THE ORIGINS OF Muhammadan Jurisprudence

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CHAPTER 3

THE KORANIC ELEMENT IN EARLY MUHAMMADAN LAW

WE had occasion, in the first part of this book, to discuss the systematic place filled by the Koran in the legal theories of the ancient schools of law, of the traditionists and Shāfi'ī, and of the *ahl al-kalām*.[1] In every single case the place given to the Koran was determined by the attitude of the group concerned to the ever-mounting tide of traditions from the Prophet. The Koran taken by itself, apart from its possible bearing on the problem raised by the traditions from the Prophet, can hardly be called the first and foremost basis of early legal theory. The *ahl al-kalām*, it is true, profess to make the Koran, interpreted rationally, the only foundation of their doctrine;[2] but this conscious formula, which shows an anti-traditionist bias, is the outcome and not the starting-point of an intricate theoretical development.

The subject-matter of the present chapter is the historical influence of the Koran on Muhammadan law during its early formative period. Muhammadan law did not derive directly from the Koran but developed, as we saw, out of popular and administrative practice under the Umaiyads, and this practice often diverged from the intentions and even the explicit wording of the Koran.[3] It is true that a number of legal rules, particularly in family law and law of inheritance, not to mention cult and ritual, were based on the Koran from the beginning. But the present chapter will show that apart from the most elementary rules, norms derived from the Koran were introduced into Muhammadan law almost invariably at a secondary stage. This applies not only to those branches of law which are not covered in detail by the Koranic legislation—if we may use this term of the essentially ethical and only incidentally legal

[1] See above, pp. 15 f., 28, 40 ff., 45 ff., 53.

[2] They had a precursor in the author of the dogmatic treatise ascribed to Ḥasan Baṣrī, at a time when traditions from the Prophet hardly yet existed; see above, p. 74.

[3] This particular aspect has been pointed out before, e.g. in Bergsträsser–Schacht, *Grundzüge*, 14.

body of maxims contained in the Koran[1]—but to family law, the law of inheritance, and even cult and ritual. I have therefore chosen to speak of the Koranic element at this point of our inquiry into the transmission of legal doctrine, a point which corresponds to the zenith of the reception of Koranic norms into early Muhammadan law.

To start with problems which were based from the beginning on the Koran, we have already discussed the common ancient doctrine of divorce, and the problem of the evidence of non-Muslims.[2] Here are two more examples.

The Medinese hold that the definitely divorced wife who is not pregnant, can claim from her former husband only lodging during her period of waiting (*'idda*); the Iraqians give her also the right to board.[3] The two doctrines are based on two variants of Koran lxv. 6, the Medinese on the *textus receptus*, the Iraqian on the reading of Ibn Mas'ūd.[4] When the text of Ibn Mas'ūd was superseded in Iraq by the *textus receptus* during the reign of the Umaiyad Caliph 'Abdalmalik (A.H. 65–86), this basis of the Iraqian doctrine was forgotten, and Abū Ḥanīfa was reduced to justifying it by an arbitrary interpretation of the *textus receptus* and by a tradition from 'Umar.

Koran ii. 234 fixes the *'idda* of a widow at four months and ten days; Koran lxv. 4 makes the *'idda* of a pregnant wife who becomes divorced end with her delivery. Nothing is said explicitly about the *'idda* of a pregnant widow. The common ancient attitude was to consider her *'idda* ended and to make her available for another marriage at her delivery, even though this might happen immediately after the death of her husband and long before the completion of four months and ten days.[5] But there arose the demand, caused by the tendency to greater strictness, that she should keep the *'idda* 'until the later of the two terms'; a demand which was expressed in traditions from 'Alī and from Ibn 'Abbās.[6]

This refinement succeeded neither in Iraq nor in Medina;

[1] See ibid., 9 ff. [2] Above, pp. 195 f., 210 f.

[3] *Muw.* iii. 62; *Muw. Shaib.* 263 and *Comm.*; *Tr. I*, 229; Sarakhsī, v. 201.

[4] 'Lodge them where you lodge [and bear their expenses] according to your circumstances'; the words in brackets do not exist in the *textus receptus*. Cf. Jeffery, *Materials*, 102.

[5] *Muw.* iii. 71; *Muw. Shaib.* 258; *Āthār A.Y.* 651 f.; *Āthār Shaib.* 72.

[6] *Muw.* loc. cit.; *Tr. II*, 10 (*m*).

the Iraqians countered it with the claim that Koran ii. 234 had been [partly] repealed by lxv. 4, a statement which they put into the mouth of Ibn Mas'ūd.[1] The Medinese produced a counter-tradition according to which the Successor Abū Salama b. 'Abdalraḥmān disagreed with Ibn 'Abbās, and had his opinion confirmed not only by Abū Huraira but by Umm Salama, a widow of the Prophet. She quoted a precedent of the Prophet himself who allowed a widow called Subai'a to remarry after giving birth and before completing an *'idda* of four months and ten days.[2] The tradition on the Prophet and Subai'a was also extracted from this context, provided with the family *isnād* Hishām b. 'Urwa—his father, and quoted as an independent *locus probans*. Finally, it was claimed against the unsuccessful refinement, that Ibn 'Abbās himself accepted the Subai'a tradition as valid, or that his disciples 'Ikrima, 'Aṭā', Ṭāwūs, and others did so.[3]

As regards the problem of the effects of conversion on marriage, we shall have occasion to notice a gradual movement of doctrine away from the Koranic regulation.[4]

We now come to the numerous cases where norms derived from the Koran were introduced into legal doctrine at a secondary stage. We have already discussed the obligatory gift from husband to wife in the case of divorce, the problem of where the divorced wife ought to live, and the legal consequences of the offer of divorce; the maxim that spoils belong to the killer, and the policy of not laying waste the enemy country; the oath of the plaintiff in confirmation of the evidence of one witness, the inadmissibility of written documents as evidence, and the evidence of minors.[5] Here are two further examples.

When a man died before consummating his marriage and without fixing a *donatio propter nuptias* (*ṣadāq*) for his wife, the earliest decision, based on systematic reasoning (*ra'y*), was to give the wife the right to the average *ṣadāq* which a woman of her standing might expect; this decision is attested for Iraq

[1] *Āthār A.Y.* and *Āthār Shaib.*, loc. cit.

[2] *Muw.* and *Tr. II*, loc. cit. Comparison of the two *isnāds* shows that this tradition which appeals from a Companion to the Prophet *himself*, dates from the generation preceding Mālik; this is the first reference to the Prophet concerning the problem in question.

[3] Zurqānī, ad loc.

[4] Below, p. 276 f.

[5] See above, p. 101 f., 197 f., 215; 70 f., 204 f.; 73, 188, 218.

where it was put into the mouth of Ibn Mas'ūd whose opinion, it was claimed, coincided with a decision of the Prophet.[1] A literal interpretation of Koran ii. 236 and xxxiii. 49, however, seemed to imply that the wife in this case had no right to *ṣadāq*. This was indeed the opinion of an Iraqian opposition group who put their doctrine into the mouth of 'Alī, but did not succeed in changing the teaching of the Iraqian school.[2] It did prevail in Hijaz where it was projected back to Ibn 'Umar and Zaid b. Thābit; the form of the tradition shows the resistance which this doctrine had to overcome.[3]

On the problem of giving battle to unbelievers who shield themselves behind Muslim infants,[4] Auzā'ī refers to Koran xlviii. 25. But the passage is not at all relevant and is obviously an argument on second thoughts against the opposite opinion which clearly reflects the rough-and-ready practice.

Even as regards questions which presuppose the rules given in the Koran, we notice that anything which goes beyond the most perfunctory attention given to the Koranic norms and the most elementary conclusions drawn from them, belongs almost invariably to a secondary stage in the development of doctrine. Problems of this kind which have been discussed before, are *'idda* and re-marriage, the presumption of intercourse, the oath of abstinence, and—from the law of inheritance—the share of the grandfather.[5] We shall have occasion later to discuss the problems of temporary marriage, of the *mukātab* slave, and of booty taken by a private raider.[6]

[1] See above, p. 29 and n. 3.
[2] *Muw. Shaib.* 244 (and *Comm.* 245, *n.* 1, referred to above, p. 50); *Tr. II*, 10 (*e*).
[3] *Muw.* iii. 7.
[4] *Tr. IX*, 21; *Umm*, iv. 199; Ṭabarī, 5.
[5] See above, pp. 181 f., 193 f., 215 f.; 212 f. [6] Below, pp. 266 f.; 279 ff.; 286.