# THE ORIGINS OF Muhammadan Jurisprudence

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# PART III

# THE TRANSMISSION OF LEGAL DOCTRINE

## CHAPTER 1

## UMAIYAD PRACTICE AS THE STARTING-POINT OF MUHAMMADAN JURISPRUDENCE

### A. Preliminary Remarks

OUR conclusions so far have led us to the beginning of the second century A.H. as the time in which Muhammadan jurisprudence started. Occasionally, we have met or shall meet legal opinions which can probably be assigned to the end of the first century.[1] But the essential features of old Muhammadan jurisprudence, such as the idea of the 'living tradition' of the ancient schools of law; a body of common doctrine expressing the earliest effort to systematize;[2] legal maxims which often reflect a slightly later stage; and an important nucleus of legal traditions—all these features can be dated, roughly in this order, from the beginning of the second century onwards. In any case, it is safe to say that Muhammadan legal science started in the later part of the Umaiyad period, taking the legal practice of the time as its raw material and endorsing, modifying, or rejecting it, as the present chapter will show in detail. This is our starting-point for an historical study of the transmission of legal doctrine in the pre-literary period, which is the subject of Part III of this book.

As we are concerned with the early history of Muhammadan jurisprudence and not that of legal institutions as such, we need not attempt to analyse here the Umaiyad practice from which it started into its component parts. Two general remarks, however, are relevant. Firstly: legal practice in the several parts of the Umaiyad empire was not uniform, and this accounts for some of the original differences in doctrine between the ancient schools of law.[3] Secondly:

[1] See above, p. 100 f., and below, pp. 234, 245.
[2] See below, p. 214 ff.
[3] See above, p. 161, on a local Meccan custom.

although the dynasty and most of the Arab ruling class were Muslims, and although some elementary legal rules enacted in the Koran were more or less followed,[1] the legal practice during the earlier part of the Umaiyad period cannot yet be called Muhammadan law. Muhammadan law came into existence only through the application of Muhammadan jurisprudence to the raw material supplied by the practice.[2] It will be shown that legal norms based on the Koran, which go beyond the most elementary rules, were introduced into Muhammadan law almost invariably at a secondary stage.[3]

During most of the Umaiyad period the administration of justice lay in the hands of the provincial governors and, in so far as special judges were appointed, they were agents of the governors to whom these last delegated part of their functions.[4] The creation of a judiciary, separate from the political administration, dates only from 'Abbāsid times. When John of Damascus refers to the law-givers (*νομοθέται*) of Islam, he means the governors and their agents, the judges, and his repeated statement, which cannot be a mistake, on flogging as the punishment for theft shows that their practice disregarded an explicit rule of the Koran (v. 38), which prescribes the cutting off of the hand.[5] In a number of passages, Shāfi'ī and his predecessors refer, for the most part polemically, to the origin of legal rules in decisions of governors and their agents.[6]

In assigning the origins of Muhammadan jurisprudence, which created Muhammadan law out of Umaiyad practice, to the later part of the Umaiyad period, I do not wish to deny that this practice contained earlier elements and, in particular, that some of its fundamental features were created by 'Umar. The problems of the caliphate of 'Umar, of pre-Umaiyad and Umaiyad administrative practice, and of the origins of Muhammadan law and jurisprudence have been discussed at length, but in rather general terms, by Caetani.[7] Parts II and III of this book will show how far my results have led me to agree or to disagree with him.[8]

[1] For examples of essential rules which were disregarded, see above, pp. 181, 188.

[2] See further below, pp. 283 ff. [3] Below, pp. 224 ff.

[4] See Tyan, *Organisation*, i. 132 ff., 169; Bergsträsser, in *Z.D.M.G.* lxviii. 396 f.

[5] Migne, *Patr. Gr.* xciv. 1591; xcvi. 1337. John's references to the flogging of the *πόρνος* (loc. cit.) take no account of the lapidation of the adulterer which is certainly later than the time of the Prophet (cf. Caetani, *Annali*, iii, year 17, § 84, at the end). A governor, at the end of the first century A.H., punished drunkenness not by flogging but by the death penalty (Ṭabarī, *Annales*, ii. 1301: year 96); the punishment for drunkenness had not yet been fixed at that time (cf. Wensinck, in *E.I.*, s.v. *Khamr*).

[6] See above, pp. 58f., 60, n. 5, 63, 68, 70, 72, 74, 78. [7] *Annali*, v, year 23, §§ 517 ff.

[8] I disagree particularly with his reversion from the historical criticism of tradi-

We often find the names of 'Uthmān, of the Umaiyad Caliphs Mu'āwiya, Marwān b. Ḥakam, and 'Umar b. 'Abdal'azīz, and of other members of the family mentioned in traditions which directly or indirectly reflect Umaiyad practice, and the occurrence of these names in a tradition makes a prima-facie case for the origin of the problem in question in Umaiyad times. We must not, of course, conclude without positive proof that the decisions or opinions ascribed to these persons are authentic; their names were quoted sometimes in order to put a genuine old practice under their authority, but often in order to make them responsible for a rejected practice or opinion, or even in order to claim their authority in favour of a doctrine which superseded an older practice or opinion. The traditions which implicate 'Uthmān and the Umaiyads are therefore to a great extent, explicitly or implicitly, counter-traditions, and in so far as they represent an anti-Umaiyad tendency, which they often express strongly, they cannot be earlier than the rise of the 'Abbāsids, when everything to which exception was taken was blamed on the fallen dynasty of the Umaiyads.[1] The 'pious' Umaiyad 'Umar b. 'Abdal'azīz escaped this fate and became a favourite authority of Auzā'ī and of the Medinese for the fictitious 'good old' practice, which was opposed to the real practice as it existed at the end of the Umaiyad period. Examples of all this have occurred before,[2] and others will be found in the following sections.

## B. Umaiyad Popular Practice

The present section is intended to illustrate the reactions of nascent Muhammadan jurisprudence to popular practice as it existed under the Umaiyads in general.

### *Cult and Ritual*

Islamic cult and ritual were certainly rudimentary at the beginning of the Umaiyad period, and the Umaiyads and their

tions (§ 519); with his antedating the origin of Muhammadan jurisprudence to about A.H. 50; and with his belief in the existence of many authentic traditions from the Prophet at the beginnings of jurisprudence (§ 549).

[1] We saw (above, p. 72) that Auzā'ī, who was himself a Syrian, showed as yet no trace of anti-Umaiyad feeling. This applies to legal traditions only; it is agreed that political traditions directed against the ruling dynasty were put into circulation under the late Umaiyads.

[2] For 'Uthmān see above, p. 153; for Mu'āwiya, pp. 55, 114, 155; for Marwān b. Ḥakam, p. 114; for 'Umar b. 'Abdal'azīz, pp. 62, 71, n. 3, 101, 119, 131, 144, 161 (twice), 167 f., 183. On the fictitious character of references to 'Umar b. 'Abdal'azīz see further below, p. 206.

governors were responsible for the elaboration of some of their essential features, as Lammens and Becker have shown.[1] The first specialists on religious law were not satisfied with the practice as they found it, and their demands were incorporated in traditions which sometimes show a strong anti-Umaiyad bias.

### *Marriage*

If divorce takes place before the consummation of the marriage, the husband has to pay only half of the *donatio propter nuptias* that has been fixed (Koran ii. 237). If husband and wife had been left together in private, the wife would normally claim that intercourse had taken place, which would give her the right to the full *donatio*. The judicial practice in Umaiyad times, however, seems to have been to reject this claim, and a decision to this effect is ascribed to 'Marwān b. Ḥakam or a governor before him' in a tradition with the *isnād* Ibn Wahb—Muḥammad b. 'Amr—Ibn Juraij—'Amr b. Dīnār—Sulaimān b. Yasār.[2] In what is clearly a later addition, a distinction according to place and circumstances is made; this corresponds to a later, Medinese, stage of the doctrine.

But a presumption in favour of the claim of the wife prevailed both in Iraq (*Muw. Shaib.* 230) and, broadly speaking, in Medina, although here sometimes a distinction as to place and circumstances was made (*Muw.* iii. 10; *Mud.* v. 2). Ibn Musaiyib is adduced in favour both of the general claim and of the distinction. This presumption was projected back in Medina to 'Umar and to Zaid b. Thābit (*Muw.*), and in Iraq to 'Alī (*Mud.*) and to Ibn Mas'ūd (Muzanī, iv. 38); later, it was ascribed to the first Caliphs.[3] The original tradition on the decision of Marwān b. Ḥakam was countered by a more detailed version of the same story, where Marwān sends to Zaid b. Thābit and the latter convinces him that the presumption in favour of the claim of the wife must be recognized (*Mud.*). The *isnād* runs: Ibn Wahb —Ibn Abil-Zinād—his father—Sulaimān b. Yasār; this

[1] Lammens, *Ṭâif*, 198, and in other places of his historical writings; Becker, *Islamstudien*, i. 465 f., 494 ff.

[2] *Mud.* v. 2. The doubt regarding the person shows the lack of positive knowledge; only the reference to the Umaiyad period is certain. The tradition, taken by itself, does not show whether this was Umaiyad practice or a counter-doctrine; the interpretation given to it here is based on the successive stages of doctrine.

[3] *Comm. Muw. Shaib.* 230, n. 7, quoting Baihaqī and others.

counter-tradition with a family *isnād* is later than the time of Sulaimān b. Yasār.

The opposite doctrine, rejecting the claim of the wife, did not disappear completely, but was projected back to Ibn 'Abbās and Shuraiḥ;[1] it was also supported by reference to the literal meaning of Koran ii. 237 and xxxiii. 49. It was taken up, together with this argument, by Shāfi'ī who thus reverted unwittingly to the Umaiyad practice.[2]

Mālik and his followers were not clear whether the presumption which they recognized was rebuttable or conclusive (*Mud.*). In the Mālikī school, their doctrine was whittled down until the difference of principle as against Shāfi'ī disappeared (Zurqānī, iii. 10). But the doctrine of Abū Ḥanīfa and Shaibānī, based on the same principle as that of Mālik, is consistent (*Muw. Shaib.*).

Foster-relationship as an impediment to marriage was recognized by the pre-Islamic Arabs, and endorsed by Koran iv. 23 with regard to foster-mothers and foster-sisters.[3] Popular opinion in Umaiyad times incorporated relationship by marriage into the orbit of foster-relationship, so that the foster-son of the wife of a man was deemed to be the (foster-)brother of the man's daughter by another wife.[4] Both the Iraqians and the Medinese adopted this popular opinion;[5] it was ascribed to Zuhrī and found expression in traditions from Ibn 'Abbās and, on the authority of 'Ā'isha, from the Prophet.[6]

But this doctrine did not remain unchallenged. Shāfi'ī relates a tradition according to which Hishām b. Ismā'īl, the governor of 'Abdalmalik in Medina, in view of the popular objection to a marriage between persons connected in this way, referred the case to the Caliph who decided that this connexion did not constitute foster-relationship. It would be rash to deduce from this the existence of a government regulation at variance with the popular belief. Opposition to it became vocal

[1] *Tr. III*, 75. On the other hand, Shuraiḥ is claimed to have been essentially in favour of the presumption (*Mud.*); this shows how arbitrary and unreliable these references are.

[2] *Tr. III*, 55, 75; Muzanī, iv. 36 ff.

[3] See *E.I.*, s.v. *Raḍā'*.

[4] The underlying idea appears from the technical terms *laban al-faḥl* and *liqāḥ wāḥid*: the milk on which one child was suckled was produced by the same *semen genitale* by which the other child was begotten.

[5] *Muw. Shaib.* 275; *Mud.* v. 88.

[6] For these and the following traditions, see *Muw.* iii. 85 ff.; *Muw. Shaib.* 271; *Tr. III*, 148 (p. 246 f.).

in Medina only in Mālik's time, and Mālik's contemporary Darāwardī is the common transmitter in the *isnāds* of most traditions to this effect. These traditions, some of which are clearly counter-traditions, claim the authority of a number of Companions, including Ibn 'Abbās and 'Ā'isha, and of numerous old Medinese authorities of the generation of the Successors: all this is certainly spurious.

### *Divorce*

The problem of the legal effects of a divorce pronounced as 'definite' (*batta*) was still unsettled in the generation preceding Mālik, and this uncertainty and several possible answers were projected back into earlier Umaiyad times in Medinese and Iraqian traditions.

The following two traditions are Medinese (*Muw.* iii. 36):

Mālik—Yaḥyā b. Sa'īd—Abū Bakr b. Muḥammad b. 'Amr b. Ḥazm informed 'Umar b. 'Abdal'azīz that Abān b. 'Uthmān considered the word *batta* as producing a single [revocable] divorce, but 'Umar b. 'Abdal'azīz insisted that it exhausted all possibilities of divorce [that is, was to be reckoned as a triple divorce].

Mālik—Zuhrī—Marwān b. Ḥakam decided that the word *batta* produced a triple [irrevocable] divorce.

The following tradition is Iraqian (*Āthār Shaib.* 74):

Abū Ḥanīfa—Ḥammād—Ibrāhīm Nakha'ī—'Urwa b. Mughīra as governor of Kufa was perplexed by the term *batta* and asked Shuraiḥ. The latter quoted the opinion of 'Umar that it produced a single revocable divorce, and the opinion of 'Alī who considered it as producing a triple divorce; pressed for his own opinion, Shuraiḥ held that the use of *batta* was a reprehensible innovation, but that it produced either a triple or a single definite divorce, according to the intention of the speaker.

This divorce with *batta* is a development from current practice and independent of the common ancient doctrine of Muhammadan law on divorce, a doctrine which is based on a not very obvious interpretation of Koran ii. 228–30.[1] Accord-

[1] It may fairly be doubted whether the Koran allows more than two divorces, and whether verse 230 does not refer to every divorce which has become definite, be it the first or the second. Cf. Bell, *The Qur'ān*, i. 32 and n. 4; *E.I.*, s.v. *Ṭalāḳ*, section IV.

ing to this common doctrine, the first and the second divorce pronounced by a husband over his wife are revocable and become definite only at the end of a waiting period (*'idda*);[1] the third divorce, however, is at once irrevocable and definite. By divorcing with *batta* the husband renounced his right to revoke the divorce and made it definite at once; it must therefore have been single but definite. This can safely be considered as part of the practice under the Umaiyads.[2] It was recognized by the Iraqians: they allow a single, definite divorce which is pronounced by using the word *batta* or similar expressions.[3]

Because divorce with *batta* did not fit well into the clear-cut scheme of the common doctrine, efforts were made in both Iraq and Medina to make it either single and revocable, or triple and definite, and the traditions quoted above reflect these efforts. They were successful in Medina, where Mālik preferred the second alternative (*Muw.* iii. 36).

When the old meaning of divorce with *batta* was no longer understood in Hijaz, the problem of its legal effects was conceived in terms of the single or triple validity of a triple divorce pronounced in one session. The memory of the old practice was harmonized with current doctrine by the fictitious statement that a triple divorce pronounced in one session counted only as a single divorce in the time of the Prophet, of Abū Bakr and the first three years of the caliphate of 'Umar, with the implication that 'Umar gave it triple validity (*Ikh.* 310). This statement, attributed to Ibn 'Abbās, can be dated immediately before Mālik; while a formal tradition through Ibn 'Abbās from the Prophet, to the effect that such a divorce counts as single and

[1] So far, the common doctrine doubtless reproduces the exact meaning of the Kóranic passage.

[2] Tibrizi in his commentary on *Ḥamāsa*, i. 203, relates how Murra b. Wāki' divorced his wife with *batta*, being under the impression that he had the power to revoke this divorce within a year; how his former wife was asked in marriage, whereupon Murra demanded her back, but she refused to return to him; and how Murra appealed in vain to Mu'āwiya or to 'Uthmān, in order to have his former wife prevented from re-marrying. The verses which are quoted in connexion with this story confirm it in its broad outlines but not in its details some of which are uncertain (cf. the doubt whether it was Mu'āwiya or 'Uthmān to whom he appealed). Supposing that the mention of *batta* is authentic, the point of the story is the ignorance of a rude bedouin (as Murra calls himself) of the legal consequences of a divorce, and what the bedouin thought is not evidence on the nature of the divorce with *batta*.

[3] *Āthār A.Y.* 632; *Āthār Shaib.* 78; *Muw. Shaib.* 255; *Tr. I*, 225; *Tr. II*, 11 (*d*), (*e*).

revocable, appeared only in the time between Shāfi'ī and Ibn Ḥanbal.[1] The Medinese considered the whole procedure a sin but valid as a triple divorce, and ascribed this doctrine to the same Ibn 'Abbās and even to the Iraqian Ibn Mas'ūd (*Muw.* iii. 35). This discussion later produced traditions from the Prophet approving or disapproving the pronouncing of a triple divorce in one session, and even declaring it altogether invalid, as well as a large number of spurious references to Companions and other authorities, including those of the Iraqians, in favour of the Medinese opinion.[2] The whole problem of the triple divorce pronounced in one session is secondary.

The following two traditions (*Muw.* iii. 34) show one of the reasons why divorce with *batta* was of practical importance; its identification in Medina with triple divorce; and the projection of this new problem back into the middle Umaiyad period.

Mālik—Rabī'a—Qāsim b. Muḥammad and 'Urwa b. Zubair held that a man married to four wives who divorces one of them with *batta*, is at once free to marry again, without waiting for her *'idda* to expire.

Mālik—Rabī'a—Qāsim b. Muḥammad and 'Urwa b. Zubair told this, their opinion, to the Umaiyad Caliph Walīd b. 'Abdalmalik when he visited Medina, but Qāsim stipulated that the three divorces must be pronounced in separate sessions.

In late Umaiyad times it must have been the practice for the divorced wife or widow to vacate the house of her husband immediately, without waiting for the end of her *'idda.* This practice is clearly stated in two Medinese traditions.[3] According to one, Yaḥyā b. Sa'īd b. 'Āṣ divorced his wife and her father took her away; 'Ā'isha complained to Marwān b. Ḥakam and asked him to have her returned to her house, but Marwān referred to the case of Fāṭima bint Qais who was divorced in the time of the Prophet; 'Ā'isha replied: 'Can you not forget the tradition of Fāṭima?', but Marwān was afraid of bad feeling between the former husband and wife. According to the other Medinese tradition, Ibn 'Umar disapproved of the divorced wife of a grandson of the Caliph 'Uthmān moving during her *'idda.*

[1] See above, p. 146.
[2] See *E.I.*, s.v. *Ṭalāḳ*, sections III and IV.
[3] *Muw.* iii. 62; *Muw. Shaib.* 263.

The same practice which the Medinese traditions ascribed to the Umaiyads, went under the name of 'Alī in Iraq.[1]

The Umaiyad practice was attacked more successfully with references to the Koran. A counter-tradition relating the decision of the Prophet in the case of a certain Furai'a referred to Koran lxv. 2, tried to explain the opposite doctrine away by implying second thoughts on the part of the Prophet, and even claimed that 'Uthmān during his caliphate decided accordingly.[2] An Iraqian tradition makes Ibrāhīm Nakha'ī quote Koran lxv. 1, which is directly relevant, and give it an arbitrary interpretation which makes it even stronger.[3] Koran lxv. 6 is also brought in.

This secondary doctrine prevailed both in Hijaz and Iraq, and was ascribed to 'Umar, Ibn 'Umar and Ibn Musaiyib, and to Ibn Mas'ūd and Ibrāhīm Nakha'ī respectively.[4]

Other points of Umaiyad practice regarding family law have been discussed before.[5]

## C. Umaiyad Administrative Practice

The starting-point of Muhammadan jurisprudence is not only popular practice under the Umaiyads as discussed in the preceding section; it is often the administrative practice of the government. The existence of administrative regulations, sanctioning the practice from which Muhammadan jurisprudence started, is sometimes directly attested[6] and can sometimes be deduced from the subject-matter. Practically all individual cases in which we must postulate an Umaiyad administrative practice as the starting-point fall under the three great headings of fiscal law, law of war, and penal law; cases unconnected with one or other of these are few. This agrees well with the general character of Umaiyad government.

[1] *Āthār Shaib.* 76; *Tr. II*, 10 (*k*).

[2] *Muw.* iii. 74; *Muw. Shaib.* 263. The Furai'a tradition cannot yet have existed at the time when the tradition on 'Ā'isha and Marwān was put into circulation; its several *isnāds* (see Zurqānī, ad loc.) have a common transmitter in Mālik's immediate authority Sa'd b. Isḥāq b. Ka'b b. 'Ujra.

[3] *Āthār A.Y.* 643.

[4] *Muw.* iii. 62, 74; *Muw. Shaib.* 252, 263.—*Āthār A.Y.* 643 ff.; *Āthār Shaib.* 76.

[5] See above, p. 161 on *muwālāt*, p. 181 on disputes about paternity, p. 182 f. on marriage without a *walī*.

[6] See further on in this section and above, p. 191, n. 6.

*Fiscal Law*

The Umaiyad administration imposed the *zakāt* tax on horses; this tax was accepted in Syria and Iraq, but rejected, after some hesitation, in Medina. Both sides expressed their doctrine in traditions.[1] In favour of the tax are the following (in *Tr. III*):

Mālik—Zuhrī—Sulaimān b. Yasār—'Umar was unwilling to impose the *zakāt* on horses, but the Syrians insisted on paying it, and 'Umar finally agreed to accept it but ordered the takings to be spent locally.

Shāfi'ī—Ibn 'Uyaina—Zuhrī—Sā'ib b. Yazīd—'Umar imposed the *zakāt* on horses. Zuhrī is the common link in the *isnāds* of both traditions.

Against the tax are directed the following (in *Muw.*):

Mālik—'Abdallāh b. Dīnār—Sulaimān b. Yasār—'Irāk b. Mālik—Abū Huraira—the Prophet decided that no *zakāt* was to be imposed on horses. The reference to the Prophet is meant to supersede that to 'Umar. Sulaimān b. Yasār is taken from the *isnād* of the first tradition.

Mālik—'Abdallāh b. Dīnār—Ibn Musaiyib bases an analogy on the exemption of horses from the *zakāt*. 'Abdallāh b. Dīnār is the common link in the *isnāds* of these two traditions.

Mālik—'Abdallāh b. Abī Bakr b. 'Amr b. Ḥazm—his father—'Umar b. 'Abdal'azīz gave written instructions not to impose *zakāt* on horses. This tradition with a spurious family *isnād* tries to enlist the authority of an Umaiyad Caliph against the Umaiyad regulation.

The Iraqians, down to Abū Ḥanīfa,[2] accepted the *zakāt* on horses;[3] but Shaibānī,[4] under the influence of the recent tradition from the Prophet, which later appeared in the classical collections, changed the doctrine.

The Umaiyad administration used to deduct the *zakāt* tax from government pensions, and Mālik states on the authority of Zuhrī that Mu'āwiya was the first who did it. In Iraq, this procedure was put under the authority of Ibn Mas'ūd. But this practice was rejected by both schools[5] for the systematic reason

[1] *Muw.* ii. 71; *Muw. Shaib.* 173; *Āthār Shaib.* 47; *Tr. III*, 83.
[2] And Zufar: Zurqānī, ii. 71.
[3] Tradition from Ibrāhīm Nakha'ī to this effect: *Āthār Shaib.* 47.
[4] And Abū Yūsuf: Zurqānī, loc. cit.
[5] *Muw.* ii. 44; *Tr. II*, 19 (*dd*).

that the *zakāt* becomes due only after one year's uninterrupted ownership; this reason is given explicitly on behalf of the Iraqians, and on behalf of the Medinese implicitly in a statement of the general rule with the *isnād* Mālik—Nāfi'—Ibn 'Umar. The Medinese explained away the authorities that might be adduced in favour of the practice,[1] by a tradition to the effect that 'Uthmān deducted from the pension only the amount of *zakāt* due for other property, on the basis of the declaration of the recipient.[2] The same procedure was projected back to Abū Bakr in the following tradition:

Mālik—Muḥammad b. 'Uqba consulted Qāsim b. Muḥammad on the deduction of *zakāt* from pensions—Qāsim referred to Abū Bakr for the general rule regarding *zakāt*, and stated that Abū Bakr followed the procedure as mentioned. This can be dated in the generation preceding Mālik, when the proper decision was still in doubt.

The Umaiyad administration seems to have levied *zakāt* tax on the property of minors.[3]

When payments were made in kind, the Umaiyad administration issued assignments on its stores, and the speculative trade in these assignments, leading as it did to 'usury' (*ribā*), provoked a reaction on the part of the Iraqians and the Medinese. The Medinese prohibited re-selling food before one had taken possession of it, the Iraqians extended this prohibition to all objects.[4] Both the administrative practice and the objection raised against it are explicitly stated in a story which involves Marwān b. Ḥakam, and the objection against re-selling food before one has taken possession of it is ascribed to Ibn Musaiyib,[5] and expressed in traditions related by Nāfi' and 'Abdallāh b. Dīnār, from Ibn 'Umar, from the Prophet. Traditions in favour of the extension of the prohibition to all objects were known also in Medina; they start with a version according to which 'Umar ordered Ḥakīm b. Ḥizām not to re-sell before he had taken possession,[6] and this version develops into traditions from the

[1] Ibn 'Abdalbarr, quoted in Zurqānī, ii. 44, mentions Ibn 'Abbās.

[2] 'Uthmān was meant to supersede Mu'āwiya.

[3] See below, p. 216.

[4] *Muw.* iii. 117, 129; *Muw. Shaib.* 331; *Tr. III.* 50, 95; *Ris.* 47; *Ikh.* 327. Cf. above, p. 108.

[5] This is the oldest tradition on the problem.

[6] This is *munqaṭi'*, on the authority of Nāfi'.

Prophet transmitted by Ḥakīm b. Ḥizām.[1] The objection prevailed only in the generation preceding Mālik; the Kufian 'Uthmān Battī (d. A.H. 143) still allowed re-selling of all objects before one had taken possession (Zurqānī, iii. 118).

A vivid picture of the levying of tolls under Umaiyad administration is given in the following tradition (*Muw.* ii. 51):

Mālik relates on the authority of Yaḥyā b. Sa'īd that Zuraiq [or Ruzaiq] b. Ḥaiyān, the director of the toll-gates of Egypt under the Umaiyad Caliphs Walīd, Sulaimān, and 'Umar b. 'Abdal'azīz, was instructed by 'Umar b. 'Abdal'azīz to levy the appropriate amounts from Muslims and non-Muslims—nothing if the value of their merchandise was under the prescribed minimum by a third of a dīnār or more—and to give a receipt valid for one year. Whereas no reliance can be placed on the individual reference to 'Umar b. 'Abdal'azīz, the description of the procedure is certainly correct in the essentials.

The third of a dīnār within which the exemption from toll does not become effective is an authentic feature;[2] it was disregarded by both the Iraqians and the Medinese.[3] For the rest, the Iraqians uphold the concession that the payment of toll frees the goods from further toll duties for a year;[4] the Medinese, however, subject them to toll duty every time they pass a toll-gate.[5]

It is possible that the restriction of legacies to one third of the estate, which is of Umaiyad origin, was connected with a fiscal interest.[6] The estate of a person who leaves no legal heirs falls to the treasury, and a restriction of legacies would therefore tend to increase its share. Whereas this is suggested only as a possible explanation, the Umaiyad origin of the restriction of legacies to one-third of the estate is explicitly stated in the following tradition (*Muw.* iii. 245):

Mālik—Rabī'a—a man on his death-bed, when Abān b. 'Uthmān was governor [of Medina], set free the six slaves who

[1] 'Aṭā' is the common link in the *isnāds* of two versions; a third, which by-passes him in the *isnād*, adds a technical definition of what is meant by the prohibition.

[2] Ibn 'Abdalbarr, quoted in Zurqānī, ii. 5, considers it as *ra'y* and *istiḥsān* on the part of 'Umar b. 'Abdal'azīz.

[3] But according to Ibn Qāsim, quoted ibid., Mālik let no exemption take place if the value was only a grain or two [of gold] less than the prescribed minimum; see also *Muw.* ii. 45, for dealing with underweight coins.

[4] *Kharāj*, 76; *Āthār Shaib.* 171.

[5] *Tr. III*, 105.

For a parallel, see below, p. 206.

were his only property, but Abān drew lots and set free only the winning two.[1]

This was projected back to the Prophet, first of all as a *mursal*, both in Iraq and in Hijaz, with the *isnāds*: Mālik—Yaḥyā b. Sa'īd and others—Ḥasan Baṣrī and Ibn Sīrīn—Prophet (*Muw.*, ibid.), and Ibn Juraij—Qais b. Sa'd—Makḥūl—Ibn Musaiyib—Prophet (*Ikh.* 370). This tradition dates only from the second century, because Shāfi'ī states[2] that it is the only argument which can be adduced against the doctrine of Ṭāwūs on another problem of legacies; whether the alleged doctrine of Ṭāwūs is authentic or not, the tradition cannot have existed in the time of the historical Ṭāwūs who died in A.H. 101. The whole doctrine on legacies was still fluid at the beginning of the second century.

The restriction of legacies to one-third of the estate was the common ancient doctrine and was directly based on an Umaiyad administrative regulation. But as regards the manumission of slaves on the death-bed, the Iraqians, for systematic reasons, abandoned the drawing of lots and set one-third of each slave free (*Ikh.* 380 ff.).

For obvious fiscal reasons, the Umaiyad administration controlled the granting of ownerless and uncultivated land for purposes of cultivation.[3] As far as the disposal of land already under cultivation, abandoned by its former owners at the time of the great conquests, is concerned, Muhammadan jurisprudence gives only an artificially systematized picture, which as a whole is considerably later than the facts it purports to represent. At the beginning of the second century A.H., when Muhammadan legal science began, there remained only the question whether a grant of the administration was necessary for a valid title to uncultivated land brought under cultivation for the first time (*iḥyā' al-mawāt*). Both the Iraqians, down to Abū Ḥanīfa, and the Medinese answered in the affirmative, upholding the Umaiyad administrative practice which in this case was maintained by the 'Abbāsids.[4]

In the generation preceding Mālik, however, traditions from

[1] The manumission on the death-bed counts as a legacy.

[2] *Ris.* 22; *Ikh.* 381.

[3] See Becker, *Islamstudien*, i. 218 ff.; Caetani, *Annali*, v, year 23, §§ 733 ff. As the result of the following analysis I must, however, disagree with Becker's oversimplified conclusion, ibid. 227.

[4] *Kharāj*, 36; *Muw. Shaib.* 356; *Tr. III*, 67.

the Prophet were put into circulation, mostly in Medina, to the effect that 'if someone brings uncultivated land under cultivation, it belongs to him', implying that no grant was necessary.[1] Mālik shows himself influenced by them when he adds 'and this is our practice', but he specifies (*Mud.* xv. 195) that they apply only to desert tracts, not to land near cultivated country, or as Ibn Qāsim adds on the authority of Mālik, not to land that has been granted as tribal quarters (*khiṭaṭ*). On the Iraqian side, Abū Yūsuf recognized the right of the ['Abbāsid] administration to the control and grant of titles, but on account of the traditions accepted the validity of the title of the cultivator without a grant, and Shaibānī followed him in this.

Connected with fiscal policy was the currency reform of the Umaiyad Caliph 'Abdalmalik. He fixed the official exchange ratio of gold to silver at 1 : 14, struck silver dirhams of 'standard seven', that is, weighing seven-tenths of one gold dīnār, and accordingly made 20 dirhams equivalent in value to one dīnār.[2] It is not surprising that in determining the amounts of weregeld in gold and silver, the ancient schools of law, for once, reflect an earlier stage. The Iraqians fixed it at 1,000 dīnār or 10,000 dirham, the Medinese at 1,000 dīnār or 12,000 dirham.[3] Both schools projected their tariffs back to 'Umar.[4]

But in the details of their doctrine, the ancient Iraqians presuppose 'Abdalmalik's reform. They specify that the dirhams must be of 'standard seven' which was introduced by 'Abdalmalik and which Shaibānī even calls 'the standard of Islam'. They further explain the different tariff of the Medinese by the artificial theory that the dirhams in this case must be of 'standard six', that is, weigh six-tenths of one dīnār. This kind of dirham never existed, but the reckoning results in approximately the same amount of silver for one dīnār;[5] this again presupposes

[1] *Muw.* iii. 204 and the passages referred to in the preceding note. The *isnāds* are quite fluid above Hishām b. 'Urwa.

[2] See *E.I.*, s.v. *Dīnār, Dirham*; J. Walker, *A Catalogue of the Arab-Sassanian Coins* (British Museum, 1941), cxlvi ff. The main Arabic source is a treatise by Maqrizī, translated and annotated by de Sacy, *Mémoires*. See also E. von Bergmann, in *Sitzungsber. Wien*, lxv. 239 ff.; H. Sauvaire, in *J.A.*, 7th ser., vol. xiv ff.

[3] *Tr. VIII*, 1; *Āthār A.Y.* 980; *Āthār Shaib.* 81; *Muw.* iv. 32.

[4] The Iraqian *isnāds*, which alone are given in full in the sources available, have a common link in Sha'bī.

[5] Exactly the weight of 7.2 as against 7 dīnār (the dīnār being also a unit of weight). Rough reckonings like this are not uncommon in early legal texts.

'Abdalmalik's reform. This ancient Iraqian theory was first put into the mouth of Ibrāhīm Nakha'ī and then projected back to 'Uthmān who was alleged to have fixed the weregeld at 12,000 dirham of 'standard six'. Later still, an alleged currency reform of 'Umar on the basis of 'standard six' was deduced.[1] The reform of 'Abdalmalik was projected back to the Umaiyad governor Ziyād b. Abī Sufyān.[2] The traditions from the Prophet concerning the amount of weregeld in gold and silver, which occur in the classical traditions, were as yet unknown to Shaibānī.[3]

The minting fees of the Umaiyad administration gave the lawyers an occasion for elaborating strict rules on the exchange of bullion for coins.[4]

### *Law of War*

It was the policy of the Umaiyads, for reasons of expediency, not to lay waste the enemy country wantonly. This was well known to Auzā'ī and to Abū Yūsuf.[5] In justification of the Umaiyad policy it was alleged that Abū Bakr instructed Yazīd b. Abī Sufyān, a member of the Umaiyad family, to adopt it when he sent him at the head of an army group against Syria.[6] Syrian doctrine acknowledged the Umaiyad practice, and Ibn Ḥanbal considered the Abū Bakr tradition a Syrian invention.[7]

The devastation of enemy country, on the other hand, was advocated by reference to Koran lix. 5 which authorizes the cutting down of trees in warfare, by counter-traditions from Abū Bakr and from the Prophet,[8] and by 'historical' traditions from the Prophet.[9]

Against this, the Syrians took the Abū Bakr tradition as an authoritative interpretation of the Koranic passage, referred to Koran ii. 205 which forbids the causing of devastation, and as far as the 'historical' traditions from the Prophet were concerned, concluded that there must have been a change of dispensation.[10]

[1] See de Sacy, *Monnaies*, 13.
[2] *Tr. VIII*, 1; de Sacy, ibid. 15.
[3] See above, p. 145.
[4] See above, p. 67.
[5] Ṭabarī, 81; *Tr. IX*, 28.
[6] *Muw.* ii. 295; *Mud.* iii. 7 f.; *Tr. III*, 65; *Tr. IX*, 28 f.; Ṭabarī, 81.
[7] See *Comm. ed. Cairo* on *Tr. IX*, 28.
[8] See above, p. 145.
[9] See above, p. 139, n. 4.
[10] *Tr. IX*, 29; Ṭabarī, 81; *Umm*, iv. 161, 173 ff.; *Siyar*, i. 35.

The Medinese, under the influence of the recent traditions, decided for unrestricted warfare,[1] and so did the main group of Iraqians, represented by Abū Ḥanīfa, Abū Yūsuf, and Shaibānī.[2] Some other Iraqians, however, shared the doctrine of the Syrians, and Sufyān Thaurī declared that were it not for the Abū Bakr tradition, he would have no objection to the cutting down of trees.[3]

The Umaiyad government controlled the distribution of booty, allotting to the rider two shares for his mount, in addition to his personal share.[4] This was done on the basis of the records in the pay-roll (*dīwān*); if a person was entered in it as a foot-soldier, he did not receive the share of a rider, even if he had acquired a horse in the meantime.[5] The Iraqians accepted this administrative practice, all the more easily as the institution of the *dīwān* was ascribed to 'Umar. Auzā'ī, however, pointed out that the *dīwān* did not exist in the time of the Prophet and opposed to it the fictitious usage of the Prophet and of the Caliphs; for Shāfi'ī this became *sunna*. Both parties reacted in the same way to the practice of dividing the booty not on the spot but after the return of the army to Islamic territory.[6] In this case, Auzā'ī positively alleged a change from the (fictitious) old to the (real) recent practice in A.H. 126, but this change is spurious.[7] Mālik, too, referred to the fictitious practice at the beginning of Islam.[8]

The right of the killer to the spoils was recognized, but some of the ancient schools felt scruples about it.[9]

## *Penal Law*

Byzantine and Syriac historians relate that 'Umar b. 'Abdal'azīz in A.H. 100 (A.D. 717/718) fixed the weregeld for a Christian at half of that for a Muslim.[10] This does not mean that the full weregeld was paid before, which would be un-

[1] *Mud.* iii. 7 f.; Ṭabarī, 81.
[2] *Tr. III*, 28 f.; *Siyar*, i. 35.
[3] *Kharāj*, 123; Ṭabarī, 81.
[4] See above, p. 108.
[5] *Tr. IX*, 4; Ṭabarī, 72; *Siyar*, ii. 184; *Mud.* iii. 32 f.
[6] *Tr. IX*, 1; Ṭabarī, 89; *Siyar*, ii. 254; *Mud.* iii. 12.
[7] See above, p. 71.
[8] See above, p. 68.
[9] See above, p. 70 f.
[10] Caetani, *Chronographia*, year 100, § 28. This date seems preferable to A.D. 725, and there is no reason to antedate it in the reign of Walid b. 'Abdalmalik (A.H. 86–96). Wellhausen, *Arab. Reich*, 187, says correctly: 'under 'Umar II'.

likely; if weregeld for a non-Muslim was paid at all, there was no fixed usage, and this regulation was the starting-point.

It is typical of the fictitious character of the frequent references to 'Umar b. 'Abdal'azīz and of the lack of positive information on the part of the ancient lawyers that here where 'Umar b. 'Abdal'azīz did inaugurate an important legal rule, there should be only an isolated reference to him which moreover is 'weak' by the standards of the Muhammadan critics,[1] and that the regulation should be commonly attributed to Mu'āwiya.[2] The most circumstantial version of the common story occurs in *Aghānī*, xv. 13, related by an anonymous sheikh from Hijaz on the authority of the freedman of an implicated party, and by that notorious propagator of traditions, Ibn Abī Dhi'b, on the authority of one Abū Suhail or Ibn Suhail who is no more than a name. According to it, Mu'āwiya demanded 12,000 dirham as weregeld for his Christian physician, remitted 6,000 to the public treasury and took 6,000 for himself, and this usage remained in force until 'Umar b. 'Abdal'azīz cancelled the ruler's share but maintained the treasury's.

We have here a disturbed echo of a corollary to the regulation of 'Umar b. 'Abdal'azīz. Half of the normal weregeld did in fact go to the next of kin of the non-Muslim victim, but the second half was demanded by the public treasury. This is explicitly stated on the authority of Zuhrī (*Tr. VIII*, 13, p. 293 *ult.*), and is another example of Umaiyad fiscal policy.

The Medinese adopted the Umaiyad regulation as far as the weregeld proper for a non-Muslim was concerned, but ignored the demand of the public treasury.[3] The Iraqians, by insisting on the full weregeld for a non-Muslim, protested against the demand of the treasury in another way.[4] The Iraqian doctrine was ascribed to the ancient authorities Ibrāhīm Nakha'ī and Sha'bī. It seems that the same doctrine was held by at least some Medinese in the time before Mālik, because Shaibānī quotes traditions from and through Medinese authorities to this effect.[5] On the other hand, once discrimination against the

[1] *Muw.* iv. 41; *Tr. VIII*, 13, p. 294, l. 13.

[2] *Āthār A.Y.* 972; *Āthār Shaib.* 87; *Tr. VIII*, 13. It was also projected back to the Prophet, but this too is not 'well-established' (*Tr. VIII*, 13, p. 294, l. 10).

[3] *Muw.* iv. 41; *Mud.* xvi. 195; *Tr. VIII*, 13.

[4] *Āthār A.Y.* 969; *Āthār Shaib.* 87; *Tr. VIII*, 13.

[5] *Tr. VIII*, 13. He mentions Rabī'a (this is perhaps genuine) and Ibn Musaiyib

non-Muslim had begun, some Medinese allotted him only one-third of the weregeld for a Muslim or even less: 4,000 dirham for a Jew or Christian and 800 for a Zoroastrian. This was projected back to 'Umar and 'Uthmān on the authority of Ibn Musaiyib, and Ibn Musaiyib was made to express indignation at the doubt whether it was generally accepted.[1] But this claim is not correct nor is the protest of Ibn Musaiyib genuine, since we find a statement on the authority of Sulaimān b. Yasār to the effect that 'people used to fix the weregeld for Zoroastrians at 800 dirham, and for Jews and Christians at the amount customary between them' (*Tr. III*, 43).

The Umaiyad administration deducted the weregeld (or the fractions of it due for wounds) from the pension account of the culprit or of his tribe, if necessary in three yearly instalments, and paid it to the family of the victim (or to the victim in person).[2] Mu'āwiya is said to have instituted this procedure (Kindī, 309). This administrative practice is the basis of the common doctrine of the ancient schools of law. According to this doctrine, the *'āqila* of the culprit must pay the weregeld for accidental killing (or the fraction of it due for an accidental wounding) in three yearly instalments;[3] the *'āqila* consists in the first place not of the members of the tribe as such, as in ancient Arab tribal society from which this idea of collective responsibility derived,[4] but of those whose names are entered in the same pay-roll. The Medinese, however, made the culprit individually responsible for all fractions amounting to less than one-third of the weregeld (*Muw.* iv. 42). Shāfi'ī more or less openly reproached them with following, against analogy, the decree of some governor (*Tr. VIII*, 14), and we must conclude that they endorsed an administrative ruling which left it to the aggrieved party to collect smaller amounts from the culprit.[5]

(a fictitious authority; see below for another doctrine ascribed to him); he also quotes from Zuhrī a statement pointing out that Mu'āwiya's regulation diverged from the practice under Abū Bakr, 'Umar and 'Uthmān, and a tradition which makes 'Uthmān fix the weregeld for a non-Muslim at the full amount.

[1] *Tr. VIII*, 13, p. 294. The amount of 4,000 dirham is based on the Medinese rate of 1,000 dīnār or 12,000 dirham for the weregeld of the Muslim (see above, p. 203).

[2] See Gaudefroy-Demombynes, in *Mélanges Dussaud*, ii. 826 and n. 7.

[3] The weregeld for murder and the fractions of it due for intentional woundings are to be borne by the culprit himself.

[4] See Robertson Smith, *Kinship*, 64; Procksch, *Blutrache*, 56 ff.

[5] The Iraqians made the *'āqila* responsible for all damages for accidental wound-

The Umaiyad administration, moreover, seems to have fixed the actual fractions of the weregeld which were due for certain kinds of wounds.[1]

The Umaiyad administration did not interfere with the working of the old Arab *lex talionis*, as modified by the Koran.[2] Considerations of public policy regarding the execution of murderers, such as are found in, or rejected by, the Iraqian and Medinese schools,[3] do not necessarily reflect a corresponding administrative practice.

As regards the purely Islamic *ḥadd* punishments and similar penalties, however, there are positive traces of an Umaiyad practice from which the ancient schools of law started. This practice was in some respects irregular by later standards.[4]

The non-Muslim slave who escaped to the enemy was killed or crucified at the discretion of the government (*imām*), if he was recaptured; Auzā'ī gave his opinion (*ra'y*) endorsing this practice, the Iraqians and the Medinese rejected it.[5]

The Umaiyad administration refused to cut off the hand of a slave who had run away from his master in Islamic territory and stolen.[6] Both Medinese and Iraqians held that the slave was liable to the punishment for theft prescribed in Koran v. 38.[7] A Nāfi' tradition makes Ibn 'Umar insist on it against the Umaiyad governor Sa'īd b. 'Āṣ; another tradition makes 'Umar b. 'Abdal'azīz countermand what had hitherto been the accepted opinion.[8] The thesis of the Medinese was projected back to Qāsim b. Muḥammad, Sālim, and 'Urwa, and Mālik found it held unanimously in Medina.

Both ancient schools, however, agreed that only the government, and not the master, could cut off the hand of a slave as

ing which amounted to one-twentieth of the weregeld or more; but one-twentieth is the smallest fraction applicable. Lesser amounts, which are not assessed in fractions of the weregeld, are to be borne by the culprit himself. See *Āthār A.Y.* 979; *Āthār Shaib.* 85; *Tr. VIII*, 14. The Iraqians, therefore, whilst materially rejecting the administrative regulation, remained formally influenced by it.

[1] See above, p. 114, and below, p. 217.

[2] See *E.I.*, s.v. *Ḳiṣāṣ*; Lammens, *L'Arabie occidentale*, 233.

[3] See above, p. 111 and below, p. 274.

[4] Cf. above, p. 191 and n. 5.

[5] *Tr. IX*, 18; Ṭabarī, 97.

[6] We have seen above, loc. cit., that the usual punishment for theft under the Umaiyads was not cutting off the hand, but flogging.

[7] *Muw.* iv. 81; *Muw. Shaib.* 303; *Tr. III*, 147.

[8] 'I used to hear'; on the meaning of this formula see above, p. 101.

a punishment for theft.[1] The tradition from Ibn 'Umar, which advocates the opposite doctrine, cannot therefore be the basis of the Medinese doctrine.

Banishment as part of the punishment for fornication is known to the ancient Iraqians as a current practice,[2] but rejected by them as likely to lead to further temptation.[3] This opinion was ascribed to Ibrāhīm Nakha'ī and projected back to 'Alī, and the opinion in favour of banishment was put under the authority of Ibn Mas'ūd; all this is reported with the *isnād* Ḥammād—Ibrāhīm.[4] The Iraqian opposition put into circulation counter-traditions from 'Alī advocating banishment. Although this opinion did not prevail in Iraq, it prevailed in Medina where it found expression in traditions, among others, from Abū Bakr, 'Umar, 'Uthmān, 'Umar b. 'Abdal'azīz, and the Prophet himself.[5] For Shāfi'ī, the administrative practice had become the *sunna* of the Prophet.

It was the practice under the Umaiyads not to apply *ḥadd* punishments in the army in enemy country, for fear of desertion.[6] The information on Auzā'ī is contradictory on details; it shows, however, that he endorsed the practice whilst idealizing it. In Iraq, Abū Ḥanīfa introduced a systematic theory of the applicability of religious punishments and their territorial limits;[7] it has its basis in the old practice but goes farther in restricting *ḥadd* punishments. Abū Yūsuf and Shaibānī relate traditions from Companions, and finally from the Prophet, in favour of the practice; their *isnāds* are significantly Syrian and Iraqian.[8] The Medinese did not recognize the practice, but Mālik made at least the concession that the commander might postpone the *ḥadd* punishment if he was otherwise engaged in enemy country.

Auzā'ī considers it natural that *ḥadd* punishments in the

[1] *Mud.* xvi. 57; *Muw. Shaib.* 303.

[2] The judge Ibn Abi Laila endorsed it: *Tr. I*, 254.

[3] *Āthār Shaib.* 90; *Tr. II*, 18 (*c*), (*z*).

[4] The person responsible for these traditions is certainly not Ibrāhīm but Ḥammād or someone who used his name.

[5] *Muw.* iv. 8, 12; *Tr. II*, 18 (*z*); *Umm*, vi. 119.

[6] *Kharāj*, 109; *Siyar*. ix. 107; *Tr. IX*. 27; Ṭabarī, 52.

[7] See below, p. 298.

[8] See also *Comm. ed. Cairo* on *Tr. IX*. 27 (p. 82, n. 1). The Iraqian *isnāds* have a common link in A'mash. In one of the later versions, with a strong anti-Umaiyad bias, Walīd b. 'Uqba, a half-brother of 'Uthmān, is involved.

army should be administered by military commanders, even those of lower rank; Abū Ḥanīfa insists, as a part of his systematic reasoning, that only the cadi is competent to do it. Shāfi'ī, with consistent and systematic reasoning, cuts across the previous divisions of doctrine. This is typical of the growth of legal doctrine out of, and away from, the old practice.

*Other Branches of Law*

At the same time at which the weregeld for a non-Muslim was fixed at half of that for a Muslim[1] it was decreed that Christians, and presumably non-Muslims in general, could not give evidence against Muslims. This did not imply that their evidence against Muslims had been admitted before, but it meant that their evidence was henceforth to be admitted in cases where only non-Muslims were involved. The Koran (ii. 282, v. 106, lxv. 2) had ordered the Muslims to choose their witnesses from amongst themselves;[2] but nothing was said about the evidence of non-Muslims against one another. The Iraqians endorsed the administrative practice for which they claimed the authority of Shuraiḥ (*Tr. I*, 109), and later that of the Prophet.[3] Yaḥyā b. Aktham (quoted in Sarakhsī, xvi. 133) calls this doctrine 'the consensus of the old authorities'.

The Iraqian judge Ibn Abī Lailā regarded Jews and Christians as belonging to two different religions, and therefore admitted their evidence only against their own co-religionists; this corresponded to the ancient practice.[4] Abū Ḥanīfa and Abū Yūsuf, however, opposed the unbelief of all tolerated religions to the true belief of Islam, and therefore held that all adherents of tolerated religions could give evidence against one another. In the particular case of *Tr. I*, 35, Ibn Abī Lailā by an expedient but inconsistent decision admitted the evidence of non-Muslims against one another but excluded regress against a Muslim, whereas Abū Ḥanīfa and Abū Yūsuf, with stricter systematic reasoning, rejected the evidence of non-Muslims because it would lead to regress against a Muslim.

When no Muslims were available to witness the will of a

[1] See above, p. 205.
[2] For an exception in one particular case, see what follows.
[3] See above, p. 146.
[4] See Kindī, 351, on Khair b. Nu'aim, judge of Egypt, A.H. 120–7.

Muslim who died on a journey, the Koran itself (v. 106) declared the evidence of non-Muslims valid, and Ibn Abī Laylā decided accordingly,[1] again presumably in keeping with the ancient practice. Legal doctrine from Abū Ḥanīfa onwards, however, rejected the evidence of non-Muslims in this case, and Abū Yūsuf arbitrarily declared the Koranic passage to have been repealed by lxv. 2.

The Medinese rejected the evidence of non-Muslims altogether, even against one another (*Mud.* xiii. 7), and Shāfi'ī followed this, providing systematic reasons (*Umm*, vii. 38 ff.). This doctrine represents the full victory of the tendency to religious exclusiveness over the ancient practice.

If a man disappears and is not heard of, his wife must wait four years for him before she is free to undergo the *'idda* and to remarry. The period of four years was based on an administrative regulation. Mālik and before him Rabī'a insisted that the government (*sulṭān, imām*) should fix the term of four years in every individual case (*Mud.* v. 130, 133). Rabī'a does not yet refer to any traditions, but uses the customary expressions 'we have heard' and 'it is said' for opinions that found general approval.[2] In the time of Mālik, the doctrine had found expression in a tradition from 'Umar, transmitted by Yaḥyā b. Sa'īd,[3] and Mālik regarded it as the 'practice'.

But some Medinese held that no matter when the first husband returned, he could reclaim his wife or demand the *donatio propter nuptias* back, and expressed their doctrine in two counter-traditions, one from 'Umar and the other from 'Uthmān.[4] Others went still farther in their opposition to the government regulation, as Shāfi'ī relates, and contested the time limit of four years altogether by saying: 'This does not look like a decision of 'Umar.' But their opposition, based on a religious scruple, did not prevail, and Zurqānī (iii. 57) could represent the Medinese doctrine which perpetuated the administrative regulation, as perpetuating a consensus of the Companions and the concurring opinion of a number of Successors.

[1] *Tr. I*, 111; cf. Sarakhsī, xxx. 152.

[2] See above, p. 101.

[3] *Muw.* iii. 56; *Mud.*, loc. cit.; *Tr. III*, 82.

[4] Ibn Musaiyib appears in the *isnāds* of both traditions from 'Umar; neither reference can be considered genuine.

The position of the grandfather with regard to the brothers was uncertain in the ancient agnatic Arab law of inheritance which the Koran had maintained in principle, whilst superimposing on it its new system of 'heirs by quota'.[1] The ancient doctrine of Muhammadan law makes the grandfather inherit on the same footing as the brothers, but guarantees him one-third of the combined shares if there are more than two brothers. There is no possible systematic reason for this guarantee, and a tradition (*Muw.* ii. 368) shows its origin in an administrative regulation of Umaiyad times, projected back into the period of the first Caliphs:

Mālik—Yaḥyā b. Sa'īd[2]—Mu'āwiya consulted Zaid b. Thābit by letter on the share of the grandfather; Zaid wrote back that Allah knew best, the rulers had decided it, and the two previous Caliphs ['Umar and 'Uthmān] let him share equally with one or two brothers, but if there were more brothers, guaranteed him one-third.

This was improved and transformed into the dogmatic statement that 'Umar, 'Uthmān, and Zaid b. Thābit gave the grandfather, when there were also brothers, one-third. Another version with a full, improved *isnād* acknowledges the process of backward projection by declaring ingenuously that "Umar treated the grandfather in the same way in which he is treated nowadays'.

Two unsuccessful Iraqian opinions reject the administrative regulation.[3] One systematizes rigidly by primitive *qiyās* and makes the grandfather preclude the brothers from inheriting; this was projected back to Abū Bakr, as being senior to 'Umar and 'Uthmān, and to other Companions, and was held by Abū Ḥanīfa. The other opinion makes the grandfather inherit on the same footing as the brothers and adopts the principle of a minimum guarantee, but fixes it at one-sixth of their combined shares. The sixth is meant to replace the arbitrary third of the administrative regulation, and is derived from the sixth which is the share of the grandfather when he inherits as an 'heir by quota', on the basis of a broad interpretation of Koran

[1] See *E.I.*, s.v. *Mīrāth*.

[2] The *isnād* is interrupted (*munqaṭi'*) here; this makes it probable that the tradition originated in the generation preceding Mālik.

[3] *Muw. Shaib.* 314; *Tr. I*, 122; *Tr. II*, 16 (*a*), (*f*); *Ris.* 81.

iv. 11. This opinion was projected back to the old Iraqian authorities 'Alī and Ibn Mas'ūd, and was held by Ibn Abī Lailā. But the majority of Iraqians in the time of Shaibānī held the same opinion as the Medinese.

## D. The Attitude of the Ancient Schools of Law to Umaiyad Practice

The evidence collected in this chapter makes it necessary to discard the opinion, often expressed as part of *a priori* ideas on the origins of Muhammadan jurisprudence, that the Medinese were stricter, more deeply inspired by the religious spirit of Islam, and more uncompromisingly opposed to the worldly Umaiyads than the Iraqians. There was no essential difference between the Medinese and the Iraqians, or the Syrians, in their general attitude both to Umaiyad popular practice and to Umaiyad administrative regulations, and their several reactions to each particular problem were purely fortuitous, whether they endorsed, modified, or rejected the practice which they found. We sometimes find the Iraqians stricter and more critical of Umaiyad practice than the Medinese, and the Medinese more dependent on the practice than the Iraqians.[1] The consistent reference to traditions from the Prophet as the decisive criterion was introduced only by Shāfi'ī, following the activity of the traditionists, and Shāfi'ī was bound by the fortuitous result of the growth of traditions up to his time.

The common attitude of the ancient schools of law to Umaiyad practice is anterior to the historical fiction of early 'Abbāsid times which made the Umaiyads convenient scapegoats. The following chapter will show that apart from this common attitude there existed at the earliest stage of Muhammadan jurisprudence a considerable body of common doctrine which was subsequently reduced by the increasing differences between the schools.

[1] Above, pp. 200, 207, 212. See also above, p. 73 f., on '*sunna* of the Prophet' as an Iraqian concept.