THE ORIGINS OF Muhammadan Jurisprudence

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OXFORD
AT THE CLARENDON PRESS

CHAPTER 5

THE MEDINESE AND MECCANS

A. The 'Seven Lawyers of Medina'

IN tracing the history of the Medinese school of law, we must leave out of account 'Umar and Ibn 'Umar, its main authorities among the Companions of the Prophet.[1] We have seen that traditions from Companions cannot be regarded as genuine,[2] that the name of 'Umar, to whom many important institutions of Muhammadan law and administration were ascribed, was invoked both by the Medinese and by the Iraqians,[3] and that the traditions transmitted from Ibn 'Umar by Nāfi' in one of the best existing *isnāds* are the product of anonymous traditionists in the second century A.H.[4]

The conventional picture of Medina as the home of the *sunna* of the Prophet is artificial and late;[5] we have seen that the development of legal theory and doctrine in Medina was secondary to and dependent on that in Iraq.[6] We are therefore justified in starting our study of the Medinese school with the 'seven lawyers of Medina', a group of persons in the time of the Successors, all of whom died shortly before or shortly after the year A.H. 100. They are, according to the most widely accepted list:

Sa'īd b. Musaiyib (d. after 90)
'Urwa b. Zubair (d. 94)
Abū Bakr b. 'Abdalraḥmān (d. 94)
'Ubaidallāh b. 'Abdallāh b. 'Utba (d. 94 or 98)
Khārija b. Zaid (d. 99 or 100)
Sulaimān b. Yasār (d. about 100)
Qāsim b. Muḥammad (d. 106).

The concept of seven representative lawyers of Medina at the end of the first century has no foundation in fact. When it was a question of singling out the representative lawyers of Medina, numbers other than seven were often mentioned in the earlier

[1] See above, p. 25 f.
[2] See above, p. 169 f.
[3] See above, p. 32.
[4] See above, pp. 176 ff.
[5] For references, see above, p. 115, n. 1.
[6] See above, p. 223 and the references given there.

period. Even when seven is the number given, there are often considerable differences over the names. According to the narrator, Qabīṣa b. Dhu'aib, his circle in the mosque of Medina consisted of 'Urwa b. Zubair, 'Urwa's brother Muṣ'ab, Abū Bakr b. 'Abdalraḥmān, the future Caliph 'Abdalmalik, 'Abdalraḥmān b. Miswar, Ibrāhīm b. 'Abdalraḥmān b. 'Auf, and 'Ubaidallāh b. 'Abdallāh.[1] Another list is purely adventitious and contains in addition the name of a woman traditionist: Ibn Musaiyib, Sulaimān b. Yasār, Abū Bakr b. 'Abdalraḥmān, 'Ikrima, 'Aṭā' [who is usually counted amongst the Meccans], 'Amra bint 'Abdalraḥmān, 'Urwa, and Zuhrī.[2] The earliest mentions, to my knowledge, of the conventional group occur in Ṭaḥāwī, i. 163 and, slightly later, in *Aghānī*, viii. 96; here 'Ubaidallāh b. 'Abdallāh, in verses addressed to a lady, calls the six other lawyers as witnesses of his love; I need hardly insist that these verses are spurious.

The 'living tradition' of the school of Medina is to a great extent anonymous[3] and, where individual authorities are mentioned in the ancient legal texts, there is no trace of any fixed group. Mālik, for instance, mentions Qāsim b. Muḥammad, 'Urwa b. Zubair, and Abū Bakr b. 'Abdalraḥmān besides 'some [other] scholars' (*Muw.* i. 269), and the *Mudauwana*, iv. 54, refers to Mālik's authorities as 'the ancient scholars, that is Ibn Musaiyib and others'. The same is true of Shāfi'ī who makes a point of collecting spurious information on the ancient Medinese authorities and confronting with it the Medinese of his time. He says, for instance: 'How can you say that the lawyers in Medina (*al-fuqahā' bil-Madīna*) did not differ from one another?' (*Tr. III*, 85).[4]

The actual doctrine of the Medinese school often does not agree with the alleged opinions of the Medinese authorities in the time of the Successors, and the information concerning these last is to a great extent spurious.[5] This contrast between the 'living tradition' and the fictitious information on the old

[1] Balādhurī, *Ansāb*, 257.

[2] Ibn Sa'd, ii$_2$. 128–33. The mention of the customary group of seven lawyers, ascribed to Ibn Mubārak in *Tahdhīb*, iii. 807, is strongly suspect.

[3] See above, p. 85.

[4] On *Tr. IV*, 258, where Shāfi'ī mentions Ibn Musaiyib as the representative scholar of Medina, see above, p. 87.

[5] For references, see above, p. 151, n. 2.

authorities provided Shāfi'ī with an argument against the legal theory and positive doctrine of the school of Medina.[1]

We can sometimes observe the growth of this spurious information about the ancient authorities, for instance, in the short period between Mālik and Ibn Wahb,[2] or in the time between Mālik and Ibn 'Abdalbarr.[3] Mālik's younger contemporary Darāwardī is responsible for some of it.[4]

This makes it impossible to regard information on the Medinese lawyers in the time of the Successors as genuine unless it is positively shown to be authentic. It would be rash to exclude this possibility *a priori*, but as far as I have been able to investigate the development of the Medinese doctrine, I have not found any opinion ascribed to one of these ancient lawyers which is likely to be authentic. The general history of legal doctrine makes it improbable that the Medinese in the time of the 'seven lawyers' had progressed farther than their Iraqian contemporary Ibrāhīm Nakha'ī.[5] That the doctrine of Ibn Musaiyib showed ten essential differences from that of Mālik,[6] presupposing as it does that both doctrines are comparable, is obviously the result of later systematizing.[7]

As an example of the negative result mentioned in the preceding paragraph, it will be useful to analyse one case in which the information on the doctrine of two of the 'seven lawyers' would seem, on the face of it, most likely to be authentic. An ancient Medinese way of expressing 'practice' or consensus was to refer to what men or people used to do (*al-nās 'alaih*). This term is attested for Yaḥyā b. Sa'īd (*Mud.* i. 36), and occurs in non-legal literature in Ibn Muqaffa' (*Ṣaḥāba*, 121); it had almost fallen out of current usage in the time of Mālik, one generation later,[8] and may well go back as far as the year A.H. 100, little more than a generation earlier. The same kind of reference to the usage of men is in fact ascribed to Qāsim b. Muḥammad in his version of a legal maxim which he

[1] See above, p. 78. f.

[2] Compare *Muw.* iv. 41, *Tr. III*, 148 (p. 247) and *Tr. VIII*, 11, with *Mud.* xvi. 168 (the quotation from Mālik's contemporary Mājashūn, however, is genuine; see above, p. 221).

[3] See above, p. 64 f.

[4] See above, p. 195.

[5] See above, pp. 234 ff.

[6] Ṭabarī, *ed. Kern*, 681. Significantly enough, two contradictory opinions are attributed to Ibn Musaiyib concerning the particular problem mentioned there.

[7] This disposes of the difficulty seen by Bergsträsser in *Islam*, xiv. 81.

[8] But see *Muw.* iii. 98: *wa-dhālik al-amr alladhī kānat 'alaih al-jamā'a bi-baladinā*; for the terms normally used by Mālik, see above, p. 62 f.

adduces in favour of the common Medinese doctrine,[1] and to Sulaimān b. Yasār in a statement on the consensus of Medina;[2] this last statement certainly represents a stage of doctrine earlier than Mālik. But the same Sulaimān b. Yasār appears also as the main transmitter of a counter-tradition against the common Medinese doctrine on the problem decided by Qāsim b. Muḥammad.[3] It is apparent that the names of the ancient Medinese authorities were affixed at random to opinions which themselves may have been old.

B. Zuhrī

From Zuhrī onwards, there exists an ascertainable authentic element in the opinions ascribed to the authorities of Medina. Zuhrī died in A.H. 124, fifty-five years before the death of Mālik; their personal intercourse is therefore more likely than that between Mālik and Nāfi'.[4] Those cases in which Mālik states explicitly that he asked Zuhrī or heard Zuhrī say something, can unhesitatingly be regarded as genuine,[5] and there are other opinions ascribed to Zuhrī which are obviously authentic.[6]

But towards the end of the second century A.H., Zuhrī had already been credited with many spurious and often contradictory opinions,[7] and his name inserted in *isnāds* of traditions which did not yet exist in his time and from which fictitious statements on his supposed doctrine were abstracted. He appears as the common link in the *isnāds* of a number of traditions from the Prophet, from Companions and from Successors;[8] Zuhrī himself was hardly responsible for the greater part of these traditions. The following examples are meant to illustrate the growth of spurious information about him.

The common ancient doctrine on what constitutes legal foster-parentship was unsuccessfully attacked in Medina.[9] Counter-statements on the opinion of ancient Medinese authorities, in favour of the original doctrine, have a common link in their *isnāds* in Zuhrī

[1] See above, p. 174; for Shāfi'ī's criticism, see above, p. 65.
[2] *Muw.* ii. 338; *Muw. Shaib.* 321; *Mud.* iii. 118.
[3] See above, p. 220.
[4] See above, p. 176 f.
[5] See, e.g., *Muw.* ii. 67; iii. 36, 37, 159; iv. 12.
[6] See, e.g., *Mud.* xvi. 166; and above, p. 101.
[7] See above, p. 115.
[8] See above, p. 175.
[9] See above, p. 216.

(*Muw.* iii. 88), but he was also made the transmitter of a tradition from the Prophet in favour of the unsuccessful modification (*Muw. Shaib.* 271; *Tr. III*, 56). Ibn Wahb (*Mud.* v. 87) quotes him as stating that 'the Muslims have finally decided' in favour of what was the common ancient doctrine (*intahā amr al-Muslimīn ilā dhālik*); but this stood at the beginning and not at the end of the development.

On a question of weregeld a spurious opinion of Ibn Musaiyib, and an alleged remark of Zuhrī on it, were abstracted from a different statement, itself fictitious, on the doctrine of Ibn Musaiyib.[1]

The oldest judgment on Zuhrī of which I know is that of Shaibānī who calls him 'the greatest lawyer and scholar of the Medinese in his time, and the most knowledgeable among them with regard to traditions from the Prophet' (*Tr. VIII*, 13). This already reflects the changed standards of a later generation.

C. Rabī'a

Rabī'a b. Abī 'Abdalraḥmān, somewhat younger than Zuhrī, was according to Shaibānī (*Tr. VIII*, 13) the most prominent lawyer of the Medinese in his time. His conventional reputation as a particularly strong upholder of *ra'y*, a reputation which later earned him the nickname of *Rabī'at al-Ra'y*, is not based on facts.[2] The information which we possess on him is of the same character as that on Zuhrī: an appreciable amount of genuine doctrine, together with spurious additions. We are in many cases able to determine the authenticity or spuriousness of the opinions ascribed to him.

Certainly authentic are references such as *Muw.* ii. 229 where Mālik states that he heard Rabī'a express a certain opinion on the problem of how to expiate a particular kind of breach of the state of ritual consecration during the pilgrimage.[3]

For further examples of genuine opinions of Rabī'a see *Mud.* iv. 64, a passage which shows conscious legal thought and anticipates in its essentials Shāfi'ī's argument in *Tr. III*, 80; further, *Mud.* v. 130 and 133 which have been discussed above, p. 211; and *Mud.* xvi. 166, a reference which is connected with a genuine statement on Zuhrī. Shaibānī's reference to Rabī'a's

[1] See above, p. 222.

[2] See above, p. 114 f.

[3] See the detailed discussion in *Tr. III*, 97.

doctrine in *Tr. VIII*, 13, may also be authentic,[1] and perhaps even the quotation in Ṭaḥāwī, i. 43, which expresses the anti-traditionist attitude of the first half of the second century A.H. and contains a conclusion *a maiore ad minus*.

Examples of spurious information on Rabī'a have been discussed above, pp. 65, 117, 151, 168 f. Apart from alleged opinions of Rabī'a, they include traditions for which Rabī'a was claimed as a transmitter. But Rabī'a himself was not a traditionist.

D. Yaḥyā b. Sa'īd

Yaḥyā b. Sa'īd is still later than Rabī'a, stands half-way between Zuhrī and Mālik, and is one of Mālik's immediate authorities. The opinions ascribed to him by Mālik and other ancient authors are certainly authentic. On the other hand, Yaḥyā is responsible for the transmission of a considerable amount of fictitious information on the ancient Medinese authorities, information which had come into existence in his time; he also transmits recently created traditions and *isnāds*.[2]

With Mālik, soon after the time of Yaḥyā, the school of Medina enters the literary period. Shāfi'ī (*Tr. IV*, 257) speaks of the struggle of opinions within the Medinese legal tradition in the time of Mālik,[3] but the details have been lost because the ancient school of the Medinese transformed itself into that of the Mālikīs and only the works of Mālik and his followers were preserved.

E. The Medinese Opposition

As we found was the case in Iraq,[4] there existed in Medina a mass of legal traditions which represented opinions advanced in opposition to the 'living tradition' of the school. By this I do not mean the unavoidable residue of ancient and later opinions which were discarded or failed to gain recognition in the normal course of the development of doctrine.[5] What concerns us here are the opinions which, in the form of traditions from the

[1] See above, p. 206, n. 5.
[2] See, e.g., above, pp. 169, 211 f.
[3] *Tr. IV*, 257, translated above, p. 7.
[4] See above, pp. 240 ff.
[5] See above, pp. 101 (on Zuhrī), 114 (l. 4 f.). Two further examples of such opinions occur in *Tr. VIII*, 9.

Prophet or from Companions, were opposed to the current doctrine of the school which they were meant to supersede.[1] This body of opposition doctrine is formally less easy to circumscribe in Medina than it is in Iraq where most of it goes under the name of 'Alī. The most important single group of legal traditions emanating from the Medinese opposition are those with the *isnād* Nāfi'—Ibn 'Umar,[2] but other Companions of the Prophet are also well represented.

Materially, the traditions and opinions of the Medinese opposition are as little uniform as are those of the opposition in Iraq, but broadly speaking they represent the doctrine of the traditionists who endeavoured to modify the 'living tradition' of the school of Medina. They were often, but by no means always, actuated by religious rigorism and scrupulousness, for instance in introducing a refinement into fasting (above, p. 152 f.), in laying down strict conditions for the creation of foster-parentship (p. 216), in making the pregnant widow keep a longer waiting period (p. 225 f.). Less rigorous, for example, is their adoption of the practice of *mash* (below, p. 263 f.). Neutral from the point of view of strictness is the opinion on a point of ritual which the traditionists opposed to a doctrine based on a biographical tradition on the Prophet (p. 139, n. 6).

All these doctrines proposed by the traditionists remained unsuccessful in Medina; others, however, were adopted and became part of the teaching of the Medinese school.[3] Numerous doctrines of the Medinese opposition, both successful and unsuccessful, derive from corresponding doctrines of the opposition in Iraq;[4] these connexions confirm that there existed the same kind of opposition to both ancient schools of law.

F. The Meccans

The little that we know of the school of Mecca[5] shows that it shared the main characteristics of the other ancient schools of law. The main authority of the Meccans among the Companions of the Prophet was Ibn 'Abbās,[6] and there are traditions which

[1] See above, p. 66.
[2] See above, p. 178.
[3] See above, pp. 153, 215, 227. See further *Ikh.* 207 f.
[4] See above, p. 241.
[5] See above, p. 8, n. 6.
[6] This was known to Maqrizī, *Khiṭaṭ*, ii. 332.

claim the sanction of the Prophet for the doctrine ascribed to him,[1] in the same way in which other traditions claim it for the doctrine ascribed to Ibn Mas'ūd in Kufa.[2] In further agreement with the procedure of the Kufians who project their doctrine back not only to Ibn Mas'ūd but to his Companions,[3] we find Meccan opinions often attributed to the Companions of Ibn 'Abbās as well as to Ibn 'Abbās himself.[4]

The representative scholar of Mecca at the beginning of the second century A.H. was 'Aṭā' b. Abī Rabāḥ.[5] He is the only Meccan lawyer whom we are able to grasp as an individual, although his companions and the Meccans in general are mentioned repeatedly and Shāfi'ī speaks of 'the majority (*'āmma*) of the muftis in Mecca' (*Tr. III*, 143).

Our information on 'Aṭā' is of the same character as that on his younger Medinese contemporary Zuhrī: an authentic core overlaid by fictitious accretions in the course of the second century. Abū Ḥanīfa states he was present at the lectures of 'Aṭā' (*Āthār A. Y.* 833; *Āthār Shaib.* 57), but himself relates little from 'Aṭā'. Abū Ḥanīfa's contemporary Ibn Abī Lailā refers to 'Aṭā' as holding the same opinions as himself (*Tr. I*, 183, 185); these references are possibly authentic. Abū Yūsuf states that he heard an opinion of 'Aṭā' related to him personally by Ḥajjāj b. Arṭāt (*Tr. I*, 181); but the opinion in question is intermediate between the two extreme opinions held by Abū Ḥanīfa and by Ibn Abī Laila, and it presupposes both; Ḥajjāj must be suspected of putting into circulation recently forged traditions.[6]

Probably genuine are the opinions related from 'Aṭā' on the *khiyār al-majlis* (above, p. 160), on the freedom of the manumitted slave to enter a *walā'* relationship with the consent of his former master (above, p. 173, n. 3), on two questions connected with the contract of *mukātaba* (below, p. 279 f.), and on the evidence given by women (*Tr. I*, 124); this last opinion is based on a strict analogy with the Koranic rules of evidence, and its tendency is contrary to that of a spurious opinion attributed to 'Aṭā' (above, p. 167).

Other opinions, presumably genuine, which are related from

[1] *Muw.* ii. 144, discussed below; *Ris.* 61.

[2] See above, p. 29.

[3] See above, p. 232 f.

[4] *Ris.* 40; *Ikh.* 241, 365; Ibn 'Abdalbarr, quoted in Zurqānī, iii. 25. The Companions of Ibn 'Abbās were said to exist also outside Mecca, particularly in Yemen.

[5] See above, p. 7. See also *E.I.*[2], s.v.

[6] See above, p. 174.

the ancient Meccans but cannot be connected with 'Aṭā' personally, concern the marriage of the pilgrim (above, p. 153), the permission of the *mut'a* marriage (below, p. 266), and the definition of what constitutes the 'usury' which is forbidden in the Koran.

The current practice of Mecca, against which the relevant passages of the Koran were directed, consisted in adding the accumulated interest to the capital which was to be repaid at a fixed term, and in doubling the debt every time the debtor asked for and received an extension of the term.[1] The other ancient schools of law, by a common development of doctrine but with differences on details, extended the law of 'usury', generally speaking, to all exchanges of gold, silver, and various other commodities, and demanded not only immediate delivery of the two lots which were being exchanged, but also absolute equality in quantity if they fell under the same species.[2] The Meccans, however, kept more closely to the original circumstances of the Koranic prohibition and held that there could be no 'usury' unless there was a time-lag in the transaction (*Ikh.* 241 f.). They had therefore no objection to the exchange of one dīnār for two, or of one dirham for two, if both lots were delivered immediately, and only objected to it if the delivery of one of the lots was to be postponed. This doctrine was projected back to Ibn 'Abbās and his Companions in general.

Corresponding doctrines were also propagated, but unsuccessfully, in Iraq under the name of Ibn Mas'ūd (*Tr. II*, 12 (*g*)), and in Medina under the names of Ibn Musaiyib and 'Urwa b. Zubair (*Ikh.* 241). They represent, it is true, an earlier stage than the doctrine which prevailed in the Iraqian and Medinese schools, but the references to these authorities cannot be taken as genuine.

Some of the opinions attributed to 'Aṭā' are certainly or probably fictitious, particularly his statement against *ra'y* which is contradicted by his own use of *qiyās* and *istiḥsān* (above, p. 131); and certainly one, or possibly both, of two contradictory opinions which are ascribed to him (above, p. 186 and n. 6); for a further example, see above, p. 167.

A tradition in *Muw.* ii. 144 aims at showing that a doctrine which goes under the name of Ibn 'Abbās, the authority of the Meccans, coincides with the practice of the Prophet. Zaid b. Aslam, in the generation before Mālik, is the common link in

[1] See *E.I.*, s.v. *Ribā*.

[2] For a consequence of this sweeping rule, see above, p. 67.

the *isnāds* of this tradition,[1] and it is likely that it originated in his time. The same doctrine is ascribed to 'Umar in a tradition which has 'Aṭā' in the *isnād* (ibid.); this tradition implies the same controversy as the first, and presumably belongs to the same period; this shows the mention of 'Aṭā' in the *isnād* to be spurious.

[1] See Zurqānī, ad loc.