THE ORIGINS OF Muhammadan Jurisprudence

JOSEPH SCHACHT

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CHAPTER 2

SYSTEMATIZING AND ISLAMICIZING

WE saw in Part III, Chapter 1, of this book[1] that Muhammadan law came into existence through the working of Muhammadan jurisprudence on the raw material which consisted of the popular and administrative practice of late Umaiyad times and was endorsed, modified, or rejected by the earliest lawyers. These lawyers and their successors were guided by a double aim: by the effort to systematize—an effort which we have considered in the preceding chapter—and by the tendency to 'Islamicize', to impregnate the sphere of law with religious and ethical ideas, to subject it to Islamic norms, and to incorporate it into the body of duties incumbent on every Muslim. In doing this, Muhammadan law achieved on a much wider scale and in a vastly more detailed manner what the Prophet in the Koran had tried to do for the early Islamic community of Medina.[2] Those two parallel and closely connected aims underlie much of the development of Muhammadan law during its formative period, as Bergsträsser has pointed out.[3]

The tendency to Islamicize took various forms: it made the ancient lawyers criticize Umaiyad popular and administrative practice,[4] it made them pay attention to the (formerly disregarded) details and implications of Koranic rules,[5] it made them attribute the 'living tradition' of their schools of law to the Prophet and his Companions,[6] it made them take account of the rising tide of traditions ascribed to the Prophet,[7] it provided them with part of the material considerations which entered into their systematic reasoning.[8] Much as the ancient schools of law represented an Islamicizing movement of opposition—though of course not necessarily political opposition—to late Umaiyad practice, the traditionists and the opposition groups within the ancient schools formed a still more thoroughly Islamicizing minority which was partly successful and, when

[1] Above, pp. 190 ff. [2] See above, p. 224 f. [3] In *Islam*, xiv. 78 ff.
[4] See above, pp. 192 ff. [5] See above, pp. 224 ff.
[6] See above, pp. 72 f., 74 ff. [7] See above, p. 66.
[8] See above, pp. 71, 162, 213, 273, and the examples given farther on in this chapter.

this happened, became indistinguishable from the majority.[1] But the Islamicizing process by which Muhammadan law as such emerged was not a monopoly of the traditionists or, within the ancient schools of law, of the school of Medina.[2]

The process of Islamicizing was, however, not carried to its logical conclusion: the sphere of law retained a technical character of its own, and legal relationships were not completely reduced to and expressed in terms of religious and ethical duties. The traditionists, it is true, set out to do this, and tried to identify the categories 'forbidden' and 'invalid'.[3] But this did not prevail, and even Shāfi'ī who adopted the teaching of the traditionists in most other respects, distinguished between the legal and the moral aspects and maintained that Muhammadan law was concerned with the *forum externum* only.[4] This clear position was of course reached only gradually.[5]

The following examples, in addition to those which have occurred earlier in this book,[6] are meant to show the close connexion that exists between systematizing and Islamicizing, the interaction of both tendencies, and the gradual achieving of a balance between the two elements.

Tr. I, 28: Ibn Abī Lailā decides a problem of the law of contracts by a consideration of material justice and identifies the moral and the legal aspect;[7] Abū Ḥanīfa shows a higher degree of technical legal reasoning, Abū Yūsuf goes back to Ibn Abī Lailā, but Shaibānī improves on Abū Ḥanīfa and anticipates Shāfi'ī (Sarakhsī, xiii. 86); Shāfi'ī follows Shaibānī and distinguishes clearly between the moral and the legal aspect.

Tr. I, 167: According to Ibn Abī Lailā, the debtor is bound to pay *zakāt* tax on his debt. This opinion was also attributed to Ibrāhīm Nakha'ī, and so was the argument that the debtor worked with it and derived profit from it.[8] The argument is presumably not in fact Ibrāhīm's,[9] but nevertheless represents

[1] See above, p. 255 f.
[2] See above, p. 213.
[3] See above, pp. 178, 183 f.
[4] See above, p. 125.
[5] See further below, p. 317 f.
[6] See the references in the notes on this chapter. See further above, pp. 185, 279 f.: in both cases, an earlier concern with material justice and Islamic ethics was later superseded by technical legal reasoning.
[7] The argument given in Sarakhsī, xiii. 86, if authentic, would show practical reasoning and formalism.
[8] *Āthār Shaib.*, quoted in *Comm. ed. Cairo*, p. 123, n. 1.
[9] See above, p. 237.

the earliest stage of doctrine and reflects the attitude of businessmen familiar with working with other people's capital. The opinion of Abū Ḥanīfa and Abū Yūsuf, that the creditor must pay *zakāt* when he receives his credit back, is the result of a religious scruple and is expressed in a tradition from 'Alī to which Abū Ḥanīfa refers.[1] The Medinese (*Muw.* ii. 50) hold essentially the same doctrine but adduce different traditions, one from 'Uthmān and another from 'Umar b. 'Abdal'azīz who is alleged to have changed his opinion. Shāfi'ī, while maintaining this later decision in principle, makes a distinction which is already adumbrated in the 'Uthmān tradition,[2] and judiciously combines the systematic and the religious aspect.

Tr. I, 208–13, 237: Ibn Abī Lailā's decisions show the general tendency to extend the sphere of the *ḥadd* punishment for *qadhf*, a qualified kind of slander; this punishment, which was introduced by Koran xxiv. 4, is purely Islamic. It seems as if Ibn Abī Lailā's doctrine represented an early stage in which the private concern for one's reputation and the reputation of one's family caused the commandment of the Koran to be interpreted in the broadest possible way. The contrary and general Islamic tendency to restrict *ḥadd* punishments as much as possible prevailed among the Iraqians from Abū Ḥanīfa onwards.

Tr. IX, 14, and Ṭabarī, 76: Auzā'ī and the Medinese admitted the lax practice of soldiers taking back food from enemy country, without dividing it as part of the booty, and consuming it at home.[3] Under the influence of the religious scruple about dishonest conversion of booty, however, it was stipulated that this food might not be sold and might be taken only in small quantities. But if the food was acquired lawfully in the first place, the restriction on its use was inconsistent, as Abū Thaur realized. The Iraqians[4] drew the full consequences of the religious scruple, and prohibited the ancient practice altogether. Shāfi'ī, for the first time, introduced strict technical reasoning, as opposed to Abū Yūsuf's common-sense argument, superseding the material religious consideration by systematic

[1] Traditions from other Companions are attested later: see *Comm. ed. Cairo.*

[2] Shāfi'ī quotes this tradition in *Umm*, ii. 42.

[3] See above, p. 67.

[4] i.e. Abū Ḥanīfa with Abū Yūsuf and Shaibānī (*Siyar*, ii. 258 f.), and his other followers.

legal thought. The Iraqian lawyer Sufyān Thaurī almost anticipated Shāfi'ī, but not quite; he retained a trace of the religious scruple and its Iraqian common-sense solution.

Tr. IX, 25, and Ṭabarī, 64: As regards booty taken by a private raider, Auzā'ī endorses the practice by leaving to the imam, that is, the government, the final decision whether to confiscate it as unauthorized or to leave it to the raider after deducting one-fifth. This deduction is based on the general ruling concerning booty in Koran viii. 41. Mālik and Sufyān Thaurī agree with Auzā'ī that the booty of the private raider is subject to the deduction of one-fifth, but make it a hard-and-fast rule and exclude any other decision of the imam. The Iraqians (other than Sufyān Thaurī), interpreting Koran lix. 6 f. carefully, find that Koran viii. 41 does not apply to the booty of a private raider, and therefore do not subject it to the deduction of one-fifth. Shāfi'ī takes the recent traditions on the history of the Prophet into account, and arrives at the same opinion as Mālik.

Tr. IX, 33, *Tr. I*, 201, and Ṭabarī, 46: The problem is whether a *musta'min*, a non-Muslim who enters Islamic territory under a safe-conduct, is liable to *ḥadd* punishments for crimes committed in Islamic territory. Auzā'ī was influenced by the material consideration of whether the crimes, such as adultery, were committed in public or not, which made his opinion inconsistent. The Iraqians from Abū Ḥanīfa onwards showed a higher degree of technical legal reasoning, by raising the question of the competence of jurisdiction; Abū Ḥanīfa with Abū Yūsuf and his other followers answered the question in the negative, and Ibn Abī Laylā, who had formerly held the opposite opinion, joined them later. Shāfi'ī made explicit the systematic distinction between religious sanctions and civil rights (*ḥudūd Allāh* and *ḥuqūq al-ādamīyīn*), a distinction which was incipient in Auzā'ī's doctrine, and was certainly in the mind of Abū Ḥanīfa. He stands on narrower systematic ground than Abū Ḥanīfa and Abū Yūsuf, being concerned exclusively with the validity of the safe-conduct and with what is covered by it, and not with the wider issue of jurisdiction. Shāfi'ī's doctrine is therefore less technically legal than that of the Iraqians, but combines considerations of Islamic public policy with systematic consistency.

Tr. IX, 34: On the question whether a Muslim may conclude contracts involving 'usury' outside Islamic territory, Auzā'ī is moved, as he was in the preceding case, by a religious and ethical consideration, but he gives also a systematic argument of sorts. Abū Ḥanīfa uses the same technically legal reasoning as in the former case; Abū Yūsuf, however, on account of traditions to which Auzā'ī had referred but which Abū Ḥanīfa had disregarded, comes back to Auzā'ī's doctrine.[1] Shāfi'ī necessarily takes the same attitude. Nothing positive is known of Mālik's opinion. Ibn Qāsim (*Mud.* x. 103) thinks that a Muslim ought not to conclude such contracts intentionally; he is still exclusively concerned with material considerations.

From this and from the preceding chapter we can draw the general conclusion that technical legal thought, as a rule, tended to become increasingly perfected from the beginnings of Muhammadan jurisprudence up to the time of Shāfi'ī, and that material considerations of a religious and ethical kind, whether they were there from the beginning or introduced at a later stage, usually tended to become fused with systematic reasoning. In both respects, the work of Shāfi'ī represents the zenith of development, and the reader will, I hope, take it on trust that technical legal thought in Muhammadan jurisprudence hardly ever approached and never surpassed the standard he set.[2] The remaining chapters are intended to complete this general picture by remarks on the reasoning of individual lawyers, concluding with Shāfi'ī.

[1] In order to excuse Abū Ḥanīfa, Abū Yūsuf refers to a tradition which Abū Ḥanīfa himself had not adduced as an argument.

[2] This applies, for instance, to the lawyer-traditionist Ṭaḥāwī, to the learned antiquary Ibn 'Abdalbarr, and to the ruthless rationalizer Sarakhsī.