THE ORIGINS OF Muhammadan Jurisprudence

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CHAPTER 9

SHĪ'A LAW

THE alleged origins of Shī'a literature in the Umaiyad period, and in particular the works on religious law ascribed to the Shiite imam Ja'far Ṣādiq, are apocryphal. In the second century A.H., the imam Mūsā Kāẓim and his brother 'Alī b. Ja'far are credited with fetwas and a book on lawful and unlawful things (*Kitāb fil-Ḥalāl wal-Ḥarām*) respectively, but their authenticity is doubtful. A work on law attributed to the slightly later imam 'Alī Riḍā is certainly spurious and recognized as such by Shiite scholars themselves. The authentic legal literature of the 'Twelver' (Ithnā 'Asharīya) Shiites starts only towards the end of the third century A.H., that of the Ismā'īlī branch even later.[1]

The Zaidī Shiites have a work which, if it were genuine, would be the earliest work on Muhammadan law in existence; it is the *Majmū'* attributed to their imam Zaid b. 'Alī. But Bergsträsser has shown that it derives its doctrines from the Ḥanafīs and other schools of law.[2] It presupposes the teaching of Shāfi'ī in a statement on legal theory (§ 679), where the 'words of the Prophet' are identified with *sunna*, and *ijtihād* with the use of analogy. The authentic literature of the Zaidīs starts only in the third century A.H.[3]

In its final form, from the third century A.H. onwards, Shiite law is distinguished from that of the Sunni schools by a limited number of differences, features which in themselves were not necessarily either Shiite or Sunni, but which became adventitiously distinctive for Shiite as against Sunni law. The discussion of some of these distinctive features will show that they gained their importance only in the second century A.H., and even towards its end had not yet become irrevocably fixed as Shiite as opposed to Sunni. The Iraqian traditions from 'Alī show no bias in favour of Shiite legal doctrines,[4] and an Umaiyad

[1] Cf. Brockelmann, *Suppl.* i. 104, 318 f., 323 f.
[2] In *O.L.Z.* xxv. 114 ff. See also Santillana, in *R.S.O.* viii. 745 ff.
[3] Cf. Brockelmann, ibid. 313 ff.
[4] See above, pp. 240 ff.

practice which was ascribed to members of the ruling family in Medina, was put under the aegis of 'Alī in Iraq.[1] Shiite imams appear occasionally in the *isnāds* of Medinese traditions in the *Muwaṭṭa'* and elsewhere, but these traditions do not express distinctive Shī'a doctrines.

Masḥ 'alal-khuffain. The *masḥ 'alal-khuffain*, that is the wiping of one's shoes instead of the washing of one's feet as part of the lesser ritual ablution under certain conditions, became a distinctive point of difference between the Shiites who rejected it, and the Sunnis who in opposition to them considered it as valid. This was not yet so in the second half of the second century A.H. Abū Ḥanīfa does not mention it in his creed (*Fiqh Akbar*), where he nevertheless refers to other points of difference from the Shiites.[2] Mālik, according to Ibn Qāsim, allowed it only to the traveller; he had formerly allowed it also to the resident, but changed his opinion,[3] moving towards a restriction of the *masḥ*. The Egyptian Medinese even said, in the words of Rabī': 'We do not like the *masḥ*, either for those in residence or for those travelling' (*Tr. III*, 60).

The only tradition from the Prophet, known to Mālik, in favour of the *masḥ* (*Muw.* i. 70) has a very faulty *isnād*, so much so that Zurqānī blames Mālik for two mistakes in it and the editor Yaḥyā b. Yaḥyā for another; but that was its original condition, and the improvements by which its higher part was changed almost beyond recognition, are later. Another Medinese tradition (loc. cit.) endeavours to defend the practice of *masḥ*: Mālik relates on the authority of Nāfi' and 'Abdallāh b. Dīnār that Ibn 'Umar came to Kufa and disapproved of the *masḥ* which was practised by the Governor Sa'd b. Abī Waqqāṣ, a senior Companion of the Prophet; but Sa'd referred Ibn 'Umar to his father, and 'Umar declared it valid. This can be dated by its *isnād* in the generation preceding Mālik. These and other traditions, none of which shows any trace of anti-Shī'a polemics, had not quite prevailed in Medina in the time of Mālik.

Shāfi'ī follows the tradition from the Prophet, acknowledges the *masḥ* as valid, and refutes the anti-traditionist argument that the Koran, by not mentioning the *masḥ* in the detailed

[1] See above, p. 197 f.

[2] See Wensinck, *Creed*, 103 f., 124.

[3] *Mud.* i. 41; cf. *Muw. Shaib.* 67.

instructions on the lesser ritual ablution, has repealed it.[1] This shows that the discussions about *masḥ* started between the traditionists and the adherents of the ancient Medinese school, and not between Sunnis and Shiites.

In his creed, Shāfi'ī passes over the *masḥ* although he declares the *mut'a* (see below) to be forbidden.[2] The so-called *Waṣīyat Abī Ḥanīfa*, however, a creed which can be dated in the early third century A.H., considers the *masḥ* to be *wājib*, that is an institution whose acknowledgement is obligatory and whose rejection implies danger of unbelief.[3] Only here the *masḥ* becomes one of the essential differences between Sunnis and Shiites. The so-called *Fiqh Akbar II*, a creed of the fourth century, mitigates this uncompromising formula again and declares the *masḥ* to be a normative practice (*sunna*).[4]

In the time of Ibn 'Abdalbarr, the Mālikī doctrine had definitely changed in favour of the *masḥ*, and Ibn 'Abdalbarr and others endeavoured to minimize and explain away the authentic information on Mālik, with the help of spurious statements attributed to some of Mālik's ancient companions (Zurqānī, i. 70).

Umm al-walad. Both pre-Islamic Arab custom and the Koran recognized the right of the master to take his female slaves as concubines, and a slave woman who had borne a child to her master was called *umm al-walad*.[5] The children born of these relationships, in order to become free and legitimate, had to be acknowledged by their father, the master, but this acknowledgement seems to have been regularly given. The position of the mother, however, was not privileged, and there is nothing in the Koran to show that the Prophet intended to introduce a change. Conditions in early Umaiyad times are reflected in an anecdote that Marwān b. Ḥakam ceded an *umm walad* of his own, together with her small daughter, to a freedman of his in recognition of his services (*Aghānī*, ix. 36).

Early Muhammadan law showed on one side the tendency to give the *umm al-walad* her freedom because her children were

[1] *Ris.* 33; *Tr. III.* 60; *Tr. V.* 265; *Ikh.* 48. For the anti-traditionist argument, see above, p. 46.

[2] See Kern in *M.S.O.S.* xiii. 141 ff., and below, p. 267.

[3] See Wensinck, *Creed*, 129, 187.

[4] Ibid. 192, 246.

[5] See Lammens, *Berceau*, 276 ff.; Koran iv. 3, 24 f.; xxiii. 6, 50 ff.; lxx. 30.

set free—a kind of primitive systematic reasoning—[1] and on the other, the conservative resistance to this innovation. We find both doctrines expressed in Iraqian traditions, the first, which was the ancient Kufian doctrine, ascribed to 'Umar (*Āthār A.Y.* 872), the second to 'Alī.[2]

There were, furthermore, compromises suggested between these two extreme doctrines. One, attributed to Ibn Mas'ūd but not with the standard *isnād* of the Kufian school,[3] set the *umm al-walad* free at the death of her master as a charge on the share of her child; another set her free at the death of her master as a first charge on the whole estate. This last compromise, with the provision that the *umm al-walad* could not be sold or otherwise alienated, became the common doctrine of the ancient schools of law; the Kufians interpreted the statements of their earlier doctrine accordingly,[4] and the Medinese, who entered the discussion only at this stage, expressed it in a tradition, through Nāfi', from Ibn 'Umar.[5] Later, the *isnād* of this tradition grew backwards to the Prophet.[6]

Because the ancient resistance to an improvement in the status of the *umm al-walad* happened to be expressed in a tradition from 'Alī, in pointed opposition to traditions from 'Umar and Ibn 'Umar, the Shiites, when they came to elaborate their own legal doctrines, insisted on considering the *umm al-walad* as a slave who could be sold or otherwise alienated by her master. This was not directly derived from the corresponding ancient doctrine, but introduced as a modification into existing Sunni law which the Shiites borrowed. We therefore find traces of the opposite Sunni doctrine in Shiite law: the 'Twelver' Shiites teach that the *umm al-walad* can be sold but becomes free at the death of her master provided she is still in his possession and her child is still alive;[7] and the Zaidīs allow the sale of the *umm al-walad* but forbid the sale of the *mudabbar* slave,[8]

[1] Cf. above, pp. 106 ff.

[2] *Tr. II*, 12 (*a*). This particular tradition represents 'Alī as having changed his opinion, after having originally agreed with 'Umar; it is intended to discredit the doctrine which went under the name of 'Alī, but presupposes its attribution to him.

[3] *Tr. II*, 12 (i): Abū Mu'āwiya—A'mash—Zaid b. Wahb—Ibn Mas'ūd.

[4] *Āthār Shaib.*, quoted in the Commentary on *Āthār A. Y.* 872.

[5] *Muw.* iii. 246; *Mus. Shaib.* 344.

[6] See *Comm. Muw. Shaib.*, loc. cit.

[7] See Querry, ii. 147 ff.

[8] *Mudabbar* is a slave to whom the master has promised freedom, to take effect on his death.

a doctrine which is based on an analogy with the *umm al-walad*.[1]

But even in the time of Dāwūd Ẓāhirī, the opinion that the *umm al-walad* could be sold, had not yet become an exclusively Shiite doctrine.[2]

Mut'a. The *mut'a* is a marriage concluded for a fixed term, at the end of which it is dissolved automatically. This was presumably an ancient Arab institution, and seems to have been sanctioned and regulated in Koran iv. 24. It was certainly a widespread practice in early Islam which found expression in a fuller and unequivocal version of the Koranic passage in the copies attributed to Ibn Mas'ūd, Ubai, and Ibn 'Abbās,[3] in a tradition attributed to Ibn Mas'ūd for Kufa,[4] and in a doctrine attributed to Ibn 'Abbās and his Companions for Mecca.[5] Its existence is also attested by the traditions directed against it.

The opposition to *mut'a* prevailed among the Iraqians and the Medinese. In Iraq, the Ibn Mas'ūd tradition was turned into its contrary by the assumption of a repeal of *mut'a* in the Koran, and to this was prefixed the standard *isnād* of the school of Kufa;[6] and a more recent tradition with a Nāfi'—Ibn 'Umar *isnād* affirmed the prohibition of *mut'a* by the Prophet.[7] In Medina, a tradition with a typical family *isnād* made 'Alī reject the doctrine ascribed to Ibn 'Abbās by referring to the prohibition of *mut'a* by the Prophet,[8] and another tradition, with spurious

[1] See Bergsträsser, in *O.L.Z.* xxv. 123.

[2] See *Comm. Muw. Shaib.* 344.

[3] See Jeffery, *Materials*, 36, 126, 197. The copy of Ubai is traditionally associated with Syria.

[4] *Tr. II*, 11 (*a*), and more fully *Ikh.* 254 f.

[5] I find a tradition from Ibn 'Abbās to this effect only in the classical and other collections of the third century; but that the doctrine in question was attributed to Ibn 'Abbās about the middle of the second century, is shown by the polemics against it in the Medinese tradition from 'Alī (see infra). Shāfi'ī implies the existence of other authorities besides Ibn Mas'ūd for this doctrine (*Ikh.* 255), and Ibn 'Abdalbarr refers to 'the Companions of Ibn 'Abbās in Mecca and Yemen' (quoted in Zurqānī, iii. 25).

[6] *Āthār A. Y.* 698; *Āthār Shaib.* 66. The systematic reasoning which this tradition implies at the end, anticipates essentially Shāfi'ī's argument (*Ikh.* 257), and represents a fairly developed stage.

[7] *Āthār A. Y.* 699; *Āthār Shaib.* 66. On the *isnād*, see above, p. 32.

[8] *Muw.* iii. 23; *Muw. Shaib.* 260; *Tr. II*, 11 (*a*). This counter-tradition against the doctrine ascribed to Ibn 'Abbās, does not necessarily imply the existence of a relatively old tradition from 'Alī in favour of *mut'a*, a tradition which one might be tempted to expect on account of the doctrine of the 'Twelver' Shiites (see what follows).

circumstantial details, makes 'Umar censure the practice of *mut'a* vehemently.[1] The *isnāds* of these two traditions, and of most of the Medinese traditions directed against *mut'a*, have a common link in Zuhrī,[2] and this shows that the explicit rejection of *mut'a* in Medina is not older than the time of Zuhrī at the earliest. There is no reason for singling out the tradition on 'Umar's prohibition of *mut'a*[3] and considering it any more authentic than the other counter-traditions.

In the generation preceding Mālik, both doctrines were outwardly harmonized and the prohibition of *mut'a* maintained by making the Prophet allow and subsequently forbid it. These harmonizing traditions or fragments taken from them, were incorporated in the biography of the Prophet, where they were difficult to reconcile with one another.[4] Nothing of this is authentic historical information.

Shāfi'ī takes the upholders of *mut'a* seriously and discusses the problem with them in *Ikh.* 255 ff. In his creed, he declares *mut'a* to be forbidden.[5] His opponents are not necessarily Shiites,[6] and it was only natural for him to take sides in his creed on a problem concerning the law of marriage, a subject which had gained a considerable religious importance in his time.

The Zaidīs, the first Shiite sect to secede from the Sunni community, rejected *mut'a*, but the 'Twelver' Shiites recognized it, for no better reason than that its prohibition had been attributed to 'Umar.

Qunūt. Ibrāhīm Nakha'ī knew that the *qunūt*, the imprecation against political enemies during the ritual prayer, was introduced by the rivals 'Alī and Mu'āwiya in their war against each other.[7] In the time of Mālik there had come into circulation traditions from the Prophet and from Companions, either rejecting *qunūt* altogether, or restricting it to certain prayers, or stating that the Prophet had said it only during a certain period

[1] *Muw.* iii. 23; *Muw. Shaib.* 260; *Tr. III*, 79.

[2] See above, p. 175.

[3] It was emphasized in a tradition from Jābir, in Muslim, but this is later.

[4] See Zurqānī, iii. 24, and above, p. 139, n. 6.

[5] See above, p. 264.

[6] The other article in his creed concerning a legal subject, the interpretation of the prohibition of wine, is directed against the Iraqians.

[7] See above, p. 60. To the same effect, *Majmū'*, 223.

and then abandoned it, which implied repeal.[1] There were also traditions from Companions in favour of *qunūt*,[2] but unambiguous traditions from the Prophet in favour of this practice appeared only in Shāfi'ī (*Ikh.* 285 f.).

One of these traditions has in its very defective *isnād* two descendants of 'Alī, the fifth and sixth imam of the 'Twelver' Shiites. This does not make its doctrine Shiite, any more than the *isnād* of the Medinese 'Alī tradition against *mut'a* (see above) makes its doctrine Shiite. Other traditions from the Prophet to the same effect, quoted by Shāfi'ī, have different *isnāds*.

As a result, the ancient schools of law are divided on *qunūt*, Shāfi'ī acknowledges it on principle on account of the traditions from the Prophet, the Zaidīs and the 'Twelver' Shiites are in favour of it.[3] The history of this problem shows that a practice which was historically connected with 'Alī failed to develop into a distinctive difference between Sunni and Shiite law.

My final example shows Khārijīs and Shiites agreeing on a doctrine which has almost disappeared from the Sunnī schools of law. The Iraqian opposition movement, at the beginning of the second century, held that unlawful intercourse constituted a permanent impediment to marriage between the guilty parties. This doctrine was inspired by the spirit of rigorism typical of that group,[4] but it did not fit well into the general background of the Muhammadan law of marriage. It was therefore rejected by the school of Kufa, and only a corollary to it, separated from its context, was adopted in Medina on the authority of a tradition attributed to 'Umar, which was interpreted restrictively; this led to a grave inconsistency in Mālikī doctrine. The essential thesis, however, with different developments of details in each case, was taken over both by the Ibāḍīs and by the 'Twelver' Shiites; both borrowings were made in Iraq.[5]

[1] *Muw.* i. 286; *Muw. Shaib.* 140; *Tr. I*, 157 (*b*), quoting Abū Ḥanīfa.

[2] *Tr. I*, 157 (*b*), quoting Ibn Abī Lailā.

[3] *Majmū'*, 149 ff., 223 ff., 369; Querry, i. 81.

[4] See above, p. 241. It ultimately seems to go back, through the intermediary of Christian converts to Islam, to a doctrine of canon law.

[5] For the details, see my paper in *Archives d'Histoire du Droit Oriental et Revue Internationale des Droits de l'Antiquité*, i, 1952, 105–123.