THE ORIGINS OF Muhammadan Jurisprudence

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OXFORD
AT THE CLARENDON PRESS

CHAPTER 5

MĀLIK'S REASONING

THE date of Mālik's death lies almost exactly half-way between the dates of the deaths of Abū Yūsuf and of Shaibānī, but Mālik's technical legal thought is considerably less developed than that of his Iraqian contemporaries.[1] Mālik's reasoning, on the whole, is comparable to that of Auzā'ī,[2] particularly in the dependence of both on the practice, the 'living tradition', the consensus of the scholars, rather than on systematic thought. The accepted doctrine of the Medinese school itself, of course, is to a great extent founded on individual reasoning (*ra'y*), as we have seen in the first part of this book.[3] In combining extensive use of *ra'y* with dependence on the 'living tradition', Mālik seems typical of the Medinese. We shall confine ourselves in this chapter to instances of technical legal thought which can with some certainty be considered as the personal effort of Mālik himself.

Mālik's systematic reasoning appears often as the secondary, retrospective justification of the 'living tradition' which he accepts. A typical example is *Muw.* iii. 182 ff. where Mālik upholds the Medinese doctrine that evidence given by one witness and confirmed by the oath of the plaintiff constitutes legal proof.[4] Mālik establishes the *sunna* or 'living tradition' in favour of this doctrine, adds systematic reasoning because 'one wishes to understand', and concludes: 'the *sunna* is proof enough, but one also wants to know the reason, and this is it.'[5] Mālik's reasoning in detail is as follows: he first establishes that this provision applies only to lawsuits concerning property, thereby obviating possible objections; he points out other instances of apparent lack of consistency in the law of evidence; he shows that the Koranic passage (Sura ii. 282) which prescribes two male witnesses is not comprehensive; the oath of the

[1] See also above, p. 276.

[2] Compare, e.g., *Mud.* iii. 24 (for Mālik) with *Tr. IX*, 21 (for Auzā'ī), where the reasonings of both are identical.

[3] Above, pp. 113 ff.

[4] On the history of this problem, see above, pp. 167 ff.

[5] See above, p. 62.

defendant, for instance, and the refusal of the plaintiff to take the oath in support of his claim, are generally recognized as evidence although they are not mentioned in the Koran. All this anticipates the essential part of Shāfi'ī's systematic argument in *Ikh.* 345 ff.

Another significant example occurs in *Muw.* iii. 102 where Mālik does his best to justify by systematic parallels a highly irregular kind of barter, the so-called 'sale of *'arāyā*'. This transaction was obviously customary in ancient Arabia, but seems to have been already obsolete in the time of Mālik, because there existed at least two divergent opinions on its nature.[1] Not content with relying on the 'living tradition' or on formal traditions from the Prophet which he quoted, Mālik adduced some weak systematic parallels.[2] It is not surprising that Mālik did not succeed in systematizing it; Shāfi'ī, who blamed him for his inconsistency, was no more successful and was forced to fall back on a tradition.

The same feature appears in a long quotation from Mālik in *Mud.* iv. 54, on the question whether a man married to a free woman may conclude an additional marriage to a slave woman. Mālik defers to the opinion of earlier scholars, such as Ibn Musaiyib and others, and to traditions from Companions of the Prophet, against his own judgment which he had based on Koran iv. 25. Mālik had changed his opinion, and systematic reasoning is noticeable both in the earlier and in the later stage. He finds arguments in favour both of his earlier and of his later doctrine in the Koran, and even justifies his later decision against the upholders of his former one by a very weak and far-fetched interpretation of the same Koranic passage. The whole shows Mālik's tendency to consistent systematic reasoning secondary to and checked by his dependence on the 'living tradition'.

In the majority of cases, we find Mālik's reasoning inspired by material considerations, by practical expediency, and by the tendency to Islamicize.

Muw. i. 108: there exist two seemingly contradictory traditions; the logical distinction between the cases envisaged by both, as

[1] Mālik's own interpretation is given in *Muw. Shaib.* 327, another interpretation in *Ikh.* 327; see further Zurqānī and *Comm. Muw. Shaib.*

[2] In *Mud.* x. 91, Mālik added a material, moral consideration.

applied by Shāfi'ī (*Tr. III*, 30), is unknown to Mālik; in *Muw.*, Mālik makes an arbitrary choice between the traditions, following the practice; in *Mud.* i. 49, he blends the considerations underlying both traditions in his reasoning.

Muw. ii. 68 (and the implications of *Mud.* ii. 108): Mālik's doctrine is practical common-sense, and far less inconsistent than Shāfi'ī's strict reasoning (*Tr. III*, 52) makes it appear; Mālik himself gives sound systematic reasoning which goes a long way towards meeting Shāfi'ī's objections, and he counters a possible objection in detail.

Muw. ii. 196 and *Tr. III*, 36: The motive of Mālik's reasoning is material and practical, as opposed to that of Shāfi'ī which is formal and technical.

Muw. iii. 3 and *Ikh.* 300: Both Mālik and Shāfi'ī try to harmonize two seemingly contradictory groups of traditions and to find a legal criterion which would enable them to admit both; whereas Mālik's reasoning is superficially practical and expedient, Shāfi'ī's is formal and technical; but the way in which Mālik expresses it obviates most of Shāfi'ī's criticisms.

Muw. iii. 129: On the details of the doctrine on the re-selling of objects other than food, before taking possession[1], Mālik's reasoning is practical, concerned with the elimination of cases which seem to fall directly under the prohibition of usury, and not with pursuing this prohibition to its last systematic consequences.

Mud. iii. 118: Mālik tries to justify the inconsistent Medinese practice by a far-fetched interpretation of Koranic passages; the formalism of his reasoning recalls that of Ibn Abī Lailā (above, p. 292).

Mud. v. 2: On the problem of the presumption of intercourse if husband and wife have been left together in private, Mālik adopts the practical and rough-and-ready distinction current in Medina,[2] and Shāfi'ī blames him for his technical inconsistency (*Tr. III*, 75); Mālik indeed refers to a somewhat similar case, but this again is not strictly parallel, as Shāfi'ī points out.

Mud. v. 55: Mālik subjects a declaration to a careful philological interpretation, worthy of Shāfi'ī at his best (but Shāfi'ī ignores it: *Tr. III*, 140); in *Mud.* v. 58, Mālik adds a practical and material consideration, typical of the early period but very commendable, in favour of his doctrine; this argument is older than Mālik himself because he calls the same distinction in a parallel case 'the best that I have heard' (*Muw.* iii. 37).

This primitive reasoning leads Mālik sometimes into in-

[1] See above, p. 108.

[2] See above, p. 193 f.

consistencies, as in *Muw.* ii. 299 where he gives partial expression to a religious scruple,[1] and in *Muw.* iii. 110 where he makes an inconsistent concession to the practice; Mālik states in both cases that this is his personal opinion (*ra'y*).[2] In many cases, however, Mālik's *ra'y* is nothing but strict analogy and broader systematic reasoning.[3] There are a fair number of cases where Mālik's technical legal thought shows itself sound and consistent, to a higher degree than Shāfi'ī's sustained polemics in *Tr. III* would lead one to expect.

Muw. ii. 68: See above, p. 313.

Muw. iii. 9: Mālik, in adopting the analogical reasoning of the Iraqians, starts consistently from his own, materially different, premiss (above, p. 108).

Muw. iii. 183 and *Tr. III*, 148 (p. 248): Mālik gives a strictly consistent systematic argument, basing himself, with regard to a point of detail, on the minimum of doctrine common to him and to his opponents; Shāfi'ī therefore charges him with ascribing to his opponents an opinion which they do not hold; Rabī' suggests that Mālik may have slipped, only to attract Shāfi'ī's indignant sarcasm; but Ibn 'Abdalbarr (quoted in Zurqānī, iii. 184) explains it correctly as an argument *a potiori* of Mālik.

Mud. i. 5: Mālik and Rabī' (*Tr. III*, 31) in their arguments both take the necessities of practice into account, but Mālik's argument is more consistent than that of Rabī' and less open to Shāfi'ī's objections.

On the whole, however, Mālik is distinguished not by the originality of his legal thought, but by his success in steering a middle course through the opinions of the Medinese, an average quality which made him the obvious choice for the head of the Mālikī school into which the ancient school of Medina developed.[4]

[1] See above, p. 67.

[2] See further above, p. 118 f.

[3] See above, pp. 115, 117.

[4] The average legal thought of Mālik's Medinese contemporaries should be judged by Ibn Qāsim (in *Mud.*, *passim*) rather than by Rabī' (in *Tr. III*). Whenever Rabī' gives reasoning of his own, he almost invariably shows himself incompetent.