THE ORIGINS OF Muhammadan Jurisprudence

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CHAPTER 6

LEGAL MAXIMS IN TRADITIONS

MUHAMMADAN jurisprudence in the pre-literary period often formulated legal maxims in the form of slogans most of which became traditions from the Prophet and from other authorities. A study of these legal maxims enables us to draw additional conclusions regarding the growth of legal traditions and the development of doctrine in the pre-literary period.

Not all legal maxims succeeded in becoming traditions with an acceptable *isnād*. This applies, for example, to the lawyers' maxim 'who joins a people belongs to them' which Auzā'ī uses as an argument (*Tr. IX*, 41),[1] and to the rule 'a sacrifice cannot be shared'. Mālik (*Muw.* ii. 348) refers to this last as 'the best that I have heard',[2] and interprets a tradition on the action of the Prophet and the Companions restrictively in its light. Shāfi'ī (*Tr. III*, 38) deprecates it as an anonymous saying which cannot overrule the action of the Prophet and of the Companions. The details of Mālik's doctrine go beyond the slogan, which, however, expresses the underlying idea in a short form.

Some maxims acquired the full status of a tradition from the Prophet rather late. The rhyming maxim 'there is no divorce and no manumission under duress' (*lā ṭalāq wa-lā 'atāq fī ighlāq*) appears as a tradition from the Prophet only in Ibn Ḥanbal and some of the classical collections;[3] Mālik (*Muw.* iii. 69) and an unsuccessful Iraqian opinion (*Tr. II*, 10 (*r*)) know only traditions from Ibn 'Umar and from 'Alī to the same effect, but still without the explicit maxim.

The process by which the maxim 'the spoils belong to the killer' was gradually provided with the authority of the Prophet and of Companions, has been described above (pp. 70 f.). It represented the old practice, but was interpreted restrictively by the ancient schools of law for a systematic reason, based on a religious scruple.

[1] It appears as a tradition from the Prophet only in a somewhat different form, from Ibn Sa'd onwards; cf. Wensinck, *Handbook*, s.v. *Mawlā*. It is inspired by Koran, iv. 115.

[2] See above, p. 101. See Zurqānī, iii. 70.

The maxim 'the Muslims must abide by their stipulations' has been discussed above (p. 174). It was put into the mouth of Qāsim b. Muḥammad, two generations before Mālik, and later ascribed to the Prophet. It is earlier than the tradition from the Prophet regarding the case of Barīra, which refers to it polemically and which can itself be dated in the generation preceding Mālik. The statement of Qāsim and the Barīra tradition refer to two separate problems, and the maxim was obviously intended as a general rule; the introductory words of the statement of Qāsim confirm this.

In most cases, however, legal maxims appear only as part of formal traditions. This is the case with the maxim 'profit follows responsibility',[1] which appears as a tradition from the Prophet in Iraqian and Medinese texts from the time of Abū Yūsuf onwards.[2] The *isnāds* of the Medinese version have a common link in the traditionist Ibn Abī Dhi'b.[3] But this shows only the origin of the Medinese tradition and not of the legal maxim.

Legal maxims can often be shown to be later than the earliest stage of legal doctrine and practice. This is the case even with as fundamental a rule on ritual as the maxim 'no prayer without recitation' (above, p. 154 f.).

The frequency of divorce with immediate re-marriage led to many cases of contested paternity in pre-Islamic Arab society and even during the first century of Islam.[4] The Koran (ii. 228 ff., lxv. 1 ff., xxxiii. 48) introduced the *'idda*, a waiting period during which a divorced woman and a widow were barred from re-marrying. But this rule was still disregarded in the middle Umaiyad period, as *Aghānī*, xi. 140, shows. The legal maxim 'the child belongs to the marriage bed' was intended to decide disputes about paternity which were likely to happen in these conditions, but which could hardly arise under the Koranic rule regarding *'idda*. The maxim is, strictly speaking, incompatible with the Koran, and it had not yet asserted itself in the time of the dispute recorded in *Aghānī*.[5] It was, however, in-

[1] See above, p. 123.

[2] *Āthār A. Y.* 828; *Mud.* x. 106; *Ikh.* 332; Ibn Ḥanbal, vi. 49, 208, 237, &c.

[3] The alternative family *isnād* Hishām—'Urwa is derived from the *isnād* of Ibn Abī Dhi'b which contains 'Urwa in its higher part.

[4] Cf. *Ḥamāsa*, i. 216; *Aghānī*, xi. 140; Wellhausen, in *Nachr. Ges. Wiss. Gött.*, 1893. 453.

[5] See Goldziher, *Muh. St.* i. 188, n. 2.

corporated in traditions from the Prophet.[1] Abū Ḥanīfa knows it as a saying of the Prophet and applies it literally with a surprising result; but Ibn Abī Laylā and Abū Yūsuf, followed by Shāfi'ī, interpret it differently (*Tr. I*, 224), so that there is hardly a case left to which it could be applied. In the time of Shāfi'ī, there are no scholars who take the legal maxim at its face value, and Shāfi'ī treats him who would do so, as an ignoramus (*Ikh.* 309 f.). This shows how incompatible the maxim was with the Muhammadan law of marriage, and since it also differed from the old Arab method of deciding disputes about paternity, it is possible that it was influenced by the rule of Roman law *pater est quem nuptiae demonstrant*,[2] as Goldziher has pointed out.[3]

The old Arab method of deciding disputes about paternity was by the decision of professional physiognomists.[4] This method was, on one side, declared superseded by the decision of the Prophet in favour of the legal maxim, and on the other, justified by making the Prophet himself use it.[5] The *isnāds* of the second of these traditions have a common link in Ibrāhīm b. Sa'd, a contemporary of Mālik, and the family *isnād* of the first points to its origin in the generation preceding him. The old Arab method was finally retained in Muhammadan law for those rare cases in which a dispute about paternity had to be decided.[6] But as the legal maxim had become a saying of the Prophet, lip-service continued to be paid to it, although it was not, in fact, acted upon.

The maxim that 'there is no [valid] marriage without a *walī*', that is, the nearest male relative of the bride who must give her in marriage, was not originally as self-evident as it became later in Muhammadan law. Mālik dispenses with the

[1] *Muw.* iii. 197; *Ikh.* 304.

[2] *Digest*, 2, 4, 5.

[3] *Muh. St.*, loc. cit.—Robertson Smith, *Kinship*, 132 ff., Wellhausen, ibid. 453, 457, n. 3, and Lammens, *Berceau*, 283, seem to consider the maxim as an authentic rule of pre-Islamic Arab practice; but there is no evidence for this, beyond the artificial theories of the later genealogists who of course knew the maxim, and a suspect tradition on the so-called *nikāḥ al-istibḍā'* (Bukhārī, *Kitāb al-nikāḥ, Bāb man qāl lā nikāḥ illā bi-walī*).

[4] See Goldziher, ibid. i. 184 f.; Robertson Smith, ibid. 169, n. 2; Lammens, loc. cit.

[5] Both traditions in *Ikh.* 305 f.

[6] The tradition from 'Umar in *Muw. iii.* 202, describing a case where the method of physiognomy breaks down, does not even mention the possibility of applying the legal maxim.

legal *walī* in the case of a lowly woman,[1] and Abū Ḥanīfa (and others, if Zurqānī, iii. 4, is right) if the bride marries a man of equal standing for the full *ṣadāq* or *donatio propter nuptias* which a woman of her standing can expect;[2] Zurqānī, iii. 17, refers to an unidentified doctrine according to which a woman who is not a virgin needs no *walī* for marriage. The marriage without a legal *walī*, which continued the easy-going practice of the pre-Islamic Arabs, was taken for granted in a tradition from 'Ā'isha which on account of its *isnād* can be dated in the generation preceding Mālik.[3]

The opinion that there is no valid marriage without a *walī* found its first expression in the alleged decision of 'Umar b. 'Abdal'azīz that such marriages must be dissolved (*Mud.* iii. 15). This is no doubt later than the Caliphate of 'Umar b. 'Abdal-'azīz, and dates only from the second century A.H. It was held in Iraq, Medina, and Mecca, projected back to 'Alī, 'Umar, and Ibn 'Abbās, and finally ascribed to the Prophet, on the authority of 'Ā'isha and of other Companions; the traditions which put it into the mouth of the Prophet appear only from Shāfi'ī onwards.[4] The legal maxim was coined at this later stage. Abū Yūsuf, having held an opinion near to that of Abū Ḥanīfa at first, adopted this doctrine,[5] Shaibānī held it, Shāfi'ī supported it with a brilliant systematic argument (*Tr. III*, 53), and Ibn Qāsim rejected the earlier tradition from 'Ā'isha as contrary to the 'practice' (*Mud.* iv. 281).

The alliterating maxim '[there shall be] no damage and no mutual infliction of damage' (*lā ḍarar wa-lā ḍirār*) is given as a saying of the Prophet in a tradition with the *isnād* Mālik—'Amr b. Yaḥyā Māzinī—his father.[6] This is *mursal*,[7] and is abstracted from two traditions with the same *isnād*, one on 'Umar with Ḍaḥḥāk b. Khalīfa and Muḥammad b. Maslama, the other on 'Umar with 'Abdalraḥmān b. 'Auf and Yaḥyā Māzinī's grandfather; both stories are parallel and express the

[1] *Tr. III*, 53; *Mud.* iv. 15, 20, 27.

[2] *Muw. Shaib.* 244. For the meaning of *ṣadāq* see above, p. 107.

[3] *Muw.* iii. 38; cf. above, p. 171.

[4] *Muw.* iii. 5; *Muw. Shaib.* 244; *Mud.* iv. 15; *Tr. II*, 10 (*a*); *Tr. III*, 53; also in Ibn Ḥanbal and the classical collections.

[5] Ṭaḥāwi, quoted in *Comm. Muw. Shaib.* 244.

[6] This and the other traditions mentioned in this paragraph occur for the first time in *Muw.* iii. 207 ff.

[7] The *isnād* was later completed and improved; see Zurqānī, ad loc.

same doctrine as applied to particular cases and not in the form of a general maxim. 'Amr b. Yaḥyā Māzinī is the relevant common link in the family *isnād*. There is a further tradition from the Prophet, on the authority of Abū Huraira, again regarding a particular case, with a strongly worded additional remark of Abū Huraira who blames his audience for their reluctance to accept it; this shows that it had to overcome resistance. The *isnād* runs Mālik—Zuhrī—A'raj—Abū Huraira, with uncertainties regarding Zuhrī and A'raj,[1] and the tradition seems to have been recent in the time of Mālik. Zurqānī's comment shows that the rule was taken literally, and therefore presumably put into circulation, by the traditionists; it gained general acceptance as a saying of the Prophet, but did not succeed in changing the doctrine of the ancient schools of law who interpreted it as a recommendation.[2]

The maxim 'restrict *ḥadd* punishments as much as possible' started as an anonymous saying, was then ascribed to the 'Companions and Successors' in general, then to a number of individual Companions, and finally to the Prophet. These successive stages are recognizable in the words of Abū Yūsuf.[3] The maxim cannot be older than the end of the period of the Successors. As an anonymous slogan, the maxim is introduced with the words 'they used to say'; this is one of the formulas used of ancient opinions.[4]

On the maxim 'the two parties to a sale have the right of option as long as they have not separated', see above (pp. 160 f.). It is later than 'Aṭā', was put into circulation as a tradition from the Prophet by the traditionists, but did not succeed in changing the common doctrine of the Iraqians and Medinese.

A considerable number of legal maxims are Iraqian.[5] The oldest Iraqian reasoning regarding the position of the slave in the law of inheritance is expressed in the maxim, ascribed to Ibn Mas'ūd (*Tr. II*, 16 (*j*)): 'the slave debars and does not cause to inherit [those who are related to the *de cuius* through a

[1] See Zurqānī, loc. cit.

[2] See *Muw. Shaib.* 346 for the Iraqians, *Mud.* xiv. 227 and xv. 192 for the Medinese; according to Zurqānī, loc. cit., Shāfi'ī adopted the same opinion in his later doctrine, having taken the tradition literally at first.

[3] *Kharāj*, 90 f.; *Tr. IX*, 15, and *Comm. ed. Cairo* for the later sources.

[4] See above, p. 101, n. 1.

[5] Two Iraqian maxims, one rhyming, on pre-emption: see above, p. 164.

slave]' (*al-'abd yaḥjub wa-lā yūrith*). This shows a primitive kind of legal reasoning, as if the right to inherit were a force transmitted from one person through another to a third. Another tradition from Ibn Mas'ūd (*Tr. II*, 16 (*l*)) shows the old, unsystematic concern for the just and morally right decision. But in the time of Shāfi'ī, the Iraqians had developed a strict and technical legal reasoning which they expressed in the maxim 'the slave cannot inherit and cannot leave inheritance' (*al-'abd lā yarith wa-lā yūrith*). This is derived from the first maxim (with a change of meaning in the word *yūrith*) and implies that the slave does not debar anyone from inheriting.

Iraqian legal maxims were sometimes taken over by the Medinese. The Iraqian maxim 'the killer inherits nothing' was transformed in Medina into 'the killer receives nothing [of the weregeld]', so as to agree with one of the two Medinese opinions (above, p. 159).

The maxim 'injury caused by an animal is not actionable' (*jarḥ al-'ajmā' jubār*), and the doctrine expressed by it, are Iraqian.[1] The Medinese held that damage caused by roving animals at night was actionable, and this doctrine was expressed in a tradition from the Prophet (*Muw.* iii. 211). But the Iraqian maxim penetrated into Hijaz and was provided with a Medinese *isnād* (*Muw.* iv. 46). Mālik, who relates both traditions, does not try to harmonize them; only Shāfi'ī (*Ikh.* 400) does so by using forced interpretation.[2]

'The Medinese say: "Talion depends on the weapon" (*al-qawad bil-silāḥ*)', meaning that talion takes place only when the murder has been committed with a weapon.[3] This does not fit the doctrine of the Medinese who have, therefore, to construe the use of a stick, stone, and so on as the equivalent of the use of a weapon. It does, however, fit the Iraqian doctrine,[4] and

[1] *Āthār Shaib.* 85 (with the *isnād* Abū Ḥanīfa—Ḥammād—Ibrāhīm Nakha'ī—Prophet); *Muw. Shaib.* 295.

[2] Zurqānī, iii. 212, states that Laith b. Sa'd of Egypt and 'Aṭā' of Mecca held that damage caused by animals both in daytime and at night was actionable; this is possibly authentic and may have corresponded with an original Medinese doctrine, so that the actual Medinese doctrine would represent a compromise under the influence of the Iraqian maxim.

[3] *Tr. VIII*, 18. See further *Muw.* iv. 49, *Mud.* xvi. 106 for the Medinese, and *Āthār A. T.* 961, *Āthār Shaib.* 82, 84, Ṭaḥāwī, ii. 106 ff. for the Iraqians.

[4] We need not go into the differences of detail between Abū Ḥanīfa, Abū Yūsuf, and Shaibānī.

we might conclude that the Medinese borrowed the maxim from the Iraqians, although I find it attested on the Iraqian side, in the sources available, only at a later period.[1]

An old Iraqian maxim is countered by a later Medinese one in the following case:

In pre-Islamic Arab usage, *rahn* 'security' meant a kind of earnest money which was given as a guarantee and material proof of a contract, particularly when there was no scribe available to put it into writing.[2] The word occurs in this meaning in Koran ii. 283. But the institution of earnest money was not recognized by the ancient schools of law, although it left some traces in traditions,[3] and the common ancient doctrine knew *rahn* only as a security for the payment of a debt. The foreign origin of this doctrine which neglects old Arab usage and an explicit passage in the Koran, is probable. There arises the question of how far the security automatically takes the place of the debt, (*a*) if the security gets lost while it is in the possession of the creditor, (*b*) if the debtor fails to pay the debt within the stipulated time. The oldest opinion goes farthest and states that 'the security takes the place of that for which it is given' (*al-rahn bi-mā fīh*). This maxim is Iraqian (*Tr. I*, 68) and was projected back to Shuraih (*Umm*, iii. 166); it was also known in Medina (*Muw.* iii. 190), and in Mecca where it was connected with 'Aṭā' and projected back to the Prophet (*Umm*, loc. cit.). The Iraqian school, however, mitigated this extreme doctrine.[4]

The old Iraqian maxim was countered in Medina by the opposite maxim 'the security is not forfeited' (*al-rahn lā yaghlaq*); it was put into the mouth of the Prophet in traditions whose *isnāds* have their common link in Zuhrī.[5] It is a late, polemical counter-statement and does not adequately express the Medinese doctrine which is considerably influenced by the mitigated doctrine of the Iraqian school.[6] The doctrines of the Iraqian

[1] Ṭaḥāwī, ii. 105 and Zurqānī, iv. 49, as a tradition from the Prophet: *lā qawad illā bil-saif*. It is applied here, perhaps secondarily, to the mode of execution by talion.

[2] Cf. Tyan, *Organisation*, i. 73, n. 3.

[3] See *Muw.* iii. 94 and Zurqānī, ad loc.

[4] *Muw. Shaib.* 362; Sarakhsī, xxi. 64. A further Iraqian mitigation in *Umm*, iii. 166, Sarakhsī, xxi. 65.

[5] *Muw.* iii. 188; *Muw. Shaib.* 362; *Umm*, iii. 147, 164, 167.

[6] *Muw.* iii. 189; *Umm*, iii. 165. The Medinese compromise is also ascribed to 'Aṭā' (*Umm*, iii. 166).

and of the Medinese school represent two successive stages in the abandonment of the opinion expressed by the first maxim. Shāfi'ī completed this process and was the first consistently to apply to securities the concept of a deposit on trust (*amāna*).[1]

The essential maxim of procedure in Muhammadan law, 'evidence [by witnesses] has to be produced by the plaintiff, and the oath [in denial] has to be taken by the defendant', became a tradition from the Prophet only at a relatively late period.[2] It is not mentioned as a tradition in *Muw.* and in *Muw. Shaib.*, although *Muw.* iii. 181 presupposes it as the accepted rule. Abū Ḥanīfa (*Tr. I*, 116) and Shāfi'ī's Iraqian opponent (*Ikh.* 354) refer to it as a saying of the Prophet, without an *isnād*.[3] *Āthār A. Y.* 738 gives it as a statement of Ibrāhīm Nakha'ī, and only the later versions of the *Musnad Abī Ḥanīfa* in Khwārizmī have full *isnāds* from Abū Ḥanīfa back to the Prophet, mostly through Ibrāhīm. It appears as a formal tradition from the Prophet, with a Meccan *isnād*, for the first time in Shāfi'ī (*Ikh.* 345), and as part of the composite speech of the Prophet at the conquest of Mecca in Shāfi'ī's contemporary Wāqidī. It is later found in the classical collections.

The maxim presupposes that the plaintiff does not have to take the oath, but Abū Ḥanīfa's Iraqian contemporary, the judge Ibn Abī Laylā, demanded it from the plaintiff together with the evidence of witnesses (*Tr. I*, 116), and this doctrine was ascribed to Shuraiḥ and expressed in a tradition from 'Alī (*Tr. II*, 14 (*e*)).[4] The Medinese, and Shāfi'ī after them, recognized the evidence of one witness together with the oath of the plaintiff, and we saw that this doctrine grew out of the judicial practice at the beginning of the second century A.H.[5] If the plaintiff has no evidence and the defendant refuses to take the oath in denial, the Medinese give judgment for the plaintiff only if he takes the oath himself;[6] Ibn Abī Laylā, in the same

[1] *Tr. I*, 68; *Umm*, iii. 147 ff., 164 ff.; Sarakhsī, xxi. 65.

[2] It was also known as a tradition from 'Umar (e.g. *Umm*, vii. 11). Margoliouth, *Early Development*, 90, considers that this maxim was taken over from Jewish law.

[3] Also, by implication, *Mud.* xiii. 49.

[4] *Āthār A. Y.* 740: 'Abū Ḥanīfa did not demand the oath together with the evidence of witnesses, nor did Ḥammād demand it.' This reference to Ḥammād for a legal opinion seems to imply that "Ibrāhīm Nakha'ī" demanded it; a remark on Ibrāhīm has perhaps dropped from the text.

[5] See above, p. 167.

[6] See *Muw.* iii. 183 f. and Zurqānī, ad loc., quoting Ibn 'Abdalbarr.

case, used to demand the oath from the plaintiff if he doubted his good faith (*Tr. I*, 9, [82], 116).

All these are traces of the common tendency to impose a safeguard on the exclusive use of the evidence of witnesses as legal proof;[1] this tendency can be dated in the first half of the second century, and the legal maxim superseded it to a great extent, but not completely. The passage Koran v. 106 f. does not belong here; it reflects an earlier stage in which the 'witnesses' were concerned not so much with giving evidence as with affirming by oath the truth of the claims of their party, as compurgators. This stage had been superseded, and the function of witnesses restricted to the giving of evidence, before the question of a safeguard arose.[2]

As regards the restriction of legal proof to the evidence of witnesses and the denial of validity to written documents, it must go back to the first century.[3] This feature contradicts an explicit ruling of the Koran (ii. 282) which obviously endorsed the current practice of putting contracts into writing, and this practice did persist during the first century and later, and had to be accommodated with legal theory.[4] Nothing definite is known about the origin of this feature.

To sum up: legal maxims are rough and ready statements of doctrine in the form of slogans, sometimes rhyming or alliterating. They are not uniform as to provenance and period, and some important ones are rather late. But as a rule they are earlier than traditions, and they gradually take on the form of traditions. They date, generally speaking, from the time of the first primitive systematization of Muhammadan law in the first half of the second century A.H., but often represent a secondary stage of doctrine and practice. Some maxims express counter-doctrines and unsuccessful opinions, but if sufficiently well attested, they were harmonized with the prevailing doctrine. Also the traditionists used them occasionally, in the form of traditions, for voicing their point of view. Numerous maxims originated in Iraq, and they were sometimes taken over by the

[1] Cf. below, p. 272, n. 1.

[2] It is possible, of course, that the oath as a safeguard in the second stage was partly a survival from the first.

[3] Already John of Damascus mentions it as a characteristic feature: Migne, *Patr. Gr.* xciv. 768.

[4] See Tyan, *Notariat*, 8 f. and *passim*.

Medinese; but we find no traces of the opposite process. This shows the prevalent role of the Iraqians in the early period of Muhammadan jurisprudence. The legal maxims reflect a stage when legal doctrine was not yet automatically put into the form of traditions.[1]

[1] I do not exclude the possibility that some legal maxims may be older than the second century A.H., or may even go back to the pre-Islamic period, but this cannot be assumed but must be positively proved in each case, as R. Brunschvig has done for the maxim *al-walā' lil-kubr* (in *Revue Historique de Droit Français et Étranger*, 1950, 23–34).