THE ORIGINS OF Muhammadan Jurisprudence

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OXFORD
AT THE CLARENDON PRESS

CHAPTER 3

THE CONFLICT OF DOCTRINES AS REFLECTED IN THE GROWTH OF TRADITIONS

WE often find that traditions are formulated polemically with a view to rebutting a contrary doctrine or practice. Some of these counter-traditions, as we may call them, are obvious; others are cleverly disguised but can be detected by analysis and comparison with parallel traditions. Counter-traditions are of course later than the doctrine or practice which they are meant to rebut. In addition to the cases noted before,[1] the following simple examples will show how counter-traditions can be found and used for ascertaining the development of doctrine.

Muw. ii. 14: 'Ā'isha relates that the Prophet said the funeral prayer over Suhail b. Baiḍā' only *in* the mosque. The wording shows that this is directed against the Medinese practice of saying the funeral prayer outside the mosque (*Tr. III*, 33). The *isnād* of this tradition is incomplete (it was later completed in an unsatisfactory manner, see Zurqānī, ii. 14), and as the only person between Mālik and 'Ā'isha is Mālik's immediate authority Abul-Naḍr the client of 'Umar b. 'Ubaidallāh, it must have originated in the generation before Mālik. In view of this, the tradition through Mālik—Nāfi'—Ibn 'Umar, to the effect that the funeral prayer over 'Umar was said in the mosque (*Muw.* ii. 15), should likewise be taken not as a bona fide historical statement, but as a counter-statement against the Medinese practice, and the parallel version in *Muw. Shaib.* 165 has in fact the same polemical wording as the 'Ā'isha tradition. The reference to the funeral of 'Umar is older than the reference to the Prophet and served as a model for it.

Muw. ii. 89 and *Muw. Shaib.* 178 contain an imposing array of traditions of two types, both obviously polemical, directed against the doctrine ascribed to Abū Huraira, that he who starts a day in Ramadan in the state of major ritual impurity cannot make a valid fast. One type seeks to establish that starting the fast in this condition was not a personal privilege of the Prophet; the other claims the acquiescence of Abū Huraira in a doctrine opposite to that

[1] See above, p. 46, 48 ff., 57, 104, 129 ff., 141 f., 145; also below, pp. 225 f., 265.

ascribed to him; some versions in the classical collections (see Zurqānī, ii. 89 and *Comm. Muw. Shaib.* 178) make him change his opinion or affirm emphatically that not he but the Prophet says so. The ascetic refinement ascribed to Abū Huraira was unsuccessful and was repelled by traditions which used his own name.

Muw. ii. 103: the first tradition from Ibn 'Umar is a typical counter-tradition, alleging a change in his practice.

The Medinese regard the marriage concluded by a pilgrim as invalid, the Meccans and the Iraqians regard it as valid (*Muw. Shaib.* 208). Mālik (*Muw.* ii. 183) has heard that Ibn Musaiyib, Sālim, and Sulaimān b. Yasār, in answer to a question, said that the pilgrim must not marry nor give in marriage.[1] This doctrine was projected back to Ibn 'Umar and, with spurious circumstantial details, to 'Umar (*Muw.* and *Muw. Shaib.*, loc. cit.). The opposite doctrine was expressed in a tradition to the effect that the Prophet married Maimūna as a pilgrim (*Muw. Shaib.*). This tradition is related by Ibn 'Abbās who is the traditional authority of the Meccans.[2] This was countered, on the part of the Medinese, by a *mursal* tradition related by Sulaimān b. Yasār who was a freedman of Maimūna, to the effect that the Prophet married her in Medina, and therefore not as a pilgrim (*Muw.*),[3] and a more outspoken tradition related by Yazīd b. Aṣamm, a nephew of Maimūna, to the same effect (*Ikh.* 238). We see that even the details of this important event in the life of the Prophet are not based on authentic historical recollection, but are fictitious and intended to support legal doctrines. There is, finally, in favour of the Medinese doctrine an alleged discussion between Abān b. 'Uthmān and 'Umar b. 'Ubaidallāh with circumstantial detail (*Muw.*, *Muw. Shaib.* and *Ikh.*), where Abān invokes the ruling of the Prophet as related by his father 'Uthmān and in one version[4] calls his adversary who died, and presumably lived, in Damascus, 'a rude Iraqian'. We have here a Medinese refinement which can hardly be earlier than the second century.

Muw. iii. 106: Mālik—Dāwūd b. Ḥuṣain—Abū Sufyān the client of Ibn Abī Aḥmad—Abū Sa'īd Khudrī: the Prophet prohibited the *muzābana*, a kind of aleatory transaction. Ibid. 102: a tradition with the same *isnād*, only with Abū Huraira instead of Abū Sa'īd Khudrī: the Prophet allowed the sale of *'arāyā*, a transaction on

[1] This general reference to the old authorities shows the doctrine, but is not necessarily genuine information on any of them; see below, p. 159.

[2] See below, p. 249 f.

[3] It appears with more or less successfully completed *isnāds* in the classical collections; see Zurqānī, ii. 183.

[4] In Muslim, quoted in Zurqānī, loc. cit.

dates which falls under the definition of *muzābana*. Both traditions represent opposite doctrines and were only later harmonized artificially by Mālik and Shāfi'ī (*Ikh.* 322). One of the two had the *isnād* of the other grafted on it; this seems to have been the tradition against *muzābana*, because it occurs also as a *mursal* through Mālik—Zuhrī—Ibn Musaiyib from the Prophet (*Muw.* iii. 106).[1] This then is the oldest authority in the form of a tradition; it was countered by the tradition in favour of the sale of *'arāyā*, and finally acquired the *isnād* of the latter.

The Medinese (*Muw.* iv. 48) hold that a person who has committed murder by guile, is to be executed by the authorities on grounds of public policy, and base themselves on a tradition from 'Umar. The Iraqians (*Āthār Shaib.* 87 and *Tr. VIII*, 17) counter this conclusion from the 'Umar tradition which they recognize and follow in another respect,[2] by a different tradition according to which 'Umar intended to execute a murderer who had been pardoned by one of the next-of-kin, but desisted on hearing Ibn Mas'ūd's reasoned objection.

Muw. Shaib. 87: Ibrāhīm Nakha'ī doubts the decisive character of a tradition from the Prophet, transmitted by 'Alqama b. Wā'il from his father, as being perhaps an isolated occurrence and unknown to Ibn Mas'ūd and his Companions.[3] But two other persons of the name of 'Alqama, 'Alqama b. Qais, and 'Alqama b. Yazīd, belong to the Companions of Ibn Mas'ūd,[4] and 'Alqama b. Yazīd appears in the *isnād* of a tradition from Ibn Mas'ūd in favour of the usual Iraqian doctrine in *Mud.* i. 68. 'Alqama b. Wā'il's tradition from the Prophet is a counter-tradition against the Iraqian doctrine, and was in its turn countered by the reference to Ibrāhīm Nakha'ī; nothing of this is authentic.

Muw. Shaib. 190: Ibn 'Umar protests against untrue statements regarding the actions of the Prophet and gives the alleged correct information. The wording shows this to be a counter-tradition. It was harmonized with the opposite doctrine in a tradition with the *isnād* Mālik—Nāfi'—Ibn 'Umar—'Umar (*Muw. Shaib.*, loc. cit.).

The common ancient doctrine that prayer without recitation of the Koran is valid, is expressed in traditions from 'Alī (*Tr. II*, 3 (*k*)) and from 'Umar (*Tr. III*, 84; *Mud.* i. 65). Against this is directed the composite and polemically worded tradition from the Prophet in *Āthār A.Y.* 1, and the sweeping maxim 'no prayer [is valid] without recitation', which Shāfi'ī (*Tr. III*, 84) knows as a tradition

[1] This version acquired a full *isnād* later; see Ibn 'Abdalbarr in Zurqānī, iii. 106.
[2] See above, p. 111.
[3] Cf. above, p. 31.
[4] See below, p. 232.

from the Prophet. Ṭaḥāwī (i. 120) still takes the old doctrine seriously.

Tr. III, 56: Shāfi'ī quotes a tradition through Ibn Zubair from the Prophet; as he is at pains to establish that Ibn Zubair, who was only a child, could have heard and remembered the words of the Prophet, it is certain that Shāfi'ī did not yet know the parallel versions through 'Ā'isha and through Umm Faḍl in Muslim (see Zurqānī, iii. 87). On the other hand, *Mud.* v. 87 gives a tradition through Umm Faḍl from the Prophet to the contrary. The version in Muslim turned this into its opposite.

Tr. IX, 1, 5: these purely negative statements on the Prophet are obviously counter-traditions.

Most of the traditions in which conflicting doctrines are ascribed to the same authority, are to be explained in this way.

A favourite device in the creation of counter-traditions consists of borrowing the name of the main authority for, or transmitter of, the opposite doctrine.[1]

Muw. ii. 152 and *Ikh.* 290: the first stage is represented by an opinion ascribed to Sālim; in the second stage, Sālim appears in the *isnād* of a version of a tradition from 'Umar, who blames Mu'āwiya for his failure to conform; both traditions represent a pious reaction against the practice, current in Umaiyad times, of using perfume before entering the state of ritual consecration for the pilgrimage. But Sālim appears also as the transmitter of a tradition from the Prophet favouring the less strict practice, and he is made to add: 'The *sunna* of the Prophet has the better claim to be followed.'[2] But this reference to the *sunna* of the Prophet made no impression on the Medinese doctrine, and only Shāfi'ī felt obliged to follow it.

Tr. II, 18 (*r*): Shāfi'ī refers to the doctrine of Ibn 'Abbās; during his lifetime, there came into circulation a tradition from the Prophet transmitted by Ibn 'Abbās, so that he changed his doctrine as stated by Rabī'.

Ikh. 259, 264: Jābir, who is the main authority for the exclusion of a neighbour from the right of pre-emption, is made to relate a tradition from the Prophet which gives a neighbour this right; Shāfi'ī mentions that the specialists on traditions suspect it because of Jābir's doctrine to the contrary.

The names of the Iraqian authorities Shuraiḥ and Sha'bī were

[1] Cf. Nöldeke, in *Z.D.M.G.* lii. 31.

[2] This can be dated in the generation preceding Mālik, because 'Amr b. Dīnār is the common transmitter of this and of another tradition to the same effect in *Ikh.* 288.

borrowed by the traditionists in their polemics against reasoning in law.[1]

The circumstantial details in many traditions, which are meant to provide an authentic touch, often reveal their fictitious character and must not be taken as an indication of authenticity.

An Iraqian tradition from 'Umar in *Muw.* ii. 296 and *Tr. III*, 88, contains a Persian expression and is disconcertingly vague in its accumulation of pretended details. A Medinese tradition from the Prophet in *Muw.* iv. 13 and *Ris.* 21 is transmitted by Zuhrī; Zuhrī expresses his uncertainty on a minor point of wording, and adds the explanation of a word; whilst the pretended scrupulousness regarding a minor point is meant to show that the transmission was correct, the explanation indicates that the text was novel in the generation preceding Mālik.[2]

The circumstantial details of one tradition are often repeated in its successors; traditions are modelled on one another, whether they be counter-traditions or not.

The same story, in different settings, is ascribed to Ibn Mas'ūd (*Āthār A.Y.* 644; *Āthār Shaib.* 76) and to 'Umar (*Muw.* iii. 74); both versions represent a later development of doctrine, common to the Iraqians and the Medinese.

Another story is related with a Medinese *isnād* from 'Abdalraḥmān b. 'Auf (*Muw.* iii. 99; *Muw. Shaib.* 343), and with an Iraqian *isnād* from 'Alī (*Āthār Shaib.* 69); closely modelled on the Iraqian version and with the mention of Basra in the text, but with a Medinese *isnād*, is a third version which relates the same from 'Uthmān (*Muw.* and *Muw. Shaib.*, loc. cit.).[3]

In the course of polemical discussion, doctrines are frequently projected back to higher authorities: traditions from Successors become traditions from Companions, and traditions from Companions become traditions from the Prophet.[4] Whenever we find, as frequently happens, alleged opinions of Successors, alleged decisions of the Companions, and alleged traditions from the Prophet side by side, we must, as a rule and until

[1] See above, p. 130 f. See further Nau, in *J. A.* ccxi. 313 and n. 2.

[2] See also above, p. 153.

[3] See also above, pp. 53, n. 3, 55, n. 2; below, pp. 157 f., 164, 171, 183; and Lammens, *Fāṭima*, 136.

[4] This has already been pointed out by Goldziher in *Muh. St.* ii. 157 and *Z.D.M.G.* l. 483 f.

the contrary is proved, consider the opinions of the Successors as the starting-point, and the traditions from the Companions and from the Prophet as secondary developments, intended to provide a higher authority for the doctrine in question. When the opinion of a Successor coincides with a tradition, it would be unwarrantable to conclude, in the absence of an explicit reference or some other positive indication, that he knew and followed it.[1] In other words: we must follow the ancient schools of law in that historically legitimate procedure for which the systematic innovator Shāfi'ī blames them, and 'take our knowledge from the lowest source'.[2] We have met numerous examples of this backward projection of doctrines in the preceding and in the present chapter, and shall meet others in what follows.

A frequent device for enlisting some higher authority in favour of a doctrine is to make him confirm it after it has been formulated by someone of lower rank. Here are a few examples. Zaid b. Thābit orders Ḥajjāj b. 'Amr b. Ghāziya to give a decision, and confirms it (*Muw. Shaib.* 248). 'Alī puts a problem to Shuraiḥ and approves of his decision, using the Greek word καλόν (*Tr. II*, 10 (*o*)). The Prophet approves of Mu'ādh's proposed principles of legal reasoning (above, p. 105 f.). An independent witness confirms that the doctrine of Ibn Mas'ūd coincides with the decision of the Prophet (above, p. 29). Ibn Mas'ūd confirms as correct a decision given by others (*Muw.* iii. 35).[3]

Traditions are improved in various ways in order to obviate possible objections, as will be seen from the following examples.

Mālik in *Muw.* ii. 111, and Shāfi'ī in *Tr. III*, 129, know only a tradition which relates how 'Umar acted when he broke the fast inadvertently. Ibn Wahb in *Mud.* i. 193 gives the tradition in a modified form which avoids implicating 'Umar himself. Bukhārī (quoted in Zurqānī, ii. 111) gives a tradition, with an *isnād* through Hishām b. 'Urwa and with the same circumstantial details, to the effect that this mistake happened frequently in the time of the Prophet; but two different opinions are related from Hishām. The problem of inadvertent breaking of the fast was discussed in the generation preceding Mālik, Hishām was quoted as an authority for two differing opinions, and one of these found expression in three successive forms of traditions.

[1] I must diverge here from the assumption of Bergsträsser in *Islam*, xiv. 79

[2] See above, p. 69. See also p. 66, and Part I, Chapters 4 and 7 in general.

[3] See also above, p. 96 f., and below, pp. 225 f., 263.

The main tradition in *Tr. III*, 5, represents 'Urwa b. Zubair as being converted to a certain doctrine by a tradition from the Prophet which he came to know (this is obviously already a counter-tradition). *Muw.* i. 79 has a statement, through 'Urwa's son Hishām, on 'Urwa's doctrine which he had heard from his father Zubair, to the same effect as 'Urwa's revised opinion in the first tradition. This obviates the claim of a change in 'Urwa's doctrine. The first tradition occurs in a more elaborate form, designed to give it greater authority, in Ṭaḥāwī, i. 43.

The essential features of the common ancient doctrine on slaves captured by the enemy and recaptured by the Muslims, a doctrine for which Auzā'ī and Abū Ḥanīfa did not yet know a tradition, are expressed in an Iraqian tradition from the Prophet which appears for the first time in Abū Yūsuf in *Tr. IX*, 18. The ruling is given in general terms which do not well agree with the circumstantial story which has been added in order to provide an authentic touch. This form is improved and a further personal touch is added in the versions in Dāraquṭnī and Baihaqī respectively (see *Comm. ed. Cairo*, loc. cit.). Ḥasan b. 'Umāra, in the generation preceding Abū Yūsuf, is the lowest common link in the three *isnāds*, and he or a person using his name must be responsible for the creation of this tradition and the fictitious higher part of the *isnād*. But Ibn 'Umāra was impugned, and the tradition is therefore related alternatively, on hearsay authority, through 'Abdalmalik b. Maisara who is, however, also considered weak.

The same doctrine is expressed in two Medinese traditions with the first-class *isnād* Abū Yūsuf—'Ubaidallāh b. 'Umar—Nāfi'—Ibn 'Umar, both quoted for the first time by Abū Yūsuf in *Tr. IX*, 18, and in *Kharāj*, 123,[1] respectively. The first gives it as a general ruling of Ibn 'Umar, the second purports to describe the loss by Ibn 'Umar of a slave and a horse to the enemy, and the subsequent restitution of the one during the lifetime of the Prophet and of the other after his death, by Khālid b. Walid who had recaptured them. In its older forms, which are preserved, without an *isnād*, in *Muw.* ii. 299 and in *Siyar*, iii. 107, this anecdote lacks the indirect reference to the Prophet[2] or is even explicitly dated to the time of 'Umar.[3] None of this is genuine, and the fact that Mālik, who relates many traditions from Nāfi'—Ibn 'Umar, does not yet know it as a formal tradition from Ibn 'Umar, makes it likely that the *isnād* with Nāfi'

[1] Read *'Ubaidallāh* and *Ibn 'Umar* in the printed text of *Kharāj*.

[2] The Prophet is made directly responsible for the ruling in a later version in Bukhārī (see *Comm. ed. Cairo*, loc. cit.).

[3] Another version, in Bukhārī (see ibid., loc. cit.), dates it to the time of Abū Bakr.

in it was created by 'Ubaidallāh b. 'Umar or a person using his name.

The common doctrine on property lost to the enemy and recaptured from them, of which the problem already discussed is a special case, was put under the aegis of Ibrāhīm Nakha'ī and Mujāhid (*Kharāj*, 123). Shaibānī (*Siyar*, iii. 107) relates three divergent opinions which are ascribed to Zaid b. Thābit and Ibn Musaiyib, to Ḥasan Baṣrī and Zuhrī, and to Abū Bakr[1] respectively. Shaibānī's contemporary Ibn Wahb (*Mud.* iii. 13), however, quotes the alleged opinions of Zaid b. Thābit, Sulaimān b. Yasār, Abū Bakr, 'Ubāda b. Ṣāmit, Yaḥyā b. Sa'īd and Rabī'a in favour of the common doctrine. The contradictions show that the names of Companions, Successors, and other ancient authorities were freely adduced in support of existing doctrines, and we cannot, until the contrary is proved, regard references to Successors as any more authentic than traditions from Companions and from the Prophet.[2]

Traditions are also adapted to the development of doctrine, as the following examples will show.

Tr. II, 18 (*q*): there are two versions of a tradition from 'Alī; the second, by an addition, has been made to conform with the later general doctrine.

A tradition which appears in its full form in *Tr. III*, 126 and in *Muw. Shaib.* 87, is progressively shortened in *Muw.* i. 142 and in *Mud.* i. 68, so as to bring it into line with the Medinese doctrine.

Shaibānī, in *Tr. VIII*, 16, relates a tradition from Ibn 'Abbās who, when consulted on the case of a man who had killed his brother accidentally, decided: 'The killer inherits nothing.' Another tradition, in *Muw.* iv. 44, refers to the case of a man who was killed by his father accidentally; 'Umar handed the whole of the weregeld over to the brother of the victim and said: 'The Prophet said: "The killer receives nothing."'[3] The import of the legal maxim is mitigated here, so as to make it compatible with that one of the two Medinese opinions which Mālik follows, to the effect that the person who has killed the *de cuius* accidentally, inherits other property but not weregeld.

The following examples will show how a critical analysis of traditions can elucidate the history of legal doctrines.

Khiyār al-Majlis is the right of option given to the parties to a sale

[1] Zurqānī, ii. 299, adds 'Alī and 'Amr b. Dīnār.

[2] See also above, p. 71, n. 1–3.

[3] On the later development of this tradition see below, p. 166.

as long as they have not separated. This right is not recognized by the ancient schools of law, as is shown by *Muw. Shaib.* 338 for the Iraqians, by *Muw.* iii. 136 for the Medinese. But a tradition from the Meccan scholar 'Aṭā' in *Umm*, iii. 3 contains a detailed statement in its favour; it shows as yet no trace of the legal maxim embodied in the tradition from the Prophet (see what follows), and must therefore be considered genuine. On the other hand, the ascription of a similar doctrine to Shuraiḥ (ibid.) is obviously spurious and an effort to project it back on to an ancient Iraqian authority.

The *khiyār al-majlis* is enjoined in a tradition expressing a legal maxim: Mālik—Nāfi'—Ibn 'Umar—the Prophet said: 'The two parties to a sale have the right of option as long as they have not separated' (*Muw.* and *Muw. Shaib.*, loc. cit.; *Tr. III*, 47). This is certainly later than 'Aṭā' and must have been put into circulation by Nāfi' or someone who used his name.[1] Mālik states that there is no such practice, Rabī' confirms this for the Egyptian Medinese, and Shaibānī, who pays lip-service to the tradition, explains it away by a far-fetched interpretation.[2] Shāfi'ī's discussion shows that the Medinese used the same explanation, and Shaibānī ascribes it to Ibrāhīm Nakha'ī. This cannot be an authentic opinion of Ibrāhīm, but is the reaction of the Iraqians to the relatively late tradition, projected back on to their ancient authority. Both arguments, the reference to the different practice and the far-fetched interpretation, were countered by an addition which purports to describe Ibn 'Umar's own practice, added to the text of the tradition from the Prophet, with the *isnād* Ibn 'Uyaina—Ibn Juraij—Nāfi'—Ibn 'Umar. This presupposes the tradition from the Prophet and is therefore later. It does not appear in Mālik but is quoted by Shāfi'ī (*Umm*, iii. 3), and seems to have been put into circulation by Ibn 'Uyaina. On the other hand, the tradition from the Prophet was made agreeable to the common Iraqian and Medinese opinion by an addition which appears in the classical collections (see Zurqānī, iii. 138).

Shāfi'ī (*Umm*, iii. 3) is also the first to quote two further traditions from the Prophet in favour of the *khiyār al-majlis*; these are later elaborations with exhortations and circumstantial detail added. Their *isnāds* had been recently composed, and Shāfi'ī's immediate authority is in both cases anonymous. Shāfi'ī claims that the majority of the Hijazis and of the traditionists in all countries are in favour of the *khiyār al-majlis*. He arrives at his statement on the

[1] See also below, p. 167.

[2] Zurqānī, iii. 138 ascribes the same explanation to Abū Ḥanīfa, on the authority of Shaibānī.

Hijazis by judging from the *isnāds* of the traditions, and more of this kind of spurious information on the ancient Medinese authorities is collected by Ibn 'Abdalbarr.[1] But Shāfi'ī's reference to the traditionists is correct.

We conclude that the idea of the *khiyār al-majlis* started from Mecca, was taken up by the traditionists and finally acknowledged, on the strength of the traditions from the Prophet, by Shāfi'ī. It did not exist in the common doctrine of the Iraqians and Medinese, and may well have been based on some local custom in Mecca.

Walā', the relationship of patron and client, is created by law between the manumitter and his manumitted slave; it is important for purposes of inheritance, *ius talionis*, weregeld and giving in marriage of women. A similar relationship is presumed between persons who have no Muslim next of kin and the state as representing the community of Muslims. History shows that conversion to Islam of non-Arabs during the Umaiyad period necessitated the creation of *walā'* between the convert and a Muslim member of one of the Arab tribes, usually the individual before whom he adopted Islam. This procedure is called *muwālāt*, and it was particularly frequent in the recently conquered countries. The Iraqians recognize the legal effects of *muwālāt*,[2] and Abū Ḥanīfa quotes traditions in which this doctrine is projected back to the Prophet, 'Umar and Ibn Mas'ūd. But in the time of Abū Ḥanīfa, *muwālāt* had already fallen into desuetude, and his contemporary Ibn Abī Lailā, who was a judge, did not recognize its legal effects (*Tr. I*, 128).[3] Neither did the Medinese (*Mud.* viii. 73), and this doctrine was projected back on the Iraqian side to Sha'bī, and on the Medinese to 'Umar and 'Umar b. 'Abdal'azīz, whose name is intended to lend it an Umaiyad flavour. The Medinese have in fact preserved no trace of the state of affairs under the Umaiyads. Shāfi'ī did not regard the tradition from the Prophet as reliable (*Umm*, vi. 186 f.), and therefore rejected *muwālāt*.

With the foundling, the problem arises whether his *walā'* belongs to the person who finds him, or to the state. Mālik states the consensus of the Medinese in favour of the second doctrine (*Tr. III*, 71). This has the corollary that the expenses of his maintenance are a charge on the treasury, and this is projected back to 'Umar b. 'Abdal'azīz (*Mud.* vii. 76). There exists, however, a tradition (*Muw.* iii. 196) according to which the Caliph 'Umar assigned the *walā'* of a foundling to the person who had picked him up but, illogically,

[1] See above, p. 64 f.

[2] See *Tr. I*, 128 (for Abū Ḥanīfa); *Āthār A. Y.* 772; Shaibānī, *Makhārij*, xv. 27 ff.

[3] Shaibānī (*Makhārij* xv. 30) does not consider it obligatory.

undertook the expenses of maintenance himself (that is to say, as a charge on the treasury). This tradition is later than the two doctrines which it combines; its *isnāds* converge in Mālik's immediate authority Zuhrī.[1]

There are two Iraqian opinions as to whether the *ḥadd* punishment ought to be applied in the mosque or not (*Tr. I*, 255 (*b*)). Abū Ḥanīfa answers in the negative, and refers to a tradition from the Prophet; it occurs in Ibn Māja with an *isnād* through Ibn 'Abbās (see *Comm. ed. Cairo*). Abū Yūsuf (*Kharāj*, 109) has a tradition from 'Alī to the same effect, and a tradition in which the Successor Mujāhid declares: 'People used to disapprove of applying the *ḥadd* punishments in the mosque.' The same doctrine is ascribed to Ibrāhīm Nakha'ī (*Āthār Shaib.*, quoted in *Comm. ed. Cairo*). The opposite opinion was held and applied in practice by Abū Ḥanīfa's contemporary, the judge Ibn Abī Lailā. This was the old-established practice, in keeping with the original function of the mosque as the place for the assembly of the community and the transaction of its official business, and the other opinion was the result of a religious objection, based on the consideration of the dignity of the mosque. The tradition from Mujāhid represents it still as anonymous; it was projected back to Ibrāhīm as the eponym of the Iraqians, and provided with the authority of 'Alī and the Prophet. Mujāhid is the main transmitter from Ibn 'Abbās, and this explains the appearance of Ibn 'Abbās in the *isnād*.

[1] In a later version, quoted by Zurqānī, iii. 196, 'Umar uses a proverb from the story of Zenobia.