CHAPTER 5

“Earnest Money” and the Sources of Islamic Law

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One of the most important areas of research to which Professor Crone’s work has contributed is that of the sources of Islamic law. In her study of the origins of the legal institution whereby outsiders were incorporated into early Islamic society (the institution of *walāʾ*), she argued that its main source was neither pre-Islamic Arab custom nor Roman law proper, but rather the provincial law and practice of those regions that came under Arab Muslim control, having previously been influenced by Hellenistic and Roman law and culture. In those regions there was what she describes as “a legal *koinē* – a way of regulating things, usually of Greek or ancient Near Eastern origin, which was known to and understood throughout the provinces which were to form the heartlands of Islam.” Furthermore, “…it is tempting to speculate that it was this *koinē* which came to form the substratum of the Sharīʿa.”

This contribution to a volume in her honor discusses another ingredient of Roman and provincial law and practice which was known to early Islamic jurisprudents. It has long been recognized that the form of contract known variously in Arabic as *bayʿ al-ʿurbān/ʿurbūn/ʿarabūn/ʾarabūn* (initial hamza), etc., is related to the institution known in Greek and Latin as *arrhabōn* and *arrha*. Professor Crone herself referred to it in passing as “another Near Eastern institution which influenced Justinian’s law.” Here we examine the discussion of this contract by some early Muslim scholars and then consider their discussions in the light of other evidence regarding it.

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2 For various spellings, see Lane, *Lexicon*, s.v. ʿarabūn/ʿurbūn/ʿurbān; Ibn al-Athīr, *Nihāya*, 3:202. Some derive the word from Arabic: al-Bājī, *Muntaqā*, 4357, cites Ibn Ḥabīb (presumably Yūnus, d. 182/798) as saying, *al-ʿurbān awwalu al-shayʾ wa-ʿunufwānuhu* (“it is the beginning and prime part of a thing”). Ibn al-Athīr, *Nihāya*, 3:202, connects it with the idea of expressing something in an explicit and clear way (*iʿrāb*). Others recognize that it must be of non-Arabic origin. For simplicity, the form ʿarabūn will be used for the Arabic here, unless citing a source using a different one.
Bayʿ al-ʿarabūn in Islamic Law

The best-known Islamic references to the contract known by this name are citations of a ḥadīth in which the Prophet is reported to have prohibited it (nahā rasūl Allāh (ṣ) ‘an bayʿ al-ʿurbān). In al-Laythī’s recension of the Muwatṭa’, Mālik b. Anas (d. 179/795) cites the ḥadīth and provides an account of his understanding of the institution.4

Mālik understands it as a contract, whether for the purchase of goods (his example is a slave) or of services (his example is the hire of a riding animal). At the time of the contract, the buyer or hirer pays a non-refundable sum to the vendor, who agrees to supply the goods or the service at a future date. In the event that the purchaser withdraws from the purchase or hire, the sum is to be kept by the vendor.5 In the event that the contract is fulfilled, the sum is to be counted as part of the agreed price, and is thus deducted from what the purchaser owes. Other accounts do not go much beyond Mālik’s explanation.6 What seems relatively clear: the contract involves the payment on the part of the buyer of a non-refundable deposit or guarantee.7 The English expression most often used to refer to the initial payment in discussions of this sort of agreement is “earnest money.”8

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5 In later jurisprudence the down payment would in such a case be characterized as a gift, although this concept is absent from the ḥadīth under consideration. See, e.g., Zuhayli, Financial Transactions in Islamic Jurisprudence, 199.

6 Ibn Māja, Sunan, K. al-Tijārāt, 22, no. 2: Alʿurbān is that a man buys a riding animal (dāhba) for 100 dinars and he gives him [i.e., the seller] two dinars as an arbūn, saying, “If I do not buy the animal, then the two dinars are yours”; Abū Dā‘ūd, Sunan, K. al-Ijāra, 33, no. 1, which paraphrases the account of the Muwatṭa’; Bayhaqī, Al-Sunan al-kubrā, 5:342, citing the Muwatṭa’ account; Ibn al-Athīr, Nihāya, 3:202: someone buys a commodity (silʿa) and gives something to the owner on condition that, if he completes the sale, the sum is counted as part of the price and, if not, it belongs to the owner and the prospective purchaser cannot ask for it back.

7 Mālik prefaces his explanation with the phrase, “In our view, but God knows best, that is… (wa-dhālik fīmā narā wa-ʾllāhu aʿlamu).” “God knows best” is probably here a pious qualification of his presumption in putting forward his own view, rather than an indication of his uncertainty.

8 According to the Shorter Oxford English Dictionary, the English “earnest” in this sense (to be distinguished from its homonym meaning “serious” or “zealous”) is derived from the Old French erres, and thus ultimately from the Semitic ʾ-r-b via Latin arrha.