THE ORIGINS OF Muhammadan Jurisprudence

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CHAPTER 2

COMMON ANCIENT DOCTRINE AND CROSS-INFLUENCES

A. The Common Ancient Doctrine

THE earliest period of Muhammadan jurisprudence is characterized by a number of features common to the several schools. We saw in the first part of this book that the ancient schools of law share the essentials of legal theory, not all of which are historically necessary and systematically self-evident. We saw in the preceding chapter that their essential attitude to Umaiyad practice, which they take as their starting-point, is the same. The present section is devoted to the considerable body of positive law which they have in common.

It will appear from the evidence collected here that this common body of doctrine is, generally speaking, not the result of a converging development from original diversity towards later unity, but that the common ancient doctrine came at the beginning and was subsequently diversified in the several schools. Not the whole of the doctrine was uniform at the beginning—we noticed in fact that the reactions of the several schools to Umaiyad practice were often different—but the existing common body of ancient doctrine certainly goes back to the earliest stage of Muhammadan jurisprudence. Because of the continual improvement on traditions and the resort to ever higher and better authorities, a process which we have considered in the second section of this book, the later variations of doctrine are often better supported by traditions than the earliest common stage. The following examples, some of which have been discussed before, are intended to illustrate the common ancient doctrine and its subsequent diversification, a process which cannot be reduced to a single formula.

Family Law

No marriage without a *walī*. See above, p. 182 f.

Privacy and presumption of intercourse. See above, p. 193 f.

Definite and triple divorce. See above, pp. 195 ff.

Offer of divorce. If the husband offers his wife a divorce by delegating to her his power of repudiation and the wife chooses to remain with her husband, the offer does not count as one of the three divorces by repudiation to which the husband is entitled. This was the common ancient doctrine in Hijaz and in Iraq.[1] By a formalistic reasoning, however, some Iraqians regarded the offer of divorce as one revocable repudiation, and projected this doctrine back to 'Alī.[2] But this suggestion was not successful,[3] and it was countered by traditions connected with 'Ā'isha: in Hijaz in the form of a remark additional to an anecdote on 'Ā'isha's interference in matters of marriage,[4] in Iraq in the form of 'Ā'isha's comment on Koran xxxiii. 28 f., a passage which orders the Prophet to offer the choice of a repudiation to his own wives.[5]

Oath of abstinence (*īlā'*). The ancient Arab oath of abstinence from marital intercourse was regulated by Koran ii. 226 f. The common ancient doctrine interpreted this passage as meaning that the oath of abstinence, if kept, produced a divorce automatically at the end of four months. This remained the constant doctrine of the Iraqians and was projected back to Ibn Mas'ūd and other ancient authorities. In Hijaz, it was ascribed to Zuhrī, Ibn Musaiyib, Abū Bakr b. 'Abdalraḥmān, and others.[6]

At a later stage, however, following a more literal and narrow interpretation of the Koranic passage, the doctrine prevailed in Hijaz that the husband at the end of four months was to be given the choice either of breaking the oath and expiating it, or of repudiating his wife. This was the doctrine of the Medinese in the time of Mālik; the earliest reference to it which is possibly historical, ascribes it to Abul-Zubair Makkī.[7] But the traditions to the same effect in the *Muwaṭṭa'*, from Ibn 'Umar (through Nāfi') and from 'Alī, are certainly spurious.

The tradition from 'Alī exists also with *isnāds* composed of Iraqian traditionists; this represents an unsuccessful effort by the Iraqian opposition to change the doctrine of the school.[8] Shaibānī countered the later Hijazi opinion by remarking that

[1] *Muw.* iii. 38; *Āthār A.Y.* 633; *Āthār Shaib.* 79.
[2] *Āthār A.Y.* 632; *Tr. II*, 10 (*g*).
[3] *Muw. Shaib.* 255 f.; *Tr. I*, 226.
[4] See above, p. 171.
[5] *Āthār Shaib.* 79; *Tr. II*, 10 (*g*).
[6] *Muw.* iii. 39; *Muw. Shaib.* 258; *Āthār A.Y.* 673 ff.; *Āthār Shaib.* 79.
[7] *Āthār A.Y.* 677 f.
[8] *Tr. II*, 10 (*j*). Cf. below, p. 240.

Ibn 'Abbās, to whom the common ancient doctrine was ascribed, knew the correct interpretation of the Koran better than others.

Foster-parentship. The ancient Iraqians and Medinese were essentially agreed that a single act of breast-feeding produced foster-parentship.[1] The traditions in the *Muwaṭṭa'* and in *Tr. III*, 56, starting with one from 'Ā'isha, were an unsuccessful effort to introduce a minimum number of feedings.[2]

Umm al-walad. See below, p. 264 f.

Contracts

Khiyār al-majlis. See above, pp. 159 ff.

Sale of the *walā'* and of the *mukātab* slave. See above, p. 173 f.

Sale of dogs. Muhammadan law at the beginning regarded dogs as *res in commercio*. According to the Iraqians, who have retained the common ancient doctrine, (*a*) the sale of dogs is valid, and (*b*) if a man destroys a dog he is responsible for its value to the owner. The idea of the ritual uncleanness of dogs was taken over from Judaism.[3] The Medinese, therefore, rejected proposition (*a*), and expressed this doctrine in a tradition from the Prophet, but inconsistently maintained proposition (*b*). Only Shāfi'ī was consistent enough to reject both propositions (*Tr. III*, 51).

Pre-emption. See below, p. 219 f.

Security. See above, p. 186 f.

Fiscal Law and Law of War

Zakāt tax of the minor. The development started with the common ancient doctrine, based perhaps on an administrative regulation of late Umaiyad times, that the property of minors was liable to *zakāt* tax.[4] This remained the Medinese doctrine, and it developed the corollary that the guardian was authorized to trade with the property of his ward, so that the *zakāt* should not eat into the capital, and to pay the tax on his behalf.

[1] *Muw.* iii. 86, 89, 93; *Muw. Shaib.* 271; *Mud.* v. 87.

[2] See also below, p. 246 f.

[3] See Lammens, *Yazîd Ier*, 461 f. and *Omayyades*, 362.

[4] *Muw.* ii. 49; *Tr. II*, 9 (*a*). We must postulate this doctrine for the earliest Iraqians not indeed from the 'Alī tradition in *Tr. II*, 9 (*a*), but from the subsequent development of the Iraqian doctrine.

In Iraq, consideration of the ward's interest led to a progressive modification of the doctrine which became thereby inconsistent.[1] One opinion, held by Ibn Abī Lailā, was that the guardian was bound to pay *zakāt* on behalf of the ward but remained responsible for his administration. According to another opinion, the guardian had to keep a record of *zakāt* due but leave it to the ward whether to pay it or not when he came of age; this opinion was ascribed to Ibn Mas'ūd. Finally, there is the more systematic opinion of Abū Ḥanīfa, Abū Yūsuf, and Shaibānī, to the effect that the minor is not liable to *zakāt* because he is not subject to other religious duties; therefore the guardian need not pay it for his ward, but may nevertheless trade with his property; this opinion, too, was ascribed to Ibn Mas'ūd, as well as to Ibrāhīm Nakha'ī.

Shāfi'ī was the first to quote a tradition from the Prophet on the subject, endorsing the Medinese or common ancient doctrine; he pointed out the inconsistency which remained in Abū Ḥanīfa's doctrine.

Cultivation of uncultivated land. See above, p. 202 f.

Property captured by the enemy. See above, p. 158 f.

Penal Law

Criminal intent of the minor. See below, p. 316 f.

Weregeld paid by the *'āqila*. See above, p. 207.

Compensation for a molar. See above, p. 114.

Weregeld of the woman. It was the common ancient doctrine that a woman's weregeld was half that of a man in cases involving loss of life or wounds the damages for which amounted to one-third of the weregeld or more; but that it was equal to the weregeld of the man where the damages amounted to fractions less than one-third of the weregeld.[2] This remained the doctrine of the Medinese who projected it back to Ibn Musaiyib.[3] It is also well attested for Iraq, where it was pro-

[1] *Āthār A.Y.* 451 ff.; *Āthār Shaib.* 46; *Tr. I*, 130; *Tr. II*, 19 (*ee*).

[2] *Muw.* iv. 34; *Mud.* xvi. 118; *Āthār Shaib.* 85 f., 95; *Tr. II.* 13 (*k*); *Tr. VIII*, 5. This doctrine seems based on an Umaiyad regulation; see above, p. 207. For another case where fractions of more and less than one-third of the weregeld are treated differently.

[3] Zurqānī, much later, ascribes it to the Seven Scholars of Medina, to 'Umar b. 'Abdal'azīz and to other ancient authorities; he even knows a tradition from the Prophet to the same effect.

jected back into the time of 'Abdalmalik's governor Hishām b. Ismā'īl, and further ascribed to Shuraiḥ, Ibn Mas'ūd, and Zaid b. Thābit. Within the pre-literary period, however, the Iraqians took objection to this breach in the system and taught that all fractions of the weregeld of the woman ought to be half of the corresponding fractions of the weregeld of the man. They adduced 'Umar and 'Alī as authorities, and made Ibrāhīm Nakha'ī 'prefer the doctrine of 'Alī to that of Ibn Mas'ūd, Zaid b. Thābit and Shuraiḥ'. But this last, the common ancient doctrine, was in the time of Ibrāhīm only on the point of being projected back into the period of Hishām b. Ismā'īl, on the authority of the same Ibrāhīm. Ibrāhīm's alleged statement of doctrine is therefore spurious, and the systematized and secondary stage of the Iraqian doctrine later than his time.

Weregeld of the slave. See below, p. 281 f.

Evidence

Oath of the plaintiff. See above, pp. 167 ff., 187 f.

Evidence of minors. The common ancient doctrine admitted the evidence of minors regarding wounds inflicted by minors on one another.[1] This was obviously inspired by practical necessity, but it was abandoned first in Iraq by Abū Ḥanīfa and Abū Yūsuf, and in Hijaz by some disciples of Mālik, for systematic reasons and in strict interpretation of the Koranic requirements of witnesses. Both opinions were projected back to Companions.

Occasionally, the common element consists of an abstract principle rather than of a positive doctrine, such as the principle that conversion to Islam gives a good title to all property held at the time,[2] the principle that the punishment by *ta'zīr*, at the discretion of the judge, ought to remain within the limits set by the fixed *ḥadd* punishments,[3] and the principle, referred to above, that the minor for purposes of penal law cannot act intentionally.

B. Early Cross-references and Cross-influences

There are numerous cross-references from one school of law to the doctrine of another, over the whole of the pre-literary period. These references are usually expressed in counter-

[1] *Muw.* iii. 185; *Mud.* xiii. 13; *Āthār Shaib.* 95; *Tr. I*, 115; Kindī, 351.
[2] *Tr. IX*, 46 f.; *Mud.* iii. 18 f.
[3] *Tr. II*, 18 (*y*); *Āthār Shaib.* 90.

traditions, directed against the doctrines of another school.[1] A reference to the doctrine of another school is also implied when the name of its main authority is borrowed by opponents;[2] in particular, the Iraqians use the name of the Medinese authority Ibn 'Umar, and the Medinese that of the Iraqian authority Ibn Mas'ūd.[3] Occasionally, we find explicit references to a school by its name,[4] and comments on its doctrine in the traditions of its opponents.[5] This taking cognizance of one another's doctrines and opposing one's own opinions to those of the opponents is a feature common to the ancient Iraqians and the ancient Medinese.

The following example, taken from the doctrine of pre-emption, will show how cross-references to other schools enter into the development of legal doctrine in the pre-literary period. The result of this development, as it affected pre-emption, was that two opposite doctrines prevailed in the Medinese and in the Iraqian school respectively: the Medinese restricted the right of pre-emption to the owner of a share in undivided property, and the Iraqians extended it to the neighbour.[6] The oldest Iraqian formula, however, was that 'the right of pre-emption goes by gates, and the person whose gate is nearest has the best right to pre-emption'; it was projected back to Ibrāhīm Nakha'ī as his alleged former opinion, and on the fictitious authority of Ibrāhīm back to Shuraiḥ. This formula, which reflects the social background of the institution of pre-emption in early Muhammadan law, seems to be the common starting-point of the Medinese and of the Iraqian doctrines.[7]

The Basrians, while essentially maintaining this opinion, justified it as against the Medinese restriction of the right of pre-emption by pointing out that the lane, on which the several adjoining plots abutted, remained undivided and constituted an interest common to them all. The earlier Kufians, on the other hand, extended the right of pre-emption to all owners of plots within a single block or section not traversed by a thoroughfare, irrespective of whether

[1] See above, p. 152 ff. [2] See above, p. 155 f.

[3] See above, pp. 32, 197.

[4] See, e.g. *Āthār A.Y.* 623; *Āthār Shaib.* 76, and above, pp. 117, 153.

[5] See above, p. 203 f.

[6] *Muw.* iii. 172 ff.; *Āthār A.Y.* 766 f.; *Āthār Shaib.* 111 f.; *Muw. Shaib.* 364; *Tr. I*, 49; *Tr. III*, 107; *Ikh.* 260, 264. On legal maxims in favour of the Iraqian doctrine, see above, p. 164.

[7] A tradition in Kindī, 334 (l. 10 ff.), reflects the change in Egypt from the common ancient to the final Medinese doctrine, and the arguments adduced in favour of the latter.

the plots adjoined or opened on the same lane. Final systematic consistency was achieved in Iraq only in the time of Abū Ḥanīfa and his companions who gave the right to pre-emption to the owner of a share in undivided property in the first place,[1] then to the owner of a separate plot who had, however, retained a common interest in the lane, and finally to the owner of an adjoining plot.[2]

Besides and beyond cross-references, there exist cross-influences, cases where the doctrine of one particular school was taken over by another in the pre-literary period. In contrast to the mutual character of the formal reactions of the Iraqians and the Medinese to one another's doctrines, we notice that the material influences almost invariably start from the Iraqians and not from the Medinese. We found that Iraqian legal maxims were taken over by the Medinese, but not vice versa;[3] and we saw that an early Iraqian *qiyās* spread into Hijaz and there produced traditions from the Prophet.[4]

A further example is provided by the doctrine of *'umrā* and *suknā*, a kind of temporary gift.[5] Etymology and old Arabic usage show that *'umrā* was originally a temporary gift, to revert to the donor at the death of the donee;[6] *suknā* meant the same with regard to a dwelling house. This was indeed the doctrine of the Medinese on *'umrā* and *suknā*. The ancient Iraqians, however, considered *'umrā*, but not *suknā*, as an unconditional gift which did not return to the donor but became the full property of the donee. This doctrine is expressed in a tradition, which claims to be transmitted by Jābir from the Prophet and which exists in two versions, one with an Iraqian and the other with a Medinese *isnād*. The main transmitter in this last *isnād* is the ancient Medinese authority, Sulaimān b. Yasār. The Iraqian version reflects the change from the original concept of *'umrā* to the Iraqian doctrine which is secondary; the Medinese version, in an additional remark, gives the kind of rudimentary technical reasoning which caused the change of doctrine; this explanatory remark soon became fused with the main body of

[1] This distinction is perhaps the result of further reference to the Medinese doctrine.

[2] This opinion was also projected back to Shuraiḥ (Sarakhsī, xiv. 92).

[3] Above, p. 185 f.

[4] Above, p. 106 f. See also below, pp. 241, 268.

[5] *Muw.* iii. 219; *Mud.* xv. 91; *Āthār A.Y.* 764; *Muw. Shaib.* 349; *Tr. III*, 41; Ṭaḥāwī, ii. 246.

[6] Cf. *'umr* 'span of life, lifetime', and the verse of Labīd quoted in Zurqānī, iii. 219. Ibn al-A'rābī, quoted in *Comm. Muw. Shaib.* 349, claimed that the Arabs were unanimous on this meaning of *'umrā*.

the tradition, and appears as part of the words of the Prophet in the texts given by Mālik and Shāfi'ī. The Iraqian doctrine, therefore, in the form of a tradition from the Prophet, penetrated into Medina but did not succeed in changing the opinion of the Medinese school. The resistance of this school to the Iraqian doctrine is attested by Mālik, and the conflict of both opinions produced counter-traditions which were collected by Ṭaḥāwī.[1] Shāfi'ī states that all cities excepting Medina shared the doctrine of the Iraqians; this, together with the near-success of this opinion in Medina itself, shows the wide diffusion of early Iraqian legal thought.

Another example occurs in the question of damages due for wounds inflicted on a slave.[2] The original Medinese opinion was that his loss in value was to be made good; this was projected back to Marwān b. Ḥakam and other authorities. The ancient Iraqian doctrine represented a systematic refinement: the value of the slave was regarded as his weregeld, and the same fraction of his value was due as would have been due of the weregeld had the wound been inflicted on a free man; this was projected back to Ibrāhīm Nakha'ī. The Iraqian doctrine gained a partial foothold in Medina for practical reasons; this is shown by the obviously authentic passage of Mālik's older contemporary 'Abdal'azīz b. Abī Salama, known as Mājashūn, quoted in the *Mudauwana*:

'If a slave is wounded, his value before and after the wounding is assessed, and the person responsible has to make good the difference. We know nothing more just than this, because if a slave loses his hand or foot, his value decreases by more than a half,[3] and he becomes almost valueless; but if he loses his ear his value decreases by less than a half if he is a weaver or another kind of artisan who commands a high price. If the damage is assessed in this way, neither the owner nor the culprit is treated too harshly; if the damage is little, little has to be paid, and if much, much—always excepting the special kinds of wounds known as *mūḍiḥa*, *munaqqila*, *ma'mūma*, and *jā'ifa* which must be assessed at something. If one considers the value here, the damage is non-existent because they cause no disability or fault or decrease in value worth speaking of; but they take place in the head and the brain, and death may result from a penetrating bone [as a consequence of these wounds]; therefore it is the doctrine (*ra'y*) to fix the damages at the fraction of the value of the slave in proportion to the weregeld of a free man.'

[1] A harmonizing doctrine, also expressed in a tradition from the Prophet (see Zurqānī, iii. 219), was pointedly rejected by Shaibānī.

[2] *Muw.* iv. 41 (see the full text in ed. Tunis, 1280, p. 350); *Mud.* xvi. 168 f.; *Āthār A.Ṭ.* 987 f.; *Āthār Shaib.* 86; *Tr. III*, 148 (p. 247); *Tr. VIII*, 11; *Ris.* 74.

[3] For the loss of one of any pair of limbs, one half of the weregeld is to be paid.

This was in fact the doctrine of Mālik and of the other Medinese of his time. The particular decision on the *mūḍiḥa* wound was projected back, certainly fictitiously, to Ibn Musaiyib and Sulaimān b. Yasār, as Mālik states without an *isnād*. Shāfi'ī relates with the *isnāds* Ibn 'Uyaina—Zuhrī and 'a reliable man', identified as Yaḥyā b. Hassān—Laiṯ b. Sa'd—Zuhrī, that Ibn Musaiyib followed a doctrine identical with that of the Iraqians; to this is added a remark ascribed to Zuhrī that 'some' held an opinion which corresponded with the original Medinese doctrine. All this is spurious and was abstracted from the statement as related by Mālik.

C. Later Polemics and Influences

Essentially the same conditions prevailed in the early literary period. A statement of Shāfi'ī's on the polemics between the several schools of law[1] refers roughly to this time. Examples of polemics are numerous, particularly in *Tr. VIII* and *Tr. IX*. In this period, too, the traditions which were originally particular to an individual school, began to spread to a greater extent than before and had to be harmonized with the doctrines of those schools into which they penetrated; the most conspicuous document of this process is the *Muwaṭṭa'* of Shaibānī.[2] Apart from this particular case, material influences causing changes in the doctrines of other schools continued to proceed almost exclusively from Iraq.[3] We had occasion to discuss a question on which Mālik diverged from the traditional Medinese doctrine under the influence of Iraqian thought;[4] and, on a point not decided by Mālik, Ibn Qāsim's decision seems influenced by an objection made by Shaibānī.[5]

D. Conclusions

The existence of a common body of ancient doctrine in the earliest period of Muhammadan law and its later diversification in the ancient schools of law show that Muhammadan jurisprudence started from a single centre. It does not of course imply that Muhammadan jurisprudence was cultivated exclusively in one place, but that one place was the intellectual centre of the first theorizing and systematizing activities which

[1] See the translation above, p. 7 f.
[2] See below, p. 306.
[3] For an exception, see above, p. 106, n. 5.
[4] Above, p. 108.
[5] *Muw.* iv. 32; *Mud.* xvi. 203; *Tr. VIII*, 4.

were to transform Umaiyad popular and administrative practice into Muhammadan law. The ascendancy of a single centre of Muhammadan jurisprudence must have been maintained over an appreciable period, because we find that the common ancient element sometimes comprises several successive stages of legal doctrine.

The fact that within the pre-literary period the cross-influences proceeded almost invariably from Iraq and not from Medina, shows that this centre was Iraq, and not Medina. Even when the question of influence does not arise, the doctrine of the Medinese often represents a later stage than that of the Iraqians.[1] On the other hand, we repeatedly found the doctrine of the Iraqians more highly developed than that of their Medinese contemporaries.[2] The Medinese have certainly not the monopoly of the foundation of Muhammadan jurisprudence, as has been sometimes supposed.[3] Our conclusion, that Muhammadan jurisprudence originated in Iraq, agrees with the opinion of Goldziher.[4]

[1] See e.g. above, pp. 161, 196 f.
[2] See above, p. 133 and n. 1; below, pp. 241, 275 f., 311.
[3] Cf. above, p. 213.
[4] *Principles*, 299.