The Early Development of Islamic Jurisprudence

By Ahmed Hasan. Delhi, India: Adam Publishers, 1994. Pp. 234.

Professor Ahmed Hasan has made a great contribution to the understanding of the early history of Islamic jurisprudence up to the time of al Shafi'i (d. 204 A.H.). A few works, such as *The Origins of Muhammadan Jurisprudence* by Professor Joseph Schacht, have been published on the early development of Islamic jurisprudence, and Hasan's work is a valuable addition. Islamic jurisprudence is a dynamic, ongoing, and virtually limitless subject. The community cannot survive without it as long as new issues arise to be resolved and Islamized. This field of study helps the community to move forward, encouraging members to solve new problems that arise in their social lives. Hasan discusses how jurists debate one another over the extraction of God's law and how, ultimately, such debates have developed Islamic jurisprudence and the different legal schools. *Ijma'* (consensus) and *qiyas* (analogy) did not exist at the time of the Prophet; they developed through *ijtihād*, based on the principle sources—the Qur'an and Sunnah. The subject has a kind of progressive flow, tide, and dynamic character. Hasan divides his book into seven chapters, besides an introduction and a concluding discussion. He also includes a bibliography and an index. The author chose a period in the history of jurisprudence for which sources for synthesis are difficult to obtain. He shows the historical development of Islamic jurisprudence in the first two centuries of Hijrah based mainly on the works of Malik, Abu Yusuf, al Shaybani and al Shafi'i.

This book is designed for readers who are particularly interested in Islamic law and history. In the introduction the author describes the meaning of *fiqh* and other allied terms. He analyzes the origins of the early schools of law—such as the schools of Medina and Iraq—that developed through the work of scholars who extracted God's law from the revealed sources. Further analysis by the author suggests that after the middle of the second century A.H., scholars were generally engaged in independent thinking on law. In the same way, al Shafi'i developed his own legal theory and brought consistency into law. After him the regional character of the early schools began to disintegrate and faithfulness to one master and his principles gradually predominated.

The author discusses the sources of Islamic law beginning with the development of the main five categories of judgment of Muslims' acts, namely, the obligatory, the recommended, the neutral, the disapproved, and the prohibited. These categories are ultimately based on four sources: the Qur'an, the Sunnah, *ijma'* and *qiyas*. The author first deals with the Qur'an, briefly pointing out that it is the primary source of legislation and guidance. The author discusses the doctrine of the abrogation of individual verses in the Qur'an *(naskh)* in a separate chapter, pointing out the development of the theory of *naskh* and its significant role in Islamic jurisprudence. Although *naskh* is an established doctrine in the field of Islamic jurisprudence, the author's long analysis of *naskh* suggests that since the Qur' an is eternal there can be no reasonable ground for the thesis

that some of the Qur'anic verses are abrogated and all its laws should not remain effective in the Muslim Ummah forever. He generalizes his viewpoint that the Qur'anic injunctions were revealed in a given situation. Instead of abrogating the previous rulings by the subsequent ones, it seems proper to implement them in conditions similar to those in which they were revealed.

The author shows the relation of the second source of Islamic law, the Sunnah, to the Qur'an and examines its early concept, its distinction from *hadith* and the phases of its development by citing the works of Abu Yusuf, al Shaybani, Malik, al Awza'i and al Shafi'i. The author raises a controversial point about the concept of the Sunnah between the early schools and al Shafi'i. He states that the early schools took the established use of the Muslims and the practiced traditions as Sunnah, analyzing the reasons for their standpoint. On the other hand al Shafi'i eliminated this practice and validated solitary traditions *(khabar al wahid)* from the Prophet and tried to prove that the Hadith was the only channel for knowing the Sunnah of the Prophet. The author gives an excellent discussion about al Shafi'i's dealing with solitary traditions, other sources, and his role in the development of Islamic jurisprudence. He discusses how al Shafi'i preferred a Sunnah that is reported by solitary chain to *qiyās* or *ijma'*, which depend on personal *ijtihād, ra'y,* or *istihsān*. Al Shafi'i said that as long as there was a *khabar al wahid* available, there was no need to rely on *ijtihād* for *qiyās* or *ijma'* formulating law to address new issues. In the absence of a source from the Qur'an and Sunnah, even with *khabar al wahid* one could use *ijtihād,* producing restricted *qiyās* or *ijma'* as agreed upon by the whole community, not only by community scholars. The author devotes a whole chapter to al Shafi'i's arguments in favor of the latter's firm conclusion.

The author presents a very good discussion about the early mode of *ijtihād* in a separate chapter, showing the picture of "opinion" (*ra'y*), "analogy" (*qiyās*); and "preference" (*istihsān*). He discusses *qiyās* as one of four sources, under *ijtihād* with *ijma', ra'y,* and *istihsān*. In the early stage, *ijtihād* conveyed the meaning of fair discretionary judgment or an expert's opinion, until it came to be used in a broader sense in al Shafi'i's time, or later. The author demonstrates that *ra'y,* which is defined as "well-considered opinion and sound judgment," was the basic and natural instrument to solve the legal problems in the early schools. According to the author, *qiyās* is a developed form of *ra'y*. In the course of time, it is subject to a number of conditions and limits that arrest its arbitrariness and systematize the process of reasoning. But *qiyās* and *ra'y* are not the same. *Ra'y* has a more flexible and dynamic nature in any decision by a person. As an opinion, it may be formulated without citing a precedent, but emphasizing the actual situation, whereas *qiyās* is an extension of a precedent—the emphasis is on abstract analogy. According to this book's analysis, the Iraqi school of law used *qiyās* more than the Medinian school. The author also discusses *istihsān,* said to be an "'unreasoned preference' to an established law" or a "decision based on absolute reasoning rather than on analogical reasoning." According to the author, *istihsān* was applied more by the Iraqi school than the Medinian school. However, he does not go into a detailed discussion of *istihsān* but rather tries to clarify its meaning through examples that show how *istihsān* was applied as a method of deducing the nature of the situation and the circumstances required by the Iraqi school, in particular.

Toward the end of the book, Hasan discusses the last source of Islamic law called *ijma'* in early Islamic history, its relation with *qiyās,* and its character.

After presenting different definitions of *ijma'*, the author mentions different views of scholars. For example, according to the Zahiris and Ahmad ibn Hanbal, *ijma'* is the consensus of the Companions alone. *Ijma'* was absent at the time of the Prophet, and the author gives historical background to trace how this doctrine developed in Islamic jurisprudence. He says the concept of *ijma'* came into existence as a socio-political necessity supported by the Qur'an and Sunnah. The first practical example of *ijma'* after the death of the Prophet was the incident of Saqifah bani Sa'idah. The personal opinion of 'Umar, concerning selection of a caliph for the Muslim Ummah, was accepted by the whole Ummah. Similarly, the personal opinions of the Companions in many legal problems were accepted later as *ijma'* of the Companions. Thus, *ijma'* began as the personal judgment of individuals (or *ijtihād)* and over time culminated in universal acceptance of a certain opinion by the community. *Ijma'* emerged by itself; it was not imposed upon the Ummah.

The author deals with the justifications of different schools about the validity of *ijma'* on the basis of the Qur'an and Sunnah, which were practiced. No jurist asserts the infallibility of *ijma'*, but there are different opinions on its criteria. Is it determined through the consensus of scholars, the whole Ummah, or only the Companions? The author shows the important role of *ijma'* in the development of Islamic law and shows that *ijtihād* and *ijma'* are interlinked. The author discusses the arguments drawn by jurists who favor one position or another. He also discusses the gradual sequential process of *ijma'* development.

The author does not confine his discussion to an analysis of early Islamic jurisprudence. He also discusses the findings of Western writers, mainly Schacht. It seems that he closely studied Schacht' work regarding the development of Islamic jurisprudence such as the sources of law—the Qur'an, Sunnah, *qiyas,* and *ijma'*. Whenever the author finds that his analysis contradicts the findings of Western writers he tries to criticize their conclusions in a constructive manner. For example (pp. 45–47), he criticizes Schacht's contention that "apart from the most elementary rules, norms derived from the Koran were introduced into Muhammadan law almost invariably at a secondary stage." Similarly, the author discusses Western views of the Prophetic Sunnah (pp. 88–89), *qiyās* (pp. 135–136), and *ijma'* (p. 159). When he disagrees with Western writers on any point or issue, he tries to correct them by presenting his own findings and arguments.

The reader may find that, among his discussions, the author deals quite a bit with *shahadah* (witnessing), which is an independent subject for research. He discusses whether a witness by one person is acceptable. Regarding the female as a witness, he discusses it implicitly. *Shahadah* is implied in a previous discussion of *khabar al wahid,* i.e., by the discussion of transmission of hadith or Sunnah by the authentic chain of transmitters, whether it was by single transmitter or by several individuals (pp. 96, 106, 146, 171–172, 184–185).

In addition, although he does not indicate to which school of law he belongs, Hasan accords al Shafi'i a high degree of importance, describing him as a "pioneer of law" (p. 178). He shows the difference between the early schools of law and the Shafi'i school (p. 181). On occasion, he mentions the word "prejudice," showing that scholars of one area "prejudiced" the scholars of another area (p. 178); but he does not clarify how scholars of the different schools "prejudiced" each other. I think the use of the word "prejudice" is inappropriate since both groups were looking for God's law and there was no personal conflict of inter-

est or rivalry among them. Perhaps "disagreement" is a better term. However, the author's work is a product of a conscientious effort. He has done the job very well and has traced the early development of Islamic jurisprudence. This book is a great contribution, laying a foundation for new scholars who, perhaps, will have less access to original sources. Some of them may wish to produce new research in many related and applicable fields that have, as yet, remained untouched and unexplored.

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