THE ORIGINS OF Muhammadan Jurisprudence

JOSEPH SCHACHT

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PART IV

THE DEVELOPMENT OF TECHNICAL LEGAL THOUGHT

CHAPTER 1

THE DEVELOPMENT OF LEGAL REASONING IN GENERAL

THE development of technical legal thought is an essential aspect of the history of early Muhammadan jurisprudence. Legal theory, positive legal doctrine, and technical legal thought grew up in close connexion with one another, until legal theory and technical legal thought reached their common culminating point in Shāfi'ī. To follow the development of technical legal thought in detail would demand an historical analysis of positive legal doctrine over the whole field of law, an undertaking which falls outside the scope of our inquiry. What I propose to do, in the first two chapters of this part, is to give the broad outline and to show the significant character of the development of legal reasoning in the early period. This is to be supplemented in the final chapters by remarks on the individual reasoning of some of those ancient lawyers whom the sources available allow us to see as individuals, concluding with Shāfi'ī.[1]

Legal reasoning was inherent in Muhammadan law from its very beginnings. We have investigated in the first part of this book the appearance of systematic reasoning from the earliest period onwards and its subsequent subjection to an increasingly strict discipline.[2] The oldest stage of legal reasoning is represented by Iraqian traditions which show crude and primitive conclusions by analogy (*qiyās*).[3] The results of this reasoning were sometimes expressed in the form of legal 'puzzles',[4] or in

[1] Only genuine quotations from the ancient authorities can be used in the study of their reasoning; the statements of later authors, such as Sarakhsī, on the alleged principles underlying their doctrine, are often unreliable.

[2] See above, pp. 98 ff.

[3] See above, pp. 106 ff.

[4] See above, p. 241.

the form of legal maxims;[1] these last then became a favourite mode of expressing the results of systematic legal thought in Iraq and in Hijaz.[2] Some abstract legal principles are part of the common stock of ancient doctrine.[3] All this belongs to the first half of the second century A.H. The technical legal thought attributed to Ibrāhīm Nakha'ī dates only, as we saw, from the time of Ḥammād,[4] and the technical details of legal doctrine which are discussed in *Tr. I* emerged in the period between Ḥammād on one side, and Abū Ḥanīfa and Ibn Abī Lailā on the other.[5] These indications provide us with a useful chronology for the development of legal reasoning.

Tr. I allows us to follow the development of legal reasoning step by step from Ibn Abī Lailā to Abū Ḥanīfa, Abū Yūsuf, and Shāfi'ī. Ibn Abī Lailā and Abū Ḥanīfa were contemporaries, but Ibn Abī Lailā's reasoning is, generally speaking, more primitive and represents an older stage than that of Abū Ḥanīfa.[6] The reasoning of Shāfi'ī is on the whole much superior to that of his Iraqian predecessors. The following examples are intended to show the general trend of the development.

Tr. I, 6: Shāfi'ī's reasoning is more detailed and articulate than that of an anonymous Iraqian.

§ 8 = *Ris.* 71 = *Ikh.* 340: The Iraqians interpret the legal maxim 'profit follows responsibility',[7] after an expedient fashion, more intuitive than logical; Shāfi'ī's reasoning is strictly systematic and superior to that of his predecessors.

§ 13: 'A man concludes a sale on condition that the seller has the right of option for one day; the buyer takes possession, and the object perishes whilst it is in his possession. Abū Ḥanīfa used to decide: "The buyer is responsible for the value, because he took it on the basis of a contract of sale", and we [Abū Yūsuf] follow this. Ibn Abī Lailā used to say: "He is a trustee and is not responsible." If the option is in favour of the buyer and the object perishes whilst it is in his possession, it is to his debit at the price for which he bought it, according to the doctrine of both [Abū Ḥanīfa and Ibn Abī Lailā]. Shāfi'ī: "If a man sells a slave, stipulating the right of option for three days or less,[8] and the buyer takes possession and the slave dies whilst he is in his possession, he [the buyer] is responsible for the value. What prevents us from making him responsible

[1] See above, p. 184 f. [2] See above, p. 188 f. [3] See above, p. 218.
[4] See above, pp. 235 ff. [5] See above, p. 239. [6] See below, pp. 290 ff.
[7] See above, p. 181.
[8] On this time limit of the right of option, see below, p 326. f.

for the price is that the sale was not completed; and what prevents us from exonerating him from responsibility, is that he took him on the basis of a sale in which he [the seller] received from the buyer an equivalent, and we must regard [the object of] the sale as covered by the responsibility [of a party]; there is no way of considering him a trustee, because one can become a trustee only of property which one does not own and from which one does not draw advantage sooner or later, and which one holds in the interest of its owner and not one's own interest. It is irrelevant whether the option is in favour of the seller or the buyer, because [in either case] the sale was not completed when the slave died." ' This shows Ibn Abī Laylā's seemingly just and reasonable solution, easily refuted by Abū Ḥanīfa's technical legal thought and Shāfi'ī's still more articulate and consistent reasoning.

§ 25: Ibn Abī Laylā, followed by Abū Yūsuf, mechanically applies the elementary rules on presumption to two contradictory claims without evidence (cf. Sarakhsī, xiii. 59); Abū Ḥanīfa, followed by Shāfi'ī in the essentials although Shāfi'ī's decision is slightly different, analyses the nature of the statements of both parties.

§ 27: Ibn Abī Laylā's decision is strictly formal; the opinion of Abū Ḥanīfa, followed by Abū Yūsuf, is more appropriate for any but the most primitive conditions of commerce; Shāfi'ī endorses it and makes it systematically more consistent.

§ 38: Abū Ḥanīfa becomes inconsistent and is reduced to a practically expedient solution (at the end), whereas Shāfi'ī remains consistent and logical.

§ 44: Ibn Abī Laylā is crudely systematic in applying the rules of pre-emption even to property given as *donatio propter nuptias*, but his solution of the problem is clumsy and inconsistent. Abū Ḥanīfa, followed by Abū Yūsuf, gives systematic reasoning against it. Shāfi'ī accepts pre-emption in the case in question, and makes this doctrine juridically acceptable for the first time. But the argument which Sarakhsī, v. 78, puts into the mouth of Shaibānī in favour of the doctrine of Abū Ḥanīfa and Abū Yūsuf is easily superior even to Shāfi'ī's reasoning; it develops Abū Ḥanīfa's argument in a masterly way and introduces a judicious distinction; this seems to be an argument that Shaibānī really did use.

§ 48: On the exercise of a minor's right of pre-emption, Abū Ḥanīfa, followed by Abū Yūsuf, holds a reasonable and defensible opinion. Shaibānī, however, with complete disregard for the stability of real property, applies purely formal reasoning (see Sarakhsī, xiv. 155; xxx. 145); in this he is followed by Shāfi'ī. Both seem to lose sight of the purpose of pre-emption and to regard it as

an institution existing for its own sake. This attitude heralds the end of the formative period of Muhammadan law.

§ 52: Ibn Abī Laylā does not admit an amiable settlement which is not based on the recognition of the claim of the other party (*ṣulḥ 'alal-inkār*); this presupposes strictly formal reasoning, of the same kind as that given by Shāfi'ī later, starting from the Koranic prohibition of 'consuming one another's property in vanity' (Sura ii. 188 and often). Abū Ḥanīfa, followed by Abū Yūsuf, admits that kind of settlement, taking a more common-sense and practical view. Shāfi'ī must, by strict *qiyās*, revert to the doctrine of Ibn Abī Laylā.

§ 55: On the validity of an acknowledgement made out of court, the decision of Ibn Abī Laylā is inconsistent but inspired by the interests of the administration of justice.[1] The decision of Abū Ḥanīfa, who is followed by Abū Yūsuf, is consistent but leaves considerations of judicial practice out of account. Shāfi'ī gives essentially the same decision as Abū Ḥanīfa on the problem in question, but raises the discussion to a higher, more juridical, plane on which he is able to provide for the need felt by Ibn Abī Laylā, whilst avoiding his inconsistency.

§ 60 f.: It is the common doctrine of the ancient Iraqians that a gift becomes fully valid only if the donee takes possession of the object. What of the gift of an undivided share in property? Ibn Abī Laylā, with a pointed reference to the common Iraqian doctrine, admits it as valid, presumably because this appeared to him as the natural solution. Abū Ḥanīfa, who gives technical reasoning of a high standard, sees a difficulty in taking possession of an undivided share, and therefore cannot admit it as the object of a valid gift; he tries to find a confirmation of this conclusion in a tradition from Companions of the Prophet and in an opinion attributed to Ibrāhīm Nakha'ī, but neither is decisive on this particular point. Abū Yūsuf,[2] inconsistently, follows Abū Ḥanīfa in the case of § 61, but not in that of § 60. Shāfi'ī, whilst in fact returning to the doctrine of Ibn Abī Laylā, contributes an excellent systematic discussion of the concept of 'taking possession'.

§ 72: Ibn Abī Laylā gives a practicable and seemingly natural solution of a problem relating to security (*rahn*); Abū Ḥanīfa, followed by Abū Yūsuf, applies elementary legal reasoning; Shāfi'ī carries the legal analysis farther, and by excellent systematic reasoning arrives at a solution different from both opinions.

[1] Being a judge, he obviously tries to safeguard himself against false witnesses; this is suggested by Shāfi'ī's comment.

[2] Also Shaibānī; see Sarakhsī, xii. 66 f.

§ 77: Ibn Abī Lailā shows primitive legal reasoning;[1] the reasoning of Abū Ḥanīfa, whom Shāfi'ī follows, is considerably more penetrating.

§ 82: A man claims ownership of a house, and the man in occupation claims that he is only the agent of an absent owner. The ancient Iraqian doctrine was not uniform. Ibn Shubruma (Sarakhsī, xvii. 37) rejected the counterclaim and made the occupier the defendant. Ibn Abī Lailā accepted the counterclaim and dismissed the suit; but later, obviously under the necessities of the administration of justice, he demanded evidence in support of the counterclaim if he doubted the truthfulness of the occupier. Abū Ḥanīfa, more consistent, demanded evidence on principle. Abū Yūsuf followed this originally, but later, again under the necessities of the administration of justice,[2] demanded the evidence of witnesses personally known to him, if he doubted the truthfulness of the occupier. So far, this problem was treated in isolation. But Shāfi'ī put it against the background of the wider problem of the judgment against an absent party, and elaborated two sets of possible and consistent solutions, neither of which agreed with the opinions of his predecessors.[3]

§ 83: Ibn Abī Lailā saw the essential problem; Abū Ḥanīfa, followed by Abū Yūsuf, applied rigidly formal reasoning; Shāfi'ī returned to Ibn Abī Lailā's decision and gave an explicit legal argument.

§§ 92, 93, 94: The decision given by Ibn Abī Lailā in these three parallel cases is an obviously common-sense and practicable one.[4] Abū Ḥanīfa, followed by Abū Yūsuf, takes a strictly formal view. Shāfi'ī adopts essentially Abū Ḥanīfa's solution which alone is juridically acceptable to him, but he develops a more appropriate procedure which also obviates the practical difficulty which Ibn Abī Lailā had in mind. In one particular case, Shāfi'ī becomes inconsistent because he must declare a transaction which involves 'usury' null and void; there is, however, a good systematic reason for the fact that the actual results of his procedure in § 94 are different from those in §§ 92 and 93. In § 94, but not in §§ 92 and 93, Abū Yūsuf anticipates Shāfi'ī's procedure by one which is parallel to it and reconciles the guiding ideas of Ibn Abī Lailā and of Abū Ḥanīfa.[5]

[1] Sarakhsī, xxx. 147, elaborates this and adds a misplaced and faulty *qiyās* which is based on a decision of Abū Ḥanīfa.

[2] This is stated explicitly by Sarakhsī, xvii. 98.

[3] Rabī' adds Shāfi'ī's own choice.

[4] Sarakhsī, xii. 164 and xxx. 150, correctly considers it based on the regard for practice and therefore calls it *istiḥsān*.

[5] The argument suggested for Abū Yūsuf by Sarakhsī, loc. cit., and his statement on Abū Yūsuf's change of opinion are unreliable.

§§ 95, 228: In the case of divergencies in the evidence of two witnesses, Ibn Abī Laylā gives a seemingly practical and common-sense solution; Abū Ḥanīfa's decision is rigidly formal and in one detail even hair-splitting; Abū Yūsuf reverts to Ibn Abī Laylā; Shāfi'ī introduces a new consideration and develops a method which does justice to both points of view.

§ 96: In admitting the evidence of witnesses on the testimony of other witnesses, Ibn Abī Laylā gives a lenient and seemingly common-sense decision;[1] Abū Ḥanīfa is strict and consistent; Shāfi'ī goes one step farther and exaggerates the demand for strictness; Rabī' supplies the far-fetched argument for this doctrine.

§ 106: Ibn Abī Laylā, being a judge, endorses a severe and inconsistent decision, obviously on grounds of public policy;[2] Abū Ḥanīfa and Abū Yūsuf apply the general rules consistently; Shāfi'ī introduces an important distinction.

§ 108: Ibn Abī Laylā gives a seemingly obvious and formally consistent decision; Abū Ḥanīfa disagrees, on account of an important material consideration; Shāfi'ī makes a distinction, gives a straightforward and convincing argument, and proposes a well-balanced solution which does justice to both considerations.

§ 126: Ibn Abī Laylā gives a practicable interim solution; Abū Ḥanīfa, strictly systematic, does not acknowledge it; Abū Yūsuf reverts to Ibn Abī Laylā, and Shaibānī, according to Sarakhsī, xvii. 47, returns to Abū Ḥanīfa; Shāfi'ī agrees with Abū Ḥanīfa in the essentials, but shows himself still more systematic on the basis of a distinction which he introduces.

§ 141 f.: Ibn Abī Laylā pursues to its farthest consequences a formal principle which embodies crude and primitive reasoning; Abū Ḥanīfa, followed by Abū Yūsuf, gives a sound juridical decision, based on wider systematic thought; Shāfi'ī cannot but agree with Abū Ḥanīfa on principle, but on account of his different premisses he arrives in one case at the same material decision as Ibn Abī Laylā, though on different grounds.

§ 150: Ibn Abī Laylā gave a seemingly just and practicable decision, obviously inspired by material considerations; Abū Ḥanīfa's decision was more strictly formal, but not quite consistent; Abū Yūsuf followed first the opinion of Abū Ḥanīfa; later, perhaps under the necessities of the administration of justice, he came nearer to the doctrine of Ibn Abī Laylā, but remained very inconsistent; only Shāfi'ī's doctrine became fully consistent, on the basis of excellent systematic reasoning.

[1] This doctrine was projected back to *Shuraiḥ* and *Ibrāhīm Nakha'ī*.

[2] See above, p. 111, for a similar consideration.

As we know that the doctrine of the Medinese was largely dependent on and secondary to that of the Iraqians,[1] we may assume the same of the development of technical legal thought for Medina. The sources available happen to be less abundant for this particular aspect of ancient Medinese doctrine, but we are able to see that legal reasoning in Medina in the ancient period was essentially of the same character as that found in Iraq though, on the whole, more primitive.

The ancient schools of law do not hesitate to adduce against one another arguments which they reject as inconclusive when they find them used against themselves.[2] They often interpret traditions in a more natural way, and more in keeping with their sometimes only vaguely expressed intentions, than Shāfi'ī who, having cut himself loose from the 'living tradition', can ruthlessly apply systematic reasoning which is often no more than a logical sleight-of-hand.[3] The attitude of the ancient schools of law and, after them, of Shāfi'ī to legal traditions[4] is a significant example of how a perfectly natural and reasonably consistent approach to legal problems became, by an historical process, involved in a mass of seeming inconsistencies, and how Shāfi'ī replaced it by a novel and severely consistent theory of his own. It is typical of the degree of systematic reasoning reached by the ancient schools of law, that they reject traditions or dispose of them by interpretation, for reasons of systematic consistency.[5]

Shāfi'ī has preserved long quotations which show the authentic reasoning of ancient Iraqians.[6] In *Ikh.* 383 we find rather clumsy, but straightforward systematic reasoning. *Ikh.* 385 ff. shows Iraqian legal reasoning at its best; the Iraqian opponent certainly gets the better of the systematic argument. But the primitive and rigidly formal systematic reasoning of the Iraqian in *Ikh.* 395 ff. soon breaks down and is easily refuted by Shāfi'ī. A similar kind of argument in *Ikh.* 398, inconclusive in itself, shows the desire to 'understand' as the basis of legal thought, the same desire which is voiced in Medina by Mālik in *Muw.* iii. 184.

[1] See above, pp. 220 ff.
[2] See above, pp. 26, 32, 38, 39, 74, 103.
[3] See, e.g., *Tr. VIII*, 13; *Ikh.* 75; and below, pp. 306, 323.
[4] See above, pp. 21 ff.
[5] See above, pp. 23, 30.
[6] e.g. *Ikh.* 277 ff., 339, 355 ff., &c.

The following examples will serve to show that the technical legal thought of the ancient Iraqians was, on the whole, more highly developed than that of their Medinese contemporaries.[1]

The Iraqians in *Muw. Shaib.* 230 are more consistent than the Medinese in *Muw.* iii. 10, *Mud.* v. 2 (cf. above, p. 193 f.).

In interpreting a declaration, the Medinese make a distinction based on a consideration which combines a material and a systematic element, and take the intention of the speaker into account in only one of two cases (*Muw.* iii. 36); the Iraqians, however, regard the intention as decisive in any case (*Āthār Shaib.* 74, 77; *Muw. Shaib.* 265); Shāfi'ī's reasoning is strictly formal and systematic (*Tr. III*, 142).

Tr. III, 16: The Iraqians use good systematic reasoning against the Medinese.

Tr. III, 61: The easy-going Medinese allow a relevant declaration to be made after the fact; the Iraqians are stricter and use systematic reasoning; Shāfi'ī, though he has a different opinion of his own, recognizes that the Iraqian doctrine is better.

Tr. VIII, 14: Shāfi'ī suggests that the basis of the Medinese doctrine is some material consideration of practical expediency. This is certainly the case in *Tr. VIII*, 19, and Shaibānī easily refutes their argument.

Finally, here are a few examples to illustrate the way in which the development of positive legal doctrine is connected with the development of technical legal thought.

As regards the effect of conversion to Islam on a previous marriage, the regulation of Koran lx. 10, which was enacted in a particular set of circumstances, was modified progressively, and a later stage of these modifications was expressed in traditions purporting to describe episodes from the history of the Prophet.[2] The ancient Iraqians follow the rule of the Koran, except for the one concession of offering Islam to the unconverted party before dissolving the marriage, and their doctrine is consistent as far as it goes.[3] The Medinese endorse a more far-reaching modification and arrive at a compromise the inconsistencies of which Shāfi'ī denounces. If it is the wife who adopts

[1] See also below, p. 311.

[2] *Muw.* iii. 26; *Muw. Shaib.* 266; *Mud.* iv. 147; v. 163; *Tr. III*, 44; *Tr. IX*, 36 f.

[3] Shaibānī in *Muw. Shaib.*, loc. cit., had to adduce a more recent tradition, but it did not agree with his doctrine, and he could not add his usual formula 'We follow this'.

Islam, the Medinese leave the marriage in abeyance during her waiting period (*'idda*);[1] if it is the husband, they still refer to Koran lx. 10, but maintain the concession of offering Islam to the wife, and this concession becomes another inconsistency, as Shāfi'ī points out. Only Shāfi'ī is fully consistent again in according the reprieve of the waiting period to both parties; for him, the Koranic regulation has become irrelevant.

There is the connected problem of the man who is married to more than four wives, and adopts Islam.[2] The earliest, and seemingly most natural solution, that he can choose those four wives to whom he wishes to remain married, was that adopted by Auzā'ī. It was also expressed in a tradition from the Prophet.[3] Mālik followed the same doctrine but specified that the Koranic prohibition (Sura iv. 23) of marital relationships with two sisters or with mother and daughter applied also here and limited the possible choices. The early Iraqians introduced systematic refinements. Abū Ḥanīfa declares: 'If the man was married to all his wives by one contract, and they all become Muslims, he becomes separated from all his wives.' Abū Yūsuf adduces systematic reasoning in favour of this doctrine and adds: 'But if he was married by successive contracts, the first four marriages remain valid'; this detail he also quotes from Ibrāhīm Nakha'ī. The tradition in favour of the first doctrine was still 'irregular' (*shādhdh*) in the time of Abū Yūsuf. Shaibānī, however, knew already a greater number of traditions from the Prophet and could not disregard them; but he retained the doctrine of Abū Ḥanīfa and Abū Yūsuf with regard to persons who had been members of tolerated religions; the result is very inconsistent. Shāfi'ī, under the spell of the traditions, returned completely to the oldest doctrine and supplied a good systematic argument.

It was an ancient Arab custom that the victors took the womenfolk of their conquered enemies as concubines without caring much whether they were married women or not.[4] This rough-and-ready practice continued in Islam,[5] and Auzā'ī

[1] Auzā'ī agrees with this essential feature of the Medinese doctrine.

[2] *Tr. IX*, 38; *Mud.* iv. 160; *Siyar*, iv. 87; Ṭaḥāwī, ii. 147.

[3] This tradition is missing from the text of *Tr. IX*, but identified in *Comm. ed. Cairo*.

[4] See Lammens, *Berceau*, 279, 303 f.

[5] *Tr. IX*, 16 f.; *Mud.* iv. 153.

states correctly: 'Such was the practice of the Muslims, and thus decrees the Koran' (Sura iv. 24). The Medinese accepted this practice unreservedly and simply drew the logical conclusion from it by formulating the legal principle that captivity dissolves the marriage tie. The Iraqians, however, reasoned that captivity as such did not dissolve the marriage tie, and consequently tried to introduce certain safeguards. Auzā'ī was partly influenced by Iraqian legal thought and, while endorsing the practice, regarded the marriage of captives as continuing valid after captivity, with the result that his doctrine became inconsistent. Abū Yūsuf criticizes Auzā'ī's inconsistency, and Shāfi'ī's doctrine is still more thoroughly systematic than that of Abū Yūsuf. At the same time, Auzā'ī, Abū Yūsuf, and Shāfi'ī represent three successive stages of growing formal dependence on traditions.

On the ownership of household chattels, a problem which became acute on every dissolution of a marriage, there existed a series of six more and more technically refined decisions.[1] Their relative position in this series does not necessarily imply a corresponding place in the historical development, but we notice that the first three belong essentially to the first half, and the last three to the second half of the second century A.H.

(A) First we have the old patriarchal idea that everything belongs to the husband, tempered more or less by exempting the wife's clothing; this opinion is ascribed (by Sarakhsī) to Ibn Shubruma and attested beyond doubt for Ibn Abī Lailā.

(B) Then comes the technically legal concern with ownership, and this leads to the idea of the presumption of ownership according to whose house it is, but in fact it would regularly be the house of the husband; this doctrine is projected back (in Sarakhsī) to Ḥasan Baṣrī, again excepting the wife's clothes; it is attested for 'some lawyers' by Shaibānī, and refuted by Shāfi'ī.

(C) A different idea is introduced with the presumption of ownership according to the nature of the chattels; this opinion was provided with the standard *isnād* of the Kufians, Abū Ḥanīfa—Ḥammād—Ibrāhīm Nakha'ī; it was held by Abū Ḥanīfa himself and originally by Abū Yūsuf, and Shaibānī came near to it.

[1] *Tr. I*, 127; *Āthār Shaib.* 101; *Majmū'*, 706; Sarakhsī, v. 213 f.

(D) This opinion was, however, open to the objection: 'What of the husband's stock-in-trade if it consists of articles used by women?' Under the influence of this objection, Abū Yūsuf (and 'others' as Shaibānī informs us) went some way back towards opinion (A).

(E) A systematic progress was achieved with the decision to divide those chattels which do not typically belong to men or to women, equally between husband and wife, on the strength of their joint possession; this doctrine grew out of opinion (C); it is attested for Zufar and others, was also ascribed to Ibrāhīm Nakha'ī, and was taken over by the Zaidī Shiites who attributed it to 'Alī.

(F) Other Iraqians, finally, extended this consideration to all chattels, whatever their nature; they were followed by Shāfi'ī who supplied excellent systematic reasoning.

The Koran says in Sura xxiv. 33: 'And those in your possession who desire a writing, write it for them if you know any good in them, and give them of the wealth of Allah which He has given you.' The hearers were supposed to know the details of the legal transaction referred to, and a strict interpretation of the passage suggests that it was not identical with the contract of *mukātaba* which Muhammadan law, from the early second century A.H. onwards, found outlined here.[1] Under a *mukātaba* contract, the master allowed his slave to purchase his freedom by his own earnings in instalments; this slave was called *mukātab*. The ancient lawyers were concerned with embodying the commendation of the *mukātaba* contract, as they found it in the Koran, in positive legal norms.

Their earliest efforts were arbitrary, such as the decision that the *mukātab* becomes free as soon as he has paid half the stipulated amount,[2] or the decision, attributed to 'Aṭā' and probably authentic, that he becomes free as soon as he has paid three-quarters.[3] Presumably authentic, too, is the information that 'Aṭā' considered it obligatory on the master to conclude a *mukātaba* contract with his deserving slave, although 'Aṭā'

[1] The terms *mukātaba* and *mukātab* in Muhammadan law are derived from the wording of the Koranic passage, but the word *kitāb* 'writing', which seems to be a technical term in the Koran, is not so used in later legal terminology.

[2] Ascribed to 'Alī: Zurqānī, iii, 260; ascribed to Ibn 'Abbās: *Comm. Muw. Shaib.* 365.

[3] Zurqānī, loc. cit.

agreed that he had no traditional authority for this doctrine[1]—in other words, the implications of the Koranic passage began to be considered in the time of 'Aṭā'.

Technically more polished are the opinions that the *mukātab* becomes free as soon as he has paid off his value—this seems to have been the current doctrine of the Kufian school at one time;[2] or that he becomes free *pro rata* of his payments—this seems to have been connected with the Iraqian opposition;[3] or that he becomes free immediately, and the payments due from him are ordinary debts.[4]

Finally, the systematically most consistent doctrine that the *mukātab* remained a slave as long as part of the stipulated sum was still unpaid, prevailed in Iraq and in Medina where it was projected back to Zaid b. Thābit,[5] to Ibn 'Umar,[6] and finally to the Prophet himself.[7] All this ante-dated documentation is later than the simple reference to the ancient Medinese authorities 'Urwa b. Zubair and Sulaimān b. Yasār, a reference which itself dates only from the first half of the second century A.H.[8]

Even after the final doctrine on the *mukātab* had prevailed, some concessions—presupposing it—in favour of a defaulting *mukātab* were made; but they were subsequently reduced, though not completely eliminated, in the interest of stricter systematic consistency. We have discussed elsewhere[9] one of these concessions which was put into the mouth of 'Alī and acknowledged by Ibn Abī Lailā and, to a lesser degree, by Abū Ḥanīfa and Abū Yūsuf, but rejected by Shāfi'ī. On the

[1] *Umm*, vii. 362.

[2] With the *isnād* Abū Ḥanīfa—Ḥammād—Ibrāhīm Nakha'ī—Ibn Mas'ūd: *Āthār A. Y.* 861 = *Āthār Shaib.* 99; with another *isnād* from Ibn Mas'ūd: *Tr. II*, 17 (*d*); ascribed to Ibn 'Abbās: *Comm. Muw. Shaib.*, loc. cit.

[3] Ascribed to 'Alī: *Tr. II*, 17 (*a*), (*b*); ascribed to Ibrāhīm Nakha'ī, on the authority of Ḥammād: *Āthār A. Y.* 860 = *Āthār Shaib.* 99.

[4] Ascribed to Ibn 'Abbās: *Comm. Muw. Shaib.*, loc. cit.

[5] *Tr. II*, 17 (*a*); and with the Kufian standard *isnād* Ḥammād—Ibrāhīm Nakha'ī, in *Āthār A. Y.* 862 = *Āthār Shaib.* 99.

[6] *Muw.* iii. 260 = *Muw. Shaib.* 365, through Nāfi'.

[7] The earliest references are those of Abū Ḥanīfa, in *Āthār Shaib.* 99, to the Barīra tradition (on which see above, p. 173), and of Shāfi'ī, in *Tr. II*, 17 (*a*), to a tradition of 'Amr b. Shu'aib, a prominent traditionist of doubtful authority (see *Tahdhīb*, viii. 81).

[8] *Muw.* iii. 260. A good systematic argument is put into the mouth of Zaid b. Thābit in discussion with 'Alī: Zurqānī, loc. cit.

[9] Above, p. 111 f.

subject of another concession, Ibn Abī Laylā expresses himself in a clumsy terminology, the sign of clumsy legal thought;[1] Abū Ḥanīfa's opinion is essentially better, but at the same time he is very inconsistent as regards details, obviously on account of material considerations in favour of freedom, the same which had already influenced Ibn Abī Laylā; Shāfi'ī's opinion is again superior to that of Abū Ḥanīfa, and more consistent, but even Shāfi'ī acknowledges an accomplished fact in favour of freedom.

We have had occasion to discuss in another context the development of legal reasoning on the question of damages due for wounds inflicted on a slave.[2] The connected problem of the weregeld of a slave shows a similar development of legal thought.[3] Originally, the loss of a slave was considered merely as the loss of property, and his value was to be made good. This seems to have been the common ancient doctrine, and it found expression in the legal maxim 'the weregeld of the slave is his value'. It had the consequence that the weregeld for a valuable slave could exceed the fixed weregeld for a free man.[4] This remained the doctrine of the Medinese who ascribed it to their ancient authorities. The Kufian doctrine, however, as attributed to Ibrāhīm Nakha'ī, while paying lip-service to the legal maxim, fixed the highest possible amount of the weregeld for a slave at the amount of the weregeld for a free man minus 10 dirham. Abū Ḥanīfa expressed the underlying reasoning by saying that there would always be found a free man who was better than any slave, and that 10 dirham represented the minimum difference in value. Shaibānī added the systematic argument that the slave was not purely property.

In the earliest *Treatises I* and *VIII*,[5] Shāfi'ī followed the Medinese doctrine and gave general reasoning in its favour. But as early as *Tr. VII* he had accepted the Iraqian principle of limiting the maximum amount of the weregeld for a slave by the weregeld for a free man, while still rejecting the reduction

[1] *Tr. I*, 134: 'the manumission is invalid until one waits and sees what he will do'; Ibn Abī Laylā wants to say that it is 'in abeyance', a concept for which the usual term *mauqūf* occurs in *Tr. I*, 140—but this may be Abū Yūsuf's wording.

[2] Above, p. 220 f.

[3] *Muw.* iv. 42; *Mud.* xvi. 196; *Āthār Shaib.* 86; *Tr. I*, 195; *Tr. VII*, 275; *Tr. VIII*, 15.

[4] On its amount, see above, p. 203.

[5] Also in *Umm*, vi. 23, which must be an early passage.

by 10 dirham, which he had very competently refuted once and for all in *Tr. VIII*. This doctrine of Shāfi'ī's is in keeping with his fully developed method of systematic analogy. He already possessed this method, it is true, when he wrote *Tr. VIII*, 11, but obviously it took him some time to work out all its implications. The Shāfi'ī school, starting with Muzanī,[1] surprisingly perpetuated Shāfi'ī's earlier doctrine.[2]

These examples serve to show the varied and interacting tendencies which contribute to the broad general development of technical legal thought.

[1] This is implied by him in *Mukhtaṣar*, v. 99 f.

[2] To suppose a further change of opinion on the part of Shāfi'ī would be unwarranted.