THE ORIGINS OF Muhammadan Jurisprudence

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CHAPTER 4

THE IRAQIANS

THE present and the following chapter are concerned with the outward development of the Iraqian and the Hijazi schools of law in the pre-literary period. The conventional picture of this development, as it is presented in the Arabic sources from the beginning of the third century A.H. onwards,[1] is thoroughly fictitious, as we have already had occasion to notice more than once and as we shall see in greater detail in the pages that follow. Prominent features of the conventional picture, like the pre-eminence of Medina, have no foundation in fact; important concepts current in the ancient schools, such as that of the Companions of Ibn Mas'ūd in Iraq, are neglected; essential developments, like the attack of the traditionists on the 'living tradition' of the ancient schools of law, are misinterpreted; and even the information on the doctrines of individual authorities belonging to that period is to a great extent spurious. We must therefore suspect on principle statements which refer to the pre-literary period unless they are verified; and they can be verified with the help of the method which I have endeavoured to work out and to put to the test in Part II of this book. The results of this verification, as far as I have been able to undertake it, will be found in the present chapter and in those that follow. The picture gained in this way cannot, of course, compare in completeness with that presented to us by the conventional opinion, partly on account of the character of the legal traditions which contain the only contemporary evidence on the period in question, and also because of the limitations inherent in a first effort of this kind.

A. SHURAIḤ

After Ibn Mas'ūd, whom we shall discuss in section D below, the oldest Iraqian authority is Shuraiḥ. Shuraiḥ is said to have been appointed judge of Kufa by the Caliph 'Umar, to have

[1] It exists already in Ibn Sa'd (d. 230), was taken seriously by the editor E. Sachau in his introduction to vol. iii and, lacking something better to put in its place, is presumably still more or less widely accepted among European scholars.

held this office for sixty years or more, and to have died between A.H. 76 and 99, presumably before the year 80, at a very great age. Lammens has pointed out the lack of historical information about him,[1] and Tyan has convincingly analysed his legend.[2] The opinions and traditions ascribed to him are spurious throughout and are the outcome of the general tendency to project the opinions current in the schools of law back to early authorities.[3] They often represent secondary stages in the development of legal doctrines.[4] Nor is it rare to find two contradictory opinions ascribed to Shuraih.[5]

B. Ḥasan Baṣrī

In contrast to the vague personality of Shuraiḥ, the historical Ḥasan Baṣrī is well known as one of the foremost pious men of Baṣra in the second half of the first and at the beginning of the second century A.H. But he was neither a lawyer[6] nor even a traditionist.[7] The specialists on traditions held most of the uninterrupted *isnāds* in which he appeared to be spurious.[8] The dogmatic treatise which Ḥasan wrote at the command of the Umayyad Caliph 'Abdalmalik, and which therefore cannot be later than the year 86,[9] does not refer to any traditions from the Prophet or even from Companions.[9]

The legal opinions and traditions ascribed to Ḥasan are regularly shown, by closer investigation, not to be genuine.[10] In later times, he was considered one of the main authorities of the Basrians; but too little is known of the doctrines of this ancient Iraqian school of law, for us to ascertain the importance which they may have ascribed to him.[11]

[1] *Omayyades*, 77 ff. [2] *Organisation*, i. 101 ff.

[3] See above, pp. 130, 218, 219.

[4] See above, pp. 160, 195. *Tr. I*, 2: the argument ascribed to Shuraiḥ is of the same character as much in the reasoning of Ibn Abī Laila. *Tr. I*, 118, 120: the opinions ascribed to Shuraiḥ represent a rather highly developed stage of the doctrine.

[5] See above, p. 194, *n.* 1, 220, n. 2. Compare further *Tr. I*, 112, with *Comm. ed. Cairo*, 75, n. 3; and *Comm. ed. Cairo*, 49, n. 3 with 50, n. 1.

[6] Cf. H. Ritter, in *Islam*, xxi. 56 f. [7] Cf. ibid. 2 f.

[8] Tirmidhī, at the end; Massignon, *Essai*, 156 f.; Ritter, ibid. 11.

[9] See above, pp. 74, 141.

[10] See above, p. 159 (highly suspect), 164 (a legal maxim expressed in a tradition from Ḥasan); below, p. 278 (the doctrine ascribed to Ḥasan in a late source reflects a secondary stage). This applies also to the doctrines collected by Massignon, ibid. 164 ff. [11] See above, pp. 8 and n. 4; 87.

C. Sha'bī

Ḥasan's contemporary Sha'bī was one of the worthies of Kufa. He does not occupy a well-defined place in the conventional picture of the school of Kufa;[1] his name was used by the traditionists in order to discredit, by statements hostile to reasoning and analogy, the doctrine of the ancient Iraqians; these last, by equally spurious statements, tried to claim the authority of Sha'bī in favour of the doctrine of the school.

The conventional idea of Sha'bī as 'the strongest critic of *ra'y* and *qiyās* among the Iraqians' is a fiction created by the traditionists;[2] and when Sha'bī is declared, against the evidence of the Kufian texts themselves, to be the representative scholar of Kufa, this is meant to support the thesis of the traditionists.[3]

Against this, the Iraqians make Sha'bī relate traditions in favour of Iraqian *ra'y*,[4] and make him endorse the authority of the Companions of the Prophet and, by implication, the teaching of the ancient schools of law.[5] A later tradition puts into Sha'bī's mouth extravagant praise of Ibrāhīm Nakha'ī, the conventional bearer of the Kufian Iraqian doctrine.[6] This retrospective incorporation of Sha'bī into the Iraqian school was so successful that the traditionists, at a further stage of their argument, adduced Sha'bī's faithful adherence to the doctrine of Ibn Mas'ūd, or of the Companions of the Prophet in general, in confirmation of his alleged rejection of *ra'y* and *qiyās*.[7] For instance, Sha'bī is made to say: 'Is that not extraordinary? I give him information on the authority of Ibn Mas'ūd, and he asks me for my own *ra'y*.[8] . . . I would rather become a singer than give you my own *ra'y*.' Or: 'Beware of the use of *qiyās*. . . . If you take to the use of *qiyās* you will make the forbidden lawful and the lawful forbidden; but what is reported to you on the authority of men who remember it from the Companions, that act upon.'

[1] It is safe to assume that Muhammadan law hardly existed in the time of the historical Sha'bī.

[2] See above, p. 130 f.

[3] See above, p. 87.

[4] See above, p. 104.

[5] *Āthār A.Ḥ.* 942; *Āthār Shaib.* 123.

[6] *Comm. ed. Cairo* on *Tr. IX*, 13.

[7] Dārimī, *Bāb al-tawarru' 'an al-jawāb.*

[8] This argument is typical of the traditionists; see above, p. 55 f.

Moreover, the opinions and traditions concerning details of positive law, which are ascribed to Sha'bī, cannot be regarded as authentic; they usually show indications of a later origin[1] or are otherwise suspect.[2] We cannot therefore take on trust an occasional attribution to Sha'bī of what happens to correspond to the earliest Iraqian opinion;[3] this doctrine was attributed to Sha'bī by the well-known transmitter Muṭarrif, who in another case ascribed to Sha'bī a later development of the Iraqian doctrine.[4] Accordingly, when Sha'bī appears as the common link in *isnāds* of traditions which reflect the common Iraqian doctrine and in *isnāds* of legal 'puzzles' ascribed to 'Alī,[5] we ought to consider not him but a person in the following generation responsible.

D. Ibn Mas'ūd and his Companions

The cases of Shuraiḥ, Ḥasan Baṣrī, and Sha'bī are typical of the retrospective incorporation, in several ways, of ancient authorities into the tradition of a school of law. With Ibn Mas'ūd and his Companions we come to the main stream of the legal tradition of the ancient Iraqians and in particular the school of Kufa.

Ibn Mas'ūd, a Companion of the Prophet, lived in Kufa for a number of years and was later considered a main authority for the Kufian Iraqian doctrine.[6] After what we have seen in the second part of this book,[7] I need hardly elaborate the point that the legal traditions from Ibn Mas'ūd are not genuine and that his name is a label affixed to early Iraqian, and particularly Kufian teaching and reasoning.[8] In one particular case, where the Iraqian doctrine is in fact based on a variant reading in Ibn Mas'ūd's text of the Koran, the school justifies it by

[1] See above, pp. 73 f. (an 'unsuccessful' Iraqian tradition, through Sha'bī, from 'Alī), 108 (a secondary stage of the Iraqian doctrine, later than Ibrāhīm Nakha'ī; Shāfi'ī, in *Tr. III*, 54, dismisses the tradition as too badly attested to deserve notice), 161 (a late, secondary opinion).

[2] *Mud.* iii. 80 (related by Ibn Wahb, together with two pairs of contradictory statements on Ibrāhīm Nakha'ī and on Ibn 'Abbās); *Tr. IX*, 31 with *Comm. ed. Cairo*, p. 92 f. (three different types of traditions are ascribed to Sha'bī, and none of them can be considered genuine).

[3] *Tr. II*, 18 (*w*); compare this with ibid. (*o*) and with *Āthār Shaib.* 91.

[4] See above, p. 161.

[5] See below, p. 241.

[6] See above, p. 31 f.

[7] See particularly above, p. 169 f.

[8] See above, pp. 156, 217, 218, 226, 227; and below, p. 265.

reference not to him but to 'Umar.[1] The name of Ibn Mas'ūd is usually an indication of the prevailing doctrine of the school of Kufa; we find it, however, occasionally affixed to Iraqian and even Medinese counter-traditions,[2] or to mutually contradictory traditions.[3]

The formal and explicit kind of reference to Ibn Mas'ūd himself, as an authority on law, developed out of an earlier stage which consisted in a more general reference to the Companions (*aṣḥāb*) of Ibn Mas'ūd. This was the name given originally to an anonymous group of Kufians,[4] some of whom were later identified as relatives of Ibrāhīm Nakha'ī: his uncle 'Alqama b. Qais and his maternal cousins 'Alqama, Aswad and 'Abdalraḥmān the sons of Yazīd.[5] We shall discuss the position of Ibrāhīm in the Kufian Iraqian tradition of legal doctrine in section E below; these relatives of his formed the family link[6] by which the doctrine which went under the name of Ibrāhīm Nakha'ī was artificially connected with the very beginnings of Islam in Kufa in the time of Ibn Mas'ūd.[7]

The Companions of Ibn Mas'ūd are often mentioned besides Ibn Mas'ūd, for instance in *Āthār A.Y.* 49, 94, 105, 369, in the corresponding passages in *Āthār Shaib.*, in *Tr. II*, 19 (*i*) and elsewhere. They appear by themselves, without mention of Ibn Mas'ūd, for instance in *Āthār A.Y.* 110,[8] 407, in *Āthār Shaib.* 37, 91, in *Muw. Shaib.* 72 and elsewhere. Ibn 'Abdalbarr[9] says correctly that much of Abū Ḥanīfa's *ra'y* and *qiyās* was anticipated by [or, as we should say, projected back to] Ibrāhīm and the Companions of Ibn Mas'ūd. Sarakhsī (vi. 95) was well aware of their existence.

As the general reference to the Companions of Ibn Mas'ūd gave rise to an explicit reference to Ibn Mas'ūd himself, this last

[1] See above, p. 225. [2] See above, pp. 197, 209.

[3] *Tr. II*, 10 (*p*), compared with *Āthār A.Y.* 710 and *Āthār Shaib.* 68; *Tr. II*, 19 (*e*), compared with 21 (*e*); *Tr. II*, 19 (*p*); *Tr. II*, 19 (*aa*); *Āthār A.Y.* 452 f. and *Tr. II*, 19 (*ee*), compared with *Āthār Shaib.* 46.

[4] See above, p. 39 and n. 3. [5] Dāraquṭnī, 361; Abū Nu'aim, iv, 169 f.; and see above, p. 169. [6] See above, p. 170.

[7] We are concerned here only with the concept of the Companions of Ibn Mas'ūd in Iraqian legal tradition, and not with their place in political history, on which see Lammens, *Omayyades*, 107, 109.

[8] Their doctrine here is identical with what Shaibānī calls the *sunna*: *Muw. Shaib.* 101. Later it was projected back to Ibn Mas'ūd and 'Alī: *Comm. Muw. Shaib.* 102, n. 8; but so was the opposite doctrine: *Tr. II*, 19 (*f*).

[9] Quoted in *Comm. Muw. Shaib.* 32.

could be taken as confirming the former, or the two attributions could be considered to contradict each other. We find, in fact, both attitudes expressed in legal traditions. For instance, 'Alqama b. Qais is made to call Ibn Mas'ūd his master (*ṣāḥib*) and to mention that Ibn Mas'ūd instructed him and his companions (*Āthār A.Y.* 777). Or it is reported that 'Alqama declared himself ignorant of the correct decision and that Ibn Mas'ūd gave it (*Āthār Shaib.* 79); at the same time, Ibn Mas'ūd's decision is also ascribed to Masrūq who counts as another of Ibn Mas'ūd's Companions (*Āthār A.Y.* 675), and a decision on a point of detail to 'Alqama himself (ibid. 676). On the other hand, 'Alqama is made to reject an opinion ascribed to Ibn Mas'ūd, by referring to a passage in the Koran.[1]

The authority of the Companions of Ibn Mas'ūd was originally clearly distinct from that of Ibn Mas'ūd himself. They also transmit traditions from 'Alī,[2] and Ibn 'Abbās, the usual authority of the Meccans, is claimed to have approved a decision of their representative Masrūq.[3] According to a later Ḥanafī opinion, they derived their doctrine 'from the specialists on law among the Companions of the Prophet, Ibn Mas'ūd, 'Alī, and 'Umar'.[4] Shāfi'ī was unable to recognize a concept as informal as that of the Companions of Ibn Mas'ūd, and in discussing the traditional basis of the Iraqian doctrine he omitted to mention the Companions of Ibn Mas'ūd although they occurred in the Iraqian texts to which he referred.[5]

E. Ibrāhīm Nakha'ī

Ibrāhīm Nakha'ī who lived in the second half of the first century A.H. is the representative scholar of the Kufians.[6] In one passage, where one would expect Ibrāhīm to be mentioned, Shāfi'ī refers not to him but to Sha'bī;[7] but this text gives an artificially simplified and systematized picture of the Iraqian doctrine.[8] The full importance of Ibrāhīm for the transmission

[1] *Āthār A.Y.* 603; *Āthār Shaib.* 66; for the opinion ascribed to Ibn Mas'ūd, see *Tr. II*, 11 (*c*).

[2] Muslim, *Bāb al nahy 'an al-riwāya 'an al-du'afā'*; Ibn Qutaiba, 93.

[3] *Āthār Shaib.* 105.

[4] See above, p. 32.

[5] See above, p. 31, n. 1.

[6] See above, pp. 31 ff., 39 and n. 3.

[7] *Tr. IV*, 258. In *Tr. III*, 148 (p. 246), Shāfi'ī mentions him together with Sha'bī.

[8] See above, p. 87.

of the Kufian Iraqian doctrine, in the opinion of the Iraqians themselves and that of Shāfi'ī, appears from passages such as *Tr. II*, 9 (*c*): 'The Iraqians diverge from what they themselves relate from the Prophet, Abū Bakr, and 'Umar, and from what they consider a well-authenticated tradition from 'Alī, in favour of the doctrine of Ibrāhīm and of something that is erroneously transmitted from Ibn Mas'ūd.'[1] The doctrine of the Kufian Iraqian school was based mainly on decisions ascribed to Ibrāhīm, although in the time of Shaibānī and Shāfi'ī the Iraqians had come to feel that this was not justifiable in theory.[2] Many of these opinions were projected back from Ibrāhīm to Ibn Mas'ūd, and Ibrāhīm became the main transmitter from Ibn Mas'ūd in the Iraqian school of law; but the doctrine of Ibrāhīm remained separate from the traditions going back to Ibn Mas'ūd.[3] Ibrāhīm Nakha'ī is the 'lowest authority'[4] for the ancient Iraqians of Kufa; in view of our former conclusions, we can dismiss the period before Ibrāhīm as legendary and have now to investigate how far the opinions ascribed to him can be considered authentic.

Judging from *Āthār A.Y.* and *Āthār Shaib.* which are the main sources for Ibrāhīm's doctrine, it appears that opinions of, and traditions transmitted by Ibrāhīm occur mostly in the legal chapters proper, much less in those concerning ritual, and hardly at all in those devoted to purely religious, ethical, and edifying matters. On the other hand, there are very few references to Ibrāhīm in *Tr. I* which treats of rather technical details of law on which Abū Ḥanīfa and Ibn Abī Lailā disagree. These technical legal questions, therefore, were in any case elaborated only after the time of "Ibrāhīm" or whosoever may be responsible for the opinions contained in *Āthār A.Y.* and *Āthār Shaib.*[5]

We have discussed several cases in which the opinions attributed to Ibrāhīm are presumably authentic.[6] They are all concerned with questions of ritual.

[1] The printed text has "'Ali" instead of "Ibn Mas'ūd" at the end; but I know of no erroneous tradition from 'Alī on the problem in question, and the doctrine of Ibrāhīm is in fact projected back to Ibn Mas'ūd: *Āthār A.Y.* 423; *Āthār Shaib.* 49.

[2] See above, p. 32. [3] See above, p. 33. [4] See above, p. 157.

[5] We shall see in what follows that the bulk of the opinions attributed to Ibrāhīm date in fact only from the time of Ḥammād. The technical questions of *Tr. I* can therefore be fixed more narrowly between Ḥammād on one side, and Abū Ḥanīfa and Ibn Abī Lailā on the other.

[6] See above, pp. 60, 142.

Much more numerous, however, are the cases in which the information about Ibrāhīm can be positively shown to be spurious, because the opinions attributed to him express secondary stages in the development of the Iraqian doctrines,[1] or because the reasoning ascribed to him presupposes the discussions of a later period,[2] or because the legal thought with which he is credited is too highly developed for it to be possible in the first century.

The technical legal thought, for instance, which underlies the doctrine attributed to Ibrāhīm in *Tr. I*, 140, and which is explicitly ascribed to him in the parallel passages in *Āthār A.Y.* and in *Āthār Shaib.*,[3] is so incisive and abstract that the historical Ibrāhīm cannot possibly be credited with it. It must belong either to Ḥammād himself, who comes in the *isnād* between Abū Ḥanīfa and Ibrāhīm Nakha'ī, or to his period. Further, Ibrāhīm's alleged statement on the three degrees of intention in unlawful homicide[4] is technically so well reasoned that it is not feasible in the time of Ibrāhīm, and again it must belong either to Ḥammād himself or to the period of Ḥammād.

The reasoning ascribed to Ibrāhīm by Ḥammād in *Tr. II*, 10 (*r*), is directed against, and therefore presupposes, the rhyming legal maxim 'there is no divorce and no manumission under duress'.[5] Two other legal maxims are attributed to Ibrāhīm by Ḥammād in *Tr. IX*, 15. One, 'restrict *ḥadd* punishments as much as possible', is given as a saying of 'Umar reported by Ibrāhīm, and this is one of the later forms in which this maxim appears.[6] The other maxim declares that '*ḥadd* punishment and *donatio propter nuptias* cannot go together', that is to say that an act of intercourse which creates a civil obligation of the man in favour of the woman is not punishable by *ḥadd*, and conversely that every act of intercourse either creates

[1] See above, pp. 154, 160, 198, 218, 219 (the development of the Iraqian doctrine is projected back into a change of opinion on the part of Ibrāhīm).

[2] See above, pp. 31 (a statement directed against traditions from the Prophet), 204 (this statement tries to explain the Medinese doctrine away, but overlooks the Umaiyad currency reform which happened in Ibrāhīm's lifetime).—See further *Āthār A.Y.* 421, 460; *Āthār Shaib.* 37, 41 (in the style of the discussions of the second century).

[3] Quoted in *Comm. ed. Cairo*, p. 100, n. 1.

[4] *Āthār A.Y.* 961; *Āthār Shaib.* 84. Both versions differ sensibly with regard to *shibh al-'amd*.

[5] See above, p. 180.

[6] See above, p. 184.

the civil liability to a *donatio propter nuptias* or the liability to *ḥadd* punishment.[1] This last principle, however, was not acted upon in all its implications in the early stage of the Iraqian doctrine as expressed in a tradition from Ibn Mas'ūd and his Companion 'Alqama; it was only on the point of gaining general recognition in the generation of Abū Ḥanīfa, Ibn Abī Lailā did not yet apply it consistently, and we can observe its gradual emergence in traditions from 'Umar.[2] All this information given by Ḥammād on Ibrāhīm is certainly spurious.

Barely a century after the death of the historical Ibrāhīm, we find numerous cases of conflicting statements regarding his alleged doctrines.[3] At least one of the two contradictory versions must be spurious in each case. Even where there is no obvious contradiction, we are sometimes able to conclude that one of two versions, both of which claim to go back to Ibrāhīm, is not authentic.[4] But nothing guarantees that the other statements which have passed the first scrutiny are genuine.

On the contrary, until their authenticity is proved, we must regard the alleged opinions and traditions of Ibrāhīm as being fully as fictitious as those of his contemporaries.[5] The main transmitter from Ibrāhīm, and the only link between Ibrāhīm and Abū Ḥanīfa, with whom we enter the literary period, is Ḥammād whom we shall discuss in the following section; Ḥammād, or someone using his name, is therefore mainly[6] responsible for attributing later Iraqian opinions and traditions to Ibrāhīm. Occasionally, we can observe this process directly; for instance, what was originally an opinion of Ḥammād, was projected back through Ḥammād to Ibrāhīm, and through Ibrāhīm to Masrūq who is one of the Companions of Ibn Mas'ūd, and to Ibn Mas'ūd himself, then with other *isnāds* to other

[1] This second aspect is treated in *Tr. I*, 251, where Abū Yūsuf relates that Ibrāhīm decided an individual case accordingly. The corresponding abstract rule is ascribed to Ibrāhīm in *Āthār A.Y.*, quoted in *Comm. ed. Cairo*, p. 214, n. 2. Both statements are made on the authority of Ḥammād.

[2] *Tr. I*, 251, and *Comm. ed. Cairo*, p. 214, n. 1.

[3] See, e.g., *Āthār Shaib.* 63, 101; *Mud.* iii. 80; *Tr. I*, 163 (*a*); 163 (*b*) compared with *Āthār A.Y.*, quoted in *Comm. ed. Cairo*, p. 120, n. 2; and above, p. 209.

[4] See, e.g., *Muw. Shaib.* 73, compared with *Āthār A.Y.* 357. Shaibānī had his information from Muḥammad b. Abān b. Ṣāliḥ who is considered 'weak' (*Comm. Muw. Shaib.* 74, n. 9).

[5] See above, p. 159.

[6] But not exclusively: see above, n. 4.

Companions of the Prophet, partly in the form of anecdotes with circumstantial details, and finally to the Prophet himself.[1]

This necessary scepticism of opinions ascribed to Ibrāhīm, as long as they are not positively shown to be genuine, causes me to regard as insufficiently proven a number of statements which attribute to Ibrāhīm *ra'y* or systematic reasoning in general and which are not in themselves ruled out by other considerations. We have had occasion to refer to two cases of this kind, one of them concerning *donatio propter nuptias*.[2] On another question of marriage, *Āthār Shaib.* 61 ascribes to Ibrāhīm a systematic distinction introduced by *ara'aita*,[3] and simple systematic reasoning which is certainly older than Abū Ḥanīfa. On a problem of divorce, *Āthār Shaib.* 78 attributes to Ibrāhīm a rather formal and rigid interpretation of declarations.[4] Finally, on a question of *zakāt* tax, the opinion historically attested for Ibn Abī Lailā and also ascribed together with straightforward reasoning to Ibrāhīm, represents the earliest stage of doctrine.[5]

It is safe to conclude that the historical Ibrāhīm gave opinions on questions of ritual (and perhaps on kindred problems of directly religious interest) but not on law proper. This is all that we can expect of a specialist in religious law towards the end of the first century A.H.

F. Ḥammād

The *isnād* affixed most frequently to the legal doctrines of the ancient school of Kufa is Abū Ḥanīfa—Ḥammād—Ibrāhīm Nakha'ī.[6] This direct evidence confirms the consensus of other sources that Ḥammād b. Abī Sulaimān was the foremost representative of the Kufian Iraqian school in the generation preceding Abū Ḥanīfa.[7] Wakī' b. Jarrāḥ, a traditionist of the second century A.H., is reported to have remarked, disparaging the Kufians: 'Were it not for Ḥammād, there would be no jurisprudence in Kufa';[8] and in some verses in praise of Abū

[1] See *Tr. I*, 217, and the parallels collected in *Comm. ed. Cairo.*

[2] See above, pp. 105, 107 f.

[3] On this word, see above, p. 105.

[4] The attribution of this problem to older authorities in *Tr. II*, 11 (*e*) and in *Āthār A.Y.* 632 f. is secondary.

[5] See below, p. 284.

[6] See *Āthār A.Y.* and *Āthār Shaib.*, *passim.*

[7] See above, p. 32.

[8] Tirmidhī, at the end.

Ḥanīfa, ascribed to 'Abdallāh b. Mubārak, another traditionist of the second century, we read: 'The loss of Ḥammād was grave enough, and our bereavement grievous, until he [Abū Ḥanīfa] saved us from the rejoicing of our enemies in our discomfiture, and showed great knowledge as his [Ḥammād's] successor.'[1] Ḥammād is considered to have been the first in Iraq to teach law to a circle of disciples.[2]

Ḥammād is the first Iraqian lawyer whom we can regard as fully historical. We saw in Section E that most of the opinions transmitted by Ḥammād and attributed by him to Ibrāhīm are in fact not older than the time of Ḥammād himself. Even allowing for all cases in which his name may have been used by other persons, there remains the great bulk of doctrine, preserved mainly in *Āthār A. Y.* and *Āthār Shaib.*, which must go back to Ḥammād himself and is nevertheless ascribed by him to Ibrāhīm. This retrospective involvement of a higher authority is of course a particular instance of the backward growth of *isnāds* which we have discussed before.[3] It is, moreover, part of a literary convention which found particular favour in Iraq and by which a legal scholar or author put his own doctrine or work under the aegis of his master. Shaibānī, for instance, refers at the beginning of every chapter of his *Jāmi' al-Ṣaghīr* and at the beginning of his *Kitāb al-Makhārij fil-Ḥiyal* to the final authority of Abū Ḥanīfa, as transmitted to him through Abū Yūsuf; this does not mean that the books in question were in any way based on works or lectures of Abū Ḥanīfa and Abū Yūsuf, but implies only the general relationship of pupil to master.[4] We must take the standing reference of Ḥammād to Ibrāhīm as meaning the same.[5]

Ḥammād had considerable freedom in formulating his own doctrine which he then put under the authority of Ibrāhīm.[6] Ibn Sa'd (vi. 232) identified Ḥammād's own doctrine with

[1] Khaṭīb Baghdādī, xiii. 350. [2] Goldziher, *Ẓâhiriten*, 13.

[3] Above, pp. 156 f., 165.

[4] Also systematic conclusions drawn from the doctrine of a scholar were stated as if they were his own explicit decisions; see *Shaibānī, Makhārij*, introduction, p. 66.

[5] But Abū Ḥanīfa did not, as a rule, project his own opinions back to Ḥammād and, through Ḥammād, to Ibrāhīm; this appears from the considerable differences as regards technical legal thought which exist between the authentic opinions dating from the time of Abū Ḥanīfa and those introduced by the *isnād* Abū Ḥanīfa—Ḥammād—Ibrāhīm; see above, p. 234, n. 5.

[6] Compare *Āthār A. Y.* 979, with *Āthār Shaib.* 85 and with *Tr. VIII*, 14.

what Ḥammād put under the aegis of Ibrāhīm by saying: 'When he [Ḥammād] decided according to his own opinion (*ra'y*), he was generally right, but when he related traditions on the authority of others than Ibrāhīm, he made mistakes.' We find indeed opinions of Ḥammād quoted without a reference to Ibrāhīm.[1] But it is not generally possible to distinguish between the common doctrine of the Kufians in the time of Ḥammād and Ḥammād's individual opinions.

Besides the Kufian Iraqian doctrine which he put under the aegis of Ibrāhīm and which he found to some extent projected back to Ibn Mas'ūd and his Companions, Ḥammād transmitted traditions which had recently come into circulation, from the Prophet and from various Companions of the Prophet.[2] These outside traditions, which did not belong to the 'living tradition' of the school and often contradicted it and Ḥammād's own doctrine, were the result of the rising pressure of the traditionists on the ancient schools of law. We should be less critical than Ibn Sa'd if we were to suppose that Ḥammād received these traditions by oral transmission from the Successors who appear as his immediate authorities in the *isnāds*.

With Ḥammād's disciple Abū Ḥanīfa, whose opinions were collected and preserved in writing by his companions and disciples Abū Yūsuf and Shaibānī, the legal tradition in Kufa entered the literary period. The activity of Abū Yūsuf and Shaibānī transformed the school of Kufa into the school of the Ḥanafīs.[3]

Tr. I is concerned with the differences between Abū Ḥanīfa and his contemporary Ibn Abī Laylā, a judge of Kufa, regarding technical details of legal doctrine. These questions were worked out and discussed in the period between Ḥammād on one side and Abū Ḥanīfa and Ibn Abī Laylā on the other.[4] Although there is little occasion here for references to earlier authorities, it is obvious that Ibn Abī Laylā shares the 'living tradition' of the school of Kufa as symbolized by the name of Ibrāhīm Nakha'ī (and by that of Ibn Mas'ūd). Generally speaking, Ibn Abī Laylā represents an older stage of doctrine than his contem-

[1] See, e.g., *Āthār A. Y.* 740 (cf. above, p. 187, n. 4); *Āthār Shaib.* 53, 79, 80, 91.
[2] See above, p. 141.
[3] See above, pp. 6 ff.; below, pp. 306, 310.
[4] See above, pp. 234, n. 5, 238, n. 5.

porary Abū Ḥanīfa, that is to say, he is more conservative; he also pays more regard to judicial practice. All this is well in keeping with his being a judge.[1]

G. The Iraqian Opposition

Towards the end of the second century A.H., Ibn Mas'ūd and 'Alī were considered the main authorities of the Iraqians among the Companions of the Prophet.[2] We saw in Section D how the name of Ibn Mas'ūd became attached to the main stream of the legal tradition of the school of Kufa. After this had happened, and as long as the reference to Companions of the Prophet carried weight, any opinions which were to be opposed to the traditional doctrine of Kufa had to be provided with an equally high or possibly even higher authority, and for this the name of the Caliph 'Alī, who had made Kufa his headquarters, presented itself easily. It does not follow that the doctrines which go under the name of 'Alī embody the coherent teaching of any group or represent a tradition comparable to that indicated by the names of Ibn Mas'ūd, his Companions, Ibrāhīm Nakha'ī, and Ḥammād. We shall in fact be able to distinguish several separate tendencies within the body of legal traditions from 'Alī.[3] All we can say is that these traditions, generally speaking, represent opinions advanced in opposition to, and therefore later than, the 'living tradition' of the school of Kufa.[4]

This is of course a much simplified picture of the complicated development of legal doctrines and traditions in Iraq. Most of the opinions advanced under the authority of 'Alī remained unsuccessful, but some succeeded in gaining recognition.[5] The oldest stages of Iraqian doctrine are sometimes embodied in traditions from 'Alī,[6] and Iraqian unsuccessful opinions in traditions from Ibn Mas'ūd.[7] But, generally speaking, traditions from 'Alī are as typical of unsuccessful opinions of the Iraqian opposition as those from Ibn Mas'ūd are of the normal doctrine of the school of Kufa; this appears from the contents of *Tr. II*, compared with those of *Āthār A. Y.* and *Āthār Shaib.*

[1] See below, p. 292.

[2] See above, p. 31 f.

[3] Three successive stages of the doctrine on the *mukātab* slave are represented by traditions from 'Alī: see below, p. 279 f.

[4] See above, p. 66 f.

[5] See above, p. 162. There are several other examples.

[6] As in the example quoted above, n. 3.

[7] See *Tr. II*, 2 (*e*) and *Āthār Shaib.* 5; also above, p. 213.

The 'unsuccessful' 'Alī traditions in *Tr. II* show often a rigorous and meticulous tendency, obviously inspired by religious and ethical considerations. The element of caution inherent in this[1] leads to the seemingly opposite tendency of restricting *ḥadd* punishments.[2]

We find this kind of Iraqian tradition from 'Alī corresponding almost regularly to doctrines attested in Medina. The corresponding Medinese doctrines remained sometimes unsuccessful even there,[3] but they mostly became the common opinion of Medina.[4] It agrees with the comparatively later development of the Medinese school[5] that a body of doctrines which remained unsuccessful in Iraq, where it could not overcome the already established tradition of a school of law, succeeded in gaining recognition in Medina to a considerable extent.[6]

Another group of traditions from 'Alī represent crude and primitive analogies, early unsuccessful efforts to systematize.[7] Occasionally, this primitive reasoning takes the form of legal 'puzzles', some of which have Sha'bī as a common transmitter in their *isnāds*.[8] We can conclude from this that the Kufian 'living tradition', against which the 'Alī traditions were directed, had become connected with the name of Ibn Mas'ūd, or at least his Companions, at a period earlier than this primitive reasoning. Contrary to the former group of 'Alī traditions, which anticipate the activity of the traditionists, these systematic traditions seem to reflect an early stage of Iraqian legal thought.

The Iraqians towards the end of the second century A.H. were able to say with regard to the unsuccessful 'Alī traditions: 'No one holds this opinion',[9] and to reject them as falling outside the 'living tradition' of the school. At an earlier period, however, they did not disdain to discredit them by scurrilous and exaggerated opinions which they equally attributed to 'Alī

[1] See above, p. 215.

[2] *Tr. II*, 18 (*f*), (*g*), (*j*), (*p*); cf. *Muw. Shaib.* 303.

[3] See above, pp. 165 (this doctrine originated certainly in Iraq), 225; further *Tr. II*, 8 (*a*) = 20 (*a*), compared with *Muw.* ii. 92, 94 and *Muw. Shaib.* 180.

[4] See above, pp. 215 (*penult.*), 227; further *Tr. II*, 2 (*c*), compared with *Mud.* I. 25.

[5] See above, p. 223; below, p. 276.

[6] See also below, p. 255.

[7] See above, pp. 106 ff., 167; further *Tr. II*, 13 (*c*).

[8] *Tr. II*, 13 (*b*) ff., (*i*), (*j*), 14 (*a*). This kind of tradition was taken over by the Zaidīs (see *Majmū'*, 690 ff.), but this does not make it Shiite (see below, p. 262 f.).

[9] *Tr. II*, 13 (*c*), (*e*), 16 (*a*).

and some of which are difficult to distinguish from the original doctrines ascribed to him.[1] A later echo of the disturbance created by the 'Alī traditions occurs in Muslim[2] where Ibn 'Abbās is made to object particularly to traditions from 'Alī; an anonymous companion of 'Alī is made to regret the falsifications introduced into the traditions from 'Alī; and Mughīra b. Miqsam Ḍabbī is made to say that traditions from 'Alī are reliably related only by some of the Companions of Ibn Mas'ūd. There is no trace of a bias in favour of Shiite legal doctrines in the Iraqian traditions from 'Alī.

H. Sufyān Thaurī

Sufyān Thaurī, a younger contemporary of Abū Ḥanīfa, belongs to the literary period but ought to be mentioned here as a Kufian[3] who did not join the followers of Abū Ḥanīfa but founded a school of law of his own. He was claimed by lawyers, traditionists, and ascetics as one of them;[4] Ibn Qutaiba reckons him among the systematic lawyers (*Ma'ārif*, 249), the author of the *Fihrist* (p. 225) among the lawyer-traditionists.[5] From the extensive fragments of his doctrines which have been preserved in Ṭabarī,[6] we can judge with certainty that Sufyān Thaurī was above all a lawyer and a representative of the ancient schools.[7] His opinions and reasonings, though on the whole definitely Iraqian, show that it would be a mistake to generalize, even within the circle of the Kufians, the uniformity of doctrine suggested by the *isnād* Abū Ḥanīfa—Ḥammād—Ibrāhīm.[8]

[1] *Tr. II*, 14 (*b*), 18 (*m*), and perhaps 18 (*i*), (*n*).
[2] *Bāb al-nahy 'an al-riwāya 'an al-ḍu'afā'*.
[3] He was born and lived in Kufa, and died in Basra only by accident.
[4] See Plessner in *E.I.*, s.v. Sufyān al-Thawrī.
[5] See Goldziher, *Ẓâhiriten*, 4, on these arbitrary distinctions.
[6] *Ed. Kern* and *ed. Schacht*.
[7] See above, p. 205, on his attitude to the 'living tradition'.
[8] See, e.g., Ṭabari, 64 (cf. below, p. 286), 76 (cf. below, ibid.), 97 (cf. *Tr. IX*, 18). And see above, p. 7.