 111).
[3] *K. al-Amr wal-Nahy*, *passim*.
[4] *Comm. Muw. Shaib.*, *passim*.

The same ambiguous use of *sunna* occurs in *Mud.* i. 128, where Saḥnūn quotes a tradition from 'Alī to the effect that the *witr* prayer is not absolutely obligatory like the prayers ordained in the Koran, but is a *sunna* introduced by the Prophet. Quotations in Zurqānī, i. 184, show Mālik's fluctuating terminology for 'recommended'.[1]

Shāfi'ī's discussion of the relationship between the categories of allowed and forbidden and the concepts of validity and nullity[2] shows that opinions were divided on this problem of legal theory, but does not enable us to trace the development of doctrine. It appears, however, from Shāfi'ī's use of the term *fāsid*, approximately 'voidable', as a synonym of *bāṭil* 'null and void', that he abandoned the never very clear distinction between *fāsid* and *bāṭil* which was familiar to the ancient schools before him.[3]

Another subject discussed at length in later legal theory is the validity of judgments in general, and in particular the annulment of judgments given against explicit rulings of Koran, *sunna*, and consensus. Shāfi'ī gives the general rule that a judgment is to be rescinded if it disagrees with a text in the Koran, a *sunna*, a consensus, or one of their necessary implications (*Tr. I*, 56). *Qiyās* is significantly absent from this list, and even Shāfi'ī recognizes the old freedom of *ra'y* to this extent.

Legal philosophy is concerned with the question whether every act is to be regarded as allowed on principle, unless it is specifically forbidden, or as forbidden on principle, unless it is specifically allowed. Shāfi'ī does not consider this theoretical problem, and in *Ris.* 48 f., where he discusses the general relationship between the categories allowed and forbidden, he keeps his feet firmly planted on positive law.

As regards the hierarchy of sources, Shāfi'ī refers to them as a rule, with variations in detail, in the following order: Koran, *sunna* or traditions from the Prophet, *āthār* or traditions from Companions and others, consensus, *qiyās* and reason (*ma'qūl*). He says in *Ris.* 70: 'The basis of legal knowledge (*jihat al-'ilm*) is the Koran, the *sunna*, the consensus, the *āthār*, and the *qiyās* based on these. The scholar must interpret the ambiguous passages of the Koran according to the *sunna* of the Prophet, and if he does not find a *sunna*, according to the consensus of the Muslims, and if there is no consensus, according to the *qiyās*.'

[1] '*Ḥasan*, not *wājib*', as related by Ashhab; '*sunna*, *ma'rūf*', as related by Ibn Wahb.

[2] *Tr. VI*; *Tr. VII*, 270; *Ris.* 48 f.

[3] See, e.g., Shaibānī, *Jāmi' al-Ṣaghīr*, 33, 78 f.; Dimitroff, in *M.S.O.S.* xi (1908), 147 ff.; Santillana, *Istituzioni*, i. 176 ff.

The quaternion Koran, *sunna*, consensus, and *qiyās*, which comprises the recognized sources or principles (*uṣūl*) of law in the classical theory,[1] occurs in *Ris.* 8, but Shāfi'ī's references to it are rare, and he certainly did not put all these four concepts on the same level as sources.

On the contrary, he calls Koran and *sunna* 'the two sources' (*aṣlān*) (*Umm*, vi. 203); everything else is subsidiary (*taba'*) to them (*Tr. IV*, 52); nothing else can add to or subtract from their authority (*Tr. IX*, 29). They are peremptory statements (*qaul farḍ*) to which no question of 'why' applies, and the final authority (*al-qaul al-ghāya*) by which the derivative statements are to be measured (*Ikh.* 340). In *Ris.* 82, Shāfi'ī defends himself against the charge of putting consensus and *qiyās* on the same plane as Koran and *sunna*. While recognizing that the decisions deriving from all of them are equally binding, he points out the difference existing between them as sources or bases (*uṣūl, asbāb*): what is based on the Koran, and on the unanimously recognized *sunna*, is true on the face of it and in reality (*fil-ẓāhir wal-bāṭin*); what is based on the *sunna*, transmitted in 'isolated' traditions, and not unanimously recognized, is true only on the face of it, because an error in transmission is possible;[2] Shāfi'ī also decides on the basis of consensus, and then of *qiyās*; but this basis is weaker, comes into play only in the case of necessity, and is inadmissible if there is a *khabar*, that is a ruling in Koran or *sunna*.

The *sunna* of the Prophet, according to Shāfi'ī, ranks below the Koran.[3] What is not to be found in the Koran, is to be taken from the *sunna* and the consensus (*Ikh.* 3). Shāfi'ī paid lip-service to the overruling authority of the Koran, which he did not recognize in practice.[4]

The consensus ranks below the *sunna* in Shāfi'ī's opinion,[5] which is opposed equally to the doctrine of the ancient schools and to the final classical theory of law.[6] In these last, the consensus guarantees the whole system of law; for Shāfi'ī it guarantees only the result of analogical reasoning (*Ris.* 65).

Last in Shāfi'ī's hierarchy of sources comes analogy (*Tr. I*,

[1] See above, p. 1. The later opposition of *uṣūl* 'legal theory' to *furū'* 'positive law' is also unknown to Shāfi'ī; for his various uses of *far'* and *furū'*, see above, p. 122 and below, p. 136.

[2] See above, p. 52.

[3] e.g. *Ris.* 14; *Ikh.* 68; also *Ikh.* 409 where *sunna* is used in the old meaning of 'living tradition'.

[4] See above, p. 15.

[5] e.g. *Ris.* 12, 58; *Ikh.* 409.

[6] See above, pp. 82, 94 f.

52), and Shāfi'ī is conscious of its precarious character, even when it is used correctly (*Ris.* 66).[1] As opposed to analogy, Shāfi'ī groups Koran, *sunna*, and consensus together under the name of 'binding information' (*khabar lāzim* or *khabar yalzam*).[2]

Shāfi'ī distinguishes between the knowledge of the general public and the knowledge of the specialists (*'ilm al-'āmma* and *'ilm al-khāṣṣa*).[3] The former comprises the essential duties (*jumal al-farā'iḍ*) of which no responsible person may be ignorant; this 'absolutely certain' kind of knowledge (*iḥāṭa*) is explicitly stated in the Koran and transmitted by the community at large in traditions from the Prophet which are related, in every generation, by many from many, so that no error in their transmission is possible. The second kind of knowledge comprises questions of detail (*furū'*, *khāṣṣ al-aḥkām*) on which there is no explicit text in the Koran, which are expressed in traditions less widely attested or 'isolated', and which are partly the result of reasoning by analogy and subject to disagreement; this kind of knowledge is beyond the reach of the general public, and not even obligatory for all specialists;[4] if a sufficient number of specialists cultivate it, the others may consider themselves excused.[5]

Finally, Shāfi'ī holds that the divine revelation, as expressed in Koran and *sunna*, provides for every possible eventuality.[6] He refers to Koran lxxv. 36 and to a tradition which makes the Prophet say that he received no command and no prohibition from Allah which he did not hand on.[7] From this thesis Shāfi'ī draws a number of conclusions, including the rejection of the 'living tradition', of the consensus of the scholars, and of *istiḥsān*. Similarly, his theory of legal knowledge connects his doctrines on traditions, consensus, disagreement, and analogy.

On the whole, and notwithstanding the evidence of its

[1] Ṭabarī still refuses to give to analogy the same character as a source of law as he does to Koran, *sunna* (that is traditions from the Prophet), and consensus (of the scholars and of the general public); see Kern, in *Z.D.M.G.* lv. 72.

[2] *Tr. VII*, 271, and elsewhere. In the terminology of the ancient schools, *khabar lāzim* (*yalzam*) seems to be restricted to the Koran and to those traditions which they recognize; see above, pp. 27, 110.

[3] *Ris.* 50, 63, 66 (main passages); see also *Tr. III*, 148 (p. 246); *Tr. IV*, 255; *Ikh.* 101, 271.

[4] According to the ancient schools, the consensus of the scholars is a rule (*ḥujja*) for those who lack the knowledge: *Tr. IV*, 255. See also above, p. 93.

[5] Shāfi'ī does not yet use the later term *farḍ kifāya*, and for its opposite he does not use the later term *farḍ 'ain*, but says *farḍ 'alal-'āmma*. Even Khaiyāṭ, 100, apparently does not know yet the technical term *farḍ kifāya*.

[6] *Tr. IV*, 250; *Tr. VII*, 271.

[7] See above, p. 53.

gradual development, traces of the influence of earlier doctrines, and occasional inconsistencies,[1] Shāfi'ī's legal theory is a magnificently consistent system and superior by far to the doctrines of the ancient schools. It is the achievement of a powerful individual mind, and at the same time the logical outcome of a process which started when traditions from the Prophet were first adduced as arguments in law. The development of legal theory is dominated by the struggle between two concepts: that of the common doctrine of the community, and that of the authority of traditions from the Prophet. The doctrine of the ancient schools of law represents an uneasy compromise; Shāfi'ī vindicated the thesis of the traditionists; and the classical legal theory extended the sanction of consensus to the traditionist principle.

The most important outside witness for the development of Muhammadan legal theory is the secretary of state Ibn Muqaffa' in his *Risāla fil-Ṣaḥāba*.[2] According to him, it is part of the duty of the government to teach the Koran, to be well-versed in the *sunna*, to uphold the standards of trustworthiness and integrity, particularly in the dispensation of administrative justice and the examination of complaints, and to avoid irresponsible persons (pp. 124, 129 f.). The Caliph ought to admit to his company righteous lawyers who might serve as a model for the people (p. 129). The lawyers ought to be the educators of every town and ought to prevent the spread of [political] heresies (*bida'*) (p. 130). These counsels reflect the conscious encouragement of Muhammadan law by the first 'Abbāsid Caliphs.

[1] See above, pp. 11 f., 15, 18, 19 f., 38, 79 f., 88 ff., 120, 125 f.
[2] See above, pp. 58 f., 95, 102 f.