

**JOSEPH SCHACHT'S CONTRIBUTION
TO THE STUDY OF ISLAMIC LAW**

by

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JOSEPH SCHACHT (1902 - 1969)

To my wife, Dra. Kuny Faizah AM, whose love,
patience, and encouragement made it
possible for me to be away from
home for nearly two years in
pursuit of this study

ABSTRACT

Joseph Schacht has devoted a considerable part of his career to study the early history and development of Islamic juristic thought. His thesis about the formation of Islamic law in which the Prophetic traditions played a decisive role has constituted a basis for subsequent research on the subject; and, what is more, it possesses all the attributes of originality and profound thought.

Some responses, sometimes severely critical, have been addressed to Schacht's thesis. Some even accuse him of fostering a "misconception" of the position of law in Islam and of paying little attention to the Qur'anic legislation. It is no wonder, they maintain, that Schacht upholds a view which clearly deviates from the common belief of the majority of Muslims.

On the other hand, certain scholars have thought highly of Schacht's thesis. The broad outlines of his thesis, his *e silentio* argument and his backward-projection and common link theories, have won high acclaim among leading scholars, both Orientalists and non-Orientalists. It is not an exaggeration therefore when Hourani writes: "Joseph Schacht resurrected the intellectual life of Medieval Islam by his powerful intelligence, learning and concentration."

RÉSUMÉ

Joseph Schacht a dévoué une part considérable de sa carrière à étudier les débuts de l'histoire et du développement de la pensée juridique islamique. Sa thèse sur la formation de la loi islamique, dans laquelle la tradition prophétique joua un rôle décisif, a constitué une base pour les recherches ultérieures sur le sujet; de plus, elle possède toutes les qualités d'une pensée originale et profonde.

Des critiques, parfois très sévères, ont été adressées à Schacht. Quelques uns sont allés jusqu'à l'accuser d'entretenir une conception erronée sur la position qu'occupe la loi dans l'Islam, ou encore de ne pas prêter suffisamment attention à la législation coranique. Il n'est donc pas surprenant, selon eux, que Schacht soutienne dans sa thèse un point de vue qui dévierait de façon significative par rapport à la croyance commune et à la compréhension de la majorité des musulmans.

Par contre, certains spécialistes ont eu une haute opinion des thèses de Schacht. Les grandes lignes directrices de sa thèse - l'argument "e silentio" la "projection rétrogarde", et la thèse de la "jonction commune" - lui ont valu les acclamations de grands spécialistes, tant de la part des orientalistes que des non-orientalistes. Ce n'est donc pas une exagération lorsque Hourani écrit: "Joseph Schacht a ressuscité la vie intellectuelle de l'Islam médiéval par la force de son intelligence, sa connaissance et sa concentration."

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TABLE OF TRANSLITERATION

| | |
|---------|---------|
| ا = a. | ب = b. |
| ت = t. | ث = th. |
| ج = j. | ح = h. |
| خ = kh. | د = d. |
| ذ = dh. | ر = r. |
| ز = z. | س = s. |
| ش = sh. | ص = ṣ. |
| ض = ḍ. | ط = ṭ. |
| ظ = ḏ. | ع = ʿ. |
| غ = gh. | ف = f. |
| ق = q. | ك = k. |
| ل = l. | م = m. |
| ن = n. | و = w. |
| ه = h. | ء = ʾ. |
| ي = y | |

- long:

أ = ā, إ = î, ئ = ū.

- ta' marbūṭah:

ـ = ah, in idāfah = at

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As for those individuals who, directly or indirectly, rendered their help, a few names deserve to be mentioned. I am particularly indebted to the staff of McGill Indonesia IAIN Development Project, especially Dr. Charles J. Adams, Dr. Donald P. Little, Dr. Rebecca B. Aiken, and Drs. Zaini Muchtarom, whose help was invaluable. I am grateful to Steve Millier who has read and edited the first draft of this study.

My everlasting gratitude goes to my wife, Dra. Kuny Faizah AM. for her encouragement during my study. The dedication of this thesis to her is but a small expression of my appreciation for her devotion, patience, and infinite forbearance.

INTRODUCTION

Joseph Schacht is a well known scholar in the field of Islamic law. For much of his lifetime he devoted himself to the historical study of early Islamic juristic thought. It is true that his works, "in which he sketches the broad outlines of the history and development of Islamic law, constitute the benchmark of all modern studies on this subject."¹

Schacht's thesis concerning the historical development of Islamic law has generated one of the most serious debates among Islamicists. Some of them generally accept the thesis but offer a critique of certain aspects of it, while others vehemently oppose it. Nevertheless, whatever their response, Schacht's thesis remains a great achievement in the field of Islamic law; and, as we shall see, it has given inspiration to Islamicists in their research on the subject. His *magnum opus* *The Origins of Muhammadan Jurisprudence*, in which he elaborates his thesis to a great extent, is remarkable. As Anṣārī put it "...no other work embodies a comparable amount of research, nor does any other work attempt to show the early development of Islamic jurisprudence on such a wide canvas."² It is no surprise then that W.M. Watt's prediction that Schacht's work is a "landmark...study...likely to be the basis of all future work on the subject,"³

¹ David S. Powers, *Studies in Qur'an and Hadīth: The Formation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1986), 1.

² Zafār Ishāq Anṣārī, "The Early Development of Islamic Fiqh in Kūtah with Special Reference to the Works of Abū Yūsuf and Shaibānī," (Ph.D. diss., McGill University, 1966), 3.

³ W. Montgomery Watt, review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht, in *Journal of the Royal Asiatic Society* (1952): 91. In other expression H.A.R. Gibb writes "it will become the foundation for all future study of Islamic civilization and law, at least in the West" (see his

has indeed proven remarkably accurate.

In order to understand Schacht's life and the importance of his endeavour as a great Islamicist, particularly insofar as his contribution to the study of Islamic law is concerned, the first chapter of this study is intended to discuss his background, personality, career and work.

The second chapter will be dealing with Schacht's main thesis about the formation of Islamic law. Contrary to the traditional belief, Schacht postulates that Islamic law did not originate in the lifetime of Muhammad, and he has seen the popular and administrative practices of the Umayyads as a starting point for the formulation of Islamic law. To support his main thesis, Schacht traces the authenticity of the concept of Prophetic traditions which had, he claims, played a significant role in the formation of Islamic law. Schacht firmly concludes that the Prophetic traditions have been formulated by later generations and have nothing to do with the Prophet himself.

The response to Schacht's thesis will be treated in the third chapter which is divided into two sections. The first concerns the authenticity of Prophetic traditions. In this part, we present the views of some scholars whose theses are at variance with Schacht's; e.g., Fazlur Rahman, Nabia Abbott, Fuat Sezgin, M.M. Azami, and Ẓalār Ishāq Anṣārī.

The second part offers some scholars' responses addressed to Schacht's primary thesis about the formation of Islamic law. Coulson, for example, remarks that it is hard to understand the discontinuity that Schacht created between the

review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht, in *Journal of Comparative Legislation and International Law* (1951): 114.

Qur'ān and the formation of Islamic law. David S. Powers, S.V. Fitzgerald, S.D. Goitein, and M.M. Azami support Coulson's viewpoint and they are of the opinion that, in contrast to Schacht's thesis, the formation of Islamic law certainly started during the lifetime of the Prophet.

To balance the views presented in the third chapter, the subsequent chapter, the fourth, will give an account of some scholars who have taken for granted Schacht's thesis and made it a basis for their scholarly research. The relevant contributions of Patricia Crone, Judith Romney Wegner, G.H.A. Juynboll, Rafael Talmon, and R. Marston Speight will be discussed.

CHAPTER 1

JOSEPH SCHACHT'S BACKGROUND, CAREER, AND WORK.

1. Schacht's Background and Personality.

While it is not our intention to write a biography of Joseph Schacht, we shall attempt to provide a sketch of certain significant events in his career and to concentrate more on those factors that are necessary for our understanding of his background as a scholar of Islamic studies, and particularly of Islamic law.

Schacht was born on March 15, 1902 at Ratibor in upper Silesia, which was then in Germany and is now inside Poland (Raciborz) just across the frontier from Czechoslovakia.¹ In this city he grew up and lived during the first eighteen years of his life.² Unfortunately we do not have enough information regarding his activities during his early life in the city of his birth.

Schacht came from a relatively religious and educated family. His father, Eduard Schacht, was a Roman Catholic and a teacher of deaf and dumb students;³ his mother was Maria Mohr. In 1943 he married an English woman, Louise Isobel Dorothy, daughter of Joseph Coleman.⁴ The religious and

¹ Robert Brunschvig, "Joseph Schacht (1902-1969)," *Studia Islamica* 31 (1970): v. See also G.E. von Grunebaum, "In Memoriam: Joseph Schacht," *International Journal of Middle East Studies* 1 (1970): 190; Bernard Lewis, "Joseph Schacht," *Bulletin of the School of Oriental and African Studies* 33 (1970): 376. Unlike the others, Hourani said that Schacht was born on June 15, 1902 (see George F. Hourani, "Joseph Schacht, 1902-1969," *Journal of the American Oriental Society* 90, 1970: 163).

² Hourani, "Schacht," 163.

³ Ibid.

educational atmosphere of his home gave him an opportunity to become familiar with Christian religious teachings and also with the Hebrew language from an early age. 'This was very important later for his understanding of the great religions in the Middle East. Bernard Lewis writes: "During the period set aside for religious studies, a rabbi came to teach the Jewish boys Hebrew. Although the young Schacht was not one of them, he managed to complete his other tasks and to get himself accepted in this group, where he took his first steps in Hebrew."⁵

Schacht was to achieve a high degree of learning. He started his education in his home town of Ratibor. After studying Hebrew from a rabbi and after receiving a classical Gymnasium education there (1911-20), he went on to the Universities of Breslau (Wroclaw) and Leipzig where he first studied classical and Semitic philology, and then theology.⁶ In 1922 he won a University prize with an essay on the Old Testament, and received his D.Phil. *summa cum laude* from Breslau University at the end of 1923. He also obtained an M.A. degree in 1947 and a D.Litt. in 1952, both from Oxford University.⁷ His doctoral dissertation consisted of an edition, with partial translation and commentary of Khassāf's *Kitāb al-ḥiyāl wa l-makhārīj* (Hanover, 1923), a medieval Arabic text on legal devices.⁸

⁴ The entry about him in *Who was Who*, vol. vi (London: Adams & Charles Black, 1972), 1007.

⁵ Lewis, "Schacht," 376.

⁶ Aharon Layish, "Notes on Joseph Schacht's Contribution to the study of Islamic Law," *British Society for Middle Eastern Studies, Bulletin* 9 (1982): 132. See also Lewis, "Schacht," 376; Brunschvig, "Schacht," v; Hourani, "Schacht," 163.

⁷ *Who was Who*, 1007. See also Hourani, "Schacht," 163.

Schacht had a strong personality and uncompromising integrity which sometimes led him to take an extreme position. Bernard Lewis gives a concise picture of his personality:

It was for moral reasons that he left Germany when Nazis came to power, and never again returned to his native land or wrote in his mother-tongue. He imposed the highest standards on himself and also expected them of others. The devil has many temptations. Those which he puts before the scholar in particular are to claim, or not to disclaim, knowledge which he does not possess, and to praise, or not to condemn, work which he knows to be shoddy--be it through politeness, interest, irenicism, or mere indifference. Schacht did not succumb to either of these, but was both humble and severe in matters of scholarship. Honest in all things, he was incapable even of the small social hypocrisies that academic and personal life so often demand. Perhaps for this reason he sometimes had the reputation of being a difficult person to get on with--one who might both give and take offence where none was intended. For those who were fortunate enough to gain his respect or friendship, this was not so. His friendship once given was complete and permanent. Behind the sometimes rather stiff exterior, there was a man of great kindness, loyalty and humour.

As a teacher, Schacht had many admirable qualities. Wakin,¹⁰ who was fortunate to have done her graduate work under his guidance, has recorded some of these. In formal lectures, according to Wakin, Schacht dominated the room. His forceful delivery, his resonant voice, and his precise use of language were very astonishing and fascinating. In a seminar or conference his performance was very remarkable, for "his enthusiasm for his subject, and the vast store of knowledge from many fields that illuminated and broadened every discussion, made these hours delightful and exhilarating ones." Moreover, he had "a fine appreciation of humor and a sharp wit which he exercised with unsuppressed

⁸ Hourani, "Schacht," 163.

⁹ Lewis, "Schacht," 381. See also Jeanette Wakin, "Additum: Joseph Schacht, 1902-69," *Journal of the American Oriental Society* 90 (1970): 168; "Dr Schacht: An Outstanding Arabist," (Obituary) *Times* (London), August 8, 1969, 10; Hourani, "Schacht," 164.

¹⁰ Wakin, "Additum," 168.

pleasure." His generosity also appeared in his attitude towards his advanced students. He was always ready, for example, to lend scarce works from his private library, and turned over copies of rare manuscripts and notes that he had carefully collected during his research over a period of many years.

2. Schacht's Career.

Schacht's scholarly background supported his career and enabled him to acquire a rare combination of academic qualifications. He received his first academic appointment at the University of Freiburg im Breisgau in 1925. Two years later, in 1927, he was appointed Associate Professor at the age of twenty-five. The year 1929, when he turned twenty-seven years old, was an important one in his career, for in that year he was promoted to full Professor of Oriental Languages, at that time the youngest man ever to have achieved this position in Germany, and he held this chair for the next three years. In 1932 he was invited to take up a chair in the same subject at the University of Königsberg,¹¹ where he stayed for only two years, for in 1934 "he resigned his post as a gesture of protest against the Nazi regime."¹²

Schacht's theoretical education was not divorced from the practical and topical aspects of his field of study. During the period of his first academic post at Freiburg, he profited from close associations with his colleagues in the Faculty of Law. Thus, "without having taken a law degree," Hourani remarks, "he acquired by his own reading and associations a basis of technical knowledge

¹¹ Lewis, "Schacht," 376. See also Layish, "Schacht's Contribution," 132; Hourani, "Schacht," 163.

¹² *Times* (London).

sufficient to support his career of research on Islamic law."¹³

Schacht was also exceptionally well acquainted with both the Western and Eastern Muslim world. During the years 1926-33, he traveled extensively to the Middle East and North Africa. In the spring of 1930, he was a Visiting Professor of Semitic Languages and Islamic Law at Cairo University (then the Egyptian University), lecturing in Arabic, and he returned there again to teach during the years 1934-9. The outbreak of the Second World War in September 1939 kept him from continuing his lectures at that University, and at the end of the war he preferred to stay in England, even though he was invited to return to Egypt. Because of his extended stay in the East, he became an expert in Arabic and Turkish and had the opportunity to work on rare manuscripts in various collections in the Arab lands and Turkey.¹⁴

In 1939 Schacht moved to England. He worked there as an Oriental specialist and researcher in the British Ministry of Information, and contributed a large number of talks to the Arabic and Persian programs of the British Broadcasting Corporation, many of which were printed in the B.B.C. publication called *al-Mustami` al-'Arabi`*.¹⁵ In 1946 he was first appointed as a lecturer at the University of Oxford, then later as Reader in Islamic studies (mainly Islamic law). During his years at Oxford, where he was able to complete his *Origins*, he made a number of trips abroad; for instance, he went on a lecture tour in the United States in 1948; conducted a research mission to Nigeria in 1950 and to the Near East and East Africa in 1953, 1963 and 1964. In 1952 he

¹³ Hourani, "Schacht," 164.

¹⁴ Layish, "Schacht's Contribution," 132. See also Hourani, "Schacht," 164-5.

¹⁵ Hourani, "Schacht," 164.

was appointed as a visiting professor at the University of Algiers. His research in Africa was very significant for his career, for he had an opportunity to come into contact with the real life of Muslim society, "whose yield became suddenly manifest in his penetrating examination of sectarian mosques ('An Unknown Type of Minbar and Its Historical Significance,' 1957)."¹⁶ More specifically he became more familiar with the problems of the application of Islamic law in a social context.¹⁷

In 1954, leaving his post at Oxford with great reluctance, Schacht left England for Holland in order to take up the position of Professor of Arabic at the University of Leiden. Here he was able to study intensively under C. Snouck Hurgronje. His stay in Holland was, however, of a brief duration. He went to Columbia University as a Visiting Professor of Arabic and Islamics in the academic years 1957-8, and returned there in 1959 to a regular appointment as Professor in the same subjects. Schacht once stated that his intention was to retire from Columbia University after January 1970 and that he was planning to return to England with his wife where he would continue his activities as a scholar and pursue research, travel, and writing. He once said that as soon as he was retired he would write a book in which "he would integrate the notes and prolegomena he had collected over the years" and which would represent the culmination of his intellectual achievement. Also, he had planned to complete editions and studies of Māturīdī's *Kitāb al-Tawhīd* and Sahnun's *Mudawwana*. Unfortunately, these projects were never realized. He was suddenly stricken by

¹⁶ Grunbaum, "In Memoriam," 190. The essay was published in *Ars Orientalis* 2 (1957): 149-73.

¹⁷ Lewis, "Schacht," 376. See also Layish, "Schacht's Contribution," 132; Hourani, "Schacht," 165.

a brain hemorrhage and died at his home in New Jersey on August 1, 1969.¹⁸

During the last twenty years of his life, Schacht was able to work on several projects that interested him. He replaced J.H. Kramers (d. 1951) as an editor of the new edition of the *Encyclopaedia of Islam*, and continued this task through the first two and a half volumes, in association with Bernard Lewis, Charles Pellat and, after 1966, L.V. Menage. In the same period, together with Robert Brunschvig, he co-founded and became the co-editor of the prestigious *Studia Islamica*, the first issue of which was published in 1953.

3. Schacht's Work.

In the preface to his *Origins* Schacht admitted that his work was influenced by other scholars. D.S. Margoliouth, according to him, "was the first and foremost among my [his] predecessors to make more than perfunctory use of the then recently printed works of Shāfi'i."¹⁹ H. Lammens had a significant influence on him in terms of critical insight and an historical appreciation of Islamic traditions.²⁰ Gotthelf Bergsträsser (1886-1933) is included among his important

¹⁸ Hourani, "Schacht," 166. See also Grunebaum, "In Memoriam," 190.

¹⁹ Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1959), v. *The Early Development of Mohammedanism* (1914) is a useful work of Margoliouth used by Schacht in both his *Origins* and *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1986).

²⁰ Some of Lammens' works used by Schacht are: *Études sur le siècle des Omayyades* (1930); *Fātima et les filles de Mahomet*, (1912); *Islām, Beliefs and Institutions*, trans. Sir E. Denison Ross (1929); *La Cite arabe de Taïf a la veille de l'hegire* (1922); *La Mecque à la veille de l'hegire* (1924); *L'Arabie occidentale avant l'hegire*, (1928); *Le Berceau de l'Islam* (1914); *Le Califat de Yazīd Ier* (1921); "Le Caractere religieux du 'lār' ou vendetta chez les Arabes preislamistes" (1925); "Les Hial dans le droit musulman," *Al-Machnuq* xxix (1931): 641-6.

predecessors, for, as Schacht said, "he guided my first steps in Muhammadan jurisprudence."²¹

C. Snouck Hurgronje (1857-1936) was also one of his important predecessors. Hurgronje's works were very important to Schacht's understanding of the character and the nature of Islamic law.²² During his stay at the University of Leiden, he profited from direct contact with Hurgronje. It should come as no surprise that immediately after Hurgronje's death, Schacht wrote a memoir on him.²³ And in the *Selected Works of C. Snouck Hurgronje*,²⁴ he presented a short introduction surveying Hurgronje's most important works, besides editing and translating four of his articles, mainly on the subject of Islamic law.²⁵

One cannot discuss Schacht's predecessors without mentioning Ignaz Goldziher (1850-1921) whose contribution to the study of the historical development of Islamic tradition literature and foreign elements in Islamic law (mainly Roman law), was perhaps of the greatest importance to Schacht's works. In his first essay on traditions, "A Revaluation of Islamic Traditions,"²⁶ Schacht

²¹ Together with Bergsträsser, Schacht wrote *Grundzüge des islamischen Rechts* (1935). Other influential works by Bergsträsser for Schacht are: "Zur Methode der Fiqh-Forschung," *Islamica* 18 (1930); and in *Z.D.M.G.* lxviii, 1914: 395-417 (on Egypt during the first four centuries of Islam).

²² Some of Hurgronje's works used by Schacht are: *Mohammedanism* (1916); *The Achehnese*, 1906; *Mekka in the latter part of the 19th century*, trans. J.H. Monahan (1931); and *Verspreide Geschriften (Gesammelte Schriften)*, 6 volumes, 1923-7.

²³ See Joseph Schacht, "Christiaan Snouck Hurgronje," *Der Islam* 24 (1937): 192-5.

²⁴ Edited together with G.H. Bousquet (Leiden: E.J. Brill, 1957).

²⁵ They are: "Islam," "On the Nature of Islamic Law," "The 'Foundations' of Islamic Law," and "Islamic Law and Custom."

²⁶ Presented at the 21st International Congress of Orientalists, Paris (July

declared that he took for granted Goldziher's thesis that the traditions "reflect opinions held during the first two and a half centuries after the hijrah."²⁷ His views about foreign elements in Islamic law, which were more elaborate than Goldziher's,²⁸ were discussed in his "Foreign Elements in Ancient Islamic Law," considered as a pioneering essay on the subject.²⁹

Although Schacht's works, according to Layish, cover many aspects of Islamic studies,³⁰ there is no doubt, however, that the most important contribution on the part of Schacht was in the field of Islamic law, and it remained one of his principal concerns to the end of his days.³¹ This is understandable, for he believed that Islamic law "will always remain one of the most important, if not the most important, subject of study for the student of Islam."³²

There are many works written by Schacht on Islamic law. Nevertheless, his

1948); then published with additional notes and materials in *Journal of the Royal Asiatic Society* (1949): 143-54.

²⁷ Schacht, "Islamic Traditions," 143.

²⁸ For Goldziher's thesis, see his essay "The Principles of Law in Islam," in *The Historians' History of the World*, volume viii, ed. H.S. Williams (New York: Tiffany & Co., 1908): 294-304. Other Goldziher's works used by Schacht are: "Das princip des istishāb in der Muhammedanischen Gesetz-wissenschaft," *Vienna Oriental Journal* i (1887): 228-36; "Das Prinzip der takijja im Islam," *Z.D.M.G.* ix (1906); *Die Richtungen der Islamischen Koranauslegung*, (1920); *Die Zāhiriten*, 1884; "Kämpfe Um die Stellung des Hadīth im Islam," *Z.D.M.G.* lxi (1907): 860-72; "kasāma," *Zeitschr. vergl. Rechtswiss* viii (1889): 412; *Le Livre de Mohammed Ibn Toumert* (1903); "Materialien zur Kenntnis der Almohadenbewegung," *Z.D.M.G.* li (1887): 30-140; *Muhammedanische Studien*, 2 volumes (*Etudes sur la tradition islamique*, trans. L. Bercher, 1952); "Streitschriften des Gazālī gegen die Bātinijja-Sekte (1916); *Vorlesungen über den Islam*, 1910 (*Le Dogma et la loi de l'Islam*, trans. F. Arin, 1920); "Zur Geschichte der hanbalitischen Bewegungen," *Z.D.M.G.* lxxii (1908): 1-28; "Zur Litteratur des Ichtilāf al-madzāhib," *Z.D.M.G.* 38 (1884): 669-82.

²⁹ A French version of the paper was presented in the Third Congress of Comparative Law, London (August 1950). At the same year it was pub-

main thesis is mostly expressed in his *Origins* and briefly reiterated in his *Introduction*.³³ Both works possess all the attributes of originality and profound thought, and, as will be seen in the third and fourth chapters of this thesis, have motivated a number of scholars to do further research. It is necessary, therefore, to give special attention to these two books.

Schacht's *Origins* is concerned with the development of legal theory during the formative period of Islamic law, and is divided into four main sections. In part I (The Development of Legal Theory) the contribution of Shāfi'i to the development of legal thought is emphasized. In part II (The Growth of Legal Traditions) there is a most illuminating discussion of the growth of legal Tradition in the period before Shāfi'i. Part III (The Transmission of Legal Doctrine) traces this transmission from the late Umayyad period in which, Schacht argues, Muhammadan jurisprudence had its starting point. Finally in part IV (The

lished in *Journal of Comparative Legislation and International Law* 32 (1950): 7-19. The essay later was reprinted with additions in *Mémoires de l'Académie Internationale de Droit Comparé* (Rome) III, 4 (1955), also in his "Droit byzantin et droit musulman," *Convegno Volte* (Rome) 12 (1957): 197-230. Concerning Foreign elements, see also his "The Law," in *Unity and Variety in Muslim Civilization*, ed. Gustave E. von Grunebaum (Chicago: University of Chicago Press, 1955), 71-2; his "Law and Justice," in *The Cambridge History of Islam*, eds. P.M. Holt, Ann K.S. Lambton, Bernard Lewis (Cambridge: Cambridge University Press, 1970), 546; his "Pre-Islamic Background and Early Development of Jurisprudence," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington, D.C.: The Middle East Institute, 1955), 35-6; Edwin R.A. Seligman, ed. *The Encyclopaedia of Social Sciences* 8 (1932-7), s.v. "Islamic Law," by Joseph Schacht.

- 30 Layish, "Schacht's Contribution," 132. For a detailed list of Schacht's scholarly publications, see Brunschvig, "Schacht," xi-xvi.
- 31 See *Times* (London); Layish, "Schacht's Contribution," 132; Lewis, "Schacht," 376.
- 32 Joseph Schacht, "The Schools of Law and Later Development of Jurisprudence," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington, D.C.:

Development of the Technical Legal Thought), after a discussion of some general tendencies, the reasoning of certain prominent scholars is described.

Schacht's findings in this book made a tremendous impression on many Islamicists. When he published it in 1950, the book immediately met with immense approval,³⁴ and several reprints subsequently appeared, the latest being the fourth, published in 1967. This work, according to Makdisi, "is a work no less fundamental than that of Goldziher [*The Zāhirīs*], confirming it and going beyond it to do what Goldziher had hoped would be done once Shāfi'ī's work [*Risālah*] was found and published."³⁵

Schacht's *Introduction* is divided into two sections. The first section is concerned with the development of Islamic law and also includes some discussion of developments in Islamic law during the last century in various regions of the

The Middle East Institute, 1955), 84.

³³ The terminology used by Schacht is worthy of note. He uses different adjectives in the title of his two famous books: *Muhammadan* and *Islamic*. This issue becomes more complicated if we look at his article "Foreign Elements in Ancient Islamic Law." In this article Schacht uses many terms almost interchangeably, such as: Muhammadan law, Islamic law, Muhammadan jurisprudence, Islamic jurisprudence, Muhammadan legal science, Islamic legal science. From this article one may conclude that according to Schacht's point of view Muhammadan is the same as Islamic. The use of the adjective Muhammadan suggests that the law was created by Muhammad, which clearly contradicts the Muslim understanding. There was, actually, a tendency of the early Western scholars such as Margoliouth, Goldziher, Hurgonje, Gibb, Bosworth, Smith, Guillaume, and Fitzgerald to use the term Muhammadan in the titles of their works. In his early time, Schacht seems to have been influenced by such a tendency. However, he never again used the term Muhammadan in his later publications as demonstrated in his last famous book, *An Introduction to Islamic Law*. To make it more clear, take the following example. When Schacht discusses the position of the concept of *sunnah* in Islamic law, he writes in his earlier work: "This originally ancient Arab idea of sunna became one of the central concepts of Mohammedan religious law" (see his "The Law," 69). Then he changes the adjective Mohammedan to Islamic in his later work: "This ancient Arab concept of *sunna* was to become one of the central concepts of Islamic law"

Muslim world; e.g. Turkey, Egypt, Sudan, Palestine, Transjordan, Israel, Lebanon, Syria, Cyprus, Iraq, Iran, Pakistan, Indonesia, and Morocco.³⁶ The second section analyzes systematically the following topics: the original sources, general concepts, the law of persons, property, obligation in general, obligation and contracts in particular, family, inheritance, penal law, procedure, and the nature of Islamic law.

Besides the new material concerning the development of Islamic law during the last century, the first section (the historical section) of this book covers the same subject contained in the author's *Esquisse d'une histoire du droit musulman* (Paris 1953)³⁷ which consists of a brief but comprehensive survey of both the early and later periods of Islamic law, corresponding to a course of lectures given at the University of Algiers.³⁸ The English version of his *Esquisse* appeared in *Law in the Middle East*, edited by Majid Khadduri and Herbert J.

(see his *Introduction*, 17).

- ³⁴ See the following reviews: J.N.D. Anderson, review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht, in *Die Welt des Islams* 2 (1953), 136: "a new landmark....The validity of his main contentions appear inescapable." H. Ritter, review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht, in *Oriens* 4 (1951), 312: "In the whole, this thorough methodical and original book, has advanced considerably our knowledge of the early development of one of the most important branches of the history of Islamic thought and has established a methodical base for investigations of this kind." Arthur Jeffery, review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht, in *Middle East Journal* 5 (1951), 393: "...meticulous in detail, sober in judgement, and clear in exposition." James Robson, review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht, in *The Muslim World* 42 (1952), 61-2: "This is a penetrating work displaying great critical acumen in which the author takes his readers systematically through the theories of doctors and schools and shows how legal doctrine and technical legal thought developed by devious ways from slender beginnings." Alfred Guillaume, review of *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht, in *Bulletin of the School of Oriental and African Studies* 16 (1954), 176: "Dr. Schacht makes a contribution of the highest importance to our knowledge both of the development of Muhammedan jurisprudence and of the evolution and manufacture of traditions." S.V. Fitzgerald, review of *The Origins of Muhammadan Jur-*

Liebesny.³⁹

The second section consists of much of the same discussion as appears in the *G. Bergstrasser's Grundzuge des islamischen Rechts bearbeitet und herausgegeben* (Berlin-Leipzig, 1935).⁴⁰ Moreover, Schacht contends that this second book is "the result of continuous work on the subject over a number of years," and, according to him, is not merely a restatement of his previous works, but rather is intended to supersede them.⁴¹

Schacht's *Introduction*, Anderson asserts, "is a most remarkable book and will be widely welcomed."⁴² In addition to this, "the law is discussed in systematic terms and in historical sequence," and it is "far easier to understand and follow" his point of view here, compared to his previous book, *Origins*.⁴³ There is also significant information in this book for any person who wishes to devote

isprudence, by Joseph Schacht, in *The Law Quarterly Review* 69 (1953), 395: "His conclusions always merit respectful attention, and they will, we believe, command general, though perhaps not unqualified, acceptance."

- 35 George Makdisi, "The Juridical Theology of Shāfi'i: Origins and Significance of *Usūl al-Fiqh*," *Studia Islamica* 59 (1984): 12.
- 36 On this issue, the following works of Schacht are relevant: "Islam in Northern Nigeria," *Studia Islamica* 8 (1957): 123-46; "Notes on Islam in East Africa," *Studia Islamica* 13 (1965): 91-136; "Problems of Modern Islamic Legislation," *Studia Islamica* 12 (1965): 99-129.
- 37 J.N.D. Anderson, review of *An Introduction to Islamic Law*, by Joseph Schacht, in *Bulletin of the School of Oriental and African Studies* 28 (1965): 151. See also his review of *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny, in *Middle East Journal* 9 (1955): 448; Schacht, *Introduction*, vi.
- 38 See Hourani, "Schacht," 165; Lewis, "Schacht," 380.
- 39 Anderson, review of *Introduction*, 151. According to Anderson, Schacht's two chapters in the *Law in the Middle East* "provide a masterly summary of the way in which Islamic law in fact originated and of the whole course of its historical development-and thus make available for the first time in Eng-

himself to the study of Islamic law, for it presents a phenomenal range of material in its bibliographical section.⁴⁴

During the last eighteen years of his life, Schacht received much public recognition for his scholarly achievements.⁴⁵ He was awarded an honorary degree of Doctor of Law by the University of Algiers in 1953, and was elected a member of the Arab Academy in Damascus in 1954 and the Royal Netherlands Academy in 1956. But the most important award that Schacht received was, perhaps, The Giorgio Levi Della Vida Medal of the Near Eastern Centre, University of California, Los Angeles, on May 9, 1969.⁴⁶ This award is given biennially to an outstanding scholar "whose work has significantly and lastingly advanced the study of Islamic civilization." On that occasion he delivered an address on a subject which fittingly sums up his major interest in the field,

lish what was previously accessible only in his *Equisse* (see his review of *Law in the Middle East*, 448).

⁴⁰ Schacht, *Introduction*, vi. The work, according to Arthur Jeffery, contains "the late Gotthelf Bergsträsser's notes on the fundamentals of Muslim jurisprudence" edited by Schacht with Otto Pretzl's help (see his review of *Origins*, 394).

⁴¹ Schacht, *Introduction*, vi.

⁴² Anderson, review of *Introduction*, 151. One of the scholars who plainly criticizes Schacht's *Introduction* is Muhammad Hamidullah. In his review of the book, he summarizes fourteen points of its content each of which he clearly rejects, ending his comments: "...very many...unscholarly expressions ought to be avoided in a new edition" (see his review of *An Introduction to Islamic Law*, by Joseph Schacht, in *Middle East Journal* 9, 1965: 238-9).

⁴³ Charles J. Adams, "Islamic Religious Tradition," in *The Study of the Middle East: Research and Scholarship in the Humanities and the Social Sciences*, ed. Leonard Binder (London: John Wiley & Sons, 1976), 90.

⁴⁴ Pages 215-285 in the paperback edition, 1982.

⁴⁵ See the following remarks about Schacht: Noel J. Coulson, *A History of*

"Theology and Law in Islam,"⁴⁷ which was his last work before his death. G.E. von Grunebaum, who was the chairman of the award committee, emphasized the importance of Schacht's achievements by saying, "[i]t has been the honor of the committee to choose you as the second recipient, the second in the sequence of time but in our judgment as well as in our sentiment your award is but the same distinction awarded once over."⁴⁸

Islamic Law (Edinburgh: Edinburgh University Press, 1990), 4: "Schacht formulated a thesis of the origin of Shari'ah law which is irrefutable in its broad essentials...;" David F. Forte, "Islamic Law: The Impact of Joseph Schacht," *Loyola Los Angeles International and Comparative Law Annual* 1 (1987), 15: "Nearly all Western Islamic scholars agree that Schacht's evidence against the authenticity of the traditions is virtually unassailable;" Adams, "Religious Tradition," 90: "The bench mark of all modern studies on the history and development of Islamic law is found in the writings of the late Joseph Schacht."

⁴⁶ Schacht was the second recipient of the award, the first one was Robert Brunschvig made on May 12, 1967.

⁴⁷ Grunebaum, "In Memoriam," 191. This address was published together with papers on the same theme by other scholars under the editorship of G.E. von Grunebaum under the title *Theology and Law in Islam*, published by Otto Harrassowitz, Wiesbaden in 1971.

⁴⁸ G.E. von Grunebaum, "Presentation of Award to Second Recipient, Joseph Schacht," in *Theology and Law in Islam*, ed. G.E. von Grunebaum (Wiesbaden: Otto Harrassewitz, 1971), 2.

CHAPTER 2

SCHACHT'S THESIS ABOUT THE FORMATION OF ISLAMIC LAW

In traditional Muslim perception, Islamic law represents a divinely ordained system, having nothing to do with any historical development. In their perception, the Qur'ān and the *sunnah* of the Prophet (as the divine interpretation of the Qur'ān) had provided a detailed account of everything.¹ Accordingly, there is only one source from which legal rulings can be derived, and this is divine revelation. The idea of natural law is unknown here. It is not surprising therefore that, according to Coulson,² the traditional understanding of the growth of Islamic law "completely lacks the dimension of historical depth."

The modern era, i.e. since the 19th century, is the period in which the traditional belief began to find itself faced with serious challenges. Through imperialism the influence of Western civilization on the Eastern World, and mainly on the Islamic world, has been considerable.³ As a result, many aspects of Islamic teaching are questioned, and one of the most serious questions is addressed to the doctrine of Islamic law.⁴

¹ See Qur'ān 16 (89), 6 (38).

² Coulson, *History*, 2. See also his "The Concept of Progress and Islamic Law," in *Religion and Progress in Modern Asia*, ed. Robert N. Bellah (New York: The Free Press, 1965), 76.

³ See James L. Barton, "The Impact and Influence of Western Civilization on the Islamic World," in *The Moslem World of To-day*, ed. John R. Mott (London: Hodder and Stoughton, 1925), 3-18. See also Seyyed Hossein Nasr, "The Western World and Its Challenges to Islam," in *Islam: Its Meaning and Message*, ed. Khurshid Ahmad (London: Islamic Council of Europe, 1975), 217-41; A. Rahman I. Doi, *Shari'ah in the 1500 Century of Hijra: Problems and Prospects* (London: Ta-Ha Publisher, 1981), 8.

It was Schacht who, among some Western scholars, undermined the traditional understanding of Islamic law. Contrary to this understanding, Schacht's study on the subject was neither theological nor juristic, but rather historical and sociological.⁵ "He treated Islamic law," Layish writes, "not as a revealed body of norms but as an historical phenomenon closely linked to social reality."⁶ It is not at all surprising that Schacht's conclusion still shocks most Muslims, as it has since it was first proposed, for "Schacht indicated that most of Islamic law, including its sources, resulted from a process of historical development."⁷

The *sunnah* of the Prophet is an important area in which Schacht addressed his research. While it is realized that Goldziher was the pioneer of the critical study of *ḥadīth*, nevertheless, "...the systematic development of his [Goldziher's] thesis, the detailed formulation of criteria for the evaluation of *ḥadīth*, and their application to a wide range of materials in the original Arabic sources, was the work of Joseph Schacht."⁸ Schacht himself acknowledged that his conclusions only confirm and elaborate the grand theory set forth by his predecessor, Goldziher.⁹

⁴ For a discussion of problems and prospects, reforms and changes of some important aspects of Islamic law, see generally Norman Anderson, *Islamic Law in the Modern World* (New York: New York State University Press, 1959), as well as his *Law Reform in the Muslim World* (London: The Athlone Press, 1976).

⁵ Lewis, "Joseph Schacht," 376.

⁶ Layish, "Schacht's Contribution," 133.

⁷ Forte, "Islamic Law," 9. See also Charles J. Adams, "Islām," in *A Reader's Guide to the Great Religions*, ed. Charles J. Adams (New York: The Free Press, 1965), 317.

⁸ N.J. Coulson, "European Criticism of *Hadīth* Literature," in *Arabic Literature to the End of the Umayyad Period*, eds. A.F.L. Beeston, T.M. Johnstone, and G.R. Smith (Cambridge: Cambridge University Press, 1983), 318.

One of Schacht's most important conclusions, one which gives pain to pious Muslims, is his statement that "the reference to traditions from Companions is the older procedure, and the theory of the overruling authority of traditions from the Prophet *an innovation* (italics are mine)."¹⁰ To prove this thesis he presents a relatively long discussion in which he examines, among others, the historical development of the term *sunnah* as it was used in pre-Islamic Arabia, early Islam, the ancient schools of law, by famous jurists such as Shāfi'i, and especially how it developed in relation to the concept of the *sunnah* of the Prophet.

In fact, it is true that the term *sunnah* which meant "custom of the community handed down by oral transmission,"¹¹ was used in pre-Islamic Arabia. It consists of the "habitual practice, customary procedure or action, norm, standard, or 'usage sanctioned by tradition'."¹² The Qur'ān provides evidence that the guiding principle of pre-Islamic moral life had been the *sunnah* of Arab society handed down orally from its forefathers.¹³ "Whatever was customarily right and proper; whatever the forefathers had done," according to Schacht,

⁹ Schacht, *Origins*, 4-5. See also his "Islamic Traditions," 143; Ritter, review of *Origins*, 309; Forte, "Schacht's Contribution," 2.

¹⁰ Schacht, *Origins*, 30. The term used by Schacht is "innovation." This term is called *bid'ah* in Arabic (Islam) which is considered as an unforgivable action based on the *hadīth*: "*Kullu bid'ah dalālah wa kullu dalālah fī al-nār*." For the meaning and the use of the term *bid'ah* (innovation), see H.A.R. Gibb, *Mohammedanism*, second edition (Oxford: Oxford University Press, 1966), 74, 98, 137, 142, 166, and 187.

¹¹ Gibb, *Mohammedanism*, 73-4.

¹² Mircea Eliade, ed. *The Encyclopedia of Religion* (London: Macmillan Publishing Company, 1987), s.v. "Sunnah," by Marilyn Robinson Waldman. See also M.Th. Houtsma and others, eds. *The Encyclopaedia of Islam*, old edition (Leyden: E.J. Brill, 1937), s.v. "Sunna," by A.J. Wensinck.

¹³ See, for example, Qur'ān 2 (170) and 43 (21-4).

"deserved to be imitated."¹⁴ It would not be strange, in Schacht's view, that "Islamic law had its roots in pre-Islamic Arab society."¹⁵ Moreover, says Schacht, it was the *hakam*¹⁶ "who applied and at the same time developed the *sunnah*," the normative legal custom which existed among the members of the society.¹⁷

We need to investigate now how pre-Islamic Arab tradition, particularly the concept of *sunnah*, entered into Islam. To a large extent it seems true that many basic aspects of Islamic teaching, even practical ones, were derived from pre-Islamic Arab tradition. According to Izutsu:

We would do a grave injustice, however, to the spirit of *Jāhiliyyah* and even to the position of Islām itself if we supposed that the latter denied and rejected without discrimination all the moral ideals of pre-Islamic Arabia as essentially incompatible with its monotheistic faith. There is clearly recognizable a certain continuity between the Qur'ānic outlook and the old Arab world view, as much as there is a wide cleavage between them.

Some of the pre-Islamic values were totally rejected by the Qur'ān. But most of them were accepted, modified, and developed, in accordance with the demands of the new religion. The old views, thus radically transformed and entirely cut off from the traditional tribal mode of life, were reborn as a new ethico-religious values and came to form an integral part of the Islamic system.¹⁸

¹⁴ Schacht, *Introduction*, 17. See also his "The Law," 69; his "Law and Justice," 543; his "Pre-Islamic Background," 34.

¹⁵ Schacht, "Law and Justice," 539.

¹⁶ *hakam* was simply defined as an arbitrator who was chosen to deal with any legal disputes in any Arab society (Schacht, *Introduction*, 7-8).

¹⁷ Schacht, *Introduction*, 8.

¹⁸ Toshihiko Izutsu, *Ethico Religious Concepts in the Qur'ān* (Montreal: McGill University Press, 1966), 74, 252. Izutsu devoted himself to a lengthy discussion of the Islamization of the old Arab virtues such as generosity, courage, loyalty, veracity, and patience (ibid., 74-104). See also W. Montgomery Watt, *What is Islam?* (Washington: Frederick A. Praeger Publisher, 1968), 28-31.

Pre-Islamic Arabia's idea of *sunnah*, in terms of precedent and normative custom, Schacht argues, "reasserted itself in Islam."¹⁹ "Islam," according to Gibb, "developed its own *sunna*, its proper system of social and legal usages, whether these were taken from older custom or were set by the Prophet."²⁰ It is not surprising therefore that some of the subject-matter of law in Islam was based on or represented a continuation of pre-Islamic Arab tradition. The area of family law and the important position of the *hakam*, as we shall see, are clear examples in this direction.

Let us observe here some of the more important aspects of family law, such as marriage, divorce, inheritance, and *zihār*. Polygamy, which is sanctioned by the Qur'ān and the *sunnah* of the Prophet,²¹ was a common practice of the pre-Islamic Arabs.²² Although there are different views concerning the limit on the number of wives which a Muslim husband can marry concurrently, some Muslim scholars are of the opinion that he may take as many wives as he wishes, and this tradition definitely derives from the pre-Islamic Arab custom.²³ The practice of divorce in Islam, as in pre-Islamic Arabia, is likewise a

¹⁹ Schacht, *Introduction*, 17.

²⁰ Gibb, *Mohammedanism*, 73.

²¹ For the Qur'ān and the *sunnah* of the Prophet, see Kawthar Kāmil `Alī, *Nizām Ta'addud al-Zawjāt fī al-Islām* (al-Qāhirah: Dar al-Itisām, 1985), 29-53.

²² Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1979), 29. For a discussion concerning the tendency to restrict or even to abolish the practice of polygamy in some area such as Turkey, Egypt, Tunisia, Iraq, and Morocco, see Majid Khadduri, "Marriage in Islamic Law: The Modernist Viewpoints," *The American Journal of Comparative Law* 26 (1978): 213-18.

²³ The limit on the number of wives permitted to a Muslim husband has been discussed by `Alī in his *Nizām Ta'addud al-Zawjāt*, 105-14, also by Bello Daura in his "The Limit of Polygamy in Islam," *Journal of Islamic and*

simple matter. A Muslim husband "may divorce his wife at any time," even without a definite reason.²⁴ The law of inheritance is also generally derived from the pre-Islamic Arab tradition.²⁵

Zihār is another example of continuity in family law. "In *zihār*," Fyzee writes, "the husband swears that to him the wife is like 'the back of his mother'."²⁶ After the oath has been taken, "the wife has the right to go to the Court and obtain divorce or restitution or conjugal rights on expiation."²⁷ This kind of practice is an ancient form of oath and issues from pre-Islamic Arab society.²⁸

The institution of the *arbitrator* (*hakam*), even as we know it today (e.g. in Indonesia), is another area which is clearly based on Arab tradition. Perhaps, influenced by Emile Tyan²⁹ Schacht is of the opinion that with some modifications to the original concept, a *hakam*, a man whose main qualifications are his personal qualities, his knowledge, his wisdom, his integrity, his reputation, and his supernatural powers, is, as in pre-Islamic Arab tradition, asked to give

Comparative Law 3 (1969): 21-6.

²⁴ Alfred Guillaume, *Islam* (England: Penguin Books LTD., 1954), 71.

²⁵ Schacht, "The Law," 66-7. See also his "Law and Justice," 539-40; Eliade, ed. *The Encyclopedia of Religion*, s.v. "Walāyah," by Hermann Landolt. For a general treatment of marriage, divorce, and inheritance in Islam, see Mahmoud Hoballah, "Marriage, Divorce, and Inheritance in Islamic Law," *The George Washington Law Review* 22 (1953): 24-31.

²⁶ Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (London: Oxford University Press, 1955), 137.

²⁷ *Ibid.*

²⁸ *Ibid.*, 138.

²⁹ Emile Tyan, "Judicial Organization," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington, D.C.: The Middle East Institute, 1955), 240-4.

advice or to resolve a dispute among his people.³⁰ The term *ḥakam* is also repeatedly used in the Qur'ān.³¹

Based on the evidence cited above it is understandable that Muhammad, in Schacht's view, preserved the pre-Islamic Arab tradition, and mainly the important concept of the *sunnah*. "Muhammad," he argues, "had little reason to change the existing customary law."³² Schacht goes on to say that Muhammad's aim:

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.³³

Schacht goes even further by saying that Muhammad "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."³⁴

³⁰ Schacht, "Pre-Islamic Background," 29. See also his *Introduction*, 10-1; his *Origins*, 182; his "The Law," 67-9; James Hawting, ed. *Encyclopaedia of Religion and Ethics* (New York: Charles Scribner's Sons, 1955), s.v. "Arabs (Ancient)," by TH. Noldeke.

³¹ Schacht, *Introduction*, 10. Schacht refers, for example, to the Qur'ān 4 (35, 65, 105), and 24 (48, 51).

³² Schacht, *Introduction*, 11.

³³ Ibid. See also his "Islamic Legislation," 106-7; his "The Law," 67-8; his "Law and Justice," 541; his "Pre-Islamic Background," 31; his "Islamic Law," 345.

³⁴ Schacht, *Introduction*, 11.

Schacht continues his analysis of the idea of the *sunnah* as used after the death of Muhammad, especially during the era of *al-Khulafā' al-Rāshidūn*. During this era, according to him, Islam started to spread outside Arabia, outside the central place of Muhammad's preaching. As a result there were definite contacts between Islam and the cultures of the newly conquered territories, where there were some aspects of life which had not been faced by Muslims in Arabia. As in the previous era, Islam in the conquered areas proved to be a flexible religion. "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."³⁵ As a consequence certain aspects of life were absorbed, and it is not surprising then that there was "widespread adoption...of the legal and administrative institutions and practices of the conquered territories."³⁶ "[T]he treatment of tolerated religions, the methods of taxation, and the institutions of *emphyteusis* and of *wakf*" are some examples of legal practices which originated from the traditions of the conquered area.³⁷

If we agree that the *sunnah*, in Schacht's definition, means nothing more than "a precedent, a way of life,"³⁸ it would then be clear that the idea of the *sunnah* as the principal guidance of the society was also taken over and

³⁵ Ibid., 19.

³⁶ Ibid.

³⁷ Ibid. For a lengthy discussion of the taxation during the first two centuries of Islam, see Daniel C. Dennett, *Conversion and the Poll Tax in Early Islam* (Cambridge: Harvard University Press, 1950).

³⁸ Schacht, *Origins*, 58. Schacht also refers to Goldziher's definition as: "traditional usage, or custom hallowed by ancestral use, by practice transmitted through past generations" (Goldziher, "The Principles," 294), also to Margoliouth's definition as: "the ideal or normative usage of the community" (D.S. Margoliouth, *The Early Development of Mohammedanism*, London: William and Norgate, 1914, 69).

adopted by Muslims after the death of Muhammad, especially during the era of *al-Khulafā' al-Rāshidūn*. It is supported by the fact, for example, that the second Caliph, `Umar ibn al-Khaṭṭāb, sent a letter to Abū Mūsā al-Ash`arī (a *qāḍī* of Baṣrah) which contains an instruction to use prevailing tradition (*al-sunnah al-muttaḥa`ah*) as one of the important sources dealing with legal problems.³⁹ Moreover, the term *sunnah* of the Prophet seems to have appeared late in this era. Instead of having a legal meaning, Schacht contends, the term itself retained a theological connotation and provided "a doctrinal link between the '*sunna* of Abū Bakr and `Umar' and the Koran."⁴⁰

The reign of the Umayyads was an important period, in that the next stage in the development of the concept of the *sunnah* began at this time. The ancient schools, the traditionists, and Shāfi`ī were some of the more important agents involved in this development.

The groups of pious specialists which developed into 'ancient schools of law' pursued the ideal concept of the *sunnah*. Although some of the 'ancient schools' employed the term in the sense of *sunnah* of the Prophet, "the actual meaning of the term was no more than 'living tradition' as the ideal practice of the community, expressed in the accepted doctrine of the schools."⁴¹ Moreover, Schacht reaffirmed that the term *sunnah* of the Prophet "was not yet exclusively embodied in traditions from the Prophet."⁴²

³⁹ Majid Khadduri, "Nature and Sources of Islamic Law," *The George Washington Law Review* 22 (1953): 11. For a critical study of the text of `Umar's instruction, see D.S. Margoliouth, "Omar's Instructions to the Kadi," *Journal of the Royal Asiatic Society* (1910): 307-26.

⁴⁰ Schacht, *Introduction*, 17-8.

⁴¹ Schacht, *Origins*, 80. See also his "Law and Justice," 554.

The continuous development of doctrine in the ancient schools was out-paced by the movement of the traditionists. According to the traditionists the "formal 'traditions' (*ḥadīth*, pl. *aḥādīth*) deriving from the Prophet superseded the living tradition of the school."⁴³ As a result, there was a growing number of 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."⁴⁴ This analysis brings Schacht to the controversial conclusion that undermines the traditional Muslim understanding: "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."⁴⁵ This conclusion was based on his analysis of the *isnād* which is the key element for determining the authenticity of each tradition. In Schacht's view, the study of the *isnād* makes it possible for us to date traditions. Much evidence is given by Schacht to prove his thesis, and thus he was able to show that the *isnāds* had a tendency to "grow backwards and to claim higher and higher authority until they arrive at the Prophet."⁴⁶ And he came to the conclusion that "there is no reason to suppose that the regular practice of using *isnād* is older than the beginning of the second century."⁴⁷ Furthermore, he set forth his view concerning the origin of the traditions, pointing out that "without

⁴² Schacht, *Origins*, 80. See also his *Introduction*, 29-30.

⁴³ Schacht, *Introduction*, 34.

⁴⁴ Ibid. See also his "Law and Justice," 555.

⁴⁵ Schacht, *Introduction*, 34. See also his "Pre-Islamic Background," 46.

⁴⁶ Schacht, *Introduction*, 5. See also his *Origins*, 156, 163, 165.

⁴⁷ Schacht, *Origins*, 37.

attempting a rash generalization, we are therefore justified in looking for the first half of the second century A.H. for the origin of the bulk of legal traditions with which the literary period starts."⁴⁸

The traditionists' viewpoint regarding the concept of the *sunnah* of the Prophet culminated in the hands of Shāfi'i (d. 204/820). In contrast with his predecessors, Shāfi'i defined the *sunnah* as the only model of the Prophet's behaviour, and, like the traditionists, he set forth his viewpoint that "nothing can override the authority of a formal tradition from the Prophet."⁴⁹ He went even further by definitely establishing the *sunnah* of the Prophet as the primary source of Islamic law in line with the Qur'an.⁵⁰ The *sunnah*, in Shāfi'i's view, "could not even be invalidated by reference to the Koran." "Shāfi'i," Schacht argues, "took it for granted that the Koran did not contradict the traditions from the Prophet, and that the traditions explained the Koran; the Koran had therefore to be interpreted in the light of the tradition, and not vice versa."⁵¹ Schacht goes on to say that Shāfi'i's theory "seems to balance Koran and *sunna* evenly, but it makes the *sunna* as expressed in traditions from the Prophet prevail over the Koran because...the Koran is to be interpreted in the light of the traditions."⁵² Given this fact, Makdisi emphasizes Schacht's view, pointing out that "the Koran is considered in his [Shāfi'i's] doctrine as subordinate to the

⁴⁸ Ibid., 176.

⁴⁹ Schacht, *Introduction*, 46. See also his *Origins*, 2; his "Theology and Law in Islam," in *Theology and Law in Islam*, ed. G.E. von Grunebaum (Wiesbaden: Otto Harrassowitz, 1971), 12.

⁵⁰ Schacht, *Origins*, 15.

⁵¹ Schacht, *Introduction*, 47, 53. See also his *Origins*, 15; his "Law and Justice," 559; his "Pre-Islamic Background," 55.

⁵² Schacht, *Origins*, 15.

Sunna."⁵³ Thus, since Shāfi'i's time the development of the ideal concept of *sunnah* of the Prophet reached its climax and, together with the development of legal thought, seems to have formed into a rigid concept handed down to following generations, even until the present time.

To sum up, the historical analysis of the ideal concept of the term *sunnah* from pre-Islamic Arabia to the era of Shāfi'i, on the one hand won for Schacht the reputation as the first and most distinguished scholar on the subject in Western scholarship and, on the other, encouraged serious reactions from 'traditional Muslims.'

The Formation of Islamic Law.

The historical development of the sources of Islamic law and the central role of Shāfi'i in its formation were the major concerns of Schacht. Shāfi'i, Schacht contends, was more than any other scholar responsible for the development of the theory of the four principal sources of Islamic law; the Qur'ān, the *sunnah* of the Prophet, *ijmā'*, and *qiyās*. Schacht also maintains that Shāfi'i was the first who composed a book on the theory of Islamic law, arguing that "the statement...that Abū Yūsuf was the first to compose books of law on the basis of the doctrine of Abū Hanīfa, is not confirmed by the old sources."⁵⁴ It is not strange therefore that Schacht recognizes Shāfi'i as the founder of Islamic jurisprudence.⁵⁵ This section, it is hoped, is intended to put forward Schacht's

⁵³ Makdisi, "Juridical Theology," 12.

⁵⁴ Schacht, *Origins*, 133.

⁵⁵ Schacht, "Islamic Law," 346.

views regarding the formation of Islamic law, particularly dealing with the historical development of the sources of Islamic law from the earliest period of Islam until its climax in the hands of Shāfiʿī.

Schacht set forth his view that during the greater part of the first century of *hijrah*, Islamic law as we know it today did not as yet exist.⁵⁶ "Law as such," Schacht maintains, "fell outside the sphere of religion."⁵⁷ The beginning of the second century A.H., or the Umayyad period, was the era in which, Schacht argues, the Islamization of law had its starting point, continuing its development down to the beginning of the literary period.⁵⁸ To elaborate this thesis, Schacht was systematically concerned with the historical development of Islamic legal thought from the pre-Umayyad period until Shāfiʿī's time, the time when, in Schacht's view, the idea of Islamic jurisprudence was to emerge as a final and complete concept.

It should be kept in mind that according to classical Islamic legal theory the principal sources of Islamic law were ranked as the Qurʾān, the *sunnah* of the Prophet, *ijmāʿ*, and *qiyās*; and any legal problem faced by Muslims were solved by recourse to these sources sequentially. Although Schacht recognized this, he asserted that historical facts show that the Qurʾān and the *sunnah* of the Prophet "were historically the last authoritative ingredients in the formulation of Islamic law, and not the first."⁵⁹ More interesting still, Schacht contends, is the

⁵⁶ Schacht, *Introduction*, 19. See also his, "Law and Justice," 546; his "Pre-Islamic Background," 35.

⁵⁷ Schacht, "Law and Justice," 546.

⁵⁸ Schacht, *Origins*, 190. See also his "Islamic Legislation," 109; his "Law and Justice," 547-9.

⁵⁹ Forte, "Islamic Law," 9.

fact that "certain norms of earliest Islamic law diverged from the clear and explicit wording of the Koran."⁶⁰ Moreover, he insisted that the centre of the first theorizing and systematizing activities which were to transform Umayyad popular and administrative practice into Islamic law was Iraq. The legal theory and the legal reasoning of the schools of Iraq, according to him, were more highly developed than those of other schools in other places.⁶¹

In accordance with the historical development of the *sunnah*, described in the foregoing pages, Schacht put forward the historical development of the sources of Islamic law. During Muhammad's lifetime, he argues, the *sunnah* which existed in his society was included as one of the main sources to solve any problem of Muslim society and became "one of the central concepts of Islamic law."⁶² This *sunnah*, during the period of *al-Khulafā' al-Rāshidūn*, was mixed with the *sunnah* of the conquered territories outside Arabia. "The concept of *sunna* was to become one of the most important agents, if not the most important, in the formation of Islamic law."⁶³ Because of the significant position of the *sunnah* certain Qur'ānic verses seemed to be neglected.⁶⁴

The next stage of the development occurred during the period of the Umayyads. The Caliph appointed the *quḍāt* (plural of *qāḍī*, a judge) in each

⁶⁰ Schacht, "The Law," 69. See also his "Pre-Islamic Background," 35, 41.

⁶¹ Schacht, *Origins*, 29, 76, 87, 105, 133, 233, 276. See also his *Introduction*, 29; his "Foreign Elements," 13; his "Law and Justice," 553; his "Pre-Islamic Background," 41.

⁶² Schacht, *Introduction*, 17. See also his "The Law," 69; his "Law and Justice," 544; his "Pre-Islamic Background," 35.

⁶³ Schacht, *Introduction*, 8. See also his "Law and Justice," 540.

⁶⁴ Schacht, *Introduction*, 15-6.

province to solve any legal problems. The customary law (*sunnah*) of each province and the popular practice and administrative regulations of Umayyads, interpreted by the *quḍāt* through their *ra'y*, were counted as the main sources used to deal with legal problems. These *quḍāt* were the officials of the Umayyad administration and "their decisions laid the basic foundations of what was to become Islamic law."⁶⁵ Here the first theorizing, systematizing, and Islamizing efforts seriously began.⁶⁶ In the first decades of the second century these *quḍāt* became more and more specialized, more interested in religion, and, by using their individual reasoning, they were concerned with the elaboration of an Islamic way of life including an Islamic legal system.⁶⁷ As a result, Schacht asserts, "the popular and administrative practice of the late Umayyad period was transformed into Islamic law."⁶⁸ In a later stage of development, together with other religious specialists, they gave rise to the so called *madhāhib* (plural of *madhhab*, 'school' of religious law) which were simply distinguished by their geographical division.⁶⁹ "The more important...schools...are those of Kufa and Basra in Iraq, and of Medina and of Mecca in Hijaz, and of Syria."⁷⁰ *Ijmā'*, consensus among the scholars of the *madhāhib*, became more important than the *ra'y* of each scholar. The ideal practice of the community,

⁶⁵ Ibid., 25. See also his "Pre-Islamic Background," 38; his "Islamic Legislation," 102.

⁶⁶ Schacht, *Origins*, 283. See also his "The Law," 69-70.

⁶⁷ Schacht, *Origins*, 26. See also his "Islamic Legislation," 101-2.

⁶⁸ Schacht, "Pre-Islamic Background," 39. See also his "The Law," 72; his "Law and Justice," 549.

⁶⁹ Schacht, *Origins*, 1. See also his "The Law," 72-3; his "Pre-Islamic Background," 40-1; his "Law and Justice," 550.

⁷⁰ Schacht, *Introduction*, 28. See also his "The Law," 73.

expressed in the accepted doctrine of the scholars, which Schacht calls simply the 'living tradition,' replaced the previous concept of the *sunnah* and became one of the main sources of Islamic law.⁷¹

The geographical character of the ancient schools of law became less strictly defined soon after Shāfi'i's time,⁷² and they transformed themselves into the later type of school "based on allegiance to an individual master," which was completed about the middle of the third century A.H. Through various developments "the ancient school of Kufa transformed itself into the school of the Ḥanafīs, and the ancient school of Medina transformed itself into the school of the Malikīs."⁷³ The involvement of Shāfi'i in the process of the systematization and Islamization of law helped his doctrines to become known the Shāfi'i school.⁷⁴ To some degree the systematic doctrine of Shāfi'i dissatisfied certain groups, particularly the traditionists. In contrast with Shāfi'i's doctrine, "the traditionists are hostile to all reasoning and try to rely exclusively on traditions,"⁷⁵ and they preferred "a weak tradition to a strong analogy." The traditionists based their doctrine on the prominent traditionist Ibn Ḥanbal (d. 241/855), recognized later as the founder of the Ḥanbalī school.⁷⁶

⁷¹ Schacht, *Origins*, 98.

⁷² Ibid., 10.

⁷³ Schacht, *Introduction*, 57-8. See also his "Schools of Law," 63; his "Law and Justice," 560.

⁷⁴ Schacht, *Introduction*, 59. See also his "Schools of Law," 64-5.

⁷⁵ Schacht, *Origins*, 128-9. See also his "Schools of Law," 66.

⁷⁶ Schacht, *Introduction*, 62-3. See also his "Schools of Law," 66 - 7. Schacht also mentioned the other individual masters such as Abū Yūsuf, Shaibānī, Sufyān Thawrī, Awza'i, Ibn Taimiyyah, and Ibn Qayyim al-Jawziyyah. Concerning the school of law, Schacht writes: "there were several other...schools of law...particularly in the early period. But since about

The next phenomenon was the emergence of 'a religious movement' opposed to the 'secular policy' of the Umayyads. In the eyes of the 'religious movement' the acts and regulations of the government had deviated from religious teaching, and a serious effort to adhere strictly to religious doctrine, according to them, must be made. It is largely, no doubt, for this very reason that the process of Islamization of law was more systematically elaborated. The Qur'ān was frequently used as a reference concerning legal problems, and the meaning of the *sunnah* was strictly limited to the words, acts, and tacit-approval of the Prophet only.⁷⁷

In the hands of Shāfi'i, Schacht contends, the systematization and the Islamization of legal reasoning in Islam reached their zenith.⁷⁸ Shāfi'i set forth his theory that the sources of Islamic law are, hierarchically the Qur'ān, the *sunnah* of the Prophet, *ijmā'*, and *qiyās*. "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*."⁷⁹ There is no room, in Shāfi'i's theory, for mere individual reasoning (*ijtihād al-ra'y*) or the customary law of society in the elucidation of legal decisions.⁸⁰ Like those scholars before him, Shāfi'i posited the Qur'ān as the primary source of Islamic law. The *sunnah*

A.D. 1300 only four schools of law have survived in orthodox Islam...the Hanafī, the Malikī, the Shāfi'i, and the Hanbalī schools" (see his "Schools of Law," 68).

⁷⁷ Schacht, *Introduction*, 26-7, 29. See also his *Origins*, 283.

⁷⁸ Schacht, *Introduction*, 45. See also his "Pre-Islamic Background," 53.

⁷⁹ Schacht, *Origins*, 134.

⁸⁰ Schacht, *Introduction*, 46. See also his "Pre-Islamic Background," 55; his "Law and Justice," 560; his "Schools of Law," 64.

was emphasized as strictly referring to the Prophet. The consensus of the scholars, held to be an important source by his predecessors, became irrelevant for Shāfi'i.⁸¹ "[H]e even denied the existence of any such consensus because he could always find scholars who held divergent opinions, and he fell back on the general consensus of all Muslims on essentials."⁸² As for the last source, *qiyās*, in contrast with earlier opinion, Shāfi'i "recognized in principle only strict analogical and systematic reasoning," by using *qiyās* as the only kind of reasoning to draw certain rules from the three previous sources.⁸³ This effort of Shāfi'i, as the final attempt at the formulation of the sources in particular and of Islamic law in general is seen as "a magnificently consistent system and superior by far to the doctrines of the ancient schools."⁸⁴ However, Schacht reminds us, this effort, in the long run, "could only lead to inflexibility" and "became increasingly rigid and set in its final mold."⁸⁵ On this he elaborates elsewhere, saying:

The first indications of an attitude which denied to contemporary scholars the same liberty of reasoning as their predecessors had enjoyed are noticeable in Shāfi'i, and from about the middle of the third century of the hijra (ninth century A.D.) the idea began to gain ground that only the great scholars of the past who could not be equalled, and not the epigones, had the right to 'independent reasoning'. By this time the term *ijtihād* had been separated from its old connexion with the free use of personal opinion (*ra'y*), and restricted to the drawing of valid conclusions

⁸¹ Schacht, *Origins*, 88-94, 136. See also his "Law and Justice," 559.

⁸² Schacht, *Introduction*, 47. In Schacht's view, such concept of *ijmā'* was based on the thesis formulated shortly before Shāfi'i that "everything of which the Muslims approve or disapprove is good or bad in the sight of Allah," and only towards the middle of the third century of the hijra, says Schacht, the thesis was developed and was put into the form of a tradition from the Prophet: "the community of Muslim would never agree on an error" (ibid.).

⁸³ Schacht, *Introduction*, 46. For Shāfi'i's attitude towards *ra'y*, *istihsān*, *istiṣhāb*, and his concept of *qiyās* and *ijtihād*, see his *Origins*, 120-28.

⁸⁴ Schacht, *Origins*, 137.

⁸⁵ Ibid. See also his "Schools of Law," 76-7; his "The Law," 77.

from the Koran, the *sunna* of the Prophet, and the consensus, by analogy (*kiyās*) or systematic reasoning.⁸⁶

In what follows, Schacht seems to agree with the view of most, if not all, the previous scholars that after Shāfi'i's time, there occurred the unfortunate event known as the '*insidād bāb al-ijtihād*', 'closing the gate of *ijtihād*'. In his own words:

By the beginning of the fourth century of the hijra...the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all. The 'closing of the door of *ijtihād*', as it was called, amounted to the demand for *taklīd*.⁸⁷

⁸⁶ Schacht, *Introduction*, 70. See also his "Schools of Law," 72-3.

⁸⁷ Schacht, *Introduction*, 70-1. See also his "Theology," 20 - 1; his "Schools of Law," 73-4; his "Law and Justice," 563; his "The Law," 77-8. On this point, it is interesting to note that Wael B. Hallaq in his articles "Was the Gate of *Ijtihad* Closed?" *International Journal of Middle East Studies* 16 (1984): 3-41, and "On the Origins of the Controversy about the Existence of *Mujtahids* and the Gate of *Ijtihad*" *Studia Islamica* 53 (1986): 129-41, successfully demonstrates that the gate of *ijtihād* was never closed. He strongly argues, for example, "[a] systematic and chronological study of the original legal sources reveals that these views on the history of *ijtihād* after the second/eighth century are entirely baseless and inaccurate" (see his "Was the Gate of *Ijtihad* Closed?," 4).

CHAPTER 3

RESPONSES TO SCHACHT'S THESIS

1. The Authenticity of Traditions.

Fazlur Rahman is one of several Muslim scholars who have criticized Schacht's thesis concerning the authenticity of traditions. According to Rahman, Schacht has failed to draw a clear conceptual distinction between *sunnah* and *ḥadīth*. As a result, Rahman maintains, Schacht comes to the conclusion that the *sunnah* of the Prophet is not in reality that of the Prophet himself, but rather 'a living tradition' of a certain local Muslim society.¹ For this reason, Rahman starts his analysis by providing a clear distinction between *sunnah* and *ḥadīth*, and then brings up some important implications of this distinction.

Generally speaking, Rahman agrees with some scholars who are of the opinion that many basic aspects of Islamic teaching, even practical ones, were derived from pre-Islamic Arab tradition, and the concept of *sunnah* is, according to him, one of the clear examples in point.²

Rahman provides a definition of *sunnah* in order to distinguish it from the concept of *ḥadīth*. *Sunnah*, according to him, is a "trodden path,"³ an "exem-

¹ Fazlur Rahman, *Islamic Methodology in History* (Karachi: Central Institute of Islamic Research, 1965), 5. See also his *Islam*, 45-7; his "Some Issues in the Ayyūb Khān Era," in *Essays on Islamic Civilization*, ed. Donald P. Little (Leiden: E.J. Brill, 1976), 285.

² Rahman, *Islamic Methodology*, 1-4. See also his *Islam*, 44. Another example given by Rahman is the practice of polygamy (see his "The Status of Women in Islam," in *Separate World: Studies of Purdah in South Asia*, eds. Hanna Papanek and Gail Minault, Delhi: Kay Kay Printers, 1982, 300; his *Islam*, 29).

³ Rahman, *Islam*, 44.

plary conduct,"⁴ or a "model pattern of behaviour,"⁵ and he agrees with the view dominant among more recent Western scholars that "*Sunnah* denotes the actual practice which, through being long established over successive generations, gains the status of normativeness and becomes '*Sunnah*'."⁶

There is no doubt, in Rahman's view, that Muhammad, as a Prophet, laid down some important rules of daily life as the guiding principles of his *ummah*. "Rejection of this natural phenomenon," says Rahman, "is tantamount to a grave irrationality, a sin against history."⁷ However, Rahman reminds us, the phrase Prophetic *sunnah* does not denote exclusively the exemplary conduct of the Prophet, but rather a continuous and progressive interpretation of his ideal examples in terms of the new situation. Hence, the Prophetic *sunnah* contains "not only the general Prophetic Model but also regionally standardized interpretations of that Model."⁸

Ḥadīth, according to Rahman, is a religious term which is different but which cannot be divorced from *sunnah*. *Ḥadīth* literally means "tradition,"⁹ and is "nothing but a reflection in a verbal mode" of the actual practice (*sunnah*).¹⁰ Therefore, the Prophetic *ḥadīth* is nothing but a reflection in a verbal mode of the Prophetic *sunnah*. In other words, the Prophetic *ḥadīth* is the carrier of

⁴ Rahman, *Islamic Methodology*, 2.

⁵ Rahman, *Islam*, 3.

⁶ Rahman, *Islamic Methodology*, 1.

⁷ *Ibid.*, 32.

⁸ *Ibid.*, 27, 74.

⁹ Rahman, *Islam*, 14.

¹⁰ Rahman, *Islamic Methodology*, 74.

the Prophetic *sunnah*.

In addition, Rahman accepts Schacht's conclusion that according to historical examination most, if not all, of the Prophetic *ḥadīths* which are accepted as the second authoritative source of Islamic doctrine, were fabricated by later generations.¹¹ Nonetheless, it is going too far to conclude, in Rahman's view, that there is no intimate connection between the later *ḥadīths* compiled in the six canonical books and the *ḥadīths* of the Prophet. For, as stated previously, while *sunnah* is a continuous and progressive interpretation of the ideal examples (of the Prophet), *ḥadīth* is the carrier of the *sunnah*, and represents "the interpreted spirit of the Prophetic teaching."¹²

John Burton makes Rahman's thesis an object of criticism, and at the same time he supports Schacht's.¹³ Rahman, according to Burton, has tried to connect the later *ḥadīths* (and *sunnahs*) with the Prophetic *ḥadīths* (and *sunnahs*). However, Rahman cannot avoid the consequence of his own thesis--that it is difficult, if not impossible, to distinguish between the content of *ḥadīth* as the continuation of the Prophetic *ḥadīth* and the content of *ḥadīth* which was really fabricated by later generations in order to support their ideas. The situation is more complex, for it is a historical fact that political, theological, and legal viewpoints deeply influenced the appearance of certain *ḥadīths*.¹⁴ To put it differently, by no means are we able to distinguish the *ḥadīth* (*sunnah*) which

¹¹ Ibid., 33. For the examples of the fabricated tradition, see *ibid.*, 17, 19-20.

¹² Ibid., 29.

¹³ See his review of *Islam*, by Fazlur Rahman, in *Bulletin of the School of Oriental and African Studies* 31 (1968): 392-5.

¹⁴ Ibid., 393-4.

really relies upon the Prophetic teaching from the *ḥadīth* (*sunnah*) which was forged by certain people to support their vested-interests or which were the result of, to use Rahman's words, the "tremendous struggles and conflicts against heresies and extreme sectarian opinion."¹⁵ Historical examination demonstrates that many *ḥadīths* are spurious and were forged by classical Muslim scholars and, according to Rahman himself, have nothing to do with Prophetic *ḥadīth*.¹⁶ On this point, according to Burton, Rahman has basically failed not only to realize the distinction between the concept and the content of *ḥadīth* or *sunnah*, but also to grasp the theses of Schacht.¹⁷

In short, Rahman's refutation of Schacht's main thesis that the Prophetic *ḥadīth* (*sunnah*) is a second century concoction of the Muslim scholars is somehow unclear. For even though he has shown the existence of the so-called genuine *ḥadīth*, Rahman failed to give a clear answer concerning the distinction between genuine and fabricated *ḥadīth*. On the contrary, through a variety of data, Schacht successfully investigates the historical development of traditions and comes to the conclusion that the so-called Prophetic traditions are fabricated by later generations and have nothing to do with the Prophet himself. He even traces the origin of individual traditions.

In 1967 Nabia Abbott published her *Studies in Arabic Literary Papyri*, volume 2 of which is concerned with Qur'ānic commentary and traditions. The purpose of this book does not seem to be to dispute Schacht's thesis directly. Nevertheless, when she comes to the conclusion that the science of traditions is not

¹⁵ Rahman, *Islamic Methodology*, 44-5.

¹⁶ See page 40 footnote 11 above.

¹⁷ Burton, review of *Islam*, 393-4.

simply an offshoot of the developing legal interests of the community, and that traditions were transmitted, both orally and in writing, from the very beginning of the first century of Islam,¹⁸ it is clear that she seriously challenges Schacht's thesis regarding the authenticity of the Prophetic traditions. This tendency is obviously emphasized by her subsequent article "*Hadīth* Literature: Collection and Transmission of *Hadīth*."¹⁹ In this article, which depends heavily on her research in Arabic Literary Papyri, she argues that the collection of traditions was begun in the lifetime of Muhammad and was handed down to the following generations until the era of the six famous canonical collections.

The era chosen by Abbott to verify her conclusion that the traditions originated in the lifetime of Muhammad fits into four general periods. The first is the period during Muhammad's lifetime. The second is the period after Muhammad's death when there was a growth in the number of traditions widely spread by the Companions until the coming of the Umayyad period. The third is the era of the Umayyads where the key role of Ibn Shihāb Muḥammad b. Muslim al-Zuhrī (d. 124/742) is emphasized. In the fourth period the formal and codified collections of traditions appeared in the canonical books.

It is impossible here to discuss in detail Abbott's elaboration of each period which, at least according to Robson,²⁰ is well designed to support her conclusion. Nonetheless, some important points must be taken into account, and one

¹⁸ See her *Studies in Arabic Literary Papyri*, vol. 2, *Qur'ānic Commentary and Tradition* (Chicago: The University of Chicago Press, 1967), 2. See also Adams, "Religious Tradition," 66.

¹⁹ In *Arabic Literature to the End of the Umayyad Period*, eds. A.F.L. Beeston and others (Cambridge: Cambridge University Press, 1983), 289-98.

²⁰ James Robson, review of *Studies in Arabic Literary Papyri*, volume 2, by Nabia Abbott, in *Journal of Near Eastern Studies* 27 (1968): 143-4.

of the crucial issues concerns the written data given by Abbott which are clearly dated only after the first century of Islam. The absence of written documents during the first century of Islam encourages the appearance of intellectual speculation among Islamic scholars to solve the mystery surrounding the era. Therefore, the result of Abbott's investigation is nothing but one among other intellectual speculations by scholars. Because of this very reason, perhaps, Wansbrough, after evaluating her papyri documents, points out that "this is surely *za`m*, not *burhān*."²¹

Moreover, although Abbott has successfully demonstrated the whole picture of the traditions as chronologically genuine, she cannot avoid the evidence that some of the traditions are forgeries. "[T]here were few dishonest and unscrupulous men," she says, "responsible for an occasional deception or forgery or, as is alleged particularly in the case of sectarians, for wholesale fabrication...."²² Unfortunately, she does not elaborate further as to how far those people had forged traditions. The number of the forged traditions is, of course, not so important. It could be many or just a few. However, when the practice of forgery is known to have happened, and the result of the practice has been handed down to the following generations together with the so-called genuine traditions, the generations which come after the era of the codified traditions must with difficulty differentiate between the genuine traditions from the forged ones. This is, for instance, clearly shown by the collection of the *Ṣaḥīḥ al-Bukhārī*, which, though considered the most genuine among the six canonical collections, never-

²¹ J. Wansbrough, review of *Studies in Arabic Literary Papyri*, volume 2, by Nabia Abbott, in *Bulletin of the School of Oriental and African Studies* 31 (1968): 614.

²² Abbott, *Studies*, 53.

theless is known to contain a number of weak traditions.²³

More interesting still is her treatment regarding the position of the family *isnād*, which strongly contradicts Schacht's conclusion. She is of the opinion that there was a positive parallel between the development of traditions and the development of the family *isnād* relating to the chronological transmission of the traditions.²⁴ Hence, the position of the family *isnād* is seen as a confirmation of her conclusion that there is a clear continuation of the traditions.²⁵

Schacht's conclusion concerning the position of the family *isnād* is in opposition to Abbott's. While Abbott considers the family *isnād* as a genuine transmitter of the traditions, Schacht considers it "not an indication of authenticity but only a device for securing its [tradition's] appearance."²⁶ This view is actually an elaboration of his general conclusion that the *isnāds* were improved. By providing certain proofs²⁷ he concludes that "the most perfect and complete of *isnāds* are the latest."²⁸

As pointed out previously, Abbott does not directly dispute Schacht's discovery. Therefore, it is understandable that she does not directly verify the evidence of family *isnāds* given by Schacht, but rather consistently bases her argu-

²³ See, for example, Rahman, *Islamic Methodology*, 72; G.H.A. Juynboll, *The Authenticity of the Tradition Literature: Discussion in Modern Egypt* (Leiden: E.J. Brill, 1969), 1.

²⁴ Abbott, *Studies*, 37.

²⁵ *Ibid.*, 39

²⁶ Schacht, *Origins*, 170. See also his "Islamic Traditions," 147.

²⁷ Schacht, *Origins*, 170-1.

²⁸ *Ibid.*, 165.

ment on the critical analysis of her own data. Further investigation is, of course, needed in order to clarify this issue.

Another scholar who in recent years has thrown light on the problem of the authenticity of Arabic literature, including traditions, is Fuat Sezgin. In the same year that Abbott published her *Studies in Arabic Literary Papyri*, he produced the first volume of his *Geschichte des arabischen Schrifttums*,²⁹ and it has been seen as one of the most significant contributions in the field. In a lengthy analysis of the tradition literature, Sezgin comes to the same conclusion as Abbott.³⁰ By examining a large number of Arabic manuscripts, and by analysing the formulas used by the transmitters he asserts that the common practice among Muslim scholars of writing down traditions started earlier than Goldziher has suggested,³¹ and finally comes to the conclusion that "the process of recording *ḥadīth* began during the lifetime of Muhammad and continued in an uninterrupted fashion until the emergence of the great *ḥadīth* collections of the third/ninth century."³²

The word *kitāb* has been seen as a key in Sezgin's analysis, proving that the

²⁹ Leiden: E.J. Brill, 1967. Sezgin's work has been seen as "expansion, correction, and updating of Brockelmann's basic study of the history of Arabic literature," and covers "an extensive manuscript concerning Qur'anic sciences, tradition, history, law, dogma, and mysticism with special attention to translations from the Sanskrit, Pahlavi, Syriac, and Greek works" (see Adams, "Religious Tradition," 67, and Nabia Abbott, review of *Geschichte des arabischen Schrifttums*, by Fuat Sezgin, in *Journal of Near Eastern Studies* 29, 1970: 57).

³⁰ Because of her enthusiasm for supporting Sezgin's work (in order to confirm indirectly her own thesis) Abbott does not address even the slightest criticism to Sezgin's theories (see her review of Sezgin's work, 57).

³¹ Juynboll, *Authenticity*, 3.

³² Powers, *Studies in Qur'ān*, 5.

transmission of written sources, including the traditions, had started from an early time in Islamic history. The frequent statements of the word *kitāb* used in Arabic literature, according to him, "must not be interpreted to signify an aversion to writing and an expression of prejudice in favor of oral transmission,"³³ but rather is to be understood "as referring to an instructional procedure (*kitāb*, *kitābah*, *mukātabah*) relying on *written* materials provided by the teacher."³⁴ He supports his thesis by referring to the report concerning the statement made by al-Zuhrī relating to his writing down "knowledge" (*ilm*) in response to requests by the Umayyads. Al-Zuhrī said: *kunnā nakrahu kitāb al-ilmī ḥattā akrahanā `alaihi hā'ulā'i al-'umarā' fara'ainā anlā namna'ahū aḥadan min al-muslimīn* ("We used to disapprove of writing the knowledge down, until these princes forced us to; after that we no longer saw any reason to forbid the Muslims to do it"). Unlike Goldziher who interpreted *kitāb al-ilm* as a process of fabrication, Sezgin interprets the term *kitāb* on the same lines as *kitābah* and *mukātabah*, and comes to the viewpoint which is supported by Nawawī and Abū Nu`aim that the Umayyads forced al-Zuhrī (and other traditionists) "not simply to write the traditions down but to practice the transmission procedure of *mukātaba*."³⁵

Sezgin's work, however, has been subjected to criticism. His data, as is the case with other works in the field, are seriously questioned on the basis of their authenticity, for they were documents only from after the first century of *hijrah*, and, according to Juynboll, the evidences themselves postdate the era of, as

³³ Franz Rosenthal, review of *Geschichte des Arabischen Schrifttums*, by Fuat Sezgin, in *Journal of the American Oriental Society* 89 (1969): 294.

³⁴ Ibid.

³⁵ Juynboll, *Authenticity*, 113.

everybody is bound to agree, wider-scale forgery of tradition, either in terms of its *matn* or its *isnād*.³⁶

Another correction addressed to Sezgin's work concerns the author of the *Kitāb al-Ṣalāt `alā al-Nabī*. This work, according to Rosenthal, is not by, as claimed by Sezgin, Abū Bakr Aḥmad b. `Amr al-Bazzār, but rather by Abū Bakr Aḥmad b. `Amr b. Abī `Aṣim an-Nabil.³⁷

Perhaps we will agree with Juynboll³⁸ that until the present time M. Mustafa al-Azami is the scholar who has provided the most articulate critique of Schacht's thesis regarding the authenticity of traditions. Azami formulates his thesis in his *Studies in Early Ḥadīth Literature*,³⁹ particularly in part one, chapters six and seven, and elaborates his more serious critique of Schacht's thesis in his subsequent book *On Schacht's Origins of Muhammadan Jurisprudence*.⁴⁰

Azami successfully demonstrates that the process of collecting traditions had begun during the time of Muhammad. He calculates, for instance, 47 cases and examples discussed by Schacht and examines 24 of them⁴¹ which lead him

³⁶ G.H.A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Ḥadīth* (Cambridge: Cambridge University Press, 1983), 4.

³⁷ Rosenthal, review of *Geschichte*, 294.

³⁸ Juynboll, *Muslim Tradition*, 3, 207.

³⁹ His doctoral dissertation at Cambridge University in 1966, and published in Beirut in 1968 by al-Maktab al-Islāmī which is now also available in an Arabic translation under the title *Dirāsāt fī al-Ḥadīth al-Nabawī wa-Tārīkh Tadwīnih*, published in Beirut in 1973, and in Riyāḍ in 1976 and 1979.

⁴⁰ Riyadh: King Saud University Press, 1985.

⁴¹ There is no clear explanation for why he examines just 24 from the 47 cases

to the following conclusion:

Careful scrutiny of his [Schacht's] examples and repeated reference to the original source material, however, reveals inconsistencies both within the theory itself and in the use of source material, unwarranted assumptions and unscientific method of research, mistakes of fact, ignorance of the political and geographical realities of the time, and misinterpretation of the meaning of the texts quoted, and misunderstanding of the method of quotation of early scholars.⁴²

Schacht's conclusions regarding the authenticity of traditions, as we know, go hand in hand with his other conclusion regarding the origin of Islamic jurisprudence, as shown clearly in the title of his first book. Therefore it is understandable that Schacht concentrates his critical analysis more on legal traditions instead of traditions in general. It is on this point that Azami challenges Schacht's approach. In Azami's view, it is quite wrong to study traditions as a subject by limiting them to the legal tradition literature alone, and he emphasizes that "any conclusion about the traditions, their transmission, or the *isnād* system, etc., based on the study of legal literature would be faulty and unreliable."⁴³ However, it is very unfortunate that Azami never touches on the reason given by Schacht as to why he concentrates his analysis more on legal traditions. Schacht argues:

Law is a particularly good subject on which to develop and test a method which claims to provide objective criteria for a critical approach to Islamic traditions, and that for two reasons. Firstly, our literary sources carry us back in law further than, say, in history, and for the crucial second century they are much more abundant on law than on any other subject. Secondly, our judgment on the formal and abstract problems of law and legal science is less likely to be distorted by pre-conceived ideas (those expressed in our sources as well as our own), than if we had to

listed in his book.

⁴² Azami, *Schacht's Origins*, 116. See also his paraphrase of this conclusion in page 3.

⁴³ Azami, *Studies*, 222.

judge directly on issues of political and religious history of Islam.⁴⁴

Schacht's method is certainly supported by the fact that the contents of the *Muwatta'* of Mālik and the six collections of traditions, *al-kutub al-sittah*, which have traditionally been seen as the authoritative works in the field, are obviously arranged in accordance with the arrangement of the subject-matter of law, *al-abwāb al-fiqhiyyah*.

The other point raised by Azami is Schacht's suspicion about the *isnād* of Mālik--Nāfi--Ibn `Umar which is based on two grounds: the age of Mālik and the position of Nāfi as the client of Ibn `Umar. Schacht writes: "But as Nāfi died in A.H. 117 or thereabouts, and Mālik in A.H. 179, their association can have taken place, even at the most generous estimate, only when Mālik was little more than a boy."⁴⁵ Azami lays the blame on Schacht's omission of the birth date of Mālik which, according to him, "can lead only to erroneous conclusions."⁴⁶ Then he writes:

Had he [Schacht] consulted any bibliographical work he would have found that most of the scholars, even those who were born a little earlier than Mālik, state that he was born in 93 A.H.; a few put it in the early months of 94 A.H., a few in 90 A.H. and a few in 97. But there is no one who maintains any date later than this. So, Mālik was at least twenty years old, if not twenty-four or twenty-seven, when Nāfi died.⁴⁷

To support his idea that the *isnād* of Mālik--Nāfi--Ibn `Umar is unquestionable, Azami challenges Schacht's viewpoint concerning the position of Nāfi as the client of Ibn `Umar in relation to the transmission of traditions.

⁴⁴ Schacht, "Islamic Traditions," 144.

⁴⁵ Schacht, *Origins*, 176-7.

⁴⁶ Azami, *Studies*, 245.

⁴⁷ Ibid.

Unfortunately, without analysing Schacht's argument, Azami provides only a general conclusion, saying:

if a man is being accepted amongst his contemporaries and among the later authorities as most trustworthy, then why should he be dishonest? If a statement of a father about his son or vice versa, or a wife about her husband or a friend about a friend or a colleague is always unacceptable, then on what sources could a biography possibly be written?⁴⁸

It is certainly beyond question that Schacht's treatment of Nāfi's position obviously corroborates his general idea of the family *isnād*, and the case of Nāfi lends support to his view that legal traditions originated in the first half of the second century A.H.⁴⁹

To my knowledge Azami's work has not received much attention from later scholars such as David F. Forte,⁵⁰ L.T. Librande,⁵¹ Marilyn Robinson Waldman,⁵² Rafael Talmon,⁵³ Charles J. Adams,⁵⁴ and Zafār Ishāq Anṣārī,⁵⁵ to mention just a few. Schacht never addressed Azami's work. More interesting

⁴⁸ Ibid. In the same way he repeated this conclusion in a paraphrase form when he discusses the family *isnād* (see his *Schacht's Origins*, 196-7).

⁴⁹ See his *Origins*, 170-1, 176-9. Schacht chooses the *isnād* group of Mālik--Nāfi--Ibn `Umar because of three reasons: the available sources are most complete on the Medinese, the Nāfi traditions are the most important single group of Medinese traditions, and the *isnād* Mālik--Nāfi--Ibn `Umar is one of the best, if not the very best, according to the Muslim scholars.

⁵⁰ See his article "Islamic Law."

⁵¹ See his article "*Ḥadīth*" in *The Encyclopedia of Religion*, ed. Mircea Eliade.

⁵² See her article "*Sunnah*," in *The Encyclopedia of Religion*, ed. Mircea Eliade.

⁵³ See his "Schacht's Theory in the Light of Recent Discoveries Concerning and the Origins of Arabic Grammar," *Studia Islamica* 61 (1987): 31-50.

⁵⁴ See his "Religious Tradition."

⁵⁵ When he cites some works which contradict Goldziher's and Schacht's viewpoints he refers to the work of Abbott and Sezgin without mentioning the

still is the absence of reviews of Azami's work by Western scholars, when in fact he is a recognized expert on the science of traditions and has received an award for his career from King Abdul Aziz University, Saudi Arabia. More than this, his *Studies* has been considered as, at least by Arberry, "one of the most exciting and original investigations in this field of modern times."⁵⁶

Zafar Ishāq Anṣārī can also be included among those scholars who have seriously challenged Schacht's thesis. His challenge is not exclusively addressed to Schacht's sceptical attitude towards the Prophetic traditions, but rather to Western scholarship in general. In his view, Schacht's thesis is "the most impressive and the best argued presentation" in Western scholarship.⁵⁷ His critique is primarily addressed to Schacht's argument *e silentio*,⁵⁸ and he has aptly remarked: "there were several considerations which show that mechanical application of the *e silentio* argument...is unjustified,"⁵⁹ then he emphasizes this conclusive remark in his later work, saying: "Schacht's 'methodical rule' and his line of argumentation are highly sweeping."⁶⁰

work of Azami at all (see his "The Authenticity of Traditions: A Critique of Joseph Schacht's Argument *e silentio*," *Hamdard Islamicus* 7, 1984: 59 footnote 2).

⁵⁶ See Arberry's "Foreword" in Azami's *Studies*. This is also cited by Muhammad Hamidullah in his review of Azami's work in *Revue Des Etudes Islamiques* 37 (1969): 373.

⁵⁷ Anṣārī, "Early Development," 235.

⁵⁸ He elaborates his critique in his dissertation, 52-66 and 234-43. The last part (234-43), with some changes of words and/or sentences, appeared in his article "Authenticity." This view is adopted later by Azami (see his *Studies*, 254-5, and his *Schacht's Origins*, 118-22).

⁵⁹ Anṣārī, "Early Development," 64.

⁶⁰ Anṣārī, "Authenticity," 53.

The argument *e silentio*, as we know, is the principal tool used by Schacht to examine Prophetic traditions and which, on the basis of sufficient data, leads him to the conclusion that "we shall not meet any legal tradition from the Prophet which can be considered authentic."⁶¹

Having analysed Schacht's argument and its data, Anṣārī charges Schacht with not being consistent in his own argument. For, according to Anṣārī, Schacht also uses later sources (e.g. fifth century sources) to support his viewpoint regarding certain doctrines which occurred in the first and second centuries. Anṣārī proves the inconsistency of Schacht's own argument, by showing that Schacht, for instance, "cites an argument of Shaibānī in favour of a doctrine of his school...on the basis of a late fifth century book viz., Sarakhsi, *Mab-sūt*."⁶²

Aside from the fact that Anṣārī has thrown light on Schacht's inconsistencies, he is also able to demonstrate the absurdity of Schacht's thesis by turning the method upside down, that is, by examining the traditions found in early works that are not found in the later works. "This would mean," Anṣārī remarks, "working on the reverse of Schacht's assumption."⁶³ In order to prove his argument, Anṣārī conducted a test on four books: the *Muwatta*'s of Mālik and of Shaibānī, and the *Athārs* of Abū Yūsuf and of Shaibānī, by examining the traditions which discuss the same issues. The result is quite impressive. There is a large number of traditions found in the *Muwatta*' of Mālik that are

⁶¹ Schacht, *Origins*, 149. For Schacht's use of the argument, see, for example, his *Origins*, 140-1.

⁶² See his "Early Development," 518 footnote 214.

⁶³ Anṣārī, "Authenticity," 54.

not found in the *Muwatta'* of Shaibānī,⁶⁴ and a number found in the *Athār* of Abū Yūsuf that are not found in the *Athār* of Shaibānī.⁶⁵ Anṣārī emphasizes the fact that the *Muwatta'* of Shaibānī appeared later than the *Muwatta'* of Mālik, and the *Athār* of Shaibānī appeared later than the *Athār* of Abū Yūsuf. Anṣārī's result, as a consequence, seriously challenges Schacht's *e silentio* argument which states: "The best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed."⁶⁶

Certain questions may be raised here as to why the later scholars do not mention the traditions which are found in earlier works in their discussions of the same issue. A variety of answers are highly possible. Anṣārī may be correct in that there is a great number of instances "where a jurist recorded the doctrine of his school on a legal question but did not care to cite the tradition which was relevant to, and/or was supportive of his doctrine, even though it can be incontrovertibly shown that he knew that tradition."⁶⁷ In fact, according to him, there are many doctrines derived from the Qur'ān that were recorded without mentioning the relevant verses.⁶⁸ However, it could also be possible that later jurists did not mention some traditions which were available in previous works, even though they could have supported their arguments, because of their con-

⁶⁴ For more details, see his "Early Development," 237-40, and his "Authenticity," 56-7.

⁶⁵ For more details, see his "Early Development," 240-1, and his "Authenticity," 57.

⁶⁶ Schacht, *Origins*, 140.

⁶⁷ See his "Early Development," 237; his "Authenticity," 54.

⁶⁸ See his "Early Development," 236; his "Authenticity," 54.

sideration that the traditions were not authentic.

Anṣārī has also called Schacht's view that there is not a single Prophetic tradition considered genuine "grossly exaggerated," while it is clear that, according to him, quite a number of Prophetic traditions are forged and fabricated by later generations,⁶⁹ nevertheless, this fact, he strongly argues, "does not exclude the possibility that quite a number of Prophetic traditions do genuinely go back to the Prophet."⁷⁰ A clear criterion to distinguish the genuine tradition from the forged one is, in his viewpoint, badly needed. Nonetheless, without clear explanation, he refers to the science of *dirāyah* which, according to him, has long been well-known among Muslim scholars.⁷¹

In 1972 Anṣārī published an article⁷² which, though it does not directly dispute Schacht's thesis, develops an argument that challenges Schacht's conclusions. In this article he is concerned with the semantic analysis of some of the important terms used in *fiqh* during the early period of Islam, terms such as *ḥadīth*, *sunnah*, etc.⁷³ The most important result of his study and one that at

⁶⁹ See his "Early Development," 58, 61, 65-6.

⁷⁰ See his "Early Development," 66.

⁷¹ Ibid., 418 footnote 94.

⁷² "Islamic Juristic Terminology before Sāfi'ī: A Semantic Analysis with Special Reference to Kūfa," *Arabica* 19 (October 1972): 255-300. This article is, actually, the first part of his dissertation, 120-177.

⁷³ Anṣārī claims that this study is very important to avoid the ambiguous understanding of the early history of Islam, e.g. Islamic jurisprudence. This ambiguity is, according to him, sometimes shown by the use of certain a term "in a multiplicity of meanings by one and the same author and often in the same work." Anṣārī examines the historical development of meaning of both *ḥadīth* and *sunnah* through the following stages: 1. *ḥadīth*: the use of the term in early Islamic literature (265), and of the works of the second century scholars particularly Kūfian school such as Abū Yūsuf and Shaibānī (256-8). 2. *sunnah*: the literal meaning (259-61), the meaning used in the

the same time contradicts Schacht's conclusion is his notion that the phrases *ḥadīth* of the Prophet and *sunnah* of the Prophet have positively been used since early times, in fact from a period close to the lifetime of the Prophet.⁷⁴ Moreover, there is an indication, according to him, that since quite early times, at least among the *muḥaddithūn*, the terms *ḥadīth* and *sunnah* were used interchangeably.⁷⁵

Anṣārī's analytical study of the development of the term *sunnah* through a variety of sources, particularly the works of Abū Yūsuf and of Shaibānī, is undoubtedly important for any scholar who studies the historical development of traditions. Unfortunately, even though he has successfully provided the positive proof that the term *sunnah* does not exclusively refer to the Prophet, but also to the Companions, *fuqahā'*, and sometimes also to the virtuous people (as a good example), he has failed in the end to draw a line between the *sunnah* of the Prophet and the other *sunnahs*. It is not an easy task to do so, we believe. Nevertheless, it is a cause for great regret, for the most controversial issue among scholars relating to the authenticity of traditions is, among others, the criteria for verifying the Muslim claim that the Prophetic traditions are undoubtedly rooted in the Prophet himself.

Qur'ān (261-3), the meaning addressed to certain people: `Umar, al-Ḥasan al-Basrī, and Abd. b. `Ibād (63-4), in the second century works of Ibn al-Muqaffa', Awza'i, Mālik, Abū Yūsuf, and Shaibānī (265-71).

⁷⁴ See his "Islamic Juristic," 256-82.

⁷⁵ Ibid., 258, 273. *athār*, *riwāyah*, and *khābar* were other terms used more or less interchangeably with *ḥadīth* (see ibid., 256).

2. The Formation of Islamic Law.

One response to Schacht's thesis about the formation of Islamic law comes, for example, from the British legal historian Noel James Coulson, a response which, according to Forte, "represents the most developed challenges to Schacht."⁷⁶ Coulson, while acknowledging the validity of the broad outlines of Schacht's thesis,⁷⁷ finds it difficult to understand the discontinuity that Schacht created between the Qur'ān and the formation of Islamic law. Contrary to Schacht, Coulson is of the opinion that Qur'ānic legislation, especially the detailed rules concerning family law, "would have given rise to an immediate and continuous development of the law."⁷⁸ Muhammad, Coulson reasons, must have dealt with a variety of legal problems, and his position as the arbitrator (*hakam*), a continuation of pre-Islamic custom, is not indoubt.⁷⁹ It would, therefore, be safe to say, in Coulson's view, that Muhammad himself "marked the beginnings of the growth of a legal structure out of the ethical principles contained in the Qur'ān."⁸⁰ To this it must at once be added, the traditions "may well represent at least an approximation to a decision of the Prophet

⁷⁶ Forte, "Islamic Law," 18. The serious polemic between Schacht and Coulson regarding the formation of Islamic law began when Coulson published his *A History of Islamic Law* in 1964 in which he challenges Schacht's thesis in *The Origins of Muhammadan Jurisprudence*. To answer the challenge, and as review of Coulson's book, Schacht wrote an article titled "Modernism and Traditionalism in a History of Islamic law," *Middle Eastern Studies* 1 (1965). Two years later, in 1967, Coulson confronted Schacht's article in his essay "Correspondence," *Middle Eastern Studies* 3 (1967). Unfortunately, two years later, in 1969, Schacht died before answering Coulson's paper.

⁷⁷ See his *History*, 4, 64.

⁷⁸ Powers, *Studies in Qur'an*, 3. See also Coulson, *History*, 64-5.

⁷⁹ Coulson, *History*, 22.

⁸⁰ *Ibid.*

which had been preserved initially by general oral tradition."⁸¹ As a consequence, he argues, "it is a reasonable principle of historical enquiry that an alleged ruling of the Prophet should be tentatively accepted as such unless some reason can be adduced as to why it should be regarded as fictitious."⁸²

Coulson claims that the different result of his study compared to Schacht's is mostly because of, among other important factors, a different approach. While Schacht, according to Coulson, is dealing with "the historical and doctrinal system of the Shari`a as such," the purpose of his book, he points out, is "the appreciation of the living phenomenon which is current Shari`a law applied by the Courts against the background of the historical development of law in Islam."⁸³

On the other hand, Schacht addresses certain critique to Coulson's viewpoint. Schacht, for example, firmly accuses Coulson of looking at "Islamic law with the eyes not of a student of Islam but of a modern lawyer,"⁸⁴ to which Coulson replies: "It is plain that Schacht does not write, or think, as a lawyer. Apparently...Islamic law is not in his view, a subject for a lawyer's approach...."⁸⁵ This notion, Coulson argues, "betrays an attitude which is not

⁸¹ Ibid., 65. Guillaume has given a good notion in line with Coulson's view. According to him, "it seems somewhat too drastic to postulate that 'every legal tradition from the prophet until the contrary is proved must be taken not as an authentic..., unless we are to understand that Dr. Schacht refers to the form rather than to the substance of the tradition" (see his review of *Origins*, 176).

⁸² Coulson, *History*, 65.

⁸³ Coulson, "Correspondence," 201.

⁸⁴ Schacht, "Modernism and Traditionalism," 390.

⁸⁵ Coulson, "Correspondence," 201.

only singularly illiberal but also manifestly out of line with the accepted trends of modern Islamic studies as a whole."⁸⁶

Schacht was also critical of Coulson's choice of sources, in particular those written by Western scholars. Coulson, according to Schacht, does not use the important works of D.S. Margoliouth and G.H. Bousquet which deal with the early history of Islamic law.⁸⁷ On the other hand, says Schacht, unsatisfactory works of R. Roberts and M.V. Merchant are used without a word of warning.⁸⁸ It is quite regrettable that Coulson does not reply to Schacht's criticism on this point.

Besides the points discussed so far, the crux of the debate between Schacht and Coulson in their respective efforts to support their different theses regarding the origin of Islamic law, mostly involves the discussion about the restriction of bequests (*waṣiyyah*, pl. *waṣāyā*) to one-third of the estate. This discussion, as we shall see later, calls for an investigation into the original date of the Prophetic tradition which discusses the one-third restriction of bequests.

As already mentioned in the preceding chapter, Schacht firmly establishes his thesis that the origin of Islamic law, supported by his thesis regarding the authenticity of traditions, started after the first century of *hijrah*. The case of one-third restriction of bequests is one of the most important pieces of evidence provided by Schacht, and he convincingly contends that the case originated in the Umayyad era. The tradition of the Prophet which discusses this aspect of

⁸⁶ Ibid.

⁸⁷ *The Early Development of Mohammedanism and Les Successions agnatiques mitigées.*

⁸⁸ *The Social Laws of the Qoran and Qur'anic Laws.*

bequests is, according to him, the result of a backward-projection.⁸⁹ In a lengthy review of Coulson's book, Schacht strengthens his thesis through analytical evidence, and he asserts "...if a restriction of legacies to one-third in the time of the Prophet was necessary, I should have expected it to be done in the Koran which refers repeatedly to legacies and...treats of the whole law of succession in detail."⁹⁰

Coulson, on the other hand, has a view different from Schacht's concerning the original date of the one-third restriction of bequests. This restriction, according to him, originated in the lifetime of Muhammad.⁹¹ The rule, says Coulson, was provided in order to regulate a problem posed by the Qur'anic provisions.⁹² He further elaborates his challenge to Schacht's thesis in his "Correspondence" in reply to Schacht's review of his book. The greater part of its content challenges Schacht's thesis about the one-third restriction, rejecting in particular Schacht's expectation that the case, if it originated in the era of Muhammad, must be mentioned in the Qur'ān. On this issue, Coulson writes:

Quite apart from the propriety of any speculation as to the proper content of what is, to the Muslim, divine revelation, Schacht's expectation in this regard is founded upon a complete misapprehension of the nature and scope of the Qur'ānic laws. The notion that all the legal rules necessary for the Prophet's community in Medina are to be found in the Qur'ān is as absurd in relation to succession as it is to any other sphere of law.⁹³

⁸⁹ For Schacht's treatment on this issue, see his *Origins*, 201-2.

⁹⁰ Schacht, "Modernism and Traditionalism," 393. See also his "Islamic Legislation," 107.

⁹¹ For this issue, see his *History*, 65-9.

⁹² Ibid., 69.

⁹³ Coulson, "Correspondence," 199.

The debate between Schacht and Coulson regarding the one-third restriction of bequests has appealed to some other scholars. David S. Powers, for example, devoted himself to a thorough discussion of bequests and linked it with the issue of the law of inheritance in Islam. In his essay, "The Islamic Law of Inheritance Reconsidered: A new Reading of Q. 4:12B,"⁹⁴ he begins to discuss the exact meaning of verse 12b of *sūrah* 4. He suggests that there is certainly one verse, at least, in the Qur'ān (4: 12b) concerning "a man's right to designate a female in-law as his sole heir."⁹⁵ This view, he claims, is contrary to the common belief among Muslim and non-Muslim scholars alike that "there is no explicit reference in the Qur'ān to the designation of an heir in a technical legal sense."⁹⁶ Surprisingly, he combines his analysis of the meaning of the Qur'ān 4: 12b with the analysis of nineteen various texts of tradition given by Speight⁹⁷ in his subsequent essay⁹⁸ which brings him to the conclusion that "there is no longer any reason to accept the dating of the one-third restriction to the Umayyad period."⁹⁹ For, he argues, our analysis concerning the will of Sa'ad b. Abi Waqqāṣ is certainly linked with the issue discussed in the Qur'ān 4: 12b as a regulation of "the law of testate succession as it was understood during the lifetime of Muhammad."¹⁰⁰

⁹⁴ *Studia Islamica* 55 (1982): 61-94.

⁹⁵ *Ibid.*, 61.

⁹⁶ *Ibid.*

⁹⁷ For Speight's view, see the following chapter, especially pages 100-3 below.

⁹⁸ David S. Powers, "The Will of Sa'ad B. Abi Waqqāṣ: A Reassessment," *Studia Islamica* 58 (1983): 33-53.

⁹⁹ *Ibid.*, 51.

¹⁰⁰ *Ibid.*, 50.

Powers addresses a more serious challenge to Schacht's thesis in his *Studies in Qur'an and Hadīth*. Contrary to Schacht, and at the same time claiming to be in line with the conclusions of Coulson, Abbott, Sezgin, and Azami, Powers is of the opinion that Islamic law began to develop during the lifetime of Muhammad.¹⁰¹ To prove his thesis, Powers traces the formation of the laws of inheritance (*farā'id*) and is led to the conclusion that the law of inheritance had its origin in Muhammad's lifetime, that it is definitely contained in the Qur'anic provisions and, that "the Qur'an introduced a complete system of inheritance...that came to replace the tribal customary law of pre-Islamic Arabia."¹⁰² Schacht's study, according to him, suffers from two weaknesses. First, Schacht does not pay enough attention to the Qur'anic legislation, particularly many rules of family law. In his *Origins*, says Powers, Schacht devoted himself only four pages discussing Qur'anic legislation.¹⁰³ This weakness is joined by, among others, Schacht's "blurring of the distinction between jurisprudence and positive law."¹⁰⁴ Schacht, according to Powers, has tried to concentrate his analysis on the origin of Islamic jurisprudence, and not on the positive law. Nonetheless, Powers says, he "was not always careful to keep this distinction in mind."¹⁰⁵ As a consequence, Schacht comes to the conclusion that Islamic law started after the first century of Islam.¹⁰⁶ Powers finally suggests that any dis-

¹⁰¹ Powers, *Studies in Qur'an*, xii, 8.

¹⁰² Ibid., 212.

¹⁰³ Ibid., 7. On page xii, Powers inconsistently says "only eight pages." The right one is four pages.

¹⁰⁴ Ibid., 6.

¹⁰⁵ Ibid., 7.

¹⁰⁶ Ibid.

cussion of positive law in Islam "ought to begin with the Qur'ānic legislation in the field of family law, inheritance, or ritual."¹⁰⁷

In a review of Schacht's *Origins*, S.V. Fitzgerald adopts a position similar to that of Powers'. Fitzgerald acknowledges the importance of Schacht's *Origins*, maintaining that Schacht "has put an immense amount of hard work into the task of building up a more trustworthy history."¹⁰⁸ Nonetheless, it is indeed strange, Fitzgerald remarks, that Schacht does not mention the distribution of inheritance (*farā'id*). When it is a fact that the law of inheritance is clearly linked to and based on the Qur'ānic verses and "perhaps more clearly than any other branch of the law." What is more, he maintains, the law of inheritance "is generally admitted to be one of the oldest branches to achieve any certainty."¹⁰⁹

Leaving aside the question of the *farā'id* Fitzgerald proceeds to an analysis of Schacht's general viewpoint. It is quite difficult, says Fitzgerald, to understand Schacht's view that law develops after the appearance of a legal theory. He argues:

The literature of Muhammadan Law...does not begin till the middle of the second century of Hijri era, when it suddenly appears in full vigour in the writings of the great founders of what afterwards became the different schools of law. The account which thereafter it gave of its own origin simply cannot be true. To mention only one obvious point, it puts the cart before the horse by suggesting that legal theory came first and law followed afterwards.¹¹⁰

He elaborates his view further in his subsequent work, "Nature and Sources of

¹⁰⁷ Ibid.

¹⁰⁸ Fitzgerald, review of *Origins*, 395.

¹⁰⁹ Ibid., 398.

¹¹⁰ Ibid., 395.

the Shari'a,"¹¹¹ saying:

The normal course of intellectual development in the humanities and the social sciences is that practice comes first and theory afterwards by a process of generalization from observed facts: logical thought comes before logic and society before the social sciences. Similarly religion...is older than its theology, and law (*Recht*) is older than jurisprudence (*Rechtswissenschaft*).¹¹²

It is very unfortunate, according to him, that the unhistorical account which holds the view that "the theory comes first and the practice was built upon it" has profoundly influenced "the whole structure of the law and is still a vital force."¹¹³ This theory, he says, has been accepted even by the great scholars such as Sachau and Schacht's great teacher, C. Snouck Hurgronje.¹¹⁴

In addition, Fitzgerald compliments Schacht on his analysis of certain practices during the era of the Umayyads and on his conclusion that Islamic law started after the first century of *hijrah*. However, he reminds us, we need to be careful in interpreting the data, particularly of the era prior to the Umayyads. Schacht's argument, Fitzgerald remarks, "does not justify the somewhat sweeping statement...that the starting point of legal doctrine was the practice of the Umayyad Caliphate of Damascus."¹¹⁵ It is important to note, he reasons, that:

The early *fuqahā'* were not in fact lawyers at all: they were... 'pious worthies' intent on casuistical study. This inevitably involved them in legal problems. They could not help turning for their law to the ancient

¹¹¹ In *Law in the Middle East*.

¹¹² S.V. Fitzgerald, "Nature and Sources of the Shari'ah," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny (Washington, D.C.: The Middle East Institute, 1955), 90.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Fitzgerald, review of *Origins*, 397.

customary law of Mecca, Medina and other Arab cities-nor could they avoid considering that ancient customary law in the light of the enormous developments which were taking place under their eyes as that law was applied to a great empire.¹¹⁶

Along with Fitzgerald's argument it would be worthwhile to note el-Awa's remark. As is well known, Shāfi'i is seen by both Schacht and Coulson as a key person in the historical development of the science of legal theory (*uṣūl al-fiqh*) in Islam. On this issue, el-Awa takes great pains to present a more proportional interpretation of the fact. In his view, Shāfi'i's importance in relation to the development of the *uṣūl al-fiqh* is undeniable. Nonetheless, to acknowledge him as the most important figure in the *uṣūl al-fiqh*, he reasons, is in fact not true and we need to consider the activities of scholars prior to Shāfi'i's time. He says:

We do not wish to understate al-Shāfi'i's achievements in jurisprudence, but his genius was in organizing and reformulating already existing material in an arrangement already sufficiently familiar to gain acceptance. He did not invent any new source of Islamic law, nor contrive for any source a greater authority than it already had. Rather, his formidable intellect and knowledge of *fiqh* enable him to gather the theoretical bases of Islamic jurisprudence into a single, coherent form such that later scholars attributed to him the foundation of the science of jurisprudence (*uṣūl al-fiqh*). To exaggerate al-Shāfi'i's role, as Coulson does (following Göldziher and Schacht), is to deny the existence of any mutual understanding or agreement among the *fuqahā'* before al-Shāfi'i on how to derive judgments from the sources. In fact, worthwhile discussions and exchange of opinions between them on this subject are amply recorded in the literature, which testifies that the *fuqahā'* were aware of these *uṣūl* and had arrived at numerous judgments on the basis of them. They differed in their interpretation and particular use of these sources, but they never doubted or denied their existence.¹¹⁷

Fitzgerald seems also to share the same view with Coulson on the substance of the Prophetic traditions as the carrier of law formulated by Muhammad. It is

¹¹⁶ Ibid.

¹¹⁷ Muhammed Selim el-Awa, "Approaches to *Sharī'a*: A Response to Coulson's *A History of Islamic Law*," *Journal of Islamic Studies* 2 (1991): 154.

an unquestionable fact, according to him, that Muhammad was a great figure for his community with an outstanding personality.¹¹⁸ Fitzgerald certainly agrees with the viewpoint that the whole story of Muhammad is not entirely genuine, even acknowledging that the story "may have been--has been--garbled, added to, distorted and refurbished out of all recognition." Nonetheless, he argues, somewhere behind the story is "the genuine historical figure."¹¹⁹ As a consequence, it is the formalism of the traditions which is certainly open to suspicion rather than their substance. To mention only one example showing that the traditions are substantially true, he cites the practice of pilgrimage of the Muslim.¹²⁰ He also stresses, elsewhere, that some of the story concerning Muhammad's life contained in the traditions may be more or less true.¹²¹ The wholesale fabrication of the Prophetic traditions has been well known not only to Western scholars but also to Muslim scholars themselves since early time.¹²² Even today, according to him, though Muslims do not formulate a new tradition, they often choose a certain tradition which can support their argument or doctrine. It is not strange indeed, he reasons, that one writer says: "the hadith is the form in which we state our conclusion."¹²³ However, long before the appearance of Schacht's *Origins*, Fitzgerald was of the opinion that the sceptical attitude of some Western scholars towards the authenticity of traditions is too extreme and that such views, according to him, "do not commend themselves to

118 Fitzgerald, review of *Origins*, 398.

119 Ibid.

120 Fitzgerald, "Nature and Sources," 95.

121 Fitzgerald, review of *Origins*, 397.

122 Fitzgerald, "Nature and Sources," 93.

123 Bousquet's citation quoted by Fitzgerald, "Nature and Sources," 94.

Moslems."¹²⁴ He even accuses European scholars of having been tendentious in dealing with Prophetic legal traditions.¹²⁵ He summarizes his view regarding the traditions, saying that any attempt on the part of historians "to sift the genuine from the false in the great mass of traditions is a hopeless task today."¹²⁶

Another of Fitzgerald's observations is important to note here. There is a trend among some scholars, according to him, not to give due respect to the existing legal system used by Muslim scholars prior to the Umayyad era. We do not deny the fact that there was no comprehensive legal system as we know it today, such as *uṣūl al-fiqh*. However, to say that the Muslim lawyers before the era of the Umayyads performed their task of resolving legal problems without a certain legal system certainly denies historical fact, and even undermines Arab civilization in general. He says:

That the civilization of Mecca before Muhammad was harsh and crude, degenerate in some respects and undeveloped in others, is probable. Nevertheless, it was a civilization: the complicated life of great city, wealthy, prosperous, and with business connections of very long standing extending into Roman Empire in one direction and in the other to Abyssinia, Arabia Felix, and directly or indirectly into India and perhaps beyond.¹²⁷ Such a civilization could not have existed without a legal system.

The pre-Islamic legal system, it is true, forms a great part of the Islamic legal system afterwards, and the institution of *ḥakam* is a very clear indication. The Qur'ān itself, Fitzgerald indicates, uses the terms *qadā'* (judgment) and *fatwā* (legal advice) which are, it is very probable, in compliance with the existing

¹²⁴ Seymour Vesey-Fitzgerald, *Muhammadan Law: An Abridgement* (Oxford: Clarendon Press, 1979), 5.

¹²⁵ Fitzgerald, review of *Origins*, 397.

¹²⁶ Fitzgerald, "Nature and Sources," 94. See also his review of *Origins*, 397.

¹²⁷ Fitzgerald, "Nature and Sources," 91.

legal system.¹²⁸

S.D. Goitein has also stated his opinion concerning the origin of Islamic law, or, to use his own words, "the origin of Muslim law, and not the origin of the science of Muslim jurisprudence." In doing so, Goitein analyzes some of the contents of Qur'ānic verses associated with the career of Muhammad in both Mecca and Medina. He agrees with the viewpoint that Qur'ān has no more than about five hundred verses which "could be considered as having legal import."¹²⁹ However, it is important to note, according to him, that "legal matters occupy a far larger part of the Qur'ān than assumed by the aforesaid estimate,"¹³⁰ and "proportionately the Koran does contain legal material not less than the Pentateuch, the Torah, which is known...as 'The Law'."¹³¹

Goitein shares the same view of some scholars who postulate that Islamic law does not differentiate between purely legal matters and religious duties. Islamic law, he notes, "is not a fixed order imposed and exercised by the power of an organized community and need not be created by a king or a legal assembly."¹³² As a truth, law itself exists forever and can be discovered only by a wise man (a *hakam*).¹³³ In accordance with the pre-Islamic Arab tradition,

¹²⁸ Ibid.

¹²⁹ S.D. Goitein, *Studies in Islamic History and Institution* (Leiden: E.J. Brill, 1968), 127. See also Forte, "Islamic Law," 3; Coulson, *History*, 12; Fitzgerald, "Nature and Sources," 87. According to Said Ramadhan, Qur'ān consists of about 228 legal prescriptions (see his *Islamic Law: Its Scope and Equity*, second edition, n.p., 1970, 43).

¹³⁰ Goitein, *Islamic History*, 127.

¹³¹ Ibid., 128.

¹³² Ibid., 129.

¹³³ Ibid.

there is no doubt that, being an outstanding spiritual figure in his community, Muhammad "should act as a *hakam* not only for Muslims, but also...for unbelievers."¹³⁴ It is supported by the fact, says Goitein, that many legal problems had been brought before Muhammad and decided by him at that time.¹³⁵ However, it must at once be admitted that during his career in Mecca, Muhammad acted solely "as a preacher and a prophet," and it was in Medina that he became aware of the fact that the Qur'ān contained "not only religious and moral injunctions but also detailed laws."¹³⁶

Sūrah 5 (4, 42-51) is seen as a key to determining the birth-hour of Islamic law. Based on the *sūrah* date (in the fifth year of the *hijrah*, or five years before the death of Muhammad), Goitein believes that it would hardly be an exaggeration to say that the date of the above *sūrah* "indicates the birth-hour of Muslim law."¹³⁷ He emphasizes, "it seems to emerge clearly...that it was Muhammad himself who envisaged law as part of divine revelation."¹³⁸ In other words, contrary to Schacht, Goitein has successfully shown us that Islamic law has been a central part of Islamic teaching long before the Umayyad era, and had its origins in Muhammad's lifetime.

We turn our discussion now to Azami, the only scholar who has written an entire book addressed to Schacht's *Origins*. Corroborating the conclusions reached in his previous book *Studies in Early Hadīth Literature*, he challenges

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid., 133.

¹³⁷ Ibid., 132.

¹³⁸ Ibid., 134.

both of Schacht's theses, the authenticity of traditions and, consequently, the formation of Islamic law. Azami's *Schacht's Origins* clearly shows us that it is impossible to study the Prophetic traditions without involving the discussion of law and vice versa. This, in part, can indirectly answer Azami's own question addressed to Schacht as to why he concentrates his study on legal literature when he discusses the Prophetic traditions.¹³⁹

Azami claims that his book is an attempt to demonstrate "the weak foundation of Schacht's theories."¹⁴⁰ He presents some examples of Schacht's weakness, one of which is his suspicion that Schacht has made "arbitrary use of source material." He writes:

Most of Schacht's arguments about the position of the *sunna* of the Prophet in the doctrine of the ancient schools of law derive from the writings of Shāfi'i; they are based either on Schacht's own deductions from those writings or the accusations of Shāfi'i against his opponents. This would hardly seem a reliable method, given that Schacht himself quotes dozens of examples of Shāfi'i's lack of objectivity. He says in so many words: 'He (Shāfi'i) often misrepresents the Iraqi doctrine,' and: 'Shāfi'i often misrepresents Medinese doctrine,' and he provides a few dozen examples. He also gives several examples of Shāfi'i's biased editing of his opponents' texts.

Clearly, we are obliged to believe in the light of Schacht's findings that Shāfi'i is an unreliable source for tracing the doctrines of the ancient schools of law, and yet Schacht is content to base his own theories on Shāfi'i's polemical writings.¹⁴¹

However, it would be interesting to note here that Azami seems to misrepresent Schacht's viewpoint concerning "Shāfi'i's Reasoning."¹⁴² According to

¹³⁹ For Azami's question, see page 48 above.

¹⁴⁰ Azami, *Schacht's Origins*, 79.

¹⁴¹ Ibid., 76-7.

¹⁴² Azami writes that his conclusion is based on Schacht's *Origins*, pages 321 to 332. Some clarifications need to be made here. Pages 321 to 329 form the last part of chapter 6 ("Shāfi'i's Reasoning"). Pages 330 to 335 form the appendices. Therefore the correct pages of Azami's reference would

Schacht, "Shāfi'i's legal theory is much more logical and formally consistent than that of his predecessors."¹⁴³ Schacht also points out that there were some important opponents to Shāfi'i's theory, whom Shāfi'i severely criticizes. His strong opposition to his opponents' attack, according to Schacht, sometimes leads Shāfi'i to be inconsistent in his own argument. Schacht writes:

Shāfi'i's eagerness to prove his new legal theory and the new legal doctrine based on it as the only legitimate interpretation of Muhammadan religious law, causes him to make unjustified assumptions, to argue arbitrarily and illogically, and to misrepresent and exaggerate the opinions of his opponents.¹⁴⁴

It is on this point, then, that Schacht presents much evidence of Shāfi'i's inconsistency and lack of objectivity. Schacht acknowledges that "Shāfi'i's systematic reasoning has its limitations."¹⁴⁵ Nonetheless, he reasons, "...apart from these natural limitations of Shāfi'i's systematic reasoning...it is rare to find him systematically inconsistent or reasoning loosely."¹⁴⁶ Schacht ends his analysis of Shāfi'i's reasoning, emphasizing:

The limitations and faults of Shāfi'i's reasoning cannot detract from the unprecedentedly high quality of his technical legal thought which stands out beyond doubt as the highest individual achievement in Muhammadan jurisprudence. In order to convey an adequate picture of the extent and character of this achievement, I shall give a list, which could easily be extended, of passages in which Shāfi'i's thought appears particularly bril-

be 321 to 329. Page 321 is the exact page from which Azami quotes Schacht's statements above. But the argument on pages 321 to 329 actually cannot be separated from that of the preceding pages in this chapter concerning Shāfi'i's reasoning (315-329). It is not at all strange, indeed, that Azami seems to misrepresent Schacht's viewpoint because he does not read the content of chapter 6 as a whole idea.

¹⁴³ Schacht, *Origins*, 315. See also his "Pre-Islamic Background," 54.

¹⁴⁴ Schacht, *Origins*, 321.

¹⁴⁵ *Ibid.*, 320.

¹⁴⁶ *Ibid.*

liant.¹⁴⁷

It is therefore justified to conclude that Azami's viewpoint is baseless and inaccurate. For he only quotes Schacht's statements (and examples) which refer to Shāfi'i's inconsistency and his lack of objectivity which, in fact, are only cited as exceptions by Schacht. Our own data from the original text of Schacht's *Origins* clearly show us that, contrary to Azami's claim, the result of Schacht's study emphasizes the brilliance of Shāfi'i's legal reasoning and his more consistent thought compared to his predecessors.

Apart from his very detailed critique, Azami generally shares the view of other scholars who criticize Schacht for having paid insufficient attention to the Qur'ānic legal provisions which was, according to Azami, a "fundamental methodological error."¹⁴⁸ This, he says, is simply because Schacht has a misconception about law and the position of the Prophet as the divine interpreter of God's law. It is largely, no doubt, for this very reason that Azami has devoted one chapter in his *Schacht's Origins*¹⁴⁹ to explaining the concept of law and the Prophet's role relating to the law based on the Qur'ānic verses. Azami seems to be shocked by Schacht's statement that Muhammad's aim "was not to create a new system of law,"¹⁵⁰ and "law as such fell outside the sphere of religion."¹⁵¹ This state of shock leads him to respond emotionally and apologetically to Schacht's thesis, and as a result he does not present a decisive rebuttal of

¹⁴⁷ Ibid., 324. See also his "Pre-Islamic Background," 54.

¹⁴⁸ Azami, *Schacht's Origins*, 17.

¹⁴⁹ See *ibid.*, 5-18.

¹⁵⁰ Schacht, *Introduction*, 11.

¹⁵¹ *Ibid.*, 19. See also his *Origins*, v.

Schacht's views. Unfortunately, his eagerness to refute Schacht's thesis sometimes leads him to misrepresent Schacht's viewpoint.

CHAPTER 4

THE IMPACT OF SCHACHT'S THESIS ON MODERN SCHOLARSHIP

Although certain responses, sometimes severely critical, have been addressed to Schacht's thesis, many scholars, however, have thought highly of his thesis and have taken it for granted as a basis for their analysis. The present chapter is intended to examine the extent of the impact of Schacht's thesis on subsequent scholarly research.

Patricia Crone seems to have adopted Schacht's sceptical attitude towards the early history of Islam. Together with Martin Hinds she published her *God's Caliph: Religious Authority in the First Centuries of Islam*,¹ in which she investigates the meaning of the term *khalīfah* and how it was used during the first two centuries of Islam. This investigation is important for understanding religious authority in the early Muslim *ummah*, and what is more, for our understanding of the relation between the problem of religious authority and the problem of authenticity of Prophetic traditions. This, in turn, may be able to explain the origin of some important rules in Islamic law, for, as is previously seen, the authenticity of Prophetic traditions and the origin of Islamic law seem inseparable.

According to Crone and Hinds, the historical data suggest that in the very early period of Islamic history, both the religious and the political authority were in the hands of the leader of Muslim *ummah*, the *khalīfah*. This view has its basis in Muḥammad as the first leader of the *ummah* in both Mecca and Medina where he provided leadership in both the religious and political aspects

¹ Cambridge: Cambridge University Press, 1986.

of communal life.² This is also emphasized by the practices of the subsequent leaders, notably Abū Bakr, `Umar, and Uthmān. It was the Caliph, Crone and Hinds remark, "who was charged with the definition of Islamic law, the very core of religion, and without allegiance to a Caliph no Muslim could achieve salvation."³

The fourth Caliph (Alī Ibn Abī Ṭālib) failed to be generally accepted. The Caliphate thereupon passed to men who, according to Crone and Hinds, "had converted late and unwillingly (the Umayyads)."⁴ The Umayyad Caliphs saw their position as the deputy of God (*khalifat Allāh*) and not the successor of the prophet of God (*khalifat rasūl Allāh*).⁵ Deputy of God is "a title which implies a strong claim to religious authority."⁶ This claim is very important in order to strengthen the position of the Caliphs as both religious and political leaders of the Muslim *ummaḥ* in the same line with the Prophet. In other words, it was they who had a final authority to regulate any aspects of the *ummaḥ*, even the definition and elaboration of Islamic law.⁷ Some evidence

² Ibid. See also Ira M. Lapidus, "The Separation of State and Religion in the Development of Early Islamic Society," *International Journal of Middle East Studies* 6 (1975): 363.

³ Crone and Hinds, *God's Caliph*, 1. According to Lapidus, it was the Caliph's duty "to teach the principles of Muhammadan revelation, to settle disputes, to maintain good order, and to extend Muhammad's conquests to secure the benefits they brought the community" (see his "The Separation," 364).

⁴ Crone and Hinds, *God's Caliph*, 2.

⁵ Ibid., 24. For a discussion of the meaning and the use of the term *khalifah*, see, 4-23.

⁶ Ibid., 5.

⁷ Crone and Hinds point out that in the letter concerning succession, "al-Walīd II expressed the opinion that God had raised up caliphs for the implementation of His *ḥukm*, *sunna*, *ḥudūd*, *farā'id* and *ḥuqūq*... Yazīd III stated that

even suggests, according to Crone and Hinds, that some people regarded the position of the deputy of God as higher than that of the Prophet.⁸ Nonetheless, the more common view among them is that the Prophet and Caliphs alike "are seen as God's agents, and both dutifully carry out the tasks assigned to them, the former by delivering messages and the latter by putting them into effect."⁹ For this reason, the Umayyad Caliphs declared that their authority comes directly from God.¹⁰

A growing political opposition towards the Umayyads had emerged in the form of certain groups questioning the Umayyads' authority in the area of religion. It was in this period, Crone and Hinds say, that "the erosion of the caliphal ideal at the hands of the scholars must have begun."¹¹ Nonetheless, "it was only under the Abbasids that the process was complete."¹² The term *sunnah* of the Prophet was, henceforth, to be a significant tool in the arguments used by both the Umayyads and their opponents.

Even though the collocation of "the book of God and the *sunnah* of His Prophet" (*kitāb Allāh wa-sunnat nabīyyihi*) had been used since the time of

until the death of Hishām 'the caliphs of God followed one another as guardians of His religion and judging in it according to His decree...Marwan II described the caliphate as having been instituted for the implementation of God's statutes" (ibid., 43-4).

⁸ Al-Hajjāj, for example, "is said to have written a letter to `Abd al-Malik expressing the opinion that God held His *khalīfa* on earth in higher regard than His *rasūl*... preferring His *khalīfa* over both angels and prophets" (ibid., 28).

⁹ Ibid., 27.

¹⁰ Ibid.

¹¹ Ibid., 57.

¹² Ibid.

ʿUthmān; nonetheless, it was in the period of Umayyads that the collocation was most frequently practiced. The second term of this collocation, according to Crone and Hinds, referred to everything which was considered good and acceptable, and had nothing to do with the *sunnah* of the Prophet. What is more, the collocation "is most frequently encountered in the context of revolt."¹³ It is supported by the fact that the opponents of the Umayyads always used the collocation in order to declare that the Umayyads' practices were unacceptable to the Muslim *ummah*.¹⁴ To put it differently, *kitāb Allāh wa sunnat nabiyyihi* "was just a slogan used by rebellious leaders to rally the support of the masses."¹⁵ For this reason, Crone and Hinds argue, it is understandable that the Umayyads "made use of the collocation in efforts to make rebels return to the fold, or...in attempts to persuade them that the right practice was to be found with the caliphs after all."¹⁶ Many examples of the Umayyads' use of the collocation are well recorded.¹⁷

ʿUmar II is reported as having been one of the Umayyads who frequently referred to the book of God and the *sunnah* of the Prophet.¹⁸ Whatever the case, Crone and Hinds maintain, the historical data suggest to us that the

¹³ Ibid., 59-61.

¹⁴ Some Umayyads' practices which were unacceptable to their opponents were: the Umayyad manner of distributing revenues, the stationing of Syrian troops in Iraq, the keeping of troops too long in the field, maltreatment of the Prophet's family, tyranny and the like (ibid., 64).

¹⁵ Adel Allouche, review of *God's Caliph: Religious Authority in the First Centuries of Islam*, by Patricia Crone and Martin Hinds, in *The Muslim World* 79 (1989): 72.

¹⁶ Crone and Hinds, *God's Caliph*, 62.

¹⁷ Ibid., 62-4.

¹⁸ Ibid., 73-4.

content of Prophetic *sunnah* "was largely notional in his day."¹⁹ And it should not be an exaggeration to conclude that "*sunna* in the sense of concrete rules authenticated by Hadīth scarcely surfaced before the Umayyads tell."²⁰ It is on this point that Crone and Hinds support Schacht's thesis that the term *sunnah* as strictly referring to Muhammad appeared about the beginning of the second century of *hijrah*, or in the late Umayyad period.²¹ The term *sunnah* of the Prophet, Crone and Hinds explain, at first simply referred to the good examples according to the prevailing custom, or venerable and acceptable practice, or little more than what is right, and not "a special record of Prophetic...precedent transmitted with particular care on account of its particular authority."²²

A serious struggle between the Caliph and the so-called pious-minded (*ulamā'*) over the control of religious authority, say Crone and Hinds, continued into the era of the Abbasids.²³ In the early Abbasid empire there was a strong effort to reunite both religious and political authority in the hands of the

¹⁹ Ibid., 78.

²⁰ Ibid., 80.

²¹ Ibid., 71-3, 80.

²² Ibid., 64, 66, 68, 88.

²³ Lapidus has well assessed a good example in this point, writing: "According to Ahmad ibn Hanbal, it was the duty of the '*ulamā'*' to revive and preserve the law, and the duty of all Muslims to 'Command the good and forbid the evil,' that is, to uphold the law, whether or not the Caliphate would properly do so. In general...Ahmad did not oppose the Caliph's authority over the machinery of the state. The Hanbalis remained committed to the Abbasid *dawla* as the true Caliphs of Islam. In the name of the law a Muslim could disobey the Caliphate over a special matter, but not rebel against the regime. The implication of Ahmad's views is to circumscribe the authority of the Caliphs in religious matters and...to recognize a practical distinction between secular and religious authority" (see his "The Separation," 383).

Caliphate. Like the Umayyads, the Abbasids claimed for themselves the title the deputy of God.²⁴ Nonetheless, unlike the Umayyads, "they were also kinsmen of the Prophet, to whose legacy they had a hereditary right, and thus able to pride themselves on the fact that they 'did not make the *rasūl* secondary in importance to...the *khalīfa*'."²⁵

In addition, it is an undeniable fact, Crone and Hinds point out, that in the era of the Abbasids, scholarly works concerning the concept of the Prophetic *sunnah*, especially relating to the law, appeared in considerable numbers.²⁶ This effort had threatened the authority of the Abbasids. "Given the fact that the 'Abbasids had failed to control all this, they had to toe the line."²⁷ In order to preserve their authority the Abbasids tried to link their position to that of the Prophet and claimed to have maintained the Prophetic *sunnah* which had originated with Muhammad himself. A lot of work had been done, some of it being: the suggestion of Ibn al-Muqaffa' to the Caliphs to reserve the right to act as the "ultimate arbiters," the special interest on the part of al-Mansur to transmit *ḥadīth* from the Hāshimites, and the efforts of al-Ma'mun.²⁸ The polemical character of al-Ma'mun's *miḥnah* and the rejection of his policies by al-Mutawakkil had caused "the end of caliphal claim to absolute religious authority."²⁹ Henceforth, Crone and Hinds contend, the Caliphs had to satisfy themselves

²⁴ Crone and Hinds, *God's Caliph*, 80.

²⁵ Ibid., 81-2.

²⁶ Ibid., 90.

²⁷ Ibid.

²⁸ Ibid., 91-6.

²⁹ Allouche, review of *God's Caliph*, 72.

with the political authority, and "the textbook view of the nature of the caliphate is substantially correct from this point onwards."³⁰

Crone continues to publish her scholarly work concerning the formation of Islamic law. In 1987, She published her *Roman, provincial and Islamic law: The Origins of the Islamic patronate*,³¹ an investigation into the origin of the *walā'* institution in Islamic law. To prove her thesis that such an institution did not originate in Islam, Crone definitely uses Schacht's thesis as well as her own findings in her *God's Caliph*.

In line with Schacht's thesis, Crone is of the opinion that Prophetic traditions are the real stuff of Islamic law,³² and according to historical examination, says Crone, the Qur'ān itself was only a secondary reference. It is not strange therefore, she argues, that "most legal doctrines are validated by a tradition."³³

Backward-projection and common law theories³⁴ are utilized by Crone to examine the authenticity of Prophetic traditions, an exercise which leads her to the conclusion that Prophetic traditions invoking the authority of the Prophet himself "was proliferating in the second half of the eight century--presumably in

³⁰ Crone and Hinds, *God's Caliph*, 97. See also Allouche, review of *God's Caliph*, 72.

³¹ Cambridge: Cambridge University Press, 1987. For a serious challenge addressed to Crone's thesis in this book, see Wael B. Hallaq, "The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law," *Journal of the American Oriental Society* 110 (January-March 1990): 79 - 91.

³² Crone, *Roman*, 23.

³³ Ibid.

³⁴ Ibid., 23-31.

response to escalating polemics between the schools, though this phase in the development of Islamic law is still badly understood."³⁵

Crone, though she does not mention certain scholars who have different views from Schacht's concerning the authenticity of traditions, generally acknowledges that to some degree both Schacht's view and his opponents' could be true. To this it must at once be added that, according to her, "they must of necessity adopt a very different methodology."³⁶ Then she writes:

For practical purposes it is impossible to prove a certain tradition authentic (with a very few exceptions), and it is often impossible to prove it inauthentic too. Defenders of the authenticity of Hadith hold that traditions should be presumed to be genuine unless the contrary can be proved, whereas followers of Schacht argue the opposite; and since the contrary usually cannot be proved, the result is a straightforward clash between those who treat Hadith as essentially authentic and those who treat it as evidence for later developments.³⁷

Of the two viewpoints, Crone naturally supports Schacht's thesis. In doing so, she traces the Prophetic tradition which contains the Prophet's prohibition of the sale and gifts of *walā'*, a major concern of her book. Based on Schacht's thesis, it is no surprise therefore that she finally comes to the conclusion that what the lawyers attributed to the Prophet concerning the prohibition of sale and gifts of *walā'* was "an opinion of their own; and the example is by no means an isolated one: numerous Prophetic traditions can be shown to have originated

³⁵ Ibid., 24.

³⁶ Ibid., 31. Coulson could be true when he writes: "In such cases, then, it may be that the truth lies somewhere between traditional Islamic legal theory and the rigorous historical approach of Schacht. At the same time it must, of course, be frankly recognized that the Muslim and the Western methods of *Hadīth* criticism are irreconcilable because they rest upon totally different premises. Between the dictates of religious faith on the one hand and secular historical criticism on the other there can be no middle ways of true objectivity" (see his "European Criticism," 321).

³⁷ Crone, *Roman*, 31.

as statements made by the lawyers themselves."³⁸

By adducing another example of Prophetic tradition³⁹ and by examining the *ḥadīth* recorded by al-Bukhārī and Ibn Ḥanbal, Crone suggests that Schacht's thesis that the legal Prophetic traditions are the second century concoction of the Muslim scholars "must be accepted as correct."⁴⁰

One important point should be made here. Crone tends to emphasize her view that the institution of *walā'* does not originate in Islam, and also rejects the idea that such an institution was derived from pre-Islamic Arab custom. This notion is clear from her statement that "pre-Islamic Arabia...supplied the general context for *walā'*.... But did not supply the institution itself....The crucial features of *walā'* derive from Roman and provincial law."⁴¹ More interesting still is her tendency to view Jewish law as having profoundly influenced Islamic law. She writes:

The one legal system which, despite the asseverations of the lawyers, manifestly did contribute to the formation of the Sharī'a is not Roman, but Jewish law. The Sharī'a and the Halakha are both all-embracing religious laws created by scholars who based themselves on scripture and oral tradition, employed similar methods of deduction and adopted the same casuistic approach: the structural similarity between Jewish and Islamic law is obvious to the naked eye.⁴²

Another of Crone's works should be treated here in relation to the two pre-

³⁸ Ibid., 32.

³⁹ Prophetic tradition contains the so-called 'Constitution of Medina' (see *ibid.*, 32-3).

⁴⁰ Ibid., 34.

⁴¹ Ibid., 41.

⁴² Ibid., 2-3.

vious works. In her essay, "Jāhili and Jewish Law: The *Qasāma*."⁴³ Crone traces the origin of the institution of *qasāma*⁴⁴ in Islamic law. As we shall see, it is clear that this essay is another application of her theory which is based on Schacht's. It is no surprise therefore that her attitude towards Prophetic traditions and her belief that the Umayyads provided the starting point of Islamic law are consistent with those adopted in her two previous works already discussed above, and we can easily find evidence of this in this essay.⁴⁵

Crone uses the concept of *qasāma* according to some schools in Islamic law, especially the Hanafis and the Medinese, as a basis to trace its origin. This concept, then, is confronted with those in other customs such as pre-Islamic Arabia, Umayyad practice, and Jewish tradition. After a long discussion, she finally comes to the conclusion that the principle itself is rabbinical,⁴⁶ and she elaborates, elsewhere, that Arabs maintained the *qasāma* "precisely because it was a Pentateuchal institution. What Moses began, Muḥammad continued; and in Kalbī's story the very proof of Muḥammad's prophethood lies in the fact that he dispenses Mosaic law: Muḥammad has here come, not to abolish the law, but to confirm it."⁴⁷ She also emphasizes her view, saying: "What it would represent is thus not the Jāhili institution modified by Umayyad battles against crime, but the Deuteronomic institution modified by rabbinic ideas regarding

⁴³ *Jerusalem Studies in Arabic and Islam* 4 (1984): 153-201.

⁴⁴ According to Crone, "Schacht identified it [*qasāma*] as 'a kind of compurgation,' and it is certainly some kind of collective oath, i.e. some form or other of an institution attested for other tribal societies" (ibid., 155).

⁴⁵ See her "The *Qasāma*," 187-8, 195.

⁴⁶ Ibid., 192.

⁴⁷ Ibid., 176.

oaths. This is the hypothesis which has the evidence in its favour."⁴⁸

Having analyzed the content of Crone's essay, it would be safe to assume that, unlike Schacht who has seen a considerable influence of, among others, Roman law on Islamic law, Crone is likely to emphasize the important position of Jewish law as a foundation on which Islamic law was formulated. Her eagerness to prove her thesis encourages her to trace step by step the origin of any institution in Islamic law. Unfortunately, her conclusion seems likely to establish her view that there is no originality in Islamic law. "Borrowing" is emphasized as a common feature of Islamic law. Given this fact, one may agree with Hallaq that:

There is little doubt that Crone writes--here and elsewhere--with the underlying assumption that the Muslim conquerors were culturally impoverished. Like the barbarians who invaded Roman lands (and between whom and the Muslims Crone is fond of drawing analogies), the Muslims could have possessed only a little culture, and it follows, therefore, that the civilization or empire they built must have been due to other, 'higher' sources.⁴⁹

In reality, Crone is not the only scholar who emphasizes the influence of Jewish law on Islamic law. Judith Romney Wegner shares a similar view to that of Crone's and has published an essay⁵⁰ in which, as will be seen, she clearly bases her research on Schacht's discoveries.

Wegner explicitly acknowledges that her essay is inspired by Schacht's work. After presenting the general thesis of Schacht regarding the origins of

⁴⁸ Ibid., 190.

⁴⁹ Hallaq, "Use and Abuse," 91.

⁵⁰ "Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts," *The American Journal of Legal History* 26 (1982): 25-71.

Islamic jurisprudence she contends, for example: "The discovery that Islamic jurisprudence emerged on the banks of the Euphrates and not on the sands of Arabia, home of the Prophet and birthplace of Islam, clearly invites further investigation." Her essay, she claims, is an effort to shed some light on the matter.⁵¹ She also maintains that her investigation to examine that each aspects of the roots of the *uṣūl al-fiqh* has its linguistic and conceptual counterpart in Jewish law is motivated by Schacht's statement that "no comprehensive study of pre-Islamic legal terminology has been undertaken so far."⁵² Moreover, the adoption of Schacht's argument that Shāfi'i's theory form the basis for classical Islamic jurisprudence and is a better theory compared to that of his predecessors is also clearly shown in her essay.⁵³ Shāfi'i's theory, then, provides the criteria for Wegner to compare Islamic jurisprudence with Jewish jurisprudence.

As is implied in the title of her essay, Wegner is more explicit than Crone in declaring the profound influence of Jewish law on Islamic law. The terms such as "systematic borrowing" is quite common and repeatedly expressed in this essay.⁵⁴ To prove her thesis, Wegner explores two points. Firstly, the general influence of Judaic on Islamic teaching (referring to certain Qur'ānic passages), the concept of "five pillars",⁵⁵ and the meaning of the term Islam

⁵¹ Ibid., 26.

⁵² Ibid., 30. See also Schacht, *Introduction*, 8.

⁵³ To elaborate her view, Wegner begins with Schacht's passage: "Shāfi'i's theory is a perfectly coherent system, superior by far to the theory of the ancient schools....It was the achievement of a powerful mind at the same time the logical outcome of process which had begun much earlier" (ibid., 63-4. See also Schacht, *Introduction*, 48).

⁵⁴ Wegner, "Islamic and Talmudic," 26, 65-7.

⁵⁵ The "five pillars" of Islam consists of *shahādah* (affirmation that there is no God but Allah), *ṣalāh* (prayer), *zakāh* (almsgiving), *ṣawm* (fasting), and

itself.⁵⁶ The second point concerns the relationship between Jewish and Islamic law. She writes:

Judaism and Islam share not only a religious framework but also a theocratic approach to law. Both systems rest on the concept of a divinely-revealed law whose further applications are deducible by studying the sacred scriptures with the aid of prescribed rules of exegesis. In theocratic systems, this combination of divine and human reason is the *only* path to law; such systems deny that law can be created, as in western humanistic theories, by human legislation.⁵⁷

Wegner finally suggests that Islamic jurisprudence, which is derived from Shāfi'ī's theory, is a clear "evidence of Islamic 'borrowing' of fundamental talmudic concepts."⁵⁸ Each aspect of the four roots of the *uṣūl al-fiqh*: the Qur'ān, the *sunnah* of the Prophet, *ijmā'* and *qiyās*, is treated to demonstrate her thesis which finally leads her to the conclusion:

It is here proposed that these roots correspond, both linguistically and conceptually, with four basic sources of talmudic law. *Qur'ān*, the Islamic scriptural revelation and first root of the law, corresponds with

hajj (pilgrimage). Some scholars have contended that the "five pillars," the law concerning food and drink, and the prohibition of wine-drinking are undeniable examples of the influence which Judaic law had on Islamic law (see James Kritzeck, *Sons of Abraham: Jews, Christianity and Moslems*, Baltimore: Helicon Press, 1962, 43-4; Bernard Lewis, *The Jews of Islam*, Princeton: Princeton University Press, 1987, 72-3, 85; Charles Cutler Torrey, *The Jewish Foundation of Islam*, New York: Ktav Publishing House, 1967, 133-42, 151 - 4; Abraham I Katsh, *Judaism in Islam*, third edition, New York: Sepher-Hermon Press, 1980, xii, xxiv-xxvi, 3-13, 128-30, 137-9, 143-4).

⁵⁶ Wegner, "Islamic and Talmudic," 26-7. The origin of Islamic doctrine is the subject of the most serious debate among Islamicists. Wellhausen, Andrae, and Ahrens were of the opinion that Christianity "played the decisive role in the birth of Islam" (see Torrey, *Jewish Foundation*, vii-viii). Richard Bell went even further by saying that popular influence, theology, and the transmission of Greek Philosophy were the important areas in which Christianity affected the development of Islamic teaching (see his *The Origin of Islam in Its Christian Environment*, London: Frank Cass and Company Limited, 1968, 190). Torrey, on the other hand, contends "that the doctrine that the basis of Islam was mainly Christianity is completely refuted by the evidence which the Qur'ān furnishes and by the materials gathered from pre-Mohammedan Arabia." And, according to him, "in the Koran itself there is no clear evidence that Mohammed had ever received instruction from a Christian

miqrā, the talmudic term for the Jewish scriptural revelation (i.e. Torah). *Sunna*, the Islamic oral tradition and the second root of the law, corresponds with *misnāh* (the Mishnah), the basic source-text of the Jewish oral law. The third root, *ijmā*, the consensus of the Muslim jurists, corresponds with the *ha-kōl* juristic consensus found in the second component of the Jewish oral law (the Gemara). The fourth root is *qiyās*, the Muslim juristic logic. This, based originally on analogy (though it came to have a wider scope), corresponds with the talmudic *heqqēs*, reasoning by analogy.⁵⁹

Islamic borrowing from Judaic is, according to Wegner, not only found in the field of jurisprudence but also in the that of substantive law.⁶⁰ She provides certain examples which are elaborated in her essay, "The Status of Women in Jewish and Islamic Marriage and Divorce Law."⁶¹

Wegner's attitude towards Qur'ānic provisions relating to the law in Islam provides further evidence to support our view that she is strictly in line with Schacht's and Crone's theses. Not to repeat what has already been stated, severe criticism has been addressed to Schacht for paying less attention to the Qur'ānic legislation.⁶² While Crone presents the view that the legal provisions of the Qur'ān were "both intended and understood as a supplement to, rather than a substitute for, the ancestral law of the Arabs,"⁶³ Wegner would have us

teacher" (see his *Jewish Foundation*, xxviii, 7).

⁵⁷ Wegner, "Islamic and Talmudic," 27-8.

⁵⁸ Ibid., 26.

⁵⁹ Ibid., 30-1.

⁶⁰ Ibid., 65.

⁶¹ *Harvard Women's Law Journal* 5 (1982): 1-33.

⁶² See chapter three above, particularly section "The Formation of Islamic law."

⁶³ Crone, "The *Qasāma*," 153.

believe that:

Early Islamic law was largely adapted from the inherited Arabian culture. Indigenous customary law remained in force except where the Qur'an countermanded the prevailing practice. Given the relative paucity of legal provisions in the Qur'an (which was not intended to be a comprehensive law code) this was inevitable.⁶⁴

One important remark should be made with regard to Wegner's theories (as well as Crone's). Islamic civilization, like other civilizations, came directly and indirectly into contact with its surrounding environment. Islamic law, being so important an aspect of Islamic civilization, could not have avoided contact with the laws of other civilizations. If we agree on this point, it should be easy to understand that, beside the great deal of its originality, foreign elements have likely influenced Islamic law, and that, of course, as Schacht, Cattán, and Boisard have pointed out, Islamic law has also influenced other systems.⁶⁵ What is more, it is very likely that in more developed stages of civilization it is well known that "a legal system which is actually in use, and really represents the habits and sentiments of the people, has never been the product of a single mind or even of a single age."⁶⁶

⁶⁴ Wegner, "Islamic and 'Talmudic,'" 26.

⁶⁵ Schacht provides some examples of Islamic law that influence other laws such as French, Austrian-German, Spain Georgia, Jewish and Christian (Joseph Schacht, "Islamic Religious Law," in *The Legacy of Islam*, eds. Joseph Schacht and C.E. Bosworth, second edition, Oxford: The Clarendon Press, 1974, 401-2). Henry Cattán remarks that "it...seems reasonable to suggest that the early English uses [Trusts] may have been derived from the Islamic system of *awqāf*" (see his "The Law of Waqt," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khadduri and Herbert J. Liebesny, Washington, D.C.: The Middle East Institute, 1955, 215). More than this, Marcel A Boisard has widely discussed this issue in his "On the Probable Influence of Islam on Western Public and International Law," *International Journal of Middle East Studies* 2 (1980): 429-500.

⁶⁶ Anonymous, "Western Influences on Mohammedan Law," *The Moslem World* 3 (1913): 351.

The impact of Schacht's thesis has been such that no scholar who discusses the Prophetic traditions in the context of the formation of Islamic law can resist the temptation to reassess that thesis. In 1969, Juynboll published a book⁶⁷ which discusses the attitudes towards the authenticity of Prophetic traditions among modern Egyptian scholars. Before discussing the main subject, Juynboll introduces the development of Orientalist work on the subject, and it goes without saying that he allots a great part of his discussion to Schacht's work.⁶⁸

Two of Schacht's works⁶⁹ are briefly discussed, and especially where they relate to the wholesale fabrication of Prophetic traditions. He presents Schacht's views that *isnāds* have a tendency to grow backwards and that the orthodox schools of law were important agents in the fabrication of the so-called Prophetic traditions, having put them into circulation. The position of Shafi'i as the first architect of the concept of Prophetic traditions, as well as the meaning of the term *sunnah* prior to Shāfi'i's period are also briefly pointed out.

Juynboll's admiration for Schacht's thesis is shown in his subsequent work, *Muslim Tradition*. Compared to his previous book, Juynboll here more explicitly claims that his work was influenced by Schacht's, particularly the *Origins*. To support his inclination to Schacht's thesis, he, as will be seen, criticizes both Sezgin's and Abbot's findings which are, as is well known, at variance with the conclusion reached by Schacht. He first addresses his critique to Sezgin's work:

Something which always struck me in the work of Sezgin, Azami and also

⁶⁷ *The Authenticity of the Tradition Literature*.

⁶⁸ Ibid., 1-2. Other scholars whose works are mentioned are: A. Sprenger, G. Weil, W. Muir, R.P.A. Dozy and Ignaze Goldziher.

⁶⁹ I.e., "A Revaluation of Islamic Traditions," and *The Origins of Muhammadan Jurisprudence*.

in that of Abbott-to which I shall return in a moment- is that they do not seem to realize that, even if a manuscript or a papyrus is unearthed with an allegedly ancient text, this text could very easily have been forged by an authority who lived at a time later than the supposedly oldest authority given in its *isnād*. *Isnād* fabrication occurred, as every body is bound to agree, on just as vast a scale as *matn* fabrication.⁷⁰

Juynboll's critique addressed to Abbott's conclusion is more detailed compared to that addressed to Sezgin. In general, according to Juynboll, Abbott's conclusion is perhaps too romantic.⁷¹ The weakness of Abbott's findings, Juynboll reasons, is because:

1. "Abbott seems to rely too heavily on much of the information given in *isnād* and in books about *isnād* concerning the three oldest *ṭabaqāt*."
2. "Abbott...relies too heavily on the information the sources give about `Umar's stance in the transmission of *ḥadīth* as she also has too detailed and too clear-cut ideas about Zuhri's role."
3. "Abbott's plea for the historicity of family *ṣaḥīfas* is in my view not convincing."
4. "Abbott lists many figures indicating the high numbers of traditions certain transmitters are supposed to have transmitted. But it seem to me that using these figures indiscriminately and placing a little too much trust in them may lead to serious misconception."⁷²

From our explanation so far, it can be seen that Juynboll has adopted a

⁷⁰ Juynboll, *Muslim Tradition*, 4.

⁷¹ Ibid., 6.

⁷² Ibid., 5-6.

rather sceptical attitude towards the Prophetic traditions. He clearly states elsewhere that "the time when the concept *sunna* began to be exclusively identified with *sunnat an-nabī* is to be set in a time some six or seven decades later, that is toward the end of the first century of the Hijra."⁷³ He also contends that both of Schacht's theses, that *isnāds* have a tendency to grow backwards and the common link theory, are worthy contributions in the effort to trace the origin of Prophetic traditions.⁷⁴ He even points out that Schacht's common link theory "is a brilliant one."⁷⁵

Inspired by Schacht's backward-projection theory, Juynboll attempts to scrutinize Prophetic traditions by tracing their original place, their original context, and the people who were responsible for bringing them into circulation.⁷⁶ The result is quite impressive and clearly supports Schacht's general thesis. Iraq, according to Juynboll, was the more likely place to be the centre of the forged traditions, and, to use his own words, Iraq "was deemed more *kadhib-prone* than the other regions."⁷⁷ To place Iraq as the centre of the forged tradition is, says Juynboll, easy to understand. For it was Iraq, he reasons, that "the greatest activity in thinking about, and subsequently formulating, Islam was dis-

⁷³ Ibid., 30.

⁷⁴ Ibid., 3, 207.

⁷⁵ Ibid., 207. For Schacht's treatment on the common link theory, see his *Origins*, 171-5.

⁷⁶ Juynboll, *Muslim Tradition*, 70. Michael Cook has provided an analysis to show that the *isnāds* grow backwards. Although he concerns with van Ess' methods dealing with "the problem of dating traditions," nonetheless, he definitely uses Schacht's theory to serve a clear understanding of the application of van Ess' methods (see his *Early Muslim dogma*, Cambridge: Cambridge University Press, 1981, 107-16).

⁷⁷ Juynboll, *Muslim Tradition*, 75, 132-3.

played."⁷⁸ The beginning of the standardization to establish the so-called Prophetic traditions, Juynboll says, took place not earlier than towards the end of the first century of *hijrah*.⁷⁹ The stage that follows, that of the Successors (generation after the Companion of the Prophet) was the first generation responsible for the circulation of Prophetic traditions, followed later by the successors of the Successors, and so on.⁸⁰

To support his conclusion, Juynboll investigates, in chapter three, two famous traditions which are considered *mutawātir* by Muslim. They are: the *man kadhaba* tradition,⁸¹ and the prohibition of lamenting the dead.⁸² Surprisingly, Juynboll's investigation through various sources concerning both the *matns* and *isnāds* of the two traditions has led him to the conclusion that the traditions were certainly put into circulation by later generations, and obviously did not originate in the lifetime of the Prophet. To prove this conclusion, Juynboll conducts a study of the two traditions in some important sources, such as the *Muwatta'*, as well as what he calls Iraqi and non-Iraqi sources. As we shall see, he tries to demonstrate the application of Schacht's backward-projection theory. Consider, for example, his investigation of the *man kadhaba* tradition in later Iraqi sources. The sources clearly suggest, according to him, that the *isnāds* of the tradition clearly increased. The result of his analysis can be seen

⁷⁸ Ibid., 133.

⁷⁹ Ibid., 10.

⁸⁰ Ibid., 73.

⁸¹ "He who (deliberately) tells lies about me, will have to seek for himself a place in Hell."

⁸² "The deceased will be punished by the lamenting (or in a variant...weeping) of his relatives over him."

in his own passage that follows:

In Ibn Hanbal's time the number of *isnāds* had increased considerably. We even find in this collection quite a few *isnāds* which did not find recognition in the six canonical books. The most extensive list of *isnāds* with the saying in different wordings is found in Ibn al-Jawzī's *Kitāb al-Mawdū'āt*. Ibn al-Jawzī composed this list as some sort of illustrative introduction to his collection of forged sayings. A comparison of his *isnāds* with those in the nine books on which the *Corcondance* is based yields the following result. With the exception of three, to which may be added one *isnād* in the *musnād* of ash-Shāfi'i, all *isnāds* from those collections occur in Ibn al-Jawzī's list but, in addition to these, we find here a good deal more. The conclusion seems justified that the thirty-one *isnāds* which Ibn al-Jawzī lists but are not found in the nine older collections have to be considered as fabrications from the fourth century A.H. onw. rds. An interesting fact is also that not a single Abu Hanīfa *isnād* found a place in Ibn al-Jawzī, something which is hardly amazing in view of that collector's leaning toward the Hanbalite *madhhab*, but nevertheless, deserves to be mentioned here.⁸³

Contrary to the traditional belief, Juynboll also asserts that *mutawātir* itself could not guarantee that a certain tradition originated in the lifetime of the Prophet.⁸⁴

In the last part of chapter five, Juynboll concerns himself with the application of Schacht's common link theory, which he claims to provide a more spectacular example than had ever been tried.⁸⁵ Using this theory, Juynboll investigates certain traditions, e.g. those traditions which have the noted traditionist Sufyān al-Thawrī as the common link (as we shall see below), and arrives at the conclusion that the appearance of certain *isnāds* as a common link in certain traditions has a correlation with the forged traditions circulating in Muslim society. Juynboll conducts research on the famous tradition contained in al-Khatīb's *Tārīkh Bagdād* and Ibn al-Jawzī's (Ibn Qayyim?) *Kitāb al-Mawdū'āt*. The

⁸³ Juynboll, *Muslim Tradition*, 129-30.

⁸⁴ Ibid., 98.

⁸⁵ Ibid., 207.

tradition itself refers to "Bagdad and bespeaks the misgivings of the originator about the builders and future rulers of...`Abbāsīd caliphs,"⁸⁶ and Sufyān al-Thawri, pictured clearly in Juynboll's diagram, occupies a position as a common link among the *isnāds*.⁸⁷

Surprisingly, after scrutinizing the relevant sources, Juynboll finally succeeds in demonstrating his conclusion that the tradition is clearly a fabrication which certainly appeared in the late forties or early fifties, or before Sufyān's death (161/776).⁸⁸ The date is strictly linked to Sufyān himself, for it is clear from our sources, Juynboll reasons, that the tradition originated with Sufyān himself and was strengthened by later generations.⁸⁹ Our sources even suggest that quite a number of Sufyān's own sayings, through no effort of himself, were eventually furnished with *isnāds* going back to Muhammad.⁹⁰ According to Juynboll, our conclusion that Sufyān is the originator of the tradition is also supported by "circumstantial evidence" derived from his own biography.⁹¹ It is well known, says Juynboll, that towards the end of his life, "he had offered some criticism of the `Abbāsīds and, consequently, had aroused the anger of

⁸⁶ The tradition is chosen for, according to Juynboll, various reasons: "a. the *matn* conveys clearly in what period and where it originated, b. the numerous *isnāds* have one common link, who happens to be one of the most celebrated traditionists of his day and whose biography clearly indicates a possible motive for him to have brought this saying into circulation, c. in their extensive commentaries on the *isnāds* al-Khatīb and Ibn al-Jawzī have preserved a few clues which also point to this traditionist as the probable originator" (see *ibid.*, 207-8).

⁸⁷ See *ibid.*, 209.

⁸⁸ *Ibid.*, 213.

⁸⁹ *Ibid.*, 212.

⁹⁰ *Ibid.*, 213.

⁹¹ *Ibid.*, 212.

al-Manṣūr."⁹² Other evidence also supports our view, Juynboll emphasizes, that Sufyān fled from Kūfa in 153/769, and, while in Mecca in 158/774 went into hiding because of the warning of al-Manṣūr's governor that the caliph wanted to capture and execute him.⁹³ Juynboll's conclusion that the tradition originated with Sufyān leads us to another conclusion, namely, that the tradition was fabricated in Kūfa where Sufyān spent most of his life.

As has been mentioned, Juynboll claims that his example showing the application of the common link theory is a more spectacular one. The reason is that the example discussed above is, Juynboll argues, "relatively rare because of its clarity and its seemingly, irrefutably strong evidence."⁹⁴ In most examples of Prophetic traditions, he says, it is very hard or even impossible to determine a certain people as a common link because of so many different *isnāds* which are "on the whole so varied."⁹⁵

Juynboll's *Muslim Tradition* is generally accepted as an important contribution to the field. The author, according to Talmon, has obviously succeeded to bring out the central position which Prophetic traditions and their satellite sciences have always played in the sphere of Islamic civilization.⁹⁶ More than this, when Juynboll concludes that the development of Islam goes hand in hand with the development of Prophetic traditions, and where there was virtually no Islam

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid., 213.

⁹⁵ Ibid., 215.

⁹⁶ Rafael Talmon, review of *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Hadīth*, by G.H.A. Juynboll, in *Jerusalem Studies in Arabic and Islam* 11 (1988): 248.

to speak of, there was virtually no Prophetic traditions activity either, Talmon convincingly comments: "this dictum and the ensuing conclusions are not merely an echo of the long-standing formulations of his great predecessors but the original results of Juynboll's own studies."⁹⁷

Talmon, however, was struck by Juynboll's statement: "that... 'on the basis of sound historical considerations, a saying is in all probability rightfully ascribed to the prophet or another early authority'," and his other statement: "that *awā'il*-reports of a certain category are on the whole 'a pretty consistent genre of historical data which hardly ever give reason for profound scepticism'."⁹⁸ These statements have led Talmon to present certain data which, according to him, serve as counter-arguments. One such datum concerns the questionable position of Abū al-Aswad al-Du'alī as the first grammarian. Juynboll's explanation regarding this issue is, says Talmon, clearly unsatisfactory and could be refuted by other data.⁹⁹

Juynboll's adoption of Schacht's theory concerning the wholesale fabrication of Prophetic traditions is also demonstrated in his essay "The Date of the Great *Fitna*."¹⁰⁰ Apart from the main point of the date of the great *fitnah* discussed in this essay, Juynboll successfully shows that, in line with Schacht's claim, the wholesale fabrication of Prophetic traditions has already happened. For example, when he scrutinizes a tradition containing the word *fitnah* in the *Ṣaḥīḥ* of al-Bukhārī, Juynboll concludes that the report therein is an obvious forgery, and

⁹⁷ Ibid.

⁹⁸ Ibid., 253.

⁹⁹ For his counter-arguments, see *ibid.*, 253 - 7.

¹⁰⁰ *Arabica* 20 (1973): 142-59.

the factual content of the remark is groundless.¹⁰¹ He also stresses that the report should be considered to be an item of the large group of forged traditions and reports "giving details about certain persons being (still) alive or (already) dead on certain occasions or at certain times in the past as well as in the future."¹⁰² In line with Schacht's discovery, Juynboll finally remarks that there is a clear tendency to project the origin of the traditions gradually grows backward to the time of Muhammad.¹⁰³ For this reason he tries to carefully scrutinize each tradition concerning the date of the so-called great *fitnah*. It is on this point that he blames Schacht for deeming Awza'i's statement authentic enough to support his thesis, whereas Awza'i's statement, according to Juynboll, is questionable or even unauthentic. In other words, Juynboll sees Awza'i's statement as a forgery put into circulation by a later generation.¹⁰⁴

Joseph Schacht's thesis has influenced scholarship not only in the field of Islamic law but also in other fields. Basing himself on Schacht's thesis, Rafael Talmon, for instance, published an essay¹⁰⁵ in which he investigates the origins of Arabic grammar. Talmon presents certain reasons for having adopted Schacht's thesis. He praises it a "rare distinction of being 'a widely accepted revolutionary theory in the field'," and has received wide acknowledgement.¹⁰⁶ Besides providing an inspiration for his studies in the origins of Arabic gram-

¹⁰¹ Ibid., 150.

¹⁰² Ibid.

¹⁰³ Ibid., 144.

¹⁰⁴ Ibid., 140.

¹⁰⁵ Talmon, "Arabic Grammar."

¹⁰⁶ Ibid., 31-2.

mar, the application of Schacht's theory, Talmon argues, "offers the best (if not the only) interpretation of the facts which my sources impose."¹⁰⁷ He also claims to propose fresh materials which will hopefully bring about a further support of Schacht's thesis.¹⁰⁸

In the first part of his essay, Talmon briefly describes Schacht's thesis which according to him consists of two main purposes. First, to establish a critical analysis of the early historical development of Islamic juristic thought. Second, "to explain the irreconcilable contradiction between his description, based on a critical approach, and the traditional account of the development of *fiqh*."¹⁰⁹ The backward-projection theory, according to Talmon, is one of the important elements of Schacht's theory that serve to prove his thesis.¹¹⁰

Schacht's theory is then utilized by Talmon to conduct research on the early history of Arabic grammar. More specifically, he raises the question: who was the first Arab grammarian? (*awwal man wada' al-Nahw*).¹¹¹ To answer this question, he investigates a number of relevant sources which discuss the issue, and also bases himself on his own findings in his previous works. According to the traditional belief, says Talmon, the first grammarian is the Basran, Abū al-Aswad al-Du'ālī (d. 69/689). Nonetheless, our scrutiny of the sources, according to Talmon, has led us to the conclusion that the appointment of Abū al-Aswad al-Du'ālī as the first grammarian is certainly the result of a back-projection

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid., 33-4.

¹¹⁰ Ibid., 34.

¹¹¹ Ibid., 42.

in the competition among the grammatical schools. Talmon gives a good picture of this issue:

The designation of 'Abdallah b. Abi Ishaq was the older attempt of the second century Basran school to create a historical depth, in the same way the Medinese school did, by reference to an old specialist of the first decades of the second century ('Abdallah and the Medinese Ibn Hummuz allegedly died in the same year and on approximately the same dates as Nasr and Yahyā b. Ya'mar). Then the Basrans projected the origins of their grammatical studies backwards to an older figure, Abu l-ʿAswad, i.e., two generations prior to Ibn Abi Ishaq. We can only surmise what the Basrans could, and already did, achieve in 'growing backward' with their projection. As a unique act, probably not followed by other centres, the designation of Abū l-ʿAswad as the first to establish grammar became a strong case in the Basran claim for primacy in the field.¹¹²

He strengthens his view, elsewhere, saying: the material describing the history of Arabic grammar "proves to be a largely fictitious body of reports invented by historians in the third (probably even late second) Islamic century who were guided by a variety of motives in their skillful fabrication."¹¹³ To put it differently, the process of fabrication and the tendency of backward-projection had already happened in the field of Arabic grammar.

Talmon has also produced another result which contradicts the traditional beliefs among Muslim scholars, especially concerning the existence of the Medinese grammatical school. The traditional belief, according to Talmon, always emphasizes Iraq as the centre of grammatical scholarship and neglects the existence of the Medinese school. By contrast, says Talmon, our study convincingly proves that the Medinese school did also exist in the early period of Islam side by side with the Iraqi school.¹¹⁴ Talmon seems to have taken for granted Car-

¹¹² Ibid., 45.

¹¹³ Talmon, review of *Muslim Tradition*, 253.

¹¹⁴ Talmon, "Arabic Grammar," 40-1.

ter's view concerning the characterization of the school which is clearly based on Schacht's findings.¹¹⁵

Adopting Schacht's theory regarding the division of schools of jurisprudence during the second century, Carter analyses the sources concerning the grammatical schools which leads him to the conclusion that the early grammatical schools were characterized not according to their doctrinal features but rather on the basis of their geographical divisions.¹¹⁶ Carter's findings also suggest that the grammatical schools were not only to be found in Iraq but also in Hijaz, as it was the case with the schools of law.¹¹⁷

Let us turn, then, to Talmon's conclusion. Though his research is based on Schacht's theory, Talmon confesses to some differences in the results. While according to Schacht's result the attribution of the traditions grows backward to the final leader of the Muslim *ummah*, the Prophet, the alleged first grammarians "are not credited with more than taking the first steps in their discipline."¹¹⁸ The reason is quite clear, says Talmon, that "the restrictions imposed, as was to be expected, on rationalistic attitudes to religious doctrines are not needed in a more secular field such as grammar."¹¹⁹

¹¹⁵ Talmon bases his viewpoint on both of Carter's works: "Les origines de la grammaire arabe," *REI* 40 (1972): 69-97, and "Sarf et Hilāl: contribution à l'histoire de la grammaire arabe," *Arabica* 20 (1970): 292-304.

¹¹⁶ Ralael Talmon, "An Eighth-Century Grammatical School in Medina: The Collection and Evaluation of the Available Material," *Bulletin of the School of Oriental and African Studies* 48 (1985): 225. See also his "Arabic Grammar," 41.

¹¹⁷ Ibid.

¹¹⁸ Talmon, "Arabic Grammar," 47.

¹¹⁹ Ibid.

Another point which differs from Schacht's discovery is, according to Talmon, the specification of the starting-point for each respective discipline.¹²⁰ While Schacht has succeeded in identifying the Umayyad administrative practices as the ground on which legal thought first grew, Talmon claims that his findings have not come to "a similar constructive suggestion for the historical beginnings of Arabic grammar."¹²¹ Dating this event to the first century or even pre-Islamic time is, says Talmon, still an open possibility.¹²² Nonetheless, Talmon argues that he has succeeded in bringing out data which force us to reconsider the traditional belief in Muslim society concerning the history of Arabic grammar, which, in turn, obviously support Schacht's consistently sceptical attitude towards the early history of Islam.¹²³

Last but not least we should look at R. Marston Speight's treatment of the polemical viewpoint concerning bequests, especially in relation to the will of Sa'd ibn Abi Waqqas.¹²⁴ As pointed out in chapter three, Schacht's findings regarding the origin of the one-third restriction of bequests has motivated some scholars to further examine the issue. There is no doubt that Speight makes a contribution to this discussion and, as will be seen, apparently strengthens Schacht's conclusion.

Even though he claims to provide an important contribution to the subject,

120 Ibid.

121 Ibid.

122 Ibid., 48.

123 Ibid., 40, 48.

124 See his "The Will of Sa'd b. a. Waqqas: The Growth of a Tradition," *Der Islam* 50 (1973): 249-67.

Speight himself is aware that his results "are in no wise conclusive or satisfying in themselves."¹²⁵ For, he argues, in dealing with certain issues various experts such as legal specialists, historians of religion, *isnād* critics, linguists and others "should coordinate their efforts and concentrate their insights upon a particular body of texts."¹²⁶

To begin with, Speight collects and analyses nineteen traditions which are, according to him, important to our understanding of the problem. Speight chooses to analyse the *matn* of the traditions, emphasizing that there is no effort to analyze the *isnāds*.¹²⁷ This method is adopted, he argues, not because the *isnād* is unimportant, "but simply because a form analysis must be concerned primarily with the structure of the *matn*."¹²⁸ In other words, without questioning the authenticity of the traditions in terms of their *isnāds*, Speight tries to analyse the reports in order to present certain views which could not be simply ignored by other scholars.

Analyzing the content of the traditions, Speight comes to the view that there is a definite development of the content both vertically and horizontally.¹²⁹ A comparison of the traditions shows that some additions and omissions of certain points have also occurred. For example, the statement "do not send them back

¹²⁵ Ibid., 249.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid., 249-50.

¹²⁹ While vertical is "the evidence of minor differences within a group of versions having the same general structure and content," horizontal is "new elements are combined or old ones reshaped to appear in different structures and with varying content" (see *ibid.*, 251-2)

to where they came from" in the fourth tradition is not found in the second and third traditions. And Sa`ad's illness mentioned in the seventh tradition is omitted in the eighth tradition.¹³⁰

Speight poses certain questions in his attempt to clarify the information contained in the traditions, such as: who was the sick-person visited by the Prophet?¹³¹ did Sa`ad have one daughter only?¹³² and what is the exact will of Sa`ad? (did he ask the Prophet about the limitation of his bequest to his daughter, or the limitation of his will to give alms, two-thirds of his estate to others than his own family?).¹³³

Speight's conclusions are certainly the same as Schacht's. Based on his chronological arrangement of the traditions, Speight firmly concludes that the first tradition is the oldest text, with the second, third and fourth traditions coming from the early period of Umayyad. The fifth through the rest "are later, beginning sometime during the Umayyad period."¹³⁴ His support of Schacht's thesis is clearly shown in his final conclusion:

It seems that Schacht's proposed explanation for the will question is highly plausible. That is, the rule of no more than one third was made in the fiscal interest of the empire [Umayyad]. If a person died, leaving no legal heirs, then his estate would belong to the government. So by restricting the amount of legacies, the state's portion would be greater.¹³⁵

130 Ibid., 252-3, 255 - 6.

131 Ibid., 257-8.

132 Ibid., 258-60.

133 Ibid., 259-61.

134 Ibid., 266-7.

135 Ibid., 265. Schacht's conclusion in this case is: "It is possible, that the restriction of the legacies to one third of the estate, which is of Umayyad

One final remark should be made. Even though Speight adduces Schacht's thesis concerning the origin of the one-third restriction in support of his theory, he himself could not avoid the fact that the problem of bequests itself had apparently appeared in the lifetime of the Prophet. If our assumption is true, it would not be too much of an exaggeration to conclude that the substance of some traditions could be traced back to the time of Muhammad.

origin, was connected with a fiscal interest. The estate of the person who leaves no legal heirs falls to the treasury, and a restriction of legacies would therefore tend to increase its share" (see his *Origins*, 201).

CONCLUSION

As a legal historian Joseph Schacht has made a contribution of the highest significance to our knowledge both of the historical development of early Islamic law and of the Prophetic traditions, two subjects which cannot be fundamentally divorced from one another. His approach may be summed up as being an extension of Goldziher's sceptical attitude towards the formation of Islamic law in which Prophetic traditions played a decisive role.

We have to realize however that what Schacht has given us is not a complete survey of the Islamic terrain, but, to use Maitland's phrase, "a guide to explorers in a region where signposts are too few."¹ In this respect, it would not be strange indeed that there have been many responses, sometimes severe, addressed to Schacht's thesis; nonetheless, Schacht's thesis has motivated a number of scholars to reconsider our common belief concerning the early history of Islam in which law occupied a central position. Furthermore, his *e silentio* argument and his backward-projection and common link theories have been used by later scholars to conduct further research; the backward-projection theory has even been applied not only in the area of law and Prophetic traditions but also in the field of Arabic grammar. It would appear to be safe to say that Schacht's findings are likely to be influential in the field of Islamic law for years to come.

¹ Quoted by Fitzgerald in his review of *Origins*, 395.

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