

60. DOĐUM YILI MÜNASEBETİYLE

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CODIFICATION OF MUSLIM LAW BY ABUHANIFA

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The Code of Roman law by the Constantinopolitan Emperor Justinian (d. 565) had thrown a challenge to the world as an unsurpassable piece of legislation, and as a miracle of juridical science. It would have proved a death knell to the legal faculty of humanity had not someone taken up that challenge, freed the human mind from an inferiority complex, and redirected it into creative channels of still greater achievements. Not five years had passed over the death of the Emperor, when Muḥammad, the Prophet of Islam, was born; and it was this «illiterate beduin» (may peace abide with him), who having no knowledge of this challenge was destined to outdo the Roman miracle. For it was the Arabian Prophet who assured humanity that «Every knower has someone above him in knowledge» (*fawq kul dī ʿilm ʿalim*, — Qurʾān 12:76). The rôle played by Abū Ḥanīfa, as head of the academy for the codification of Muslim law, is what we shall try to describe in the following.

The Qurʾān as a revealed Book had, no doubt, laid down a number of provisions as to what was absolutely prohibited, what was unavoidably obligatory, and what was to be considered as disliked or praiseworthy; yet the number of such things is extremely limited. All the limitless rest was left to human discretion. «Everything beyond these is permissible to you» (*uḥilla lakum mā warā dālikum* — Qurʾān 4:23), was the basic principle. The only check on unbridled liberty was the sense of propriety and of general good (*salus populi*) which the Prophet constantly aimed to foster in his adherents. I may recall the oft-quoted tradition of Muāḍ ibn Ḡabal, whom the Prophet, had asked, when sending him as governor-judge of Yemen, how he would decide cases. He replied: «According to the Qurʾān; in the silence of which according to the Sunna; and in the silence of which also,

according to the best endeavour of my personal opinion». This reply was not only endorsed but even expressly extolled by the Prophet. Or again, in another famous case, the Prophet consented to revoke his earlier orders by saying: «You know better your worldly affairs.»

How the Muslim law developed from the Qur'ān, from the Sunna, from the unabolished old usages of the country, from the ever-varying deductions and judgements of jurists and judges, — the story of all this, though very fascinating, is beyond the scope of this small article. We shall confine ourselves to the description of the first collective effort to systematize Muslim legal rules early in the second century of the Hijrah, in the city of Kūfa.

Kūfa

A word about the importance of Kūfah, a town in south Iraq, in this connection.

According to Caliph 'Umar the Great, Kūfa was the backbone of Islam — at least in his days — and this statement was not without reason.

Kūfa had replaced the older Ḥīra. At the breach of the Dam of Mārib in Yemen, many Arab tribes had migrated from there, some of them colonizing Ḥīra. The town became in time the capital of a cultured kingdom, under the Lakhmids, and served as a confluence of Persian and Arab cultures for many centuries.

When Islam conquered this region in the time of Caliph 'Umar I, (in the year 17 H.) Kūfa was planned as the military cantonment, or Muslim town, whereas Ḥīra had to content itself as a civilian center mixed with the older population. Al-Balāḍurī and Yāqūt assure us that the Muslim colony consisted at first of 12 thousand Yemenites, including 1050 Companions of the Prophet, of whom 24 had taken part in the battle of Badr of the time of the Prophet.

This repeated influx of the Yemenite elements demands of us to stop for a moment and ponder over the happy country of their origin. Ma'in and Sheba of Arabia Felix. They had preceded all others in the Desert Peninsula in culture, and had produced such an advanced civilization that they rivalled the people of the Mediterranean in this respect. Materially they were inferior to none when they were given a new mental orientation under a fanatic Jewish rule in the country. This was followed by Abyssinian Christians; and we know that an Italian priest, Gre-

gentius, had promulgated Christian canon law in the country, on the model of the code of Alexandria. This code is preserved in manuscript form in Vienna (cf. Desverger, *Arabie*, p. 71, nota). Former Jewish persecution was now replaced by the notorious law that no Jew in the country should give his daughters in marriage to Jews, but to Christians only (Saint-Martin, *Hist. de Bas Empire*. liv. 40). In time, Christians were replaced in Yemen by Magian Iranians who disseminated their own national traditions. These Iranians ceded to Islam only at the time of the Prophet.

It was the Yemenites of such diverse experience that colonized Hira and Kūfa. Islamic history is no less picturesque.

The place of Abū Bakr and ʿUmar among the Companions of the Prophet requires no introduction. It was from them that ibn-Masʿūd first studied Islam. He later had the opportunity of direct contact with the Prophet, and became so learned that the Prophet often said, whoever wants to study the Qurʾān, let him do so under ibn-Masʿūd (Ibn ʿAbd al-Barr, *Istīʿāb*, No. 156). It was this same ibn Masʿūd whom the Caliph ʿUmar sent as teacher, «*Muʿallim*», to our Kūfa (ibid.). He lectured to his pupils in the grand mosque of Kūfa. Among his students it were two Yemenites, ʿAlqama and Aswad al-Naxaʿī (d. 75 H.) who distinguished themselves, and succeeded their teacher, ibn-Masʿūd in the school. After ʿAlqama, his pupil, another Yemenite, Ibrāhīm al-Naxaʿī by name, continued the teaching institute of the grand mosque of Kūfa. When Ibrāhīm died, Ḥammād ibn Abī Sulaymān, probably a Persian, succeeded to the chair, and this law school received increased renown all over the Islamic world. Abū Ḥanifa was the pupil and successor of this same Ḥammād at the school of the Kūfa mosque.

This is not all. Caliph ʿAlī — who may be anything in statesmanship, but there are no two opinions regarding him as a jurist — also migrated to Kūfa in his later life to make it the capital of his empire. Thus the legal traditions of Abū Bakr, ʿUmar, Ibn Masʿūd and ʿAlī all converged in Kūfa. Abū Ḥanifa was destined to shed added lustre — as we shall see presently.

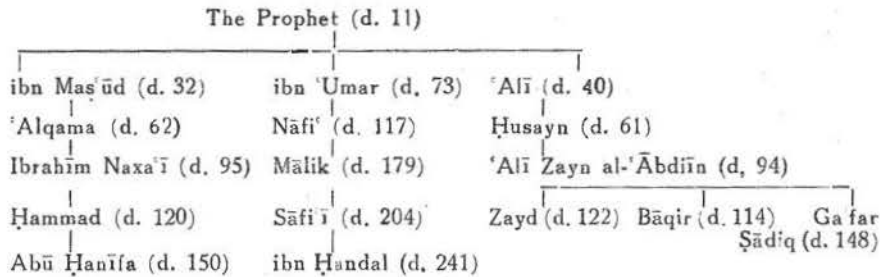
Different Schools of Muslim Law

Caliph ʿUmar had appointed a committee of seven jurists in Madīna, and everyone, even the chief Qāḍī of Madīna, was directed

to consult this committee in case of difficult legal problems (Saxāwī, *Fath̄ ai-Muḡit*, p. 399-400). It had inherited traditions of some of the most distinguished jurists of early Islam. Some of them lived long enough for Abū Ḥanīfa to come into direct contact with and study under. For Abū Ḥanīfa had spent long years of exile in the Ḥiḡāz and was reputed to have performed the *ḥaḡḡ* 55 times. He further imbibed the traditions of the so-called Šī'a school of law of the family of Caliph 'Alī, and for years remained in direct contact with Imām Muḥammad Bāqir, Imām Ġa'far al-Šādiq and Imām Zayd ibn 'Alī (Zayn al-'Abidīn).

Of the hundreds of thousands of the Companions of the Prophet, only three have left schools of law: ibn Mas'ūd, ibn 'Umar and 'Alī. Of ibn Mas'ūd, we have seen that he had settled in Kūfa, and that Abū Ḥanīfa was a direct product of this school. As to ibn 'Umar, he had lived mostly in the Ḥiḡāz. Among his pupils, his freed slave Nāfi' is the most renowned. Imām Mālik, his successor, later migrated to Madīna. Imām Šafi'i was the pupil of Mālik, and Imām ibn Ḥanbal was the pupil of Šafi'i. As to 'Alī, the cousin, ward and son-in-law of the Holy Prophet, he had lived mostly in Madīna though settled later in Kūfa for political reasons. His legal school was continued, among others, by his family, and all the Šī'a schools of law trace their origin to it.

Here is a table showing the relationships involved :



These legal schools did not originally live in their modern self-contained isolation: we have seen how Abū Ḥanīfa benefited among others, from the school of 'Alī. He had come into as much contact with Imām Mālik. Among his other numerous teachers we come across 'Aṭā' ibn Abī Rabāḥ who was a Nubian, 'Ikrima Mawlā ibn 'Abbās who was a Berber, and Makḥūl who is variously described as a Syrian, or an Egyptian, or an Afghan from Kabul.

This intermingling produced what we now call the Ḥanafite school of jurisprudence.

Early Attempts of Codification

The absolute liberty of judgement to Qaḍis and of opinion to private jurists, in vogue in early Islam, was responsible for the ever-growing mass of conflicting opinions. As early as the days of ibn ʿAbbās (d. 68), somebody had tried to collect the judicial responsa (*fatāwī*) of ʿAlī. We possess the code of Zayd ibn ʿAlī, the famous *Kitāb al-Maǧmūʿ*. Yet all these were individual efforts, and could hardly cope with the situation so aptly described by a contemporary of Abū Ḥanifa:

§ 12. The Commander of the Faithful shall see what has happened to these two cities and other and towns with regard to conflicting judgements culminating into a chaos concerning life, permissibility of cohabitation and property. They are permitted for instance in Ḥira yet they are prohibited in Kūfa. Such divergence may be found even inside Kūfa it self. In spite of all this, it is enforced and validly enforced among the Muslims. Whoever of the people of Iraq or the Ḥiǧāz sees it, is amazed at the slight with which the judgements of one place are treated by people of another place; and every thinking person is pained at this sight.

§ 13. If the Commander of the Faithful were to order that in case of conflicts the matter should be referred to him along with the pros and cons of each side, and if he decided what should be the law, and commanded therewith and enjoined the courts to follow nothing but these imperial commands, this uniformity after divergence would be a matter of pleasure to God. And one caliph after another would continue to do so till the end of the world, if so pleases God (*Risāla fi 'l-ṣaḥāba*, by Ibn al-Muqaffaʿ).

Abū-Ḥanīfa

Nuʿman ibn Tābit, better known as Abū Ḥanifa, was born in 80 H. Without entering here into the question of his racial origin, it may be recalled that he was a silk merchant all through his life. Even as a school boy, he was considered as a rich man, "*muṭrin*". Probably commerce was his ancestral profession. Yet as a young, intelligent man in his late teens, he was powerfully influenced by the new movement of the love of letters which

was so profoundly transforming the mentality of the Muslim world during the caliphate of 'Umar ibn 'Abd al-'Azīz. Once "addicted" to the habits of a literary life, it was not possible for him to give it up later.

It is said that it was Ša'bī, a great traditionist, who first told him how suited he was for the noble profession of letters, and that he should not spend all his energies in the market (*Muwaffaq*, I, 59). *Kalām* or dogmatics was *à la mode* in the town, and he was first attracted to it. It is said that when he had become proficient, an old lady once asked him a question of daily law and religious devotion. He painfully realized how *fiqh* (law) was much more important than the subtleties of dogmatics, for he could not reply to the simple question of the old woman. (*Šaymarī*, fol. 118). He changed over to law, and after attending the lectures of several scholars in Kūfa, finally found satisfaction in those of Ḥammād and did not leave them until the teacher breathed his last (*Muwaffaq*, I, 64). As Abū Ḥanīfa had himself once told Caliph Maṣūūr, this school of Ḥammād had become a confluence of the learnings of 'Umar, 'Alī, ibn Mas'ūd and ibn 'Abbās (*Šaymarī*, fol. 48 a-b). Hence its great reputation in the country. At the death of Ḥammād, there was none to succeed in the chair better than Abū Ḥanīfa, yet he was considered too young at the age of forty. Other arrangements did not prove a success and finally he was asked to assume the post. He knew the handicap, and so told those who had proposed him the chair, and all his own classmates, that he would not accept the post unless ten of them promised to attend his lectures as pupils at least for one whole year. The idea seems to have been to give the public the impression of what respect his own classmates held him. This done, he assiduously began to perform his duties. He helped poor students from his private purse, exchanged lavish gifts with the notables of the city, and had no eye whatsoever to the governmental posts. All this coupled with his unrivalled intelligence and learning rendered his circle in the grand mosque the greatest ever seen (*Muwaffaq*, I, 66-70, 72).

Codification of Law and Foundation of an Academy

The actual situation of Muslim law must have been known to Abū Ḥanīfa better than to ibn al-Muqaffa, and he must also have

realized not only the impracticability of official codification in those days of political instability and incessant internecine war, but also its inadvisability owing to the whims and fancies of despotism. He also realised the handicaps attending single-handed attempts. A code of law deals with each and every walk of life, and no single person can do justice with all of them. Again, codification of Muslim law had its own peculiar difficulties: interpretation of the words of the Qur'an and the ḥadīth, sifting of reliable ḥadīths from forged ones, chronological arrangement of ḥadīths in case of two conflicting sayings of the Prophet, and mastery over logic and other subjects for purposes of deduction, induction, and all the multifarious processes of legislation in case no express provision was forthcoming in the reliable sources. The idea occurred to him of founding an academy of law and achieving the task by collective effort.

Of his one thousand students, Abū Ḥanīfa selected forty of those who had completed their studies. According to Sayf al-A'imma al-Sā'ili, these forty had reached the stage of independent thinking (*iḡitihad*), and the training of the master during years was such that they never hesitated to criticize the opinion even of their own respected teacher. He invited these forty of his pupils, told them the need and importance of the codification of Muslim law, and asked them to help him in the task (*Muwaffaq*, I, 33).

We do not yet know the names of all these forty members. However, there were Abū Yūsuf, Muḥammad al-Ṣaybānī, and Zūfar, none of whom requires introduction. There were 'Abdallah ibn al-Mubārak, Fuḍayl ibn-ʿIāyḍ and Dawūd ibn Nuṣayr of reputation for piety and with the unbounded confidence of the public. There was an expert of Qur'ānology and commentary like Wakī'; there was a great traditionist (*Muḥaddith*) like Ḥafṣ; there was a great jurist, Ḥasan ibn Ziyād. Xariḡa ibn Muṣ'ab was another trusted consultant of the master. There were also Yaḥyā ibn Zakariya, Hibbān, Mandal, Qāsim ibn Ma'n (grandson of ibn Mas'ūd (*Muwaffaq*, I, 33, 222). 'Āfiya had such prestige in the council, that if by chance he did not attend the discussion any day Abū Ḥanīfa postponed decision of the point until he came and gave his own opinion. (*Ġawāhir* of 'Abd al-Qādir, 703). There were those who had specialised in the history of the time of the Prophet, in rhetorics, in grammar, in philology, in mathematics and algebra, and other auxiliary arts and sciences. Abū Ḥanīfa's own intimate

knowledge of commercial and industrial affairs must also have proved an invaluable asset to the academy. (*Muwaffaq* I, 32, 33, 72; II, 133; *Mabsuṭ* of *Saraxsī*, I, 2-3).

A sort of questionnaire on each chapter seems to have been prepared, of course with the possibility of adding new questions at any time. It is said that Abū Ḥanīfa would first introduce the question asking the opinions of the members, and when needed would himself interfere and express his own opinion criticizing any argument put forward by others. The discussion continued until all points became clarified. The discussion on a single point sometimes continued for as long as a whole month. Finally the Secretary of the Academy, Imām Abū Yūsuf, wrote it down in precise terms (*Muwaffaq*, I, 33; *Kardārī*, I, 50). Once somebody asked how he could dogmatically decide a point, when even the Companions of the Prophet were divided over the question. He replied «Do you think I have formed this opinion haphazardly? On this particular point I have pondered for twenty years, collected all relevant data and allied rules, and examined the opinion of each of the Companions in minute detail» (*Kardārī*, I, 150-51).

Once there was question of the age of puberty. He asked every one present in what year they had reached the age of manhood. Most of them said at the age of 18, but some said at the age of 19 lunar years. Abū Ḥanīfa decided for 18 lunar years (*Muwaffaq*, I, 82).

According to his own statement: «I take first the Qur'ān; and if it is silent, I take the Sunna of the Prophet as reported by trustworthy narrators; if that is also silent I refer to the opinion of the Companions of the Prophet; and if there is conflict of opinion among them I decide whom to follow on the merit of individual cases. It is only when there is a question of my own senior or junior contemporaries, that I take the liberty of deduction, even as they have liberty, and do not feel myself bound by their opinion.» (*Muwaffaq*, I, 89). He also stated: «Analogical deduction (*qiyās*) is not useful except in matters perceptible of human opinion: *qiyās* is useless for proving the fundamentals of the faith or finding out the exact reasons of a divine ordinance; it serves only for finding out what things are to do and what not to do (the *aḥkām*)» (*Kardārī*, I, 145).

It was in this way that he first completed a book on the daily devotional services (ṣalāt) and named it *Kitāb al-ṣarūs* (Muwaffaq, I, 67-68). Encouraged by the success and popularity of the tract, he continued the work. In his code, he began with the rites of bodily purification for the service (ṭahāra). This was followed by daily services, then the *ibādāt*, viz. fasting, ḥaḡḡ, surplus-property tax (zakāt). Then came chapters on affairs (muʿāmalāt) like contract, sale, companies, etc. Finally came wills, testaments and inheritance (Kardārī, I, 53; Muwaffaq, I, 164).

It is said Abū Ḥanifa was the first author to compile a monograph on inheritance and also the first on conditional contracts (ṣarāʾiṭ) (Muwaffaq, I, 35).

I maintain that it was also he who rendered international law, which he called *siyar*, an independent subject of law and dictated a monograph on the subject. This caused heated discussion in the country. Al-Awzāʿī wrote to refute it; Abū Yūsuf counter-replied on behalf of his master. This last tract alone has come down to us and has now been published in Hyderabad-Deccan. Another pupil of his, Imām Muḥammad, specialized in the field, and he was so proud of his achievement, *Kitāb al-siyar al-kabīr*, that he had a de-luxe edition of it, prepared. It was so large that a cart was required to carry it when he presented it to Caliph Harūn al-Raʿīd (Saraxsī, *Šarḥ al-siyar al-kaʿīr*, I, introduction).

It is said in all half a million points were decided in this way by Abū Ḥanifa (Muwaffaq, II, 137). According to al-Xwārizmī, Abū Ḥanifa's own deductions amounted to 83,000 points, of which thirty-eight thousand related to *ibādāt* and the rest to affairs (muʿāmalāt).

The meetings began with recitations of the Qurʾān. The general public, and ordinary pupils as well, were excluded from the deliberations (Muwaffaq, I, 96).

Select Committees

Apart from the general assembly of forty, there was a smaller technical committee of ten. It is related that Muḥammad ibn Wahb, originally an *ahl-Ḥadīth* opposed to the deductive method of law, but later a devout pupil of Abū Ḥanifa, was one of the members of this committee of ten. This committee was responsible for the arrangement of chapters (Kardārī, II, 185-86; Šaymarī, fol. 84 b-85a).

It is well-known that Roman law is basically divided into three chapters: laws of persons, of things and of actions. In the Ḥanafite compendia we find quite a different division, i. e. 'ibādat (devotional affairs), mu'āmalāt (commercial affairs), and zawāgīr (deterrents or penal law—which incidentally includes laws of war and peace, for it is to punish a foreign state that war is waged).

Ṣaymarī (fol. 54a) mentions another select committee of only four members, and says: «There were only ten who constantly attended the deliberations of Abū Ḥanīfa, yet there were only four who could be considered as Ḥāfiẓ (memorizers by heart) of law — like the more common memorizers of the Qur'ān».

There are some interesting anecdotes also. Once somebody asked Abū Ḥanīfa a question in the presence of Caliph Maṣū'ūr, the reply of which suggests quite clearly that Abū Ḥanīfa, believed in the spherical form of the earth (Muwaffaq, I, 161). Al-Ṭabarī asserts it was Abū Ḥanīfa who first counted bricks by measuring them by a rod instead of counting them individually by millions (IX, 241).

It was natural that there was constant revision and addition to the code thus compiled. 'Abdallah ibn al-Mubārak says: "I could not settle in Kūfa, so I was forced to abandon the attendance of the academy meetings from time to time. It was thus that I had to copy the same chapters again and again from the memoranda taken by my friend and fellow member Zufar,, (Muwaffaq, II, 68; Ṣaymarī, fol. 103b).

I have contributed a special monograph on the question of whether Roman law had in any way influenced Muslim law, so I leave the point here out of discussion.

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