

THE ORIGINS OF
Muhammadan
Jurisprudence

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CHAPTER 8

KHĀRIJĪ LAW

THE variants of Muhammadan law which are recognized by the ancient sects of Islam, the Khārijīs and the Shiites, do not differ from the doctrines of the orthodox or Sunni schools of law more widely than these last differ from one another. We must not, however, conclude from this well-known fact, as has been done, that the features common to Khārijī, Shiite, and orthodox law are older than the schisms which split the Islamic community within its first century. When the Khārijīs and the Shiites seceded from the orthodox community, Muhammadan law did not yet exist, as we have seen earlier in this book.¹ For a considerable period, and during the second and third centuries A.H. in particular, the ancient sects remained in a sufficiently close contact with the Sunni community, for them to adopt Muhammadan law as it was being developed in the orthodox schools of law, introducing only such superficial modifications as were required by their own political and dogmatic tenets. This point of view is not only in keeping with the main results of this book; it is confirmed by positive indications which we shall discuss in the present and the following chapters.²

The foundation of the legal doctrines of the Ṣufriya and Ibāḍī branches of the Khārijīs is attributed to the two Successors 'Imrān b. Ḥiṭṭān and Jābir b. Zaid respectively;³ both appear also among the transmitters of traditions acknowledged by the orthodox community.⁴ The two historical persons in question were active though not extremist Khārijīs; their names, being those of respected members of the generation of the Successors, were used in the process of fictitious creation of *isnāds*; and this enabled the Khārijī groups to claim them as founders of their law.

The political and dogmatic principles of the Khārijīs led to certain consequences in law, particularly in the law of war.⁵

¹ See above, p. 190.

² My whole approach to Khārijī law is necessarily different from that of W. Thomson, in *The Macdonald Presentation Volume* (1933), 352 ff.

³ Ancient Khārijī authorities are mentioned by Jāḥiz, *Bayān*, i. 131 ff., ii. 126 f.

⁴ *Tahdhīb*, viii. 222, ii. 61.

⁵ See *Kharāj*, 33; Ash'arī, *Maqālāt*, i. 90.

One of these consequences was that women and minors, who accompanied the army on a raid, had a right to a full share in the booty.¹ This was also the opinion held by Auzā'ī, and it was expressed in an informal tradition, without an *isnād*, on the history of the Prophet. That this doctrine was held by the ancient Khārijīs, is shown by the counter-tradition, quoted by Abū Yūsuf against Auzā'ī, in which Ibn 'Abbās refers the Khārijī leader Najda b. 'Āmir to the decision of the Prophet to the contrary.² But the official doctrine of the Ibāḍī branch of the Khārijīs, the only one on whose law there exists detailed information, reproduces the doctrine of the other orthodox schools, that women and minors receive no share but only a remuneration.³ The legal consequence of the ancient Khārijī tenets was obviously never part of a legal system recognized by the Ibāḍīs; when these derived their law from the orthodox schools, the ancient Khārijī decision, and presumably also Auzā'ī's corresponding doctrine on the orthodox side, had been forgotten.

The doctrine of the Ibāḍīs on 5 dirham as the minimum value of stolen goods, to make the *ḥadd* punishment for theft applicable, is derived from an ancient Iraqian *qiyās*.⁴ Whereas the political history of the Ibāḍīs goes back to the middle of the first century A.H., their law was derived from the orthodox schools at a much later date.

A later development of legal theory is projected back into the Khārijī movements of the sixties and seventies of the first century A.H. in the report that some Khārijīs, including the followers of Najda, acknowledged *ijtihād al-ra'y*, whereas others, the Azraqīs, rejected it and confined themselves to the outward and obvious meaning (*zāhir*) of the Koran. This statement presupposes a secondary Iraqian terminology.⁵

But a predilection for the interpretation of the Koran according to its *zāhir* meaning seems indeed to have been a feature of the ancient Khārijīs.⁶

¹ See on this question *Tr. IX*, 7, 10; *Mud.* iii. 33; Ṭabari, 18.

² See *Comm. ed. Cairo on Tr. IX*, 7, 10.

³ Ibn 'Abbās b. Qais, *Kitāb mā lā yasa' jahluh*, MS. Or. 3711 of the British Museum, pp. 105 b-106 a.

⁴ See Ash'ari, *Maqālāt*, i. 105 and above, p. 107.

⁵ See *ibid.* 127 and above, p. 105.

⁶ For further examples of this tendency, see *Umm*, vii. 15; Ash'ari, *Maqālāt*, i. 95.