

THE ORIGINS OF
Muhammadan
Jurisprudence

JOSEPH SCHACHT

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EPILOGUE

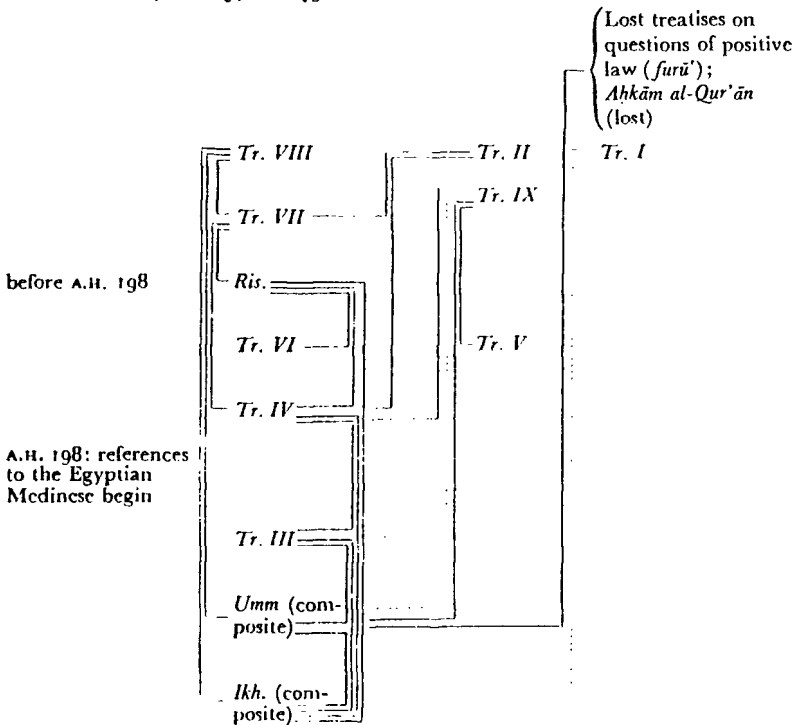
WE have followed the development of Muhammadan jurisprudence from its origins through its formative period to its apex which it reached in Shāfi'i. What came after him was first a time of consolidation which produced the classical system of legal theory, and then a long period of scholasticism.

The idea we have gained of the formative period is thoroughly different from the fiction which asserted itself from the early third century A.H. onwards. After the work of Goldziher there remained no doubt that the conventional picture concealed rather than revealed the truth; and I trust that the sketch by which I have tried to replace it comes nearer to reality. Beyond the detailed evidence on which this book is based, the coherence of the picture which emerges ought to confirm its essential outlines. Furthermore, our results are in harmony with the general trends of political and intellectual development during the period. Finally, the method which we used for investigating the origins of Muhammadan jurisprudence is equally applicable to the development of positive law. But this is a subject for another book.

APPENDIX I

CHRONOLOGY OF SHĀFI'Ī'S WRITINGS

In this diagram the uninterrupted lines represent explicit references from one book to another and indications of similar certainty, the dotted lines other probable conclusions on the relative chronology of Shāfi'ī's writings. Two absolute points of reference are the death in A.H. 198 of 'Abdalrahmān b. Mahdī at whose request, according to a well-attested statement (Bulqīnī in *Umm*, i. 122, n. 3), Shāfi'ī wrote his *Risāla*, and Shāfi'ī's arrival in Egypt in A.H. 198 (mentioned first in Kindī, 154), an event which accounts for the references to the Egyptian Medinese as 'the people of our country' in his later writings. The earliest reference to Shāfi'ī's death in A.H. 204 occurs in Mas'ūdī, *Murūj*, vii. 49 f.



APPENDIX II

LIST OF PARAGRAPHS IN SHĀFI'Ī'S TREATISES

SEVERAL of Shāfi'ī's Treatises divide naturally into sections or paragraphs, and I found it convenient to refer to these natural divisions of the text rather than to the pages of the printed editions. I therefore give a synopsis of the paragraphs which I have introduced, with the pages and lines on which they begin.

Treatise I

			<i>Ed.</i>					<i>Ed.</i>					<i>Ed.</i>	
<i>Umm vii</i>			<i>Cairo</i>		<i>Umm vii</i>			<i>Cairo</i>		<i>Umm vii</i>			<i>Cairo</i>	
§	<i>p.</i>	<i>l.</i>	<i>p.</i>	<i>l.</i>	§	<i>p.</i>	<i>l.</i>	<i>p.</i>	<i>l.</i>	§	<i>p.</i>	<i>l.</i>	<i>p.</i>	<i>l.</i>
1	87	21	9	2	37	97	13	29	4	73	107	25	54	14
2		23	10	1	38		17		8	74	108	1	55	4
3	88	11	11	2	39		27		16	75		4		8
4		18		6	40	98	4	30	2	76		11	56	1
5		22	12	4	41		12		9	77		15		6
6		32	13	3	42		24	33	3	78		17		8
7	89	20		11	43		30	34	1	79		22	57	2
8		26		15	44	99	2	35	2	80		27	58	1
9	90	2	15	2	45		11	36	1	81		34		7
10		19		11	46		16		6	82	109	6		13
11		30	16	1	47		23	37	1	83		16	59	5
12		34		6	48		29		5	84		23	60	3
13	91	20	17	3	49		31		10	85		30		9
14		28		8	50	101	11	38	4	86	110	1	61	1
15	92	3	18	3	51		22	41	2	87		9		5
16		13	19	1	52	102	21	43	2	88		16	62	4
17		20		5	53		29		8	89		26		11
18	93	1	20	1	54		34		12	90	111	5	63	3
19		20		9	55	103	8	44	5	91		10	64	1
20		33	21	6	56		23		9	92		18		9
21	94	4		11	57		33	45	2	93		25		12
22		15	22	6	58	104	3		7	94		33	65	1
23		22	23	6	59		15	46	3	95	112	11		8
24		33	24	6	60		22		7	96		23	66	4
25	95	7		13	61		27	47	1	97		29	67	3
26		13	25	1	62	105	4	48	6	98	113	5		9
27		20		6	63		13		12	99		20	68	9
28	96	3	26	9	64		22	50	5	100		30	69	1
29		13		14	65		27	51	3	101	114	1		5
30		17	27	3	66	106	5		12	102		7		11
31		22		6	67		8	52	1	103		11	70	2
32		26		9	68		18	53	2	104		18		7
33		32	28	3	69		23		7	105		32	71	6
34	97	1		6	70		29		12	106	115	2		9
35		5		11	71	107	1	54	3	107		10	72	3
36		10	29	1	72		10		9	108		25		12

Treatise II

Umm vii		Umm vii		Umm vii		Umm vii	
§	p. l.	§	p. l.	§	p. l.	§	p. l.
1 (a)	151 3	8 (a)	157 2	13 (a)	163 16	18 (p)	169 19
(b)	5	(b)	4	(b)	22	(q)	20
2 (a)	9	9 (a)	9	(c)	26	(r)	25
(b)	11	(b)	11	(d)	29	(s)	32
(c)	15	(c)	20	(e)	30	(t)	170 4
(d)	18	(d)	30	(f)	34	(u)	7
(e)	21	(e)	158 1	(g)	164 3	(v)	8
(f)	23	(f)	4	(h)	5	(w)	12
(g)	25	(g)	8	(i)	9	(x)	16
(h)	29	(h)	12	(j)	14	(y)	19
3 (a)	152 2	10 (a)	18	(k)	21	(z)	23
(b)	6	(b)	23	(l)	23	19 (a)	26
(c)	11	(c)	26	14 (a)	27	(b)	29
(d)	18	(d)	29	(b)	165 3	(c)	171 1
(e)	21	(e)	31	(c)	7	(d)	6
(f)	23	(f)	159 2	(d)	13	(e)	14
(g)	26	(g)	5	(e)	16	(f)	31
(h)	29	(h)	9	15	19	(g)	33
(i)	32	(i)	14	16 (a)	28	(h)	172 5
(j)	153 1	(j)	16	(b)	31	(i)	12
(k)	5	(k)	23	(c)	166 4	(j)	14
(l)	7	(l)	30	(d)	6	(k)	23
(m)	9	(m)	32	(e)	9	(l)	26
(n)	11	(n)	160 5	(f)	13	(m)	35
(o)	21	(o)	8	(g)	16	(n)	173 4
(p)	29	(p)	20	(h)	20	(o)	10
(q)	31	(q)	24	(i)	21	(p)	16
(r)	34	(r)	27	(j)	24	(q)	31
(s)	154 1	(s)	29	(k)	26	(r)	34
(t)	3	(t)	31	(l)	27	(s)	174 7
4 (a)	13	11 (a)	161 2	17 (a)	32	(t)	12
(b)	15	(b)	11	(b)	167 3	(u)	14
(c)	18	(c)	17	(c)	5	(v)	19
(d)	22	(d)	20	(d)	7	(w)	22
(e)	24	(e)	33	18 (a)	12	(x)	26
(f)	30	(f)	162 5	(b)	16	(y)	31
(g)	155 7	(g)	7	(c)	18	(z)	175 4
5 (a)	11	(h)	10	(d)	23	(aa)	6
(b)	15	12 (a)	14	(e)	27	(bb)	11
(c)	17	(b)	16	(f)	168 5	(cc)	12
(d)	23	(c)	21	(g)	10	(dd)	16
(e)	27	(d)	25	(h)	14	(ee)	19
(f)	30	(e)	28	(i)	21	20 (a)	29
(g)	34	(f)	30	(j)	24	(b)	30
6 (a)	156 10	(g)	33	(k)	28	(c)	33
(b)	16	(h)	163 3	(l)	35	(d)	176 2
7 (a)	24	(i)	6	(m)	169 8	(e)	4
(b)	26	(j)	9	(n)	10	(f)	6
(c)	29	(k)	11	(o)	15		

§	Umm vii		§	Umm vii		§	Umm vii		§	Umm vii	
	p.	l.		p.	l.		p.	l.		p.	l.
21 (a)	176	15	21 (c)	176	27	21 (e)	176	34	21 (g)	177	6
(b)		20	(d)		31	(f)		177			

Treatise III

§	Umm vii		§	Umm vii		§	Umm vii		§	Umm vii	
	p.	l.		p.	l.		p.	l.		p.	l.
Introd.	177	12	37	198	18	76	217	26	113	229	30
1		29	38		26	77	218	9	114	230	3
2	178	3	39	199	9	78		33	115		9
3		12	40		33	79	219	4	116		18
4		18	41	201	2	80		10	117		25
5		29	42	202	8	81		20	118		32
6	179	13	43		10	82		29	119	231	4
7		28	44		17	83	220	14	120		17
8	180	4	45	203	25	84		28	121		25
9		10	46	204	2	85	221	8	122		32
10		25	47		13	86		18	123	232	7
11	181	7	48		24	87		28	124		15
12		21	49	205	2	88	224	12	125		21
13		33	50		15	89 (a)		22	126		32
14	182	13	51		25	(b)	225	13	127	233	17
15		23	52	206	12	90		30	128		25
16	183	2	53		26	91		33	129		32
17		15	54	207	13	92	226	7	130	234	20
18		31	55	208	5	93		9	131		28
19	184	20	56		12	94		12	132		31
20	186	9	57		31	95		20	133		33
21	187	4	58	209	17	96		30	134	235	5
22		20	59		29	97	227	1	135		18
23	188	31	60	210	10	98		17	136		27
24	189	15	61		28	99		30	137	236	1
25	190	6	62	211	25	100		32	138		8
26		23	63	212	2	101		33	139		13
27	191	15	64		19	102	228	1	140		21
28		34	65		27	103		10	141	237	2
29 (a)	192	10	66	213	9	104		14	142		19
(b)		22	67		34	105		18	143	238	2
(c)		26	68	214	19	106 (a)		30	144		20
30	193	15	69	215	4	(b)		32	145 (a)		33
31	194	27	70		20	107		34	(b)	239	8
32	195	26	71		27	108	229	6	146		29
33	196	4	72	216	17	109		10	147	240	7
34		14	73		25	110		13	148		18
35	197	17	74		32	111		20			
36		33	75	217	6	112		26			

Treatise VIII

<i>Umm vii</i>		§	<i>Umm vii</i>		§	<i>Umm vii</i>		§	<i>Umm vii</i>		
<i>p.</i>	<i>l.</i>		<i>p.</i>	<i>l.</i>		<i>p.</i>	<i>l.</i>		<i>p.</i>	<i>l.</i>	
1	277	6	7	284	26	12	289	2	17	299	6
2	279	28	8	285	16	13	290	31	18		21
3		31	9	286	6	14	295	25	19	300	20
4	280	28	10	287	11	15	297	24	20	301	28
5	282	12	11		30	16	298	22	21	302	17
6	283	7									

Treatise IX

§	<i>Umm vii</i>		<i>Ed. Cairo</i>		§	<i>Umm vii</i>		<i>Ed. Cairo</i>		§	<i>Umm vii</i>		<i>Ed. Cairo</i>	
	<i>p.</i>	<i>l.</i>	<i>p.</i>	<i>l.</i>		<i>p.</i>	<i>l.</i>	<i>p.</i>	<i>l.</i>		<i>p.</i>	<i>l.</i>	<i>p.</i>	<i>l.</i>
1	303	7	1	3	18	316	2	56	6	35	326	27	98	6
2	305	11	13	2	19		24	61	10	36		31	99	6
3	306	7	17	2	20	317	15	63	1	37	327	30	103	2
4		33	22	1	21	318	4	65	3	38	328	5		10
5	307	23	23	6	22	319	2	68	5	39	329	5	107	5
6	310	4	34	7	23		30	70	7	40	330	12	111	2
7		35	37	6	24	320	28	75	4	41	331	15	115	2
8	311	14	39	1	25	321	5	76	10	42		26	117	2
9		24	40	6	26	322	5	79	3	43	332	8	121	2
10	312	6	42	5	27		16	80	7	44		16		12
11		19	43	8	28	323	9	83	4	45		33	124	3
12	313	1	44	9	29	324	5	85	9	46	333	21	126	2
13		11	45	5	30		27	89	9	47	334	8		10
14		26	47	6	31	325	10	90	9	48		25	129	5
15	314	11	49	3	32		23	94	4	49	335	4	130	4
16	315	9	53	6	33		28		10	50		10	131	3
17		25	55	6	34	326	16	96	4					

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THE following bibliography contains only works which have been quoted in this book, and does not aim at being complete. I have referred, wherever possible, to paragraphs and not to pages. In quoting *Muw.*, *Muw. Shaib.*, and *Mud.*, I often found it convenient to give only the first page of the whole section in which the reference is to be found.

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ADDENDA

P. 8: The earliest reference to Medina as the 'true home of the *sunna*' of which I know occurs in a non-legal work, the *Sīrat Rasūl Allāh* of Ibn Hishām (d. 218), p. 1014 (ed. Wüstenfeld), in a tradition which Ibn Hishām attributes to the work of his predecessor Ibn Ishāq (d. 150 or 151) as edited by Ziyād b. 'Abdallāh Bakkā'ī (d. 183). The attribution to Ibn Ishāq ought not to be accepted without reserve, and Caetani has already pointed out the difference in style between the tradition in question, which in any case is not authentic, and the fragment of a genuine quotation from Ibn Ishāq, concerning the same events, which precedes it immediately in the text of Ibn Hishām (*Annali*, ii/1, year 11, § 36). The context shows that *sunna* in the passage in question has a meaning sensibly different from *sunna* as understood in the ancient schools of law, let alone the 'sunna of the Prophet'. The parallel tradition in Ṭabarī (d. 310), *Annales*, i, 1820, the *isnād* of which by-passes Ibn Ishāq, represents a re-formulation in the light of the then prevailing ideas. Even if the tradition should have originated in the first half of the second century A.H. (because the lowest common transmitter in the two versions is Zuhri), the time-lag before the concept of Medina as being the 'true home of the *sunna* of the Prophet' entered legal discussion is significant.

P. 29, n. 4: Even Ibn Taimiyya (d. 728) uses the argument that the Companions of the Prophet would have known best the intentions of their master (see, for example, G. Hourani, in *Studia Islamica*, xxi (1964), 36); this represents a return to the position of the ancient schools from that of the Traditionists, and shows how deeply ingrained that idea was.

P. 37: Criticism of traditions on material grounds. It was said of Abū Muṣ'ab al-Aṅṣārī: 'If he were a Companion that (particular) tradition would be sound because its *isnād* going back to him is sound; now the authorities on *ḥadīth* have judged that this text is unsound; therefore we must conclude that he is not a Companion.' (Ibn Ḥajar al-'Asqalāni, *Lisān al-Mizān*, Hyderabad 1331, vi, No. 1143.)

P. 58: On the whole of this and of the following chapter, cf. R. Brunschvig, 'Polémiques médiévales autour du rite de Mālik', *Al-Andalus*, xv (1950), 377-435.

P. 67, n. 3: On the question of mintage fees, see further Qurtubī (d. 671), *al-Ḥāmi' li-Aḥkām al-Qur'ān*, on Koran ii, 275 (Cairo 1933 ff., iii, 351 f.); 'Alī b. Yūsuf al-Ḥakīm (wrote 749-59), *Regimen de la Casa de la Moneda*, ed. H. Monés, Madrid 1960, 100.

P. 70: The legal maxim 'the spoils belong to the killer' appears in the form of a tradition from the Prophet, with two imperfect *isnāds*, in the work of Ibn Ishāq, as quoted by Ibn Hishām (p. 848), but both Abū Ḥanīfa and Abū Yūsuf disregarded it, and Abū Yūsuf disdainfully upbraided Auzā'i for accepting it as evidence of a 'valid *sunna* going back to the Prophet'. It appears with a full *isnād* for the first time in Mālik.

P. 74: The term '*sunna* of the Prophet' occurs also in the statement which 'Abdallāh b. Ibād sent to the Umayyad Caliph 'Abdalmalik, at his command, about the year 76, and which has been preserved in the *Kitāb al-Jawāhir* of Barrādī (lithogr. Cairo 1302, 156-67). The term is used always in conjunction with a reference to the Koran, and it does not refer to authoritative acts of the Prophet, and hence definitely not to traditions. The *sunna*, the norm to be followed, comes directly from Allah, and the '*sunna* of the Prophet' consists in following the Koran. Cf. J. Schacht, 'Sur l'expression "*Sunna du Prophète*"', in *Mélanges Henri Massé*, Teheran 1963, 361-5.

P. 143: Another tradition originating between Abū Ḥanīfa and the classical collections is the saying: 'Prayer behind every man, be he of good or bad behaviour, is valid.' This originally controversial principle of orthodox Islam, which goes back to the Umayyad period, is pronounced by Abū Ḥanīfa as his own statement, in answer to a question, in the *Fiqh al-Absaṭ* (*al-'Alim wal-Muta'allim*, followed by two other treatises, ed. Muḥammad Zāhid al-Kautharī, Cairo 1368, 52); it appears as a tradition from the Prophet for the first time in Abū Dāwūd (*ṣalāt* 63; Wensinck, *Creed*, 221). A similar statement with regard to the holy war occurs in Bukhārī (*jihād* 44) not as a tradition but only as part of Bukhārī's comments. The putting into circulation of traditions concerned in the first place with defining the community of Muslims and with other points of dogma (traditions which were, on the whole, earlier than those concerned directly with religious law), continued well into the second century A.H.; cf. J. Schacht, in *Oriens*, xvii (1964), 116; see also A. Guillaume, in *J.R.A.S.*, Centenary Supplement, 1924, 234; F. Nau, in *J.A.* ccxi (1927), 313 and n. 2.

P. 176: On the fictitious character of the *isnād* Mālik—Nāfi'—Ibn 'Umar, see J. Schacht, in *Acta Orientalia*, xxi (1953), 292 f.

P. 177, n. 2: Darāwardī used not only his own notes but *cahiers* of the collected traditions of others (*kutub al-nās*), and he made mistakes in reading from these (Ibn Ḥajar al-'Asqalānī, *Tahdhīb*, vi. 677).

P. 194: Opposition against the extension of the effects of foster-relationship by the doctrine of the *laban al-fahl* was voiced not only in Medina but in Iraq, where it was attributed to Ibrāhīm Nakha'i

(*Āthār A.Y.* 669). It is difficult to say whether this attribution is genuine; if it is, the opinion of the school of Kufa must have changed between Ibrāhīm and Abū Ḥanīfa (cf. *Muw. Shaib.* 275).

P. 244: The 'Seven Lawyers of Medina'. Ibn al-Nadīm (wrote 377) attributes to Ibn Abil-Zinād (d. 174; cf. above, p. 7) a 'Book on the *ra'y* of the seven lawyers of Medina and their points of difference' (*Fihrist*, p. 225, ll. 28 f.). According to Ibn Ḥajar (*Tahdhīb*, vi. 353), Ibn Abil-Zinād derived his 'Book of the seven (lawyers)' from his father. But according to the same Ibn Ḥajar (iii. 807, on the authority of Aṣma'ī), Ibn Abil-Zinād singled out three persons as the prominent scholars of Medina, according to Dhahabī (A. Fischer, *Biographien von Gewährsmännern*, 46) he singled out four, and both short lists contain names outside the group of Seven. I therefore regard the reference in the *Fihrist* as Ibn al-Nadīm's description, in the terms of his own time, of the work, and not an exact quotation of its title as formulated by the author. R. Brunschvig, in *Al-Andalus*, xv (1950), 399, refers to 'Abd al-Raḥmān b. Zaid b. Aslam (d. 182; *Tahdhīb*, s.v.) who, according to Ibn Ḥazm (*Iḥkām*, ii. 113), composed a book in which he collected the opinions 'on which the seven lawyers of Medina, to the exclusion of others, agreed, but this only amounted to a few pages'. As the person in question is known only as an exceedingly unreliable traditionist and not as a Mālikī scholar (he occurs neither in the *Dībāj* of Ibn Farḥūn nor in the *Shajarat al-Nūr* of Muḥammad Maḥlūf), I am not prepared to accept this statement as authoritative. The *Mudawwana*, iv. 8, refers to the opinion of 'the seven' and enumerates them painstakingly one by one 'together with other authorities among their equals' (*ma'a mashyakha siwāhum min nuzarā'ihim*); it is possible that the idea of the group of the 'seven lawyers' started from this passage.

P. 246, n. 4: Ibrāhīm b. Sa'd was born in A.H. 108 and died between 182 and 185, and doubt was thrown on the traditions which he related from Zuhri because he was too young when he heard them from him (Ibn Ḥajar al-'Asqalānī, *Tahdhīb*, i. 216).