

THE ORIGINS OF
Muhammadan
Jurisprudence

JOSEPH SCHACHT

OXFORD
AT THE CLARENDON PRESS

CHAPTER 5

THE ORIGIN OF LEGAL TRADITIONS IN THE FIRST HALF OF THE SECOND CENTURY A.H.

MOST of the 'common transmitters', whose importance for the dating of traditions we discussed at the end of the preceding chapter, occur in the generation preceding Mālik and his contemporary Abū Yūsuf, and we have found numerous traditions for which other considerations pointed to the same period of origin.¹ On the other hand, we have found genuine legal traditions from Companions as elusive as those from the Prophet.² We have even seen that the traditions pretending to express the doctrines of the Successors, in the second half of the first century A.H., are to a great extent fictitious.³ Without attempting a rash generalization, we are therefore justified in looking to the first half of the second century A.H. for the origin of the bulk of legal traditions with which the literary period starts. The present chapter is intended to show this in detail on the test case of the traditions related by Mālik on the authority of Nāfi' from Ibn 'Umar. We choose this group of Medinese traditions (*a*) because the available sources are most complete on the Medinese, (*b*) because the Nāfi' traditions are the most important single group of Medinese traditions, (*c*) because the *isnād* Mālik—Nāfi'—Ibn 'Umar is one of the best, if not the very best, according to the Muhammadan scholars.

Already Shāfi'i considers the transmission of traditions from Nāfi' to Mālik as very reliable, and he says in *Ikh.* 378 f., where he has to choose between two traditions related on the authority of Nāfi' by Mālik and by Aiyūb respectively: 'I think no one who knows traditions and their transmission can doubt that Mālik remembers the traditions of Nāfi' better than Aiyūb, because Mālik was more closely associated with him, and had the merit of remembering the traditions of his associates particularly well.' But as Nāfi' died in A.H. 117 or thereabouts, and Mālik in A.H. 179,⁴ their association can have taken place, even

¹ See above, pp. 97, 107, 141, n. 4, 152, 156 f., 163 ff.; below, p. 212, n. 2.

² See above, p. 169 f.

³ See above, p. 151 and n. 2.

⁴ Nothing authentic is known of Mālik's date of birth.

at the most generous estimate, only when Mālik was little more than a boy. It may even be questioned whether Mālik, whom Shāfi'ī charged elsewhere with concealing imperfections in his *isnāds*,¹ did not take over in written form traditions alleged to come from Nāfi'.²

As Nāfi' was a freedman of Ibn 'Umar, the *isnād* Nāfi'—Ibn 'Umar is a 'family *isnād*', a fact which, as we have seen, is generally an indication of the spurious character of the traditions in question.³ We saw further that Nāfi' often alternates with Sālīm,⁴ 'Abdallāh b. Dīnār, and Zuhri, in other words, that these transmitters of traditions from Ibn 'Umar appear at random.⁵ This makes us doubt whether the historical Nāfi' is responsible for everything that was ascribed to him in the following generation, and we shall find this doubt confirmed later in this chapter.

Wherever the sources available enable us to trace the development of doctrines, we find that the Nāfi' traditions, as a rule, express a secondary stage;⁶ we have noticed cases in which they are later than doctrines or traditions which can be dated in the time of 'Aṭā', Zuhri, and Hishām b. 'Urwa respectively.⁷ Many Nāfi' traditions represent unsuccessful attempts at influencing the doctrine of the Medinese school, and Shāfi'ī in *Tr. III* discusses numerous examples of this kind from his own point of view which is biased in favour of the traditions. The very fact that the Medinese disagree to a considerable extent with alleged traditions of Nāfi' from their own authority Ibn 'Umar (or through Nāfi'—Ibn 'Umar from 'Umar or the Prophet), shows that these traditions are later than the established Medinese doctrine.⁸

¹ See above, p. 37.

² This procedure was customary in Shāfi'ī's time: see above, p. 38.

³ See above, p. 170.

⁴ A son of Ibn 'Umar; this gives another 'family *isnād*'. As Sālīm died in A.H. 106 or thereabouts, it is even more likely that Mālik received the traditions from him in written form than it is in the case of Nāfi'.

⁵ See above, p. 163. For further typical examples, compare *Muw.* iii. 204 with *Mud.* viii. 23; *Tr. III*, 47 with *Umm*, iii. 3.

⁶ See above, p. 48, n. 1, 154, 167, 171; and below, pp. 208, 215, 265. The examples could be multiplied.

⁷ See for 'Aṭā': above, p. 160; for Zuhri: above, p. 102, and below, p. 266 f.; for Hishām: above, p. 173.

⁸ See above, p. 25 f. on Ibn 'Umar as an authority of the Medinese, and p. 66 f. on the relation between traditions and the established doctrine of the school.

This effort to change the doctrines of the ancient schools of law by means of traditions is typical of the traditionists in the second century A.H.¹ We have noticed a Nāfi'—Ibn 'Umar tradition which expressed their attitude explicitly.² There is also external evidence. Shāfi'ī himself stated that the *khiyār al-majlis*, which was prescribed in a Nāfi' tradition but not recognized by the Medinese, was accepted by the traditionists.³ Furthermore, there are two traditions with the *isnād* Mālik—Nāfi'—Ibn 'Umar, according to which the Prophet prohibited underbidding and overbidding, and certain practices which might create an artificial rise or fall in prices.⁴ The traditions were obviously intended to make these practices illegal in the same way as, say, the taking of interest is illegal, so that contracts concluded in defiance of the prohibition would be invalid. With regard to the second of these two closely connected traditions, Ṭaḥāwī, ii. 199, states that this was indeed the doctrine of 'some', and Ibn Mundhir (quoted in *Comm. Muw. Shaib.* 333) identifies these as the traditionists. But again the traditions did not prevail with the Medinese; they, in common with the Iraqians, minimized them by interpretation, and Shāfi'ī distinguished clearly between the legal and the moral aspect. There exists a late counter-tradition, also with the *isnād* Nāfi'—Ibn 'Umar (Ṭaḥāwī, loc. cit.).

We have noticed the gradual appearance of Nāfi' traditions in several cases,⁵ and seen that existing traditions acquired *isnāds* with Nāfi' in them.⁶ It is also not rare to find Nāfi' traditions advocating opposite doctrines, even at the beginning of the literary period.⁷ In the time of Abū Ḥanīfa, Nāfi'—Ibn 'Umar traditions were imitated in Iraq.⁸ The Nāfi' traditions are not uniform, and "Nāfi'" is a label which was used for various purposes over a considerable period. It is certain that even the group of Nāfi' traditions in Mālik's *Muwatta'* represents the result of gradual growth. The historical Nāfi' was

¹ See below, pp. 249, 255.

² See above, p. 144.

³ See above, p. 160.

⁴ *Muw.* iii. 148, 152; *Muw. Shaib.* 333, 337; *Ikh.* 185 ff.

⁵ See above, pp. 144, 148, 150, 160.

⁶ See above, p. 139, n. 4, 158 f.

⁷ See above, p. 150, and further: *Muw.* i. 245 f. with Zurqānī, ad loc.; *Muw. Shaib.* 126; *Mud.* i. 121 (= *Tr.* III, 117) and 172 (= *Muw.* ii. 253).

⁸ See above, p. 32.

certainly not a representative of the ancient Medinese school of law, but beyond this his personality remains vague,¹ and the bulk of the traditions which go under his name must be credited to anonymous traditionists in the first half of the second century A.H.

¹ In *Mud.* iii. 8, Nāfi' is asked his opinion on the question whether one ought to lay waste enemy country; but his alleged answer is shown as spurious by the development of doctrine on this point since Umayyad times (see above, p. 144 f., and below, p. 204 f.). Occasionally, remarks of Nāfi' appear appended to his traditions, but none of them seems to be authentic.