CHAPTER 2

The Development of the Dogmatics of Islamic Law

The Dogma of the Legal Sources and the Methodology of the Deduction of Laws from the Sources of Law (uṣūl al-fiqh)

1 Introduction

Like the development of the institutions of the law, the emergence of the dogmatics of Islamic law took place in a rather improvised fashion, heterogeneous and over a long time. The sources are comparatively sparse, in particular for the earliest period. Of the few texts that have been transmitted as books (*kitāb*, pl. *kutub*) by no means all were actually prepared for publication by the author named; a number are later compilations by pupils and others.[1] The wealth of works of legal literature does not date back further than the third/ninth century. On the whole we know very little about the degree of effectiveness they had in practice, as hardly any sources of everyday legal affairs, such as documents and charters which could provide the necessary information, survive from the time before the ninth/sixteenth century. It is remarkable that some of the fundamental texts were composed at the explicit request of rulers: this alone would suffice to relativise the, occasionally exaggerated opposition between scholars and political power.[2]

All of this is in stark contrast to the idea, widely held later, of a coherent system with a self-referential basis. According to this kind of traditionally grown understanding, the foundations of the sharia are God-given, and consequently immutable. As we mentioned at the beginning, the separation of legal norms and religious rules is indeed possible within Islam as well, even though their mutual boundaries are not always clearly defined. The two spheres do, however, share two important principles. Firstly: everything that is not forbidden is allowed (the so-called *ibāḥa aṣliyya*; cf. also 4.4.b below regarding contract law); secondly: there is no obligation unless there is a specific decree to that effect (the so-called *barā'a aṣliyya*).[3] It is important to emphasise this because there is

1 Cf. Görke, Das kitāb al-amwāl, 7 ff. with further references.

2 Cf. Jokisch, Islamic Imperial Law, 522 ff.

3 Cf. al-Ghazālī, Al-mustaṣfā, vol. 1, 29; cf. also the instances in Ramadan, Das Islamische Recht, 68 ff., and Löschner, Die dogmatischen Grundlagen, 214 ff. Contemporary Quran exegesis emphasises this aspect as well (cf. Uçar, Moderne Koranexegese, MS p. 139 with further references). According to one tradition, Muhammad already reproached those Muslims who asked too many questions, provoking prohibitions; cf. Krawietz, Hierarchie, 287.

4 Cf., in the place of many, Spies/Pritsch, Klassisches Islamisches Recht, 220, 222; on contract law cf. Schacht, Introduction, 144. In agreement with the revised opinion e.g. Milliot, Introduction, 205, marginal note 193; Ramadan, Das Islamische Recht, 67, 71 ff. with further references.

5 Cf. the references in Josef van Ess, Theologie und Gesellschaft, vol. 2, 302; vol. 4, 573, to whom I owe this information.

6 Cf. only the concise introduction in Jokisch, Islamic Imperial Law, 517 ff. with further references.

7 Cf. Crone/Hinds, God's Caliph, 54 and *passim*; Hallaq, History, 8.

8 Still, Muhammad's 'farewell sermon' (*khuṭbat al-waḍā'*) in Ibn Hishām's Al-sīra, vol. 4, 186, contains the statement that one must not diverge from God's book and his prophet's 'sunna' (*lan taḍillu abadan (...) kitāb Allāh wa-sunnat nabiyyihi*).

9 Its authenticity is doubtful all the same, concerning the different opinions cf. Lucas, Legal Principles, 289, 317 ff. with further references; Jokisch, Islamic Imperial Law, 526 ff. with further references.

10 The sources differ regarding the scope of his responsibilities: according to some accounts

a widely held opinion, based on an incorrect preconception, which erroneously asserts the contrary.[4] A rule of this kind, expressing a universal prohibition, is – as far as we can tell – found only in the writings of the early Abbasid jurist 'Īsā ibn 'Abān,[5] whose view does not, however, appear to have made any perceptible impression. 44

The first task was, and is, indeed, in every legal system, to ascertain all the relevant sources of the law. Islamic law encounters particular difficulty here, as there are many areas for which there is no precise and case-relevant information in either the Quran or the prophetic tradition. Consequently a supplementary collection of legal sources and instruments of the deduction of laws had to be developed. A separate branch of jurisprudence evolved, which was concerned with the 'roots of law deduction' (*uṣūl al-fiqh*).[6] The counterpart to this field is the application of these rules and instruments in the practice (*furū'*, 'branches').

As we have mentioned before, we do not have much information on the beginnings of the Islamic legal system. What is reasonably certain is that the Quran,[7] the prophet Muhammad's relevant legal practice and his companions' (*ṣaḥāba*) and the early caliphs' continuation of this practice were guidelines for the evolving legal system. This is true independently of whether the traditions on the subject stand up to scrutiny of their authenticity.[8] One such tradition was and is quoted particularly frequently:[9] Before sending Mu'ādh ibn Jabal to Yemen as a judge,[10] Muhammad asked him on what he was going to base his