THE EARLY DEVELOPMENT OF FIQH IN KÛFAH

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ABSTRACT

Title: "The Early Development of Islamic Fiqh in Kufah with Special Reference to the Works of Abû Yûsuf and Shaybânî."

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The legal content and bearing of the Prophet's teaching are undeniable.

This is corroborated by the establishment of judiciary during his life-time.

Prophetic sunnah was normative from the beginning.

Islamic legal doctrines were mainly the result of endeavour to apply Prophetic teachings.

Trend towards formalism and systematisation followed the emergence of fuqahâ' circa 100. In Kufa Ibrâhîm typifies this.

During the second century sunnah of the Prophet retained its importance. Besides traditions from the Prophet its embodiments were traditions from Companions, and 'practice'. Inter-school polemics led to increasing formalism, culminating in Shâfi'î's theory which equated sunnah with Prophetic traditions. Kufian doctrines normally rested on traditions from the Prophet and Companions rather than 'practice'. Kufians represent the trend which led to Shâfi'î's legal theory.

The theory of "back-projection" of traditions is untenable.

In respect both of legal theory and technical legal thought, Kufians stood mid-way between ancient schools and Shâfi'î.

THE EARLY DEVELOPMENT OF ISLAMIC FIQH IN KÛFAH WITH SPECIAL REFERENCE TO THE WORKS OF ABÛ YÛSUF AND SHAYBÂNÎ

by

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DEDICATED

TO MY MOTHER

IN THE NAME OF ALLÂH,

THE BENEFICENT, THE MERCIFUL

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PREFACE

This study is the result of about two and a half years of sustained research (October 1963 to March 1966 A.D.) in which there was hardly any distraction except this writer's teaching job (from May 1965 A.D. onwards). The expenditure of such a considerable amount of time is understandable in view of the vastness and the highly involved nature of the subject. For in order to arrive at one's own judgment on the questions which this work attempts to investigate — even if that might have meant in the end the confirmation of some established opinion — a great deal of careful reading and reflection was required. This was especially so for a person who had not gone through the traditional, systematic education of Fiqh and thus had to devote a good deal of time filling up gaps in his knowledge of Fiqh, Hadîth, etc. While it would be preposterous on this writer's part to consider his conclusions to be the revelations of absolute truth, it is hoped they are correct in their broad essentials and deserve serious consideration of the scholars of the history of Islamic law. This does not detract from the fact that in such a complicated subject as the present one, occasional lapses can hardly

be avoided.

It seems essential to express my gratitude to all those who stimulated my interest in this field of study and assisted me in one way or the other in adding to my knowledge of the subject or in the completion of this work. The first name that comes to my mind is that of Prof. W.C. Smith, the former Director of the Institute of Islamic Studies, McGill University. It occurred to him several years ago that Fiqh, which represented an important aspect of Islamic thought, called for serious research and, initially to my great consternation, he thought that I was the man for the job. In fact but for his initial encouragement this writer would have hardly been inclined to undertake research in this subject.

Several courses at McGill University proved to be of considerable help in preparing this writer for this task. Prof. Niyazi Berkes' seminar made this writer familiar with the sociological and historical aspects of Islamic law. Prof. Muḥammad Rashîdî's course, which consisted of reading Shawkânî's Irshâd al-Fuḥûl, helped a good deal in developing an understanding of the structure of Islamic legal theory. Prof. T. Izutsu's course helped prepare this writer to look at development of ideas through its semantic

evidence. Prof. Smith's seminar on Theology enabled this writer to study an aspect of Islamic thought with which he was theretofore only nominally conversant. Mawlânâ Sa'îd Ahmad Akbarâbâdî, (who was at McGill during the academic year 1962-63 A.D.), helped him to develop some competence in Arabic literature and poetry. Moreover, in order to deepen this writer's knowledge of Fiqh and in order to understand better the approach of modern Western scholars to the subject, the Institute arranged once-a-month visit to Columbia University, New York. During these visits this writer spent greater part of day with the most erudite Western scholar in the field of Fiqh, Prof. Schacht. Hardly could anything have been more instructive. Thanks to these meetings with Prof. Schacht, this writer was able to develop a vivid understanding of the approach of the Western scholars to Islamic Fiqh, particularly to its historical aspects.

Through the courses taken at the History Department of McGill and under the able professors such as Bayley, Fieldhouse, Reid, Zagorin and Mladenovic, I became more keenly aware of the implications of applying the historical method to a given historical problem, apart from my developing better acquaintance with the grander problems which face a historian — the philoso-

phical aspect of history. To all these teachers I am deeply grateful, particularly to Prof. Schacht who not only helped me a good deal during my visits to him in New York but also helped me during the last stages of my work by further explaining his viewpoint in reply to two of my letters. I have frequently referred to his Origins in this study. At several places I have also benefited from Prof. Schacht's translations of the original texts.

During my stay in Cairo (October 1963 - April 1964 A.D.) where I was enrolled at Ma'had al-Dirâsât al-Islâmîyah, I received appreciable help and encouragement from the learned director of the Ma'had, Dr. Muḥammad 'Abd Allâh al-'Arabî. In Cairo I also had the unique fortune of benefiting from the learning of Shaykh Muḥammad Abû Zahrah, one of the greatest Muslim jurists of our time. Shaykh Abû Zahrah generously permitted me to visit him at his residence once every week and spend the evening with him discussing the problems of my research. Apart from seeking guidance from Shaykh Abû Zahrah, which itself was very valuable, I also tried to acquaint him with the results of Orientalist research in the field of Islamic law. With this purpose in mind, I translated into Arabic Prof. Schacht's article "Pre-Islamic Background and Early Development of

Jurisprudence" from Law in the Middle East, vol. I, ed. Majid Khadduri and Herbert J. Liebesny, (Washington D.C., 1955 A.D.), (pp. 28-56). I tried to elicit Shaykh Abû Zahrah's opinion on Schacht's approach and method and also tried to find out his own alternate approach and method. His reaction to Schacht's article is enshrined in a lengthy rejoinder entitled "Ta'lîqât 'alá awhâm Shakht [sc. Schacht]", which illustrates the gulf that continues to exist between the Orientalist and the Islamic traditions of learning. In Cairo I also received valuable help and guidance from Mr. Muḥammad 'Abd al-Mut'âl al-Jabrî, the author of al-Naskh fî al-Sharî'ah Islâmîyah, and Mr. 'Abd al-Raḥîm Fûḍah of Majallat al-Azhar in reading early and classical fiqhî texts.

In Cairo I also enjoyed courteous assistance from several libraries. The Dâr al-Kutub and the libraries of the American University of Cairo, of Jâmi'at al-Qâhirah, of the Institute of Dominican Fathers and of al-Azhar generously allowed me the use of their materials. I am deeply thankful to all the above-mentioned institutions and scholars, and to my numerous friends in Cairo who made my stay pleasant and useful.

The major part of this research was carried on, however, in Karachi. During the course of this work

this writer received assistance, co-operation and encouragement from various sources. The Institute of Islamic Research (Pakistan) arranged that Muftî Amjad 'Alî, a learned scholar of Fiqh on the staff of the Institute, help me grasp the subtleties of the most difficult book in Fiqh that I have so far encountered, Shaybânî's al-Jâmi' al-Kabîr, a task which the learned scholar accomplished with competence. The library of the Institute of Islamic Research, the library of the Department of Archaeology, Government of Pakistan, Ribât al-'Ulûm al-Islâmîyah, Majlis-i 'Ilmî and the library of Dâr al-'Ulûm al-'Arabîyah allowed me to make use of their materials. My good friend Mr. Bashîr Muḥammad, who has an excellent private collection of Arabic books, allowed me to borrow several books, particularly mentionable among which are two rare books which I kept with me for about two years: K. al-Âthâr of Abû Yûsuf (which was neither available in the book-stores of Cairo, nor of Baghdad, nor of Karachi, nor of Bombay), and K. al-Hujaj of Shaybânî (which again, is extremely rare). The availability of this last work has been of great advantage. The Library to which this thesis owes most, however, and where almost every single page of it was written, is the promising library of the State Bank of Pakistan. Had the excellent facilities of

this library and the enthusiastic co-operation of its staff not been available to me, it would have been exceedingly difficult to complete this work in Karachi.

I also have had the privilege of occasionally discussing matters relating to my thesis with several scholars: with Mawlânâ Muntakhab-u-l-Haqq, Mawlânâ 'Abdu-r-Rashîd Nu'mânî, Mawlânâ Abû al-A'lá Mawdûdî, Mawlânâ Ṭâsîn, Mawlânâ 'Abdu-l-Quddûs Hâshimî, Mawlânâ Muḥammad Taqî 'Usmânî, and my learned father-in-law, Mawlânâ Muḥammad Nâẓim Nadvî. My father, Mr. Muḥammad Ẓafar Aḥmad Anṣârî kindly went through a few chapters and suggested a few useful changes. Dr. Muhammad Hamidullah was good enough to go through the first draft of the first two chapters of the thesis and besides jotting down a couple of remarks, also furnished valuable information about 'Umar's instructions to Abû Mûsá al-Ash'arî.

Dr. Fazlur Rahman, my thesis adviser, showed great patience, consideration and tolerance throughout the period of my contact with him and played no minor role in keeping my spirits up. The present Director of the Institute of Islamic Studies, Dr. Charles Adams took very good care of my requirements during my research, besides constantly goading to finish up my research. It is through his kindness that I was able to make use of a

considerable amount of material not available in Karachi, of which particularly mentionable is the xerox copy of Ibn Ibâḍ's letter to 'Abd al-Malik in Barrâdî, K. al-Jawâhir. To all these gentlemen I am profoundly grateful.

This study was made possible firstly, by the long study leave granted by the University of Karachi and secondly, by the several grants which enabled this writer to concentrate on his study and research. But for the grants made available by the Canada Council, Ottawa, the Institute of Islamic Studies and the Asia Foundation this study would hardly have been possible. I am thankful to all these institutions for the assistance I have received from them, particularly for the fact that they enabled me to keep my family together with me in Montreal and Cairo. Needless to say that the views expressed in this work are exclusively mine and have nothing to do with these institutions.

Among my friends and colleagues, Mr. Y. Freedman obtained for me information about the usages of certain fundamental words in the pre-Islamic and early Islamic poetry from the Hebrew University, Jerusalem. I am very grateful to him and have used this information in compiling appendix II. During the last days of my work in particular, my close friend Mr. Mi'râj Muḥammad ungrudgingly gave so much of his time, reading through the proofs, etc.,

that I can hardly ever repay the debt of gratitude that I owe him. My brother-in-law Mr. 'Alî Kâẓim, M.A., helped me a good deal in checking references and preparing appendix II, for which I thank him heartily.

Last, but not the least, is the debt of gratitude I owe to my wife who suffered my bookishness with her characteristic grace and sweetness, and to the members of my family who kept my life pleasant and cheerful throughout.

A few words in the end, about some of the technical aspects of this thesis. First of all, the writer has tried to follow the system of transliteration adopted by the Institute of Islamic Studies, McGill University. The table embodying this system, forms appendix III of this thesis. So far as the Arabic or Urdu names of persons, books or institutions are concerned, they have been transcribed according to the above-mentioned system, unless the persons or institutions concerned had themselves transcribed them differently. As for the names of places, while the proper scientific transcription of Kufa has been adopted in the title for the sake of accuracy, the popular English spellings have been retained consistently for the sake of convenience. Secondly, the abbreviations of most of the works which have been used have been mentioned in the

notes. With regard to some of them it was found more convenient to mention them in the bibliography. Particularly noteworthy in this connection are the often-quoted Treatises of Shâfi'î. We have cited them as Trs. I, II, etc., in the manner Prof. Schacht has done in his Origins of Muhammadan Jurisprudence (p. 338). Thirdly, reference to Treatises I, II, III, VIII, and IX has been made according to the number of their paragraphs as fixed by Prof. Schacht (q.v. ibid., pp. 331-35).

It seems necessary to point out in connection with the names of important Islamic personalities, that this writer is habituated to pronouncing with the Prophet Muhammad (and other prophets) the formula which is usually rendered into English as "peace be on him", and with the Companions the formula: "God be pleased with them", and "God have mercy on them" in respect of other venerable personalities. It was extremely difficult, besides being jarring, to include all these formulae in the text of the thesis for they would have sometimes occurred several times on a page. These formulae may, therefore, be considered understood.

This writer who, both as a student and as a Muslim, is committed to search after truth and knowledge feels inclined to round off this preface by expressing his

profound consciousness of man's limitations in his quest for truth and knowledge — unless aided by God — by repeating the sentence with which often the writings of classical Muslim scholars are concluded: "What is true is best known to Allâh".

Ẓafar Isḥâq Anṣârî

Karachi, July, 1966.

INTRODUCTION

The early centuries of Islâm have formed the subject of several important studies during the last hundred years. The scope of historical research has gradually expanded to increasingly embrace, besides biographical works and political histories, subjects relating to the cultural and intellectual aspects of early Islâm. The history of Islamic law is one of those subjects which have stimulated the curiosity of a considerable number of scholars during the last hundred years.

The earliest mentionable work in the field of early Islamic law was that of E. Sachau, Zür altesten Geschichte des muhammedanischen Rechts, (published in 1870 A.D.).[1] The next important scholar who stepped into this field was Ignaz Goldziher, one of the most erudite and brilliant scholars in the Orientalist tradition of scholarship. His Die Ẓâhiriten, (Halle, 1884 A.D.)[2] is a competent pioneering work on the Ẓâhirî school. No less valuable, however, is that portion of the work (pp. 3 ff.) in which Goldziher has attempted to give an historical account of how, in the course of handling legal questions during the early period, various strands, particularly those of Ra'y and Ḥadîth, developed. His explanation of the attitudes adopted by

ahl al-Ra'y and ahl al-Hadîth remains to this day one of the most illuminating statements on the subject. Moreover, Goldziher devoted the second volume of his magnum opus: Muhammedanische Studien, (first published in 1890 A.D.),[3] to a critical study of the traditions from the Prophet. With regard to them Goldziher arrived at the conclusion that they represented various stages in the growth of Islamic doctrines and it is in this that their utility lay. He denied, however, the claim that they went as far back as they professed to, viz., the time of the Prophet. The attribution of doctrines to the Prophet, Goldziher pointed out, was the standard means whereby a doctrine attained its binding character and it was for this reason that the name of the Prophet was invoked. Goldziher's thesis has generally been accepted by Western scholars. His "discovery", to cite Schacht, "became the corner-stone of all serious investigation of early Muhammadan law and jurisprudence, even if later authors, while accepting Goldziher's method in principle, in their natural desire for positive results, were inclined to minimize it in practice".[4] Margoliouth, Hurgronje, Lammens, Guillaume, Wensinck, all subscribe to this view and have tried to apply it in their investigations.[5]

More recently, Joseph Schacht has applied Goldziher's thesis in studying the "origins" of Islamic jurisprudence

and has carried it perhaps to its farthest limit. Goldziher had at least conceded that there was a possibility of referring confidently a very small part of the contents of canonical compilations to the early period from which they professed to date. [6] But Schacht has carried Goldziher's skepticism to the point of declining to recognize the authenticity of each and every legal tradition.[7] However, Schacht is a scholar of such vast learning and competence that his Origins, (first published in 1950 A.D.), has already become a classic. The significance of the Origins lies in Schacht's rigorous application of Goldziher's thesis in trying to explain the entire development of Islamic jurisprudence during its formative phase. No less significant is the fact that Schacht has further developed the trends initiated by Margoliouth and has vehemently argued that the sunnah of the Prophet is a relatively late concept.[8] This writer disagrees with several of his conclusions, as will become obvious in the following pages. This does not detract, however, from the fact that no other work embodies a comparable amount of research, nor does any other work attempt to show the early development of Islamic jurisprudence on such a wide canvas.

Since the publication of the Origins no significant work in the field of the early history of Islamic law and jurisprudence has been written by any Orientalist scholar. The latest work viz. N.J. Coulson, A History of Islamic Law,

(Edinburgh, 1964 A.D.),[9] does not make any significant contribution to the existing fund of knowledge about the history of Islamic law. Nor does that book aim at that. It addresses itself to a much more modest purpose: "to show the present stage of [Western] scholarship"[10] in that field of study. This fact notwithstanding, the worth of the book seems to lie in the fact that the author has expressed some serious doubts about the method that has been pursued by Western scholars, for instance, Schacht, in their study of the development of Islamic law. Coulson is so greatly under the spell of the Orientalist scholars of established reputation, however, that his position betrays an extent of ambivalence and confusion.[11] The book might be remembered in future, if it is remembered at all, among the first hesitant expressions of skepticism about some of the presuppositions underlying the method generally adopted by the Orientalist scholars in their study of Ḥadīth.[12]

Among the Muslims, interest in the historical aspect of Islamic law is even more recent. This does not mean that the Muslim scholars of the past lacked historical consciousness altogether.[13] There is, however, a perceptible difference between the attitudes of the scholars of the present time who are interested in the history of Islamic law as such, and the Muslim scholars of the past. This lies in the fact that the latter's interest in the Islamic legal science was

so absorbing and their curiosity about the historical aspect of Islamic law was so feeble that they could have hardly thought in terms of making it the subject of a special study.

During the last fifty years, however, the history of Islamic law has been the subject of several works produced by Muslim scholars. In the Arab countries, the two pioneering works were: Muhammad al-Khudarî, Ta'rîkh al-Tashrî' al-Islâmî, (Cairo, first published in 1920 A.D.),[14] and Muhammad b. al-Hasan al-Hajawî, al-Fikr al-Sâmî fî Ta'rîkh al-Fiqh al-Islâmî, 4 vols., (Rabat-Fes-Tunis, 1345-9/1926-31 A.D.). By the forties of the present century of the Christian era, the history of Islamic law had already become a fairly popular subject. 'Alî Hasan 'Abd al-Qâdir, a graduate from al-Azhar and subsequently a Ph. D. from the University of Berlin, wrote his Nazarah 'Âmmah fî Ta'rîkh al-Fiqh al-Islâmî, vol. I, (Cairo, 1361/1942 A.D.). Both of the two earlier-mentioned works were merely elaborations of the classical Muslim image about the past of the Islamic law. 'Abd al-Qâdir, however, shows awareness of some of the issues raised by Western scholars, though he treats them rather cursorily. Subsequently, several Muslim scholars have produced a considerable number of books. Muhammad Yûsuf Mûsá (d. 1963 A.D.) wrote his: Muhâdarât fî Ta'rîkh al-Fiqh al-Islâmî, 3 vols., (Cairo,

1954-6 A.D.). Muḥammad Abû Zahrah wrote a series of books on the founders of the Islamic legal schools which throw valuable light on the problems which were under discussion in their times, the characteristics of their legal methodology and their contributions to Islamic law. A very valuable book which was produced by a traditional Muslim scholar of vast learning is 'Alî al-Khafîf, Asbâb Ikhtilâf al-Fuqahâ', (Cairo, 1375/1956 A.D.), which is a very good illustration of the manner in which a highly educated Muslim jurist, with the traditional background of education, looks at the early centuries of Islamic law. Aḥmad Amîn (d. 1955 A.D.), who had been educated under the traditional Islamic system of education, but subsequently acquainted himself with Western writings, also threw light on some of the basic issues which are relevant to the history of Islamic law. Aḥmad Amîn was not specifically concerned with the history of Fiqh as such, and therefore he did not treat the subject comprehensively. His remarks on the relevant problems concerning this question form part of his attempt to present, in broad outlines, the entire cultural and intellectual history of Islâm.[15] What is striking about Amîn is the fact that he is more keenly conscious than his contemporary Muslim scholars of the element of growth and development even in matters such as Fiqh, is more keenly aware of the relationship between

ideas and the social and material milieux in which they arise and develop, and tries to use, with considerable boldness, whatever notions of historical criticism he has acquired from his study of Western writers. Some of his views, particularly those relating to Ḥadîth, however, drew the fire of some Muslim scholars, as we shall see later.[16]

In the Indo-Pakistan sub-continent the first mentionable work on the subject was Sîratu-n-Nu'mân by Shiblî Nu'mânî (d. 1916 A.D.). The book is a biography of Abû Ḥanîfah (d. 150) along with a study of his juristic method. Even though the book is now dated, it was a valuable piece of pioneering work and its standard was considerably higher than the general standard of historical scholarship at that time in the sub-continent. This book had appeared around the turn of the century after which no other significant work appeared for a considerably long period of time. After this interregnum several books have appeared in quick succession in recent years. One of these is Fiqh-i Islâmî kâ Târîkhî Pas Manẓar, (Lahore, 1961 A.D.) by Muḥammad Taqî Amînî. This book, however, does not make any substantial improvement on the work of Khuḍarî. More recently, two other noteworthy works have appeared from Pakistan. One of these is: Kemal A. Faruki, (sic), Islamic Jurisprudence, (Karachi,

1382/1962 A.D.). Its doctrinal section is preceded by a brief section on the history of Islamic law (pp. 21-33), which is not of much significance except that it shows some influence of Western researches on the subject. Of very considerable significance, however, is the work of Fazlur Rahman, Islamic Methodology in History, (op. cit.). Rahman does not deal in detail with the development of Islamic law and jurisprudence, but is centrally concerned with the growth of the "Islamic Methodology" over the entire course of Islamic history. It is in this context that he attempts to study the historical development of concepts such as Sunnah, Ijtihâd and Ijmâ' and its impact on the outlook of Muslims. The distinction of this work lies in the fact that it takes serious notice of the questions raised by Western scholars. The author attempts to refute the view taken in recent years by the Orientalist scholars that the concept of the Sunnah of the Prophet developed at a later period. Inspite of this, Fazlur Rahman's disagreement with the views generally entertained by Muslim scholars is quite significant. For he holds the opinion that:

> ...the Sunnah-content left by the Prophet was not very large in quantity and that it was not something meant to be absolutely specific; that the concept Sunnah after the time of the Prophet covered validly not only the Sunnah of the Prophet himself but also the interpretations of the Prophetic Sunnah: ...

> that the "Sunnah" in this last sense is co-extensive with the Ijmâ' of the Community, which is essentially, an ever-expanding process; and finally...that after the mass-scale Hadîth-movement the organic relationship between the Sunnah, Ijtihâd and Ijmâ' was destroyed.[17]

Thus while Fazlur Rahman rejects the current view of the Western scholars that the sunnah of the Prophet is a relatively late concept, he considers their views to be correct in regard to the content of the sunnah - for he considers the traditions from the Prophet, on the whole, to be the formulations of a later period.[18]

These works of Muslim scholars seem to have been actuated by a variety of motives. On the one hand there has been the purely academic motive of an historian - the attempt to find and state the truth. Side by side with this motive, however, there has been the pressure of the need to reconstruct Islamic Fiqh. This necessity has impelled, on the one hand, to take stock of the foundational principles of Fiqh which has led to a proliferation of books on Uṣûl al-Fiqh.[19] On the other hand, people have tried to go back to the early period of Fiqh in order to find the bases on which this reconstruction could be carried out. This applies to those who have a modernist orientation, such as Faruki and Rahman, as well as those whose orientation is relatively traditionalist, such as Mûsá and Abû Zahrah.

The question of authenticity or otherwise of the traditions from the Prophet has also remained in discussion among the Muslims during the last three decades. In Egypt, a writer Ismâ'îl Adham published a brochure in 1356 wherein he argued that the canonical compilations (Sihâh) contained traditions of doubtful authenticity, including those which were downright fabricated. The publication of this brochure raised a storm of opposition and the Azhar demanded its proscription.[20] Another scholar who was attacked for expressing skeptical views about the authenticity of the traditions was the Egyptian scholar, Ahmad Amîn.[21] Ahmad Amîn was by no means of the opinion that the authenticity of all or even of a majority of the traditions was doubtful, what to speak of his positively asserting that they were spurious. His views were, nevertheless, different from those of the orthodox scholars, who considered the following of his views to be highly objectionable: (1) that fabrication of traditions had begun in the life-time of the Prophet himself; (2) that the compilation of traditions had taken place long after the death of the Prophet, during which period traditions were transmitted by memory, which rendered the accuracy of transmission doubtful; (3) that the traditionists considered all the Companions to be absolutely trustworthy [implying, that this was not

a legitimate assumption] although the Companions themselves did not consider all the Companions to be so; (4) that the trustworthiness of the well-known Companion, and the transmitter of a large number of traditions from the Prophet, Abû Hurayrah (d. circa 59) was questionable; (5) that the scholars of the past had focussed their attention on the criticism of isnâd rather than of the content of the traditions.[22]

More recently Mahmûd Abû Rayyah has written his Adwâ' 'alá al-Sunnah al-Muhammadîyah,[23] wherein he has carried these skeptical views even farther than Amîn. Although the whole of his work was denounced by the orthodox scholars, those of his remarks in which he had expressed doubts about the trustworthiness of Abû Hurayrah were considered to be particularly blasphemous.[24]

The attempt to answer these provocative views led to the appearance of a number of studies. Of these the best-known is that of the Syrian scholar, Mustafá al-Sibâ'î (d. 1964 A.D.). In his work (op. cit.) Sibâ'î tries to establish the authority of the sunnah on the basis of Quranic arguments; explains the attitude of various Muslim schools and sects with regard to sunnah, proving thereby that the authority of the sunnah had never been a disputed issue among the Muslims; outlines the compilation of traditions from the Prophet and argues

that their authenticity is beyond doubt. Moreover, a large portion of his book consists of refutation of the views expressed by Aḥmad Amîn and Abû Rayyah (pp. 273-363) and by the Orientalists (pp. 364-420) with regard to the authenticity of the traditions from the Prophet. From among the Orientalists he chooses Goldziher as a typical Orientalist scholar. His sources of information about the findings of Goldziher, however, are the summary of Goldziher's views on the question concerned in 'Alî Ḥasan 'Abd al-Qâdir, Naẓarah 'Âmmah (op. cit., pp. 121-25) and the Arabic translation of Goldziher's Vorlesungen über den Islam, (op. cit), entitled al-'Aqîdah wa al-Sharî'ah fî al-Islâm, (op. cit.). Among the numerous points raised by Goldziher which have struck Sibâ'î as significant, one is concerning the famous traditionist Zuhrî (d. 124), who was allegedly used by the Umayyads to fabricate traditions conducive to their interests. Sibâ'î's main defence of Ḥadîth, to put it succinctly, seems to consist of asserting that alongside oral traditions, written traditions too had been in existence from quite an early period; that the transmitters as well as the compilers of traditions were people of trustworthy moral character; that the application of canons of Ḥadîth-criticism had weeded out spurious traditions so that they had not been able to find their way into the accepted

corpus of traditions.[25-26]

The present study seeks to form part, in a way, of both the Western and Muslim traditions of scholarship. It seeks to become a part of the academic tradition of the Western universities not only because it is being presented in a Western language and submitted to a Western university, but also because the questions it attempts to come into grips with are those which have engaged the minds of Western scholars. Moreover, this writer has given a serious consideration to the studies on the subject in question made by Western scholars, and has dispassionately tried to profit from them. At the same time, it is a part of the Muslim tradition of learning insofar as this writer believes in Islâm and shares with his co-religionists faith in the revealed character of the fundamentals on which Islamic law is based.

An attempt is being made in the following pages to portray the development of Islamic Fiqh during its formative phase. Instead of attempting to embrace the entire Muslim world, however, attention has been focussed on Kufa and the period mainly under study is the second century of the Hijrah. Now, since legal thought in Kufa was not divorced from the rest of the Muslim world, the discussion quite often exceeds the boundaries of Kufa. In the same way, since the second century was so vitally

linked with the first, a considerable portion of the work is devoted to explaining the developments of the first century. This was necessary because the nature of the development in the second century, in this writer's opinion, is often seriously misunderstood owing to an erroneous picture of the developments which took place in the first century.

The choice of Kufa for the present study is not fortuitous. It was dictated by the fact that it was one of the earliest centres of Islamic juristic thinking.[27] Moreover, a considerable number of works of that period is extant so as to form the basis of sound historical investigation. The legal theory as well as technical legal thought of the Kufians, as we have shown in this study, was more advanced than in the other contemporary centres of Islamic legal thinking viz. Medina, Mecca and Syria. In fact, Kufa formed, in both respects, an essential intermediary stage between "the ancient schools of law",[28] to borrow Schacht's expression, and Shâfi'î.

Our study of the development of Fiqh in Kufa is confined to the mainstream of the Sunnî tradition of legal thought. In order to keep this study within manageable limits, we have excluded from the scope of our study the legal thought of the Shî'ah, Mu'tazilah

and the Khawârij.[29] We have also not touched the interesting question of the possible influence of foreign legal ideas and institutions on Islamic law, since the issue it raised was not fundamentally relevant to our discussion.[30]

The approach to the subject is historical: that is, an attempt is being made to offer an explanation of the phenomenon under study which coheres with the rest of the historically-established knowledge. In order that an historical work be worthwhile, it is essential to approach one's subject with a certain amount of skepticism: with the readiness to re-examine with boldness the conclusions of other scholars as well as the presuppositions and the method which have led them to those conclusions. The same applies to the presuppositions and the method of the researcher himself.

Moreover, being essentially a study of the development of ideas and concepts, rather than of events, this commitment to the historical method makes it all the more imperative to exercise critical judgment at every step of the investigation. For, as is well known, ideas and concepts tend to undergo transformations with the passage of time, and are not the same in their formative stages as in the subsequent periods. Hence, there is little that can be "taken for granted" in this kind of study without

subjecting it to searching criticism. Unless this is done an historian is likely to have a distorted and anachronistic picture of the past. It is out of our desire to guard ourselves against anachronisms that this study draws mainly on the works composed during the second or the early decades of the third century, and it is only rarely that works composed later than this date have been used as evidence.[31] Needless to say that even in the use of these works, attempt has been made to use them with the imagination and critical spirit of an historian, rather than uncritically, according to the method which has been jeeringly designated by Collingwood as scissors-and-paste-method.[32] Furthermore, whenever the works of a later period have been used, their evidences have been handled with extraordinary care. Our avoidance of the works of a later period does not mean that those works are, in our view, necessarily inauthentic. Our attitude was motivated merely by our desire to remain on the surest possible ground. In fact, this procedure might well furnish substantial grounds to enable responsible judgment as to the extent of accuracy or otherwise of the scattered statements contained in these later works regarding the earlier period of Islamic law. This subject is, however, beyond the scope of the present work.

It will be evident from the following pages that

even though there is an amount of similarity in our approach and that of Western scholars — historical method being common between us — several of our conclusions are substantially different from theirs. There seem to be several reasons for this. One of these, and quite fundamental in our opinion, is the divergence of our opinions regarding the earliest period of Islâm, viz., the life-time of the Prophet. Modern Western scholarship seems to entertain a seriously distorted picture of this period. This misinterpretation seems to be the result of employing a certain method of investigation without critically scrutinizing the adequacy of the presuppositions which underlie this method.[33] This has naturally influenced the account usually presented by Western scholars of the development of Islamic jurisprudence and of the Islamic judicial organisation. On the whole, the Western scholars do not seem to appreciate fully the role of the Prophet as a law-giver and as the head of the Muslim state. Though the basic concern of the Prophet was spiritual and moral, this did not exclude legal problems from the jurisdiction of the Prophet's concerns. It rather provided him and his early followers with a frame of reference for dealing with these problems. There areweighty reasons to believe not only that the Prophet had a concern for legal problems, but also that he possessed the insight to comprehend the bearing of "legal"

questions on the ideals that he was seeking to implement. The seriously wrong notion that is entertained about the Prophet - and is entertained on pre-suppositions of questionable validity - has served as a basis for the *à priori* judgment that the legal traditions from the Prophet, as embodied in the canonical compilations, are generally apocryphal.[34] This trend of thought has been reinforced by another conclusion at which some contemporary Western scholars have arrived, *viz.*, that the foundation of the Islamic judicial institution (*qadâ'*) was laid in the late Umayyad period. This, as we shall see, is wrong.[35] This error of judgment too is of considerable importance because it has lent support to the view that the Prophet was not much concerned with legal and judicial matters, and therefore, that the consideration of legal problems by Muslims began much later than what the Muslims generally imagine. Once both these pre-suppositions are established as untenable, there remains hardly any *à priori* basis for discarding, at least fundamentally, the traditional view (as implied in the canonical compilations of traditions), that the Prophet did express himself on legal problems.

This brings us to the problem of the relationship between traditions and the Islamic law in its early phase. There is no substantial basis, as we shall see, for the view that the *sunnah* of the Prophet is a later concept, or

that there was any ambiguity or disagreement in the early period of Islâm as to the binding character of the precepts and practices of the Prophet. There is no difference between the early and later periods with regard to the concept, as distinguished from the phraseology employed for its expression or the question of the sources wherefrom it ought to be derived. The fact of the matter is that in the earlier period, the sunnah of the Prophet was as yet not a formalized and technically defined concept. The result was that sunnah of the Prophet was not equivalent to well-attested traditions from the Prophet. Practices, traditions from Companions, doctrines of specialists, etc., all these were freely referred to and were looked upon as evidences of the sunnah of the Prophet. Moreover, during the second century, traditions from the Prophet had as yet neither been exhaustively compiled (on the scale done during the third century), nor had they been extensively scrutinized according to objective and formal criteria. The result was that an alleged tradition from the Prophet did not elicit as overwhelming a respect as it began to do from the third century onwards. It is reasons such as these which inclined the early jurists occasionally to disregard traditions from the Prophet in favour of other evidences of sunnah such as traditions from the Companions, established practice, etc.

The earlier works such as Âthâr of Abû Yûsuf Ya'qûb b. Ibrâhîm (d. 182)[36] and of Muḥammad b. al-Ḥasan al-Shaybânî (d. 189)[37] contain traditions from the Successors, the Companions, and the Prophet, alongside the doctrines of specialists belonging to a later period. Quite often one also comes across the rather intriguing phenomenon that a doctrine of some jurist is recorded without any mention either of the Companions or of the Prophet and is mentioned at the same period of time or subsequently as a tradition from some Companion and/or from the Prophet. Some Western scholars have interpreted this as an incontrovertible proof of the back-projection of doctrines to the ultimate authorities — the Companions and the Prophet. We have tried to examine the adequacy of this line of argument and have shown it to be based on premises which are too feeble to justify sweeping generalizations such as the above. This writer has thus tended to the view that the current views of the Western scholars, that traditions from the Prophet and Companions exercised no influence at all on the formulation of legal doctrines during their formative phase, that these traditions constitute not the cause but the effect of legal doctrines are not supported by convincing evidence.

The trend of development that is noticeable during the second century is from a non-formal concept of the

Sunnah of the Prophet to the formalization of that concept, culminating in the highly formal doctrine of Shâfi'î. Traces of this non-formal stage are evident from the doctrines of the Syrians and the Medinese who give considerable weight to the informal concept of 'practice'. The Kufian doctrines also exhibit traces of this less formal stage of legal theory. The Kufian jurists of the second century were, however, more advanced than their contemporaries elsewhere insofar as their legal theory was better developed and relatively more formal. Traditions from the Prophet and Companions were the main sources of their doctrines, 'practice' occupying only a secondary position. The same trend towards formalization is evident from the Kufian attitude to Ijmâ'.

In our view, Islamic law has had, from the very beginning, a predominantly religious orientation. This is evident from the fact that right from the earliest time till the period under study (and even later), discussion remained centred around questions the bulk of which could have hardly ever arisen but for the prescriptions contained in the Qur'ân. After the death of the Prophet, the ever-increasing problems of life forced the Muslims to define the rules of their conduct, and there is incontrovertible evidence that in this connection they took the teachings of the Prophet seriously. At this stage,

however, even though there did exist a body of laws, a full-fledged legal science, a self-conscious jurisprudence obviously did not exist. This is evident from the fact that the manner in which legal problems were handled by specialists during the first century was perceptibly different from the manner in which they were handled by later jurists (say Shaybânî). In the first place, during the earlier period only elementary conclusions were drawn from the authoritative sources, and with the passage of time, the scope of the legal questions under consideration expanded vastly. Secondly, the legal theory as well as methodology was neither well-defined nor elaborate, nor was the attitude to legal problems of a technically legal character. This is evident, inter alia, from the increasing supercession of material, by systematic and technical legal considerations. By the close of the first century, however, a class of specialists had appeared in Medina, Kufa, etc., and the first historical personality among the Kufian jurists whose legal doctrines have authentically come down to us, is that of Ibrâhîm (d. 95). Ibrâhîm typifies the emergence of a new type of legal specialists. He was a specialist in the strict use of the term insofar as he was interested in the entire body of laws, rather than in some particular laws. Since the doctrines of Ibrâhîm are available to us in some detail, we are already on firm historical

ground in respect of Kufa from the last quarter of the first century.[38]

During the second century when debates between representatives of various legal schools increased, legal theory was more clearly defined and technical legal thought, refined. All available evidence shows that the legal theory as well as the technical legal thought of the Kufians was more advanced than that of the Syrians and the Medinese, and was closer to that of Shâfi'î. Noteworthy in this connection is the fact that contrary to the popular notion in Muslim writings,[39] the Kufians took traditions from the Prophet and the Companions no less, perhaps even more, seriously than did their Medinese and Syrian contemporaries. Thus, the Kufians paved the way for the identification of Sunnah, by Shâfi'î, with well-attested traditions from the Prophet. Although the Kufian jurists of the second century had as yet not fully spelled out that doctrine, their skepticism with regard to 'practice' definitely contributed to that development.

On the whole, the Kufian school occupies an essentially mid-way position, both in respect of legal theory and technical legal thought, between the Medinese and Syrian schools on the one hand, and Shâfi'î on the other. The picture that emerges from this is that the body of norms designated as Islamic law was the outcome of a

conscious, religiously-motivated effort to define and elaborate ethical and legal norms for the conduct of Muslims. The mass of opinions thus gathered formed the basis of a legal science which began to take shape in Kufa, Medina, Mecca, Syria, etc., more or less at the same period of time - the last quarter of the first century when a group of full-fledged legal specialists began to emerge. Out of these several centres of juristic activity, Kufa proved to be more fertile and juristic activity there soon outpaced activity in the other centres. This is proved by the fact that in many important respects the Kufians paved the ground for and anticipated Shâfi'î. This does not detract from Shâfi'î's greatness as a tremendous systematiser, and as a very great lawyer. It only helps to place him in the proper historical setting - not as one who had cut himself adrift from the general course of development in Islamic jurisprudence, but as one who carried forward and developed certain emerging trends and moulded all the various elements of legal theory into a magnificently coherent and logically consistent system.

CHAPTER I

THE BEGINNING

The advent of Prophet Muhammad had a revolutionary impact on the life of the Arabs and set into motion a series of changes which radically altered their outlook as well as their mode of living. This statement applies as much to legal-judicial, as to other facets of life. Even within the life-time of the Prophet a good deal of change had taken place in the outlook and in the norms which guided the lives of the followers of the Prophet, as well as in the socio-political and judicial institutions of their society. As time passed, the process of change introduced by the Prophet gained momentum, leading to the development of a new structure of laws and a distinct set of judicial institutions.

I

The ethical-legal concepts and institutions of the pre-Islamic Arabs were largely conditioned by the tribal structure of their society and a conservative outlook which had sanctified the ancient customs.[1] The ethical-legal norms of their life rested, in the Arab view, on the customs and usages which had come

down to them from their remote past. Moreover, the political aspect of life in Northern Arabia before Islâm was noted, on the whole, for its lack of a common authority, the absence of a state in the proper sense of the term. It was the tribe which was the nucleus of the life of the Arabs and which mainly claimed their allegiance.[2] It played an important part in their life so much so that without affiliation to a tribe, either by birth or naturalization, an individual was not entitled even to the protection of his life and property. Owing to the non-existence of the state, disputes could not be referred to any determinate body of people, for there was no public institution entrusted with the administration of justice. Instead, disputes were generally referred to arbitrators (ḥakam)[3] who were chosen by the mutual consent of the disputing parties. In general it was soothsayers (kâhins) who were chosen for this job owing to the belief of the Arabs in their super-natural powers to divine secrets. These arbitrators were different from the judges proper (qâḍîs in the later Islamic terminology) in several respects. First, unlike the judges, they were not public functionaries, but were chosen by the disputing parties themselves. Secondly, they could refuse to arbitrate, if they so desired. Thirdly, there existed no public agency for the enforcement of their verdicts.[4]

The teaching of the Prophet brought about, first of all, a radical change in outlook. The very basis of authority underwent a fundamental change. The primary loyalty was now claimed by Allâh. In concrete terms, it was the charismatic authority of the Prophet — the vehicle of God's communication. In social terms, the mental horizon of the Prophet's followers extended beyond the tribe (without obliterating it altogether) to encompass a new community based on identity of faith. In the realm of ethico-legal outlook, the authority of the ways of the forefathers was challenged.[5] Instead, the set of principles revealed to, and preached by the Prophet were to guide man's life.[6] This did not necessarily lead to denouncing everything of the past with a spirit of vengeance. What it did lead to, however, was that 'ancient custom' was no longer considered the highest court of appeal. It might be regarded as valid only if it was not opposed to the teachings of the Prophet. For the essential change brought about by the Prophet lay in instituting a new authority — that of revelation. This authority was clearly postulated to be ultimate and supreme.[7] Thanks to this, the followers of the Prophet came to possess a new set of norms which subsequently served as the basis for developing a new structure of laws.

Let us turn to the Qur'ân — the most trustworthy mirror of the Prophet's outlook and teaching[8]— to form an idea as to the character of these norms and their bearing on the course of the development of Fiqh.

The essence of the Quranic message to man is to live righteously, that is, in matters of belief as well as conduct. The rationale of this message is that man is the creature and vicegerent of God, and hence, the only appropriate course for him is the one which recognizes this fact as centrally important. All this is vitally linked with the eschatological teachings of the Qur'ân. These teachings stress God's reckoning of man's conduct on the Day of Judgment, and subsequently, the enternal bliss or damnation in the after-life. The main purpose of human activity, therefore, should be to seek the pleasure of God, and to pass the reckoning on the Day of Judgment. Righteous conduct is the means whereby this goal can be achieved. How does one know, then, what constitutes righteous conduct? The Quranic answer is: through the teachings of the messengers sent by God from time to time, and finally through the last of the messengers, Muhammad.[9] What is thus laid down is a body of duties which one should perform. In this connection three things are significant.

(1) The 'body of duties' envisaged in the Qur'ân

covers, in a broad fashion, the whole life of man. The Qur'ân mentions questions of worship as well as those of distribution of booty; it deals with the question of ritual cleanliness and also lays down the prohibited degrees of marriage and the shares of inheritance; it urges people to discharge their duties towards the poor, the orphan, and the wronged and mentions, almost in the same breath, provisions of penal law. All these multifarious questions have been mentioned in such a manner that they do not give the least impression that any of these is too mundane to concern God and His Apostle. Thus, the notion that the religious ethic comprises all these matters has its basis in the Qur'ân itself.[10] Hence there is every reason to believe that the authority of the Prophet was considered, from the very beginning, not only to be religious and political, but also legal.[11] All available evidence corroborates that in Islâm law has never been detached from religion, neither in the earliest period, nor subsequently.

(2) Even though the Quranic legislation covers a good many problems which generally form part of the legal subject-matter, it does so in its own peculiar fashion. The Quranic legislation differs from the legal codes in form as well as in spirit and purpose. The basic motivation of the Quranic legislation is religious and moral

rather than 'legal'. The primary aim of the Quranic legal injunctions seems to be to lay down certain standards of conduct. Moreover, it is conscience which is postulated primarily, though not exclusively, as the sanction for compliance with these standards. This is not only because the appeal of the Qur'ân is directed primarily to the conscience of the individual, but also because the Quranic legislation covers a number of matters which cannot possibly be enforced by any external authority. The ultimate sanction for the compliance or infringement of the norms envisaged in the Qur'ân is the reward or punishment of God. Those who "wrongfully devour the wealth of the orphans", says the Qur'ân, "they do but swallow fire into their bellies and they shall be exposed to burning flame".[12] As Coulson has aptly remarked: "While political legislation considers social problems in terms of the effects of an individual's behaviour upon his neighbour or upon the community as a whole, a religious law looks beyond this to the effect that actions may have on the conscience or soul of the one who performs them".[13] This moral-religious spirit of the Quranic legislation has, inter alia, made its scope much wider than that of secular laws. This characteristic has also determined the form of the Quranic legislation. Its form is not typical, as we have hinted above, of a code of rights and obligations.

This is evident even from the fact that no particular chapter of the Qur'ân is devoted to legal subjects alone. On the contrary, the provisions of the Quranic legislation are scattered here and there, interspersed with verses of purely dogmatic and ethical import. This form further emphasises the predominantly religious and ethical orientation of the Quranic legislation. The Quranic norms, as well as the ideals underlying those norms, however, served as an important source and guiding principle for the process of legislation from the earliest period of Islâm. What we are suggesting is that the legal value of various actions was determined by the consideration whether they conformed to the explicitly expressed principles or the general purposes of Islâm or not. For instance, manumission of slaves was declared in the Qur'ân to be a meritorious act (XC. 13 and often). This has served as an important guiding principle so that even transactions which were not quite in order, from a technical legal point of view, were deemed valid because of this basic predisposition in favour of liberty.[14]

(3) To this must be added the observation that the predominantly religious and moral concern of the Prophet did not preclude his concern with legal problems. It rather provided him with a frame of reference for their evaluation. This is evident from the Quranic legislation

wherein we find an admixture of religious-ethical and legal elements, as we shall see later.

Modern Western scholarship has, on the whole, not been able to appreciate fully the role of the Prophet as a law-giver and as the head of the young Muslim community and state. Not realizing this fully, the Prophet is seen almost exclusively as a religious and moral reformer and the impression that the writings of these scholars create is that the Prophet's concern with legal problems was only peripheral.[15]

The Qur'ân is cited as an evidence in support of this view about the attitude of the Prophet. It is argued, for instance, that only a very tiny fraction of the Qur'ân contains legal injunctions[16]: out of the 6,236 verses of the Qur'ân approximately 500 verses,[17] i.e. less than one twelfth could be considered as having legal import.[18] Goitein has ably shown the weaknesses of this line of argument. Goitein's argument, to state it succinctly, is that in order to have a more accurate estimate of the proportion of the legal to the non-legal contents of the Qur'ân, two things ought to be taken account of: (1) that the legal verses are perceptibly longer than the non-legal verses; and (2) that the non-legal verses are repeated, while the legal verses, as a rule, are not. He concludes:

> ... In any case, if one condenses its [i.e. the Quranic] subject-matter to its mere content, under the five main headings of preaching, polemics, stories, allusions to the Prophet's life, and legislation, one will reach the conclusion that proportionately the Qur'ân does not contain less legal material than the Pentateuch, the Torah, which is known in the world literature as "The Law".[19]

On the contrary, a careful study of the Quranic legal injunctions shows that the broad purposes which the Prophet sought to serve (and which are scattered throughout the Qur'ân) brought a number of legal questions — seemingly of no direct relevance to religion — within the purview of religion.[20] There are positive evidences to show that the Prophet consciously sought to build a social structure that would be in harmony with, and conducive to, the realization of his ideals. It was for this reason that he tried to introduce numerous changes in the social and economic structure. Hence, it would be reasonable to say that he did not take up legal matters merely on an ad hoc basis, as several contemporary scholars tend to think, but in the context of the long range objectives which he cherished.[21] This will become clear from a question relating to the law of inheritance. The Qur'ân,[22] as we know, extended the right of inheritance to the female relatives as well. This quite obviously reflects, on the one hand, the desire for the uplift of women, the desire to ensure for them better

conditions of living. At the same time, if this legislative measure is viewed in the context of the main tasks which the Prophet sought to achieve, it seems to be part of the scheme — as Bergsträsser has pointed out — to dissolve the society based on common blood and create a new one based on common faith, with individual family rather than tribe as the basic unit.[23]

Moreover, a careful reading of the Constitution of Medina[24] throws light on the Prophet's capacity to devise a socio-political structure which might be conducive to the realization of the objectives that he had set before himself. This constitution, in the words of Goitein, "betrays a highly legalistic and even formalistic mind — a fact which is not surprising in a son of a flourishing city of merchants".[25]

More conclusive on this question, however, is the evidence of the Qur'ân itself (V. 42-51) which has been very competently analysed by Goitein and has served as the basis of his conclusion that legal questions were deemed by the Prophet, at least ever since the revelation of these verses, to be a part of his religious message. Even prior to the revelation of these verses (for which Goitein has suggested the period circa 5),[26] it is quite likely that owing to his capacity as a ruler the Prophet would have taken interest in legal matters —

sometimes, perhaps, on his own initiative under the pressure of his impulse for reform, sometimes under the pressure of queries on legal matters which might have been addressed to him. Be that as it may, there can be no doubt about the fact that at least from the time of the revelation of these verses onwards, he recognized the details of civil law as inseparable constituents of God's message. Goitein's conclusion, in his own words, is the following:

> ...From that time onward, hukm al-jâhilîyah, the mode of judgment of the time of Ignorance, had to be given up. The decision of legal questions was now a matter of one's religion, exactly as the beliefs about God or resurrection or Muḥammad's prophetic mission.[27]

Goitein later adds:

> ...at a certain stage of his prophetical and political career in Medina, [the Prophet] suddenly became aware of the fact that the scriptures revealed before him contained not only religious and moral injunctions, but also detailed laws concerning matters which were religiously irrelevant. The new knowledge, together with some difficulties, incurred in practice, created in him the belief — which was well in line with his original idea of religion as a constitution for a body-politic — that he, too, had to recognize the details of civil law as inseparable constituents of God's message. In other words, the idea of the Sharî'ah was not the result of post-Quranic developments, but was formulated by Muḥammad himself.[28]

The characteristic attitude of the Qur'ân and of the Prophet is evident from the fact that on several questions moral judgment is accompanied in the Qur'ân by statements which have an evidently legal import.

Even though these statements are generally not couched in technical phraseology, the idea that legal consequences follow certain relevant facts or acts, is found at several places in the Qur'ân, especially in respect of penal law as we shall see shortly.[29] If the Quranic legislation is viewed in the context of the social and political changes which had been brought about during the Prophet's life-time, its legal significance becomes even more evident.[30] The following examples will illustrate what we have said above.

The Qur'ân condemns morally unjustifiable homicide as tantamount to the murder of all human beings (V. 32). It also admonishes people against homicide in these words: "Do not murder except by virtue of right the soul that Allâh has made sacred" (VI. 151). Both these verses can be considered to be of a purely moral nature. However, the following verse on the same subject has a clear legal bearing: "We prescribed unto them: life for a life" (V.45). In the same manner, illegitimate sex-indulgence has been severely denounced (XVII. 32), and has been dubbed as unbecoming of a believer (XXVI. 68). All this is moral admonition. Side by side with that, however, is the injunction that man and woman who commit fornication should be punished by flogging with hundred stripes (XXIV. 2). The same may be said with regard

to ribâ (usury). Ribâ, as distinct from transactions of sale which have been declared by the Qur'ân to be permissible, has been declared to be prohibited by the Qur'ân (II. 275). The Qur'ân also declares: "Allâh blights ribâ and makes charity fruitful" (II. 276), which is a purely moral statement. Then there is the admonition to "fear God and give up whatever remained of ribâ if you are believers" (II. 278). However, if people insisted on ribâ inspite of all this, warning was issued to them that they should be prepared for "warfare from Allâh and His Messenger", (II. 279), which has an obvious legal import.[31]

The tendency to under-estimate the legal or quasi-legal character of Quranic legislation (and, therefore, to misunderstand the Prophet's attitude) stems partly from a lack of vivid appreciation of the changed socio-political setting in which the Quranic legislation was expounded. A good many of the Quranic provisions are apparently mere statements as to what are the proper standards of conduct. But the fact that a community had come into being which was committed to apply the teachings of the Prophet, and the fact that a state, even though its administrative apparatus was primitive — had been established and its coercive power could be used to enforce those teachings, confers on

these provisions an altogether different significance. It is also pertinent to note that during the last decade of the Prophet's life, the period during which the bulk of the legal verses was revealed — the pre-Islamic institution of tahkîm was replaced by a public-administered system of justice.[32]

To sum up, the changes introduced during the life of the Prophet in the outlook and in the ethico-legal norms were the following:

(1) A new authority was created, the authority of revelation.

(2) A new set of norms, covering the whole range of human life, was expounded. These norms indicate the wide area of the Prophet's interest and concern, viz. from matters of ritual cleanliness to questions relating to marriage, divorce, inheritance, economic transactions, penal laws, etc. Some of these norms were expressed in legal or quasi-legal form. The rest served as the normative reservior wherefrom legal rules could be drawn, providing the general frame of reference for legislation.

(3) The legal aspect of these norms, although generally overshadowed by their moral-religious aspect, yet it is there. The true picture of the Prophet is, therefore, not that of a mere moral and religious

reformer, who had only a nominal interest in legal matters, but of a reformer who sought to create the proper institutional framework for the operation of his reforms and, therefore, also took a positive interest in legal matters.

II

We have outlined above the influence of the Prophet's teaching on the development of the ethico-legal outlook of the first generations of Muslims and have indicated that it provided a reservior of norms wherefrom laws could be derived. The possession of a common body of norms also contributed to the establishment of a new system of justice insofar as it enabled settlement of disputes in the light of a common body of norms. Indeed, such a system of justice had already come into existence during the last decade of the Prophet's life, for in Medina the Prophet did not remain merely the spiritual-religious guide of his followers, but also became the head of the body-politic which was composed of his followers and of the tribes in league with him. Administration of justice became, thereafter, a public concern. The importance of the arbitrator of the pre-Islamic type who was chosen freely by the disputing parties was, therefore, gradually reduced. His seat and wand came to be occupied by a state-functionary — the qâdî.[33]

This development took place much earlier than some of the modern scholars tend to think.[34] It is not during the late Umayyad period but before the Prophet himself had breathed his last that the office of the judge, in its rudimentary form, had come into being and if it did not altogether supplant the pre-Islamic institution of arbitration (tahkîm), it began to operate along with it, and gradually divested the latter of its erstwhile effectiveness. The Quranic stress on "al-hukm bi mâ anzal Allâh",[35] implies the recognition of the norms propounded by the Qur'ân, a factor which obviously facilitated the development of the Islamic judicial institution. Moreover, the fact that the pre-Islamic arbitral justice had been replaced by a public-administered system of justice is conclusively proved by the following Quranic verse:

> ...And eat up not your property among yourselves in vanity, nor seek by it to gain the hearing of the hukkâm that ye may knowingly devour a portion of the property of others wrongfully.[36]

It is quite obvious that had there not been state-functionaries, instead of arbitrators of the pre-Islamic type, to administer justice at the time of the revelation of this verse, the whole admonition would have been meaningless. This verse clearly pre-supposes the existence of an institutional framework in which the pre-Islamic system of justice had been modified in several ways. First,

in the changed situation a disputing party, even if it was in the wrong, could force the other party to refer the matter to the hukkâm.[37] Secondly, the verdict of the hukkâm was binding on both the parties so much so that on the basis of that verdict one could "devour a portion of the property of others" even wrongfully, if he had been able to obtain a judicial verdict in his favour.

Tyan, who has produced the most impressive work on the history of the judicial organisation in Muslim countries, has arrived at a conclusion on this question which is altogether different from ours.[38]

Tyan starts from the premise that the pre-Islamic Arabs knew only the system of "justice privée". There were no publicly appointed judges to administer justice. Disputes were referred to the hakam who was an arbitrator, rather than a judge.[39] What were the changes that took place as a result of the Prophet's teaching or his activity? Tyan makes the following points on that question:

(1) When one glances through the work of Muhammad, one is easily convinced that he did not intend to institute a new juridical system, even as he did not introduce a new system of legislation.[40]

(2) In the Qur'ân, references to questions of justice

are designated by the pre-Islamic term tahkîm which expresses the notion of arbitral justice (IV. 65). As against this, the term qadâ', which was employed in order to express the Muslim judicial institution has been employed in the Qur'ân in an altogether different sense: speaking of God, the Qur'ân refers to Him as the Lord of the day of judgment (XLV. 17; X. 93), or as the judge in respect of controversial doctrines (XXVII. 78; XXXIX. 69; XL. 20), or uses this term with reference to the ordaining of creation by God (XL. 68), or with reference to the Prophets of nations who have been sent "in order to guide their destinies" (X. 47). [41]

(3) The Qur'ân (V. 42) shows that the Prophet could refuse to arbitrate even if he was approached by the litigants. The same was the position of pre-Islamic hakam.[42] The verses (V. 58 and X. 49) are also adduced by Tyan to reinforce the impression of the above-mentioned verse, namely, that the Prophet's judicial activity was of an arbitral nature.

(4) As for the traditions regarding the appointment of judges by the Prophet (ibid., pp. 69 ff), i.e. 'Alî (d. 40), Mu'âdh (d. 18), 'Umar (d. 23) and Abû Mûsá al-Ash'arî (d. 52), [and thereby imply the existence of qadâ'], two arguments have been adduced to disprove their authenticity. One of them is the à priori argument based

on the presupposition that the Prophet could not have appointed any judges because he had no idea of instituting any judicial organisation. The second consists of showing contradictions in those traditions which state that he did appoint certain persons as judges implying thereby the apocryphal nature of all those traditions. To state briefly, the following is what Tyan says in that regard:

(i) 'Alî has been mentioned in one tradition as having been sent as a judge. According to another tradition, he was sent to Yemen for the collections of revenues. Acording to still another tradition, he was sent to Najran for the collection of alms.[43]

(ii) Mu'âdh, according to some sources, was sent to Yemen as a judge; according to others, to teach the Qur'ân; according to others, in connection with a military expedition; according to still another tradition, he was sent as the governor of Yemen. There is also disagreement as to the exact place where Mu'âdh was sent: to Mecca, according to some, and to Yemen according to other traditions.[44]

(5) The traditions which show that judges were appointed by the Pious Caliphs (Râshidûn) are also not authentic. This too is proved by the contradictions in the traditions which mention their having made appointment of judges.

The evidences and arguments in this regard are the following:

(i) For a long time the pre-Islamic judicial system continued to function. This is evidenced by the choice of the famous poet Akhṭal as arbitrator in a dispute between the Muslim Bakrites and Christian Taghlibites. In the same manner, Aghânî mentions the decision of poetic dispute by means of arbitration.[45] Moreover, the famous poet of the Umayyad times, Jarîr, extolled the Quraysh for being good ḥakams. Ibn Qutaybah also mentions that ʿAmr b. al-ʿĀṣ expressed his views on the difficulties of the job of the ḥakam [implying, thereby, the continuance of the institution of arbitration].[46]

(ii) The case of Shurayḥ also proves the point. The traditions regarding Shurayḥ disagree as to who appointed him: whether ʿUmar or Ziyâd. Moreover, there is no agreement as to whether he was appointed as the judge of Kufa or of Basra. The claim that he remained judge for sixty-five years too is incredible. He died at the latest in 80 while Kufa was founded between 17 and 19. Traditions also show Shaʿbî (d. 110) as having served as judge of Kufa under ʿAbd al-Malik between the

years 66 and 75 and that he was replaced by some other qâḍî rather than by Shurayḥ.

(iii) Abû Mûsá al-Ash'arî (d. 52) is reported to have been appointed by 'Umar as the judge of Basra and to him is addressed his famous epistle containing instructions regarding judicial procedure. Now, the historical fact is altogether different. According to certain documents, one can affirm that Ash'arî was not at all the judicial personage which the tradition has represented him to be.[47] Ash'arî distinguished himself as a military general and was appointed by 'Umar as the governor of Basra, and was transferred subsequently to Kufa, etc.[48]

As for the famous Epistle of 'Umar, Tyan draws on the arguments of Margoliouth: that its first reporters were Jâḥiẓ (d. 255), Ibn Qutaybah (d. 276) and Ibn 'Abd Rabbih (d. 327), none of whom belongs to a period earlier than the latter part of the third century; that it had not been mentioned in Muwaṭṭá' of Mâlik (d. 179), in the Musnad of Ibn Ḥanbal (d. 241), in the works of Shâfi'î (d. 204), etc.[49] To evaluate these arguments would require a detailed discussion which would take us somewhat away from our main theme. Nevertheless, since the determination of the time at which Muslim judicial institutions

originated, and of the extent to which the Prophet made a break with the pre-Islamic framework of legal-judicial institutions have a bearing on the development of Islamic legal doctrines, we shall briefly scrutinize these arguments.

So far as Tyan's view of the judicial life of pre-Islamic Arabia is concerned, it seems to be accurate: that instead of judges (qâḍîs) there were arbitrators (ḥakam). This was, inter alia, owing to the absence of a central political authority. Moreover, even though certain parts of Arabia were not altogether primitive in respect of their laws, there was no one person or a body of persons whose word had the force of law. This situation changed with the establishment of the city-state of Medina with the Prophet as its head. The charismatic nature of the personality of the Prophet ensured that his teachings would have the force of law and his conduct would be regarded as exemplary, and therefore, normative.[50] Thus, the main impediments to the emergence of a full-fledged state-directed judicial system were removed. What presumably further facilitated this development was that certain crimes such as the violation of the sanctity of life and property, illegitimate sex-indulgence, etc., were declared punishable offences and their punishments were specifically laid down by the Qur'ân. That the Prophet would have taken

it upon himself as a God-imposed duty to punish these offenders is obvious. This would naturally have been instrumental in developing a machinery for the enforcement of these punishments. It is in this context that the Quranic verse (II. 88) embodying the admonition against misappropriating the property of others by approaching the hukkâm, should be read.[51] As against all this, the à priori conclusion of Tyan that the Prophet "did not intend to institute a new juridical system"[52] does not carry much weight.

The same can be said in regard to his argument based on a semantic analysis of the use of the terms qadâ' and hukm[53] and their derivatives. The fact that the judicial activity continued to be referred to by the ancient term tahkîm, or that the person who administered justice continued to be called hakam, does not prove Tyan's contention. For, in times when the institutions of a society are passing through a phase of rapid transformation, semantic lags are likely to occur. The mere fact that the derivatives of hukm rather than qadâ' remained in use for some time does not conclusively establish that the pre-Islamic judicial practice had not been modified. What seems to have happened was that the ancient term and its derivatives continued to be used with regard to the activity relating to the settlement of disputes, although the nature

of this activity had changed — perhaps imperceptibly, but to a very considerable degree nevertheless. Gradually it was realized that the older term had become anachronistic insofar as it did not accurately describe the phenomenon to which it referred. It was this which rendered that term obsolete and led to the employment of a new term. Moreover, the Quranic use of the term qadâ' with reference, inter - alia, to the judgment made by the Prophet after he had been made the hakam (IV. 65) — a judgment to which the Muslims were required to submit cheerfully, (loc. cit.) is also significant. It not only evidences the introduction of a conceptual innovation, but also of a semantic one. For, it was perhaps this use of the term qadâ' with reference to judicial activity which gave that term its classical Islamic connotation.

Tyan has also drawn an incorrect inference from Akhṭal's arbitration in an inter-tribal dispute, or the submission of poetic disputes to arbitration, etc.[54] For, arbitration does not exclude the existence of a public-administered system of justice. It seems quite likely that side by side with qadâ', taḥkîm also continued to function at the period of time in question.[55] Moreover, it does not require much historical imagination to realize that whenever a new institution is introduced which ultimately supplants the pre-existing one,[56] the process works itself out over

a period of time rather than overnight. Even on this account the existence of taḥkîm in the early period of Islamic history does not prove that qadâ' had not come into being.

Furthermore, the apparent discrepancy in traditions regarding the appointment of 'Alî and Mu'âdh, etc. by the Prophet is again not a weighty argument. Tyan refers to these traditions and points out that one tradition represents 'Alî as having been appointed a judge and another mentions him as having been charged with the collection of revenues. In the same manner, one tradition mentions Mu'âdh as having been appointed a judge, and the other as having been entrusted with the teaching of the Qur'ân. From the apparent discrepancy in these traditions he infers that all of them are apocryphal. Such an inference presupposes a clear demarcation of functions, which hardly fits with the primitive administrative structure of the state during the life of the Prophet, and even the early Caliphs.[57]

Discrepancy in the traditions in regard to the actual places whereto these persons were sent by the Prophet: in respect of Mu'âdh to Yemen and Mecca, in respect of 'Alî, to Yemen and Najran, appears to Tyan as an evidence of the spuriousness of these traditions.[58] Such an inference is hardly convincing. For is it not

conceivable that a person was deputed once to a certain place, and then to another? It is understandable, however, that a skeptical view of these traditions would lead to the conclusion that the traditions in regard to this very early period are not accurate and have to be examined with extraordinary care. What is difficult to appreciate is the conclusion on that ground that at this period of time qadâ' itself did not altogether exist.

The appointment by the Pious Caliphs of judges such as Shurayḥ and Abû Mûsá al-Ash'arî has also been denied by Tyan. In regard to both, the line of argument is not substantially different from the one just mentioned. The traditions which claim that Shurayḥ remained the judge of Kufa for 65 years indeed appear to be exaggerated.[59] Nevertheless, the evidence that Shurayḥ remained the judge of Kufa for a long long time is too overwhelming to be reasonably doubted.

In regard to Ash'arî, part of Tyan's argument presupposes not only a clear functional demarcation in governmental administration, but also the established convention that a person would stick all his life to the same career.[60] This underlies his denial of the view that Ash'arî was a judge on the ground of his governorship of Basra and Kufa.[61] As we have argued above, this hardly fits with the actual picture of the primitive administration in early Islâm.

In such circumstances it is very difficult to imagine that if a person had once been made a judge, he would not be appointed a governor at any later period of his life merely because of his once having been appointed a judge, or that a governor would never be asked to look after the administration of justice along with discharging his duties as a governor.[62]

The famous Epistle of 'Umar addressed to Ash'arî, has also been rejected by Tyan as apocryphal[63] and this fact has been adduced by him in order to reinforce the view that Ash'arî had not been appointed a judge at all and that the office of the judge did not exist at that time. The earliest reference to this epistle that this writer has come across is in K. al-Kharâj of Abû Yûsuf, wherein he mentions merely to a sentence of the epistle, viz., the one in which 'Umar admonishes Ash'arî to treat the disputing parties equally.[64] The next author who mentions these instructions of 'Umar, contrary to the view of Margoliouth and Tyan, is Shaybânî.[65] Apart from the fact, however, that the arguments adduced to prove the apocryphal character of the epistle are not overwhelmingly persuasive, they do not prove the contention that Ash'arî had not been appointed a judge, not to speak of establishing the non-existence of the institution of qadâ'. On the contrary, the mention of these instructions as early

as in the works of Ma'mar[66] and Abû Yûsuf shows at least that even in the early part of the second century, that is about three quarters of a century after his death, Ash'arî was already known as a judge, a fact which lends support to, even if it does not conclusively prove the contention that Ash'arî had served in the capacity of a judge.

Even this brief scrutiny would show that the conclusion at which Tyan has arrived is hardly rooted in solid historical facts. This negative argument of ours, combined with our positive evidences and arguments, makes a strong case in favour of the traditional Muslim view of the origin of the Muslim judicial institution — the view that the Prophet's activity marked a very perceptible break with the pre-Islamic judicial tradition, and that the foundation of the new judicial institution was laid during the Prophet's own life-time.

III

With this background, let us make a preliminary connaissance of the controversial question of the contribution of the Prophet to Islamic Fiqh. Was his contribution confined merely to expounding the ethical-legal norms which are embodied in the Qur'ân or did the Prophet, by his precept and practice, provide the basis for further

elaboration of these norms? Moreover, did the immediate followers of the Prophet attempt to understand the Quranic norms with reference to the precepts and practices of the Prophet through whom they had received them, or did they do so without any reference to them, regarding them as not possessed of any binding authority?

The classical Muslim image of Islamic legal doctrines has been that they were based, theoretically as well as historically, on the Qur'ân, the sunnah, ijmâ' and qiyâs.[67] The view of several contemporary Western scholars on the other hand, is quite different. They consider, for instance, that the sunnah of the Prophet itself is a relatively late concept.[68] In other words, the earliest generations of the Muslims did not consciously subscribe to the view that the precepts and practices of the Prophet had a binding authority as such.

The fact, on the contrary, is that the impact of the Prophet on his followers was as extraordinary as was his personality. This will become quite evident if we look at his personality in the context of the Arabia of the Prophet's time. His struggle had proved to be a turning-point in the history of the Arabs. It had not only revolutionized their life but had also made them, within a decade after the death of the Prophet, a world power. Would a relatively primitive people, who had

witnessed their inspired leader's astounding success, have conceived of him in the cold terms conceived by these present-day scholars? Would it have occurred to them that the Quranic utterances of the Prophet alone were binding on them? Would it have been possible for them to distinguish between the Quranic and non-Quranic utterances of the Prophet so sharply as to consider the former authoritative and the latter not so; in fact, was it even possible for them to look at the Qur'ân as divorced from the total activity of the Prophet? To assume that they could have done so merely shows poverty of historical imagination and ignorance of human psychology.[69]

The other major à priori argument against the authenticity of traditions from the Prophet is that their contents evince an attitude of mind which is different from that of the Prophet.[70] The doctrines embodied in the works of Hadîth, it is contended, often represent a stage of legal development which is inconceivable in regard to the period to which the Prophet belonged.

Were this argument to be accepted as sound it should also constitute a strong à priori argument against the revelation of the Qur'ân to, or through, the Prophet. The finesse of the metaphysical doctrines of the Qur'ân, its high degree of moral sensitivity, its inimitable literary style, all these can hardly be conceived with regard to an

unlettered son of Arabia that the Prophet was. As for the Prophet's attitude of mind, we have already seen that even though it was not that of a technical jurist, his interest in legal questions cannot be doubted.[71] That is obvious even from the Quranic verses, say, relating to inheritance, family law, etc. Indeed, the Quranic legislation, even though its quantity might not be very large, is nevertheless a good reflection of both the attitude and the acumen of the Prophet.

In the same way, it would not be correct to deny à priori those traditions from the Prophet which imply conditions and problems which could not have arisen in an altogether primitive society. For what seems to underlie this line of thinking is a false hypothesis — that the socio-economic conditions in which the Prophet had lived were altogether primitive. The Prophet's birth-place, Mecca, was one of the main centres of trade in Arabia which had trading relations with foreign lands such as South Arabia, Byzantine Syria and Egypt and Sassanian Iraq. In the early period of his life, the Prophet had himself been a merchant who had even travelled abroad for trade. The extensive use of commercial technical terms in the Qur'ân also shows awareness of problems relating to trade and commerce which obviously presupposes a sedentary and a somewhat economically advanced

society. The last decade of the life of the Prophet was spent in Medina and it is during this period of his life that the bulk of legal injunctions was revealed. Medina was an agricultural town and had a colony of Jews, and the people of this city were familiar with several forms of agricultural contracts. If we keep in mind this background of the varied experiences of the Prophet, his awareness of, and interest in, legal questions is not surprising. For, as in respect of other things, the customary laws operating in these two cities were, to say the least, "more highly developed than those of the Bedouins".[72]

Besides this, there is another significant fact in regard to the traditions attributed to the Prophet. An overwhelming majority of them is addressed to problems which either pre-suppose or seem to have been raised by the Quranic legislation.[73] This legislation usually consists of broad and general statements of principle. These statements are of such a nature that any attempt to put them into practice will necessarily require their elaboration and the determination of their precise legal significance. This is true even in respect of rituals — salâh, zakâh, sawm, hajj, etc. Rules in regard to them are mentioned in the Qur'ân in such general terms that unless they are elaborated, they cannot be put into

practice. There is reference, for instance, to ṣalâh, but without precise fixation of time, its form, and its length. The same is the case in regard to zakâh, the tariff of which has not been laid down in the Qur'ân. Questions as to the fixed time of ṣalâh, the number of rak'ahs, and rates of zakâh payments on different items were bound to arise even during the life of the Prophet. The same can be said, more or less, with regard to the legal matters, using the term in its narrow sense, such as family laws, laws of inheritance, laws of contract, etc. Questions pertaining to these were bound to be referred to the Prophet as long as he was alive because of the belief in his being the recipient of revelation from God and because of his being the head of the Muslim state. Moreover, people confronted with such questions would have often, though not necessarily always, gone around inquiring whether the Prophet had said or done anything that was relevant to the questions concerned. Hence the à priori judgments which exclude the possibility that the Prophet had expressed his views on legal matters or that he had done anything which might have been considered by his immediate followers to be of legal relevance, seems to be an unreasonable hypothesis. On the contrary, it seems natural that these problems should have been referred to the Prophet and that he would have been inclined to

express his views on them in his dual capacity as a prophet and a statesman. As for the actual practices of the Prophet, what could have been more natural for people than, say, to find out how the Prophet had prayed and to derive guidance in their own praying therefrom? The same applies to his conduct with people, say, in warfare, etc.

What this establishes is the probability that the Prophet did express his views, broadly speaking, on the subjects discussed in the Hadîth collections. It might be argued, however, that even if this view is regarded as correct and it is conceded that the Prophet's utterances and actions did have a bearing on fiqhî questions, there is little possibility that the reports about the precepts and practices of the Prophet which have reached us would be accurate. What is more likely is that true reports of them would have been mingled with, and thus overlaid by, spurious traditions, as a result of the need for 'back-projection' of doctrines. The fact that collection of traditions took place, in the main, during the second and the third centuries, seems to give this line of argument an appearance of plausibility.[74]

Contrary, however, to the conclusions of some contemporary scholars, historical evidence indicates that the interest in the collection of data regarding the Prophet began at a very early date.[75] The collection of

maghâzî traditions, according to Horovitz, began in the generation of Tâbi'ûn.[76] The reason is quite plain. The impact of the Prophet on his followers was so great that they talked about him a great deal and were inclined to take steps for the preservation of the memory of his achievements, especially of his military expeditions. This seems to have been in continuation of the ayyâm tradition of pre-Islamic Arabia.[77]

But that was not all. There are evidences which show that collection and transmission of traditions dealing with dogmatic and legal questions also began quite early. One of the earliest extant documents in this connection is the Ṣaḥîfah of Hammâm b. Munabbih (d. 101), the pupil of the noted Companion, Abû Hurayrah. This Ṣaḥîfah saw the light of the day a few years ago owing to the efforts of Muhammad Hamidullah (sic.). There can be little doubt as to the authenticity of this Ṣaḥîfah, as Hamidullah has shown.[78] This, along with other references in the extant works of the early period, makes it quite evident that traditions had begun to be collected at a fairly early period, and had even begun to be preserved in the form of written works, even though it is understandable that the circulation of such works was considerably limited.[79]

In fact there are evidences which show that even isnâd, the system of citing the chain of the transmitters

of a tradition, was already in use (though not, of course, consistently) during the sixties or seventies of the first century which points to a very early origin of the transmission of traditions. Joseph Horovitz has arrived at more or less the same conclusion.[80] A more recently discovered testimony is provided by the letter written by the Umayyad Caliph 'Abd al-Malik b. Marwân (65-86). In his letter to Ḥasan al-Baṣrî (d. 110), 'Abd al-Malik asked him in regard to his doctrine of Qadar whether it was supported by "any riwâyah from any of the Companions of the Apostle of Allâh or is it your own ra'y or is it something the verification of which is known in the Qur'ân".[81] It is evident that this statement pre-supposes the custom of asking people to authenticate the traditions which they cited by mentioning the transmitters of those traditions.[82]

The view that traditions as a whole are apocryphal, has also been argued by means of a comparison of the contents of the early works of Fiqh-Âthâr. Evidences are cited showing that a number of doctrines were mentioned in the beginning as the doctrines of some fuqahâ' of a comparatively late period, and were ascribed subsequently to Successors, then to Companions, and ultimately to the Prophet. The attribution of doctrines to these different authorities shows that the use of the Prophet's name was

merely a part of the endeavour to back-project the doctrines of one's school in quest for the support of increasingly higher authorities from the past. Moreover, there is the phenomenon of the appearance of new traditions with the passage of time. A certain tradition, for instance, is not found at all in the earlier works, but appears in some later work as a tradition from the Prophet (or from some Companion). The only reasonable inference that can be drawn from this is that the tradition concerned was forged during the intervening period.[83]

Now, so far as historical method goes, it would be accepted by all that if the later works contain much more factual information about a past event than the earlier works, the statements found in the later works should be looked at with initial distrust. In regard to Sîrah literature, for instance, we notice that the later works embody a good many more traditions regarding the miracles of the Prophet than the earlier works. The only sensible deduction would be to look at these anecdotes with an amount of distrust and scrutinize them carefully. Does this also apply to the period of time and the subject under discussion?

In our view there are several factors which raise serious doubts as to the validity of applying this method, specially applying it mechanically. These factors are

the following:

(1) The Arabs were, in general, not a literate people and writing was introduced among them not very long before the advent of the Prophet.[84] In pre-Islamic Mecca, there were said to be no more than fifteen or twenty persons who knew how to read and write;[85] in Medina, the number of persons who could write was said to be less than a dozen.[86] Islâm undoubtedly contributed to the spread of literacy. Nevertheless, it would be an unjustified assumption in respect of a society wherein the tradition of reading and writing had just begun to take roots that the work of an author on a subject would include the sum-total of the knowledge available on that subject at that period of time.[87] No matter how sharp the memory of the Arabs might have been, there could have been no guarantee that a person who had come to know a certain tradition would not forget or confuse its content, or its transmitting authorities, or that he would necessarily include it in his work.

(2) Then, the attribution of a tradition simultaneously to some Successor, to a Companion, and to the Prophet does not necessarily prove its spuriousness. It is understandable, for example, that if a layman of Kufa was faced with a legal problem, he would have gone to some well-known scholar, let us say, Ibrâhîm Nakha'î (d. circa 95). Now,

quite possibly the question he would have put to Ibrâhîm would not necessarily have been whether anything on that subject had been reported from the Prophet, or whether there was any Quranic verse in regard to the problem concerned. Many a layman would have been interested in inquiring what the right doctrine on that question was, not the source of it. It is quite likely that his question would have been put in some such form: "I married my bondswoman and then I set her free. Some people have told me that she is no longer my wife. Is it true?" To this kind of question, Ibrâhîm's reply would not have necessarily included a mention of the arguments — some Quranic verse or tradition from the Prophet or from some Companion, etc. It is likely that quite often he would have stated his own doctrine without mentioning the source of it. His reply, therefore, would either have been that the woman stood divorced or that by virtue of her having obtained freedom, she had acquired the right to decide whether to continue as his wife or not. Anyone who would have reported this opinion would have reported it as the doctrine of Ibrâhîm which does not necessarily prove that Ibrahîm had no authoritative tradition to support his doctrine. The same applies to the judgments issued by the judges in connection with the dispensation of justice.

(3) If the early works are read carefully and compared with one another, there are numerous examples which will show that a faqîh-traditionist knew a certain tradition from a Companions or the Prophet, but did not mention it; or that he mentioned it at one place but not at the other place. For instance, in his Âthâr Shaybânî does not mention several of the traditions which had found a place in the Âthâr of his predecessor, Abû Yûsuf. In the same way, the Muwaṭṭa' of Shaybânî does not mention quite a few traditions found in the Muwaṭṭa' of Mâlik,[88] even though Mâlik was a predecessor of Shaybânî. Does this fact warrant the conclusion that the traditions found in Abû Yûsuf's works or in the Muwaṭṭa' of Mâlik, but not found in the works of Shaybânî, were not known to the latter, or that they did not exist at all upto the time of Shaybânî? At times even those marfû' traditions which support, for instance, the Iraqian doctrine are not found in Muw. Sh. though they are found in Muw. Mâlik.[89] Would it be valid to infer in such cases that the traditions in question did not exist upto the time of Shaybânî? What we are driving at is that there are several considerations which show that a mechanical application of the e silentio argument, such as in the Origins of Schacht, is unjustified.[90]

(4) The difficulties of communication in an age such

as the first and second century of hijrah between the various centres of Islamic culture — Medina, Kufa, Syria and Egypt should be kept fully in view before making any categorical judgments on the issue. The above-mentioned method could perhaps be considered valid to a limited extent in respect of matters which are faced practically by the mass of Muslims and hence, knowledge about them can be assumed to be widely diffused. As for those matters which do not concern every Muslim, but only a specialized group of people, e.g. the validity of various forms of business transactions, questions regarding the distribution of inheritance, etc., these are directly the concern of those who are businessmen, or of the specialists in Fiqh, or of judges.[91] In respect of matters of the latter category it would be bold indeed on one's part to infer from the lack of mention of a certain tradition, say, in the extant works of Abû Yûsuf and its existence in the works of Shaybânî, that no tradition on that question had ever existed upto the time of Abû Yûsuf. It would be still bolder to make a positive statement that the tradition concerned had been put into circulation in the intervening period between the composition of the works of Abû Yûsuf and those of Shaybânî.[92]

What we are driving at is not that traditions were not forged, or that legal doctrines were not back-projected.

For these are well-known facts. What we are suggesting is that the operation of these processes does not exclude the possibility that quite a number of traditions do genuinely go back to the Prophet. Hence, the conclusion of Schacht, for instance, that not even a single legal tradition from the Prophet is genuine,[93] appears to be grossly exaggerated. The position of this writer on the issue seems to approximate the following statement of Coulson:

> ...the Qur'ân itself posed problems which must have been of immediate concern to the Muslim community and with which the Prophet himself, in his role of supreme political and legal authority in Medina, must have been forced to deal. When, therefore, the thesis of Schacht is systematically developed to the extent of holding that "the evidence of legal traditions carries us back to about the year A.H. 100 [sc.A.D. 719] only," and when the authenticity of practically every alleged ruling of the Prophet is denied, a void is assumed, or rather created in the picture of the development of law in early Muslim society. From a practical standpoint and taking the attendant historical circumstances into account, the notion of such a vacuum is difficult to accept....it is suggested [i.e. by the author] that the substance of many Traditions, particularly those which deal with the obvious day-to-day problems arising from the Quranic laws, may well represent at least an approximation to a decision of the Prophet which had been preserved initially by general oral Tradition. If this practical premise is accepted then it is a reasonable principle of historical enquiry that an alleged ruling of the Prophet should be tentatively accepted as such unless some reason can be adduced as to why it should be regarded as fictitious.[94]

CHAPTER II

THE EARLY PHASE: FIQH BEFORE ABÛ ḤANÎFAH

One of the main burdens of the Prophet's teaching, as we have noted, was to establish the authority of revelation.[1] Evidences regarding the time immediately after the demise of the Prophet show that this task had been successfully accomplished during his life-time. These evidences corroborate, on historical grounds, our <u>à priori</u> inference that the authority of the teachings of the Prophet had become well-established.[2] In fact, it can be proved that not only was the authority of the Prophet acknowledged in principle, but even his specific rulings were adduced with a view to supporting legal doctrines in the earliest period of Islâm.[3]

The attitude adopted in respect of the problems which arose on the very morrow of the Prophet's demise support this contention. One of these was the question regarding the inheritance of the estate of the Prophet. The ruling which prevailed on that question was that of Abû Bakr. He based his ruling on a statement of the Prophet the substance of which is that the material estates of the prophets should be treated as charity, rather than be distributed among their legal heirs.[4]

A skeptic might be inclined to doubt the veracity of Abû Bakr's attribution of this ruling to the Prophet. There seems no reason to doubt, however, the fact that Abû Bakr did give this ruling and that he based it on a saying of the Prophet.[5] In the first place, the ruling of Abû Bakr was at variance with the customary law of the pre-Islamic Arabs as well as the Quranic injunctions regarding inheritance. Under such circumstances, it is hardly conceivable that it could have prevailed on his own authority alone. Reference to a higher authority was, therefore, a circumstantial necessity. Secondly, even though the Shî'î authorities in general express unhappiness at Abû Bakr's ruling, they do not deny the fact that Abû Bakr gave this ruling and that he did so on the basis of an alleged statement of the Prophet. In fact, the criticism of Abû Bakr by the Shî'ah is one of those testimonies which reinforce other evidences which authenticate the event.[6] This is besides the fact that traditionists as well as historians consider, almost unanimously, the tradition concerned to be authentic.[7]

The same may be said about a few other questions which arose around the same period of time. Particularly mentionable among them are Abû Bakr's decision to wage war against those who had refused to pay zakâh and to despatch the army of Usâmah despite manacing circumstances

around Medina. He decided in favour of this policy on the ground that nothing else was proper to do in view of the well-known intention of the Prophet to despatch the army.[8]

I

It is evident, therefore, that even in this early period "the teachings of the Prophet", by which we mean the Quranic as well as extra-Quranic teachings of the Prophet, including the precedents of his life,[9] were deemed to be normative. Beyond this, however, the picture is not very clear. There is very little by way of written works composed during that period which is extant. Moreover, information concerning the doctrines of the individual authorities of that period is far too meagre and fragmentary to give an adequate picture of their characteristic attitudes. Nevertheless, thanks to the extant works of the second century, we can at least perceive, in a broad manner, the main stages of development through which Islamic law passed during the first century and how its doctrines were elaborated.

The evolution of positive legal doctrines as well as legal theory in Islâm is, in part, the result of the endeavour — both theoretical and practical — to apply "the teachings of the Prophet". The desire to live

according to the will of Allâh necessitated acquiring knowledge as to what the "will of Allâh" is. Anyone who has studied the early history of Islâm cannot fail to be impressed by the religious fervour that Islâm had created — the fervour to know and fulfil the will of Allâh. It is this very fervour which is evident from the painstaking efforts for the "collection" of the Qur'ân and the presence of a considerable number of "reciters", at a very early period of Islâm.[10] Another manifestation of this fervour was the early interest in the biography of the Prophet,[11] and in the collection and transmission of traditions from him.[12] Indeed, it appèars that quite early a group of pious religious scholars had begun to appear. These people met in mosques and discussed religious questions, and their discussions covered theological questions such as that of Qadar,[13] as well as questions relating to the practical duties of a Muslim. It is the attempt to define and elaborate doctrines in regard to the latter from the religious point of view which gave rise to a body of legal doctrines which served as the basis of Islamic law.

There was another powerful factor which contributed to the development of Fiqh. This was the establishment of the judiciary during the last decade of the Prophet's life.[14] While the former motive stimulated the search for defining the norms of conduct, the latter motive

forced the consideration of more or less the same questions from a legal and juristic point of view.[15] In short, a combination of these two motives made the early Muslims face a large number of questions which had not been covered, at least explicitly, in the fragmentary pieces of information that the early Muslims possessed.[16] One of the concerns of the early Muslims was to establish the nexus of relevance between the questions which were constantly arising in the fast-developing Islamic society and the "teachings of the Prophet". The following examples will illustrate this:

Ritual Cleanliness

Menstruation according to the Qur'ân is a period of illness and ritual uncleanliness[17] and hence the Islamic doctrine that a woman may neither pray nor have sexual intercourse during her menstrual cycle. The same is the case with regard to the period of post-natal bleeding (nifâs). Aside from regular menstruation, Islamic law also takes note of irregular menstruation (istiḥâḍah) i.e. continuation of menstrual cycle for a period longer than normal. The doctrine with regard to istiḥâḍah is that if bleeding continues beyond a certain number of days, the woman does not remain unclean for purpose of the ritual prayer.[18]

Systematic reasoning (though without explicit reference to ḥayḍ and istiḥâḍah) led to the formulation of the doctrine that the period after the normal period of post-natal bleeding is not to be treated as a ritually unclean period and a woman may pray during this period, though she has to perform ablution for every prayer [owing to bleeding].[19]

In case the post-natal bleeding period (nifâs) of a woman is not regular, it was inferred that the normal nifâs period should be determined according to the nifâs period of the women of her tribe.[20]

Ritual Prayer

If one is greeted while one is praying, should one respond to the greeting or not? This problem seems to have been settled rather early.[21] It is pre-supposed in the question: "Should one respond to greeting during the sermon of the Friday prayer?" It is understandable that it should have taken some time to realize that the prayer and Friday sermon, both being rituals, had so much in common that the injunction in regard to the former should be regarded as applicable to the latter as well.[22] Both Ibrâhîm and Ibn Musayyib (d. 93) considered this question, and while the former found no harm in returning the greeting, the latter found it objectionable on the

ground that Friday sermon amounted (bi manzilah) to ritual prayer, an opinion which Abû Ḥanîfah and Shaybânî accepted.[23]

Marriage

The Qur'ân lays down the norm that a person may not remain in matrimonial bond with a woman and her sister at the same time.[24] This was the given in the light of which non-given situations had to be faced. The question which arose quite early, may be even as early as in the time of the Companions (understandably so owing to the existence of a large number of slave-girls), was whether one could exercise the right of sexual intercourse with two of his slave-girls who happened to be sisters? Since the parallel between the two cases was quite obvious, the prohibitory injunction with regard to the one was judged to be applicable to the other.[25]

This also gave rise to another question: what is the legal effect of violating the prohibition of cohabiting with two sisters? Does this automatically lead to the annulment of marriage?[26]

Further corollaries of the question were: What is the legal effect of kissing one's mother-in-law with sexual desire?[27] and of looking [with sexual desire] at the genital part of a woman's body [i.e. does it make marriage with that woman impermissible for his son?].[28]

Divorce

The procedure of divorce has been laid down in the Qur'ân at some length.[29] It was settled quite early that triple divorce — and the standard procedure for which was to pronounce one divorce after each menstrual cycle — led to irrevocable repudiation of marriage. From this arose the question: What is the legal effect of a triple divorce if it is pronounced in one session.[30]

A corollary of the doctrine on divorce was to consider the legal effect of some of the customary expressions for the repudiation of marriage instead of the categorical ṭalâq, such as the expression "thou art ḥarâm unto me", or "spend thy waiting period", etc.[31] What was the legal effect of a slave-girl's bearing a child for ~~his~~ her master? Is it permissible to sell or donate such a slave-girl (umm walad)?[32] Then, what is the status of her children?[33]

If one sells one's slave-wife, does this sale amounts to repudiation of marriage?[34]

Penal Law

The question of deliberate assassination of a slave by his master: does it fall under the general Quranic rule of qiṣâṣ?[35] In the beginning the answer was in the

affirmative, a doctrine which has come down from Ibrâhîm. Later the problem was seen in a different light. A systematic consideration showed that the slave was merely the property of the master. The master, therefore, could merely be penalized by beating, rather than be executed, the underlying reason of which presumably was the opinion that a person's destruction of his own property did not constitute homicide.[36]

Accusation of illegitimate sexual intercourse between a male and a female, provided it is unsupported by the requisite number of witnesses, is a penal offence for which the Qur'ân has laid down a specific penalty (Qur'ân XXIV. 4). If false imputation of zinâ makes a person liable to punishment, what is the legal consequence of false accusation of sodomy? In other words, does the latter offence also render a person liable to the punishment laid down for the former?[37]

Examples such as these are myriad. Our citations above are only for the purpose of giving a cross-section of the kinds of questions that were posed during the first century of Islâm. It is clear that these questions presupposed the general acceptance of certain norms. It was by facing questions such as the ones mentioned above in the light of those norms that positive doctrines were formulated and the elaboration of Islamic law took place.

Whatever evidences are available confirm the continuance of two characteristic features of the Muslim attitude to legal matters during this period. In a broad fashion, the scope of the "legal questions" which were discussed was circumscribed by the legal provisions of the Qur'ân. Secondly, all kinds of questions were looked at from the religious point of view insofar as they were judged in the light of the accepted religious norms.[38]

II

The examples we have cited above generally show an attempt to formulate norms relevant to the situations which had not been directly covered in the teachings of the Prophet. The next step, and indeed very close to this, was the rise of a new kind of questions, viz., the purely legal and judicial ones. We have seen that the Quranic norms — even the legal ones — have an ethico-religious form.[39] It is for this reason that the bulk of the Quranic verses seems to be directed to creating in man the attitude of willing compliance with the directives of God and the Prophet. But a more mundane question that was bound to arise was: What would be the consequence if someone violated these directives? In the Qur'ân, this question has been squarely faced at a few places and clear, explicit rules have been laid down.[40] It is true,

nevertheless, that in a majority of cases purely legal judgments about human acts are lacking. The actual administration of justice, however, necessitated the confrontation of these problems from a legal point of view. The following examples will illustrate how the early Muslim mind was wrestling with the problem of deriving rules from a body of primarily ethico-religious norms.

The Qur'ân lays down that if a person divorces his wife, he should part with her after having given her some kind of gift (mut'ah). This gift has been declared by the Qur'ân to be a right of the divorced woman against "the pious."[41] What is obvious from this Quranic verse is the duty imposed by God on a person in case he divorces his wife. But what should be the decision of a judge if to him is referred the case of a person who had deviated from that norm? One of the rulings was that since the Quranic appeal was directed to the conscience of the individual, it was not judicially enforceable. Shurayḥ, for instance, is said to have remarked that it was incumbent upon a person if he is pious, but he did not force the divorcing person to do so.[42] This was also the ruling of an early judge of Egypt.[43] On the other hand, the decision of another judge was that the offender be forced to pay some gift to the divorced wife and in fact he is reported to have decreed that a certain amount should be deducted from his

stipend.[44]

Then there was the problem as to whether the testimony of those who have been convicted of major offences such as those punished for imputing unchastity without the required number of witnesses, or for drinking or theft should be accepted by the judge if they had repented and had reformed their conduct. Do repentance and reform have any mundane legal significance, or are their effects totally other-worldly? In other words, is such a person's testimony acceptable in a court of law or not?[45]

III

The task was not an easy one. Besides the difficulties inherent in deriving legal precepts directly from ethico-religious norms, there were several others. One of these was that the character of the Quranic injunctions was such that often they lent themselves to several interpretations. This difficulty was accentuated by the fact that the several verses of Qur'ân seemed to contain mutually contradictory provisions. It was accentuated still further by the fact that it is not to the Qur'ân alone that fiqhî problems were referred.[46] A few examples would suffice to show the difficulties with which the early Muslims were wrestling:

The Qur'ân lays down a period of waiting for

divorced women, as well as for widows before they may conclude a fresh contract of marriage. The following Quranic verses are relevant in this connection:

(i) Women who are divorced shall wait, keeping themselves apart, three [monthly] courses (II. 228).

(ii) Such of you as die and leave behind them wives, they [the wives] shall wait, keeping themselves apart, four months and ten days (II. 234).

(iii) And for those with child, their period shall be till they bring forth their burden (LXV. 4).

Since the view that one verse could abrogate the other was held from the very beginning,[47] there was considerable disagreement regarding a pregnant woman's period of waiting based on the consideration as to which of the verses was applicable to the question under consideration, or which of these verses abrogated the others. In the light of the above consideration, decision had to be made whether this period comes to an end with the delivery of the child, even if it comes to an end before the appointed period of four months and ten days, or necessarily extends to that period (in case of widows) or the specified period of three menstrual cycles as prescribed in the case of divorced women.[48]

False imputation of <u>zinâ</u>, as we have noted, is

a punishable offence.[48a] One of the legal effects of conviction in this crime is to lose the right of testimony. The Quranic verse on this question is the following:

> ...And those who accuse honourable women but bring not four witnesses, scourge them [with] eighty stripes and never [afterwards] accept their testimony. They indeed are evil-doers. Save those who afterward repent and act aright, [For such] lo! Allah is Forgiving, Merciful.[49]

The ambiguity in this verse is whether repentance and making amends restore the right of testimony, or is their effect confined to the next world? This remained one of the disputed issues among the early jurists.[50]

The pre-Islamic Arabs knew several forms of marriage, one of which was mut'ah — marriage for a fixed period of time. In the earliest period of Islâm, it had not been prohibited and there are attributions of variant readings of the Qur'ân in favour of mut'ah to Ibn Mas'ûd, Ubayy, and Ibn 'Abbâs.[51] Mut'ah was, nevertheless, held as prohibited, a development which took place fairly early. Among other grounds there was the argument that it had been repealed by the Quranic verses on nikâḥ, 'iddah and mîrâth.[52]

A further source of difficulty was lack of agreement as to which of the traditions should be accepted and which should be rejected. During the first century, the science of tradition was at a very elementary stage of its

evolution. Traditions had as yet not been scrutinized according to the criteria of Hadîth-criticism, for these criteria were as yet not developed. We have seen that isnâd had begun to be employed sometime around the middle of the first century.[53] Being of recent origin, during the first century it was not employed very consistently.[54] The result of all this was that the generally accepted doctrine of one's school or those practices of the community which enjoyed general approval, occupied a relatively more important position than they did subsequently. Furthermore, even though the Qur'ân and the Sunnah of the Prophet were considered authoritative, the methodology according to which legal doctrines could be formulated from these sources had as yet not been elaborated. In formulating legal doctrines, therefore, the fundamental sources were used in a manner perceptibly different from the manner they were used in the subsequent period.[55] More than any elaborate methodology (which, in fact, was developed later) the early Muslims were guided by good common sense and ethical and practical considerations. Practice, formal traditions from the Prophet and the Companions, Consensus, etc., all these were referred to as arguments, but without the rigid discipline that followed the precise definition of legal theory and methodology during the second century.[56]

IV

The two main channels through which positive legal doctrines were formulated during the first century were futyâ[57] and qadâ'. Futyâ consisted of replies to queries from men who had a reputation for piety and religious knowledge. This was an informal institution and represented the response to a religious need of the Muslim society — the need for the definition and elaboration of its religious ethic.[58] These queries covered dogmatic, ritualistic, ethical, as well as purely legal questions. As for the judgments of the qâdîs, whose function was to settle disputes and enforce the law, they were generally confined to legal questions in the narrow sense of the term. It is the dicta of the pious scholars and judgments of the judges of the early period which constituted the first outlines of Islamic law.

The main interest of both these groups lay in considering specific legal questions, questions as they arose, rather than the totality of the questions which were to constitute the body of Islamic legal doctrines. In their judgments they were guided by ethical and practical considerations, particularly the consideration of substantive justice. Legal questions were generally treated in an ad hoc and piecemeal manner. Technical legal considerations

played a relatively insignificant role. These factors prevented the early Muslims from focussing attention on the structure of positive laws as a whole and from considering, in a systematic fashion, questions relating to legal theory. This is besides the fact that even a systematic view of the entire body of laws develops in a society only gradually, what to speak of constructing a science on that basis.

During the greater part of the first century, particularly during the first half of it, the science called Fiqh[59] scarcely existed. And tautologous though it might sound, one of the main reasons for this was the absence of the fuqahâ' in the technical sense of the term.

It was during the last quarter of the first century that we get the first traces of the development of the science of Fiqh — which manifested itself in the first attempts to discuss, although not yet quite systematically, questions relating to legal theory.[60]

As for the development of positive doctrines, it had continued apace even before the question of defining a precise legal theory had been seriously discussed to any appreciable extent. For these doctrines had developed during the course of answering questions which had arisen as a result of the endeavour to apply the "teachings of the Prophet". This process was not confined to any parti-

cular Islamic area. Although no work on Fiqh of that period has survived the vicissitudes of time, the extant works of the second century bear testimony to the kinds of legal questions which confronted the early Muslims during the first century. It is significant that in all the known centres of Islamic law — Hijaz, Iraq and Syria — more or less the same questions were brought under consideration — a fact which points to a common source of their origin: "the teachings of the Prophet". It is this which explains the fact that Islamic law has inherited a common body of doctrines which has served as its infra-structure from the earliest time.[61] Although even during the early period, the doctrines of these centres of Islamic Fiqh were different from one another, there always seems to have been a core of agreed norms out of which multifarious questions arose, and in the light of which further elaborations of these doctrines took place.[62]

We have seen above some of the difficulties which confronted the early Muslims in connection with the formulation of legal doctrines,[63] and have also noted in passing the absence of a well-defined methodology.[64] The evidence available to us about the earliest period corroborate these conclusions.

The doctrines of the early period are characterised with considerable irregularity, from a systematic point of

view, in addition to lack of certainty. These doctrines represent the first attempts to formulate legal norms in the light of the information available to the Muslims of the early period regarding "the teachings of the Prophet". The following examples will illustrate that even though it was remarkable that a great many legal questions were considered and the outline of Islamic law was laid down, yet quite a few doctrines were irregular according to the later standards. This is illustrated by the following examples:

> Regarding the punishment of adultery: lashing according to the Book of God and then stoning according to the sunnah of the Apostle of Allâh.[65]
>
> Regarding the punishment of zanâdiqah: they were put to death, then thrown into a ditch and then their corpses were burnt.[66]
>
> Regarding the expressions khalîyah, barîyah, harâm and battah in connection with divorce, the ruling was that they had the effect of triple divorce.[67]
>
> Regarding the waiting-period of a pregnant widow: the two prescribed terms of waiting, i.e., four months and ten days, and child-birth, whichever happens to be longer.[68]
>
> Regarding a man and woman who indulged in

illegitimate sexual intercourse and then married: they continue to live in the state of sin.[69]

Regarding the exchange of two dirhams against one: there is no objection against that.[70]

Regarding the person who marries and commits illegitimate intercourse before the consummation of his marriage: the couple should be separated,[71] the husband punished with lashing, and the woman should receive half of her sadâq.[72]

Regarding a Christian whose wife embraces Islâm: he has greater right over her as long as he does not take her out of dâr al-hijrah.[73]

If a person offers his wife the option either to choose herself or him [i.e., either to separate or to continue the matrimonial relationship], and she chooses her husband: this entails a single divorce.[74]

Even at a slightly later stage, i.e., during the second half of the first century, evidences regarding the rulings of judges present numerous irregularities, although they register some advance over the doctrines embodied in Tr. II. The judges, who were generally possessed of a pragmatic outlook and whose main concern was substantive justice, were less formal and less strict in the application of the Islamic legal norms, particularly in the

sphere of judicial procedure. A judge of the early second century, Tawbah b. Nimr (d. 120), for instance, did not accept the testimony of a Yamanî against a Mudarî and vice versa.[75] Of another judge, 'Abd Allâh b. al-Ḥujayrah (judge of Egypt 69-83), Kindî reports:

> ...If the witnesses were equal [in number] Ibn al-Ḥujayrah used to decide that [the merchandise in dispute] should be divided between them. In case any of the parties had more than two witnesses, or more witnesses than [the other party], the case was decided in favour of that party. And if the merchandise was in the possession of a person who produced a shâhid 'adl, the merchandise went to him, even if the other party produced a greater number of witnesses.[76]

Tawbah also used to decide cases in favour of the plaintiff on the basis of the testimony of one witness and the oath of the plaintiff in "trivial matters"[77]— an expression which is characteristic of the less formal attitude of the judges of the early period.

On the question of manumission and walâ', the following ruling of Ibn al-Ḥujayrah illustrates the same attitude: In the case of a woman who had deprived her slave-girl of food, Ibn al-Ḥujayrah set that slave-girl free and decided that her walâ' belonged to the Muslims as a whole, who would be responsible for her upbringing and for the payment of blood-money on her behalf.[78]

V

Towards the last quarter of the first century, we notice at various places —particularly in Medina and Kufa — the emergence of a group of specialists in Law — the fuqahâ'. This was a group of people which in respect of mental attitude as well as academic training was different from its predecessors. For one thing, these specialists seemed to be concerned with the totality of legal questions, rather than with some specific issues. Partly owing to this factor, and partly owing to the increased quantum of knowledge of the "teachings of the Prophet" available at this stage and to the less practical vocation of these specialists, they strove to achieve systematic consistency. Moreover, since this class generally remained independent of the state, it was less inhibited in examining the soundness of not only popular but also administrative practices and applying theoretical and systematic considerations to all spheres of life including taxation, laws of warfare, etc.[79]

There were three important centres of this kind of juristic activity during the second half of the first century: Hijaz, Iraq and Syria. Within Hijaz, the main centres of fiqhî activity were the two holy cities of Islâm — Mecca and Medina. In Iraq, its two foremost

cities — Kufa and Basra were also the centres of juristic speculation. Of these four cities, our knowledge in regard to Medina and Kufa is much more abundant than in regard to Mecca and Basra.[80] As for Syria, its contribution to the development of Fiqh was much less significant than the contributions of Hijaz and Iraq. The only Syrian jurist whose authentic doctrines have come down to us in some detail is Abû 'Amr 'Abd al-Rahmân al-Awzâ'î (d. 157), and even his opinions are almost confined to Siyar.[81]

The early development of Fiqh in Kufa — which is the subject of this inquiry — is vitally linked (apart from the juristic developments in other centres such as Medina) with the totality of circumstances which prevailed in Iraq during the first century, the currents of thought which flowed in that country, as well as that country's pre-Islamic background, which we shall attempt to glance at briefly.

Iraq,[82] one of the earliest centres of human civilization, was conquered by the Arab Muslims in 15 A.H. At the time of the conquest, the country was part of the Sassanid Empire. This was the reason, apart from the greater fertility of land and a long tradition of sedentary existence, which marked off Iraq from Hijaz in many respects — in social structure, economic conditions, administrative organization, etc. Being a part of the

orbit of Persian culture, the intellectual climate of Iraq was quite different from that of Hijaz. For the same reason, the Iraqians were familiar with religious doctrines and philosophical ideas with which the Arabs of the peninsula were either inconversant or of which they were only vaguely aware. Population-wise, the country was highly heterogeneous as a result of the movements of population in the early Islamic period. Apart from the local population, there was a large number of Arabs, belonging to northern as well as southern regions of Arabia who had settled down in Iraq. Moreover, there was a large number of local non-Arab converts, which constituted a much greater proportion of the Iraqi Muslim society than did the non-Arab converts in Hijaz. Being a melting-pot of different religious and cultural traditions, it was no wonder that the Iraqians were, in general, less conservative, the pace of intellectual activity there was faster, and its level, higher than in the rest of the Islamic world.

Another factor of importance was the role of the non-Arab Muslims[83] (generally of the Persian descent) as well as that of the products of the mixture of blood between the Arabs and the Persians in Iraq. During the Umayyad period, the non-Arab Muslims had, on the whole, only a nominal share in political power. Thanks to this, their ambitions chose cultural and literary channels for

their self-fulfilment. Being possessed of a tradition of learning and of a mind sharpened by intellectual tradition and sedentary existence, their role assumed paramount importance in the development of all Islamic sciences. It is significant that they played the pioneering role even in the foundation and development of the sciences related to Arabic language, not to mention the purely Islamic sciences such as Tafsîr, Sîrah, etc.[84]

Furthermore, owing to a complex of factors, Iraq remained the hot-bed of the activities and conspiracies of the opposition groups throughout the Umayyad period. The Khawârij as well as the Shî'ah found in Iraq a fertile ground for their activities. When 'Abd Allâh b. al-Zubayr (d. 73) raised the standard of revolt, the hold of the Umayyads on Iraq proved too feeble to stand this trial of strength. On the whole, it was by appointing some of their ablest governors and by continually resorting to severe repressive measures that the authority of the Umayyads was established in Iraq. This, inter-alia, presumably accounts for the disposition, on the part of the Iraqian fuqahâ', to scrutinize administrative practices more strictly than, say, the Syrians.[85]

On the theological plane, too, the Iraqians were bolder and more keenly sensitive. Their relish for pure theological discussion had no parallel in either Hijaz or

in Syria. It is from Iraq that most of the theological schools sprang up and most of the currents of theological thought originated. Indeed, the "general climate of theological opinion" of Iraq seems to have had no mean share in giving the Iraqian Fiqh its particular impress, as we shall see later.[86]

VI

Of the early jurists[87], the doctrines of Ibrâhîm have come down to us in considerable detail, mainly in the Âthâr of Abû Yûsuf and of Shaybânî and are, on the whole, authentic.[88]

In this respect Ibrâhîm seems to be unique. For, insofar as the doctrines of his contemporaries are concerned, besides the fact that too few of them have come down to us to give an adequate picture of the doctrines of individual jurists, they have also come down in such a manner that their authenticity is not beyond doubt. On the contrary, there are numerous reasons which go to establish the authenticity of the doctrines of Ibrâhîm as embodied in the works of Abû Yûsuf and Shaybânî. First of all is the fact that in the Âthâr of Shaybânî, Abû Ḥanîfah is mentioned to have disagreed quite frequently with the doctrines of Ibrâhîm.[89] In the presence of this, it is hardly reasonable to think, as Schacht does, that in

Ḥammâd's time a whole mass of doctrines was spuriously attributed to Ibrâhîm. For, apart from other things, the time-lapse between Ibrâhîm (d. circa 95) and Abû Ḥanîfah (d. 150) is so brief, that it is hardly conceivable that first a bulk of doctrines should have been formulated around the year 120 and falsely attributed to Ibrâhîm, and then their opposite doctrines should have been formulated within the next thirty years.[90] Moreover, there is the significant fact that on most of the questions discussed in Tr.I and Tr.IX, which deal generally with the technical aspects of law, the Kufian doctrines have not been attributed to Ibrâhîm. This shows that the attribution of doctrines to Ibrâhîm was not considered imperative for their acceptance.[91] There remains hardly any justification, then, for the view that the opinions which go under the name of Ibrâhîm are in fact the opinions of Ḥammâd or of some one of his period.[92]

On the basis of the above, it seems safe to conclude that the body of doctrines attributed to Ibrâhîm is, on the whole, authentic and represents the doctrines in vogue in Kufa during the last quarter of the first century. It was around this period that by and by questions of uṣûl began to be brought up, not directly and per se, but indirectly and in the context of discussions about the theoretical soundness of specific legal doctrines.

In order to appreciate the doctrines of Ibrâhîm it is essential that we grasp the attitude of Muslims during this period of time. An important development that took place during the first century was that the Muslim outlook gradually moved in the direction of "traditionalism".[93] We have already seen the fundamental change of outlook brought about by Islâm by means of establishing the authority of "the teachings of the Prophet".[94] Under the aegis of that authority, a traditional outlook gradually developed with the result that the early generations of Muslims — the generations of the Companions[95] and, to some extent, of their Successors — were idealized. This attitude manifests itself, inter alia, in the denigeration of innovation. The letter of 'Abd al-Malik and its reply by Ḥasan al-Baṣrî (d. 110) contain repeated references to the salaf (the forbears), etc., which bears out our contention. The following passage in the letter written on behalf of 'Abd al-Malik to Ḥasan is of telling significance:

> ...The Commander of the Faithful has come to know your doctrine of Qadar, a doctrine the like of which he has heard from none in the past and the Commander of the Faithful does not know of any Companion [of the Prophet] who expressed the kind of views which he has heard as having been expressed by you. . . . So, write to him about your doctrine on the question, stating whether you derive it from any riwâyah (tradition) from some Companion of the Apostle of Allâh, or is it an opinion (ra'y) that you have yourself formulated (ra'aytahû), or is it something the confirmation of which can be found in the Qur'ân.[96]

The reply of Ḥasan further illustrates the same attitude of mind. The argument that he advances in favour of the soundness of his doctrine is that it had been derived from the salaf, "who acted according to the ordinance of Allâh, narrated His wisdom (ḥikmah), and followed the sunnah of the Apostle of Allâh".[97] Ḥasan then proceeds to argue that "none of the salaf ever denounced this doctrine or debated this issue for they were all agreed on one and the same view". He also contended that some people later "introduced an innovation in this matter (aḥdatha al-nâs fîh) when they denounced it [i.e. the ancient doctrine]... and distorted the Book of Allâh".[98]

What is common to both the letters is a traditional outlook which is manifest from the belief in the authoritativeness of the past. The doctrines of the forbears in general and of the Companions in particular are considered authoritative, particularly if there was any doctrine on which they were in agreement.

This was one strand in the development of the intellectual tradition of the early Muslims — the traditionalist strand. There was, however, another strand as well — the one designated in the classical Islamic literature as ra'y, which signified the use of human reasoning in legal matters. Ra'y, as we shall see later[99], had been in use from the earliest period. Its use in the early period, however,

did not necessarily follow any clearly-defined method. It was only by and by that a method was evolved, the method of qiyâs, which gave this activity a direction and imposed upon it a methodological discipline.[100]

It is in this perspective that the doctrines of Ibrâhîm should be viewed, and an attempt should be made to appreciate the sources whence he derived his doctrines, and the stage of development of Islamic law that his doctrines represent.

Coming to the question of the legal theory of Ibrâhîm, there is very little direct first-hand evidence. Ibrâhîm hardly ever discusses this question explicitly. This seems to be mainly for two reasons. First, the early expositions of legal theory owe themselves to legal controversies, which pressed the contending parties to justify their doctrines in terms of principles which were generally recognized by all concerned as valid. Uptil the time of Ibrâhîm, these controversies had not assumed any important proportions. Secondly, for a considerable period of time, there was not much of usûl-consciousness. Positive doctrines were derived from "the teachings of the Prophet" without strict conformity to a methodology the details of which, such as those discussed in Shâfi'î's Risâlah,[101] were still in an embryonic stage. A number of concepts were taken for granted from the very beginning, one of

which was the authoritative character of the "teachings of the Prophet". But the "teachings of the Prophet", except for the Qur'ân, were not available in a compact and codified form so as to enable people to consult it readily. There was considerable disagreement as to what the Prophet had said or done on the question under consideration. Besides, even when there was some sort of agreement as to what was the "teaching of the Prophet" on a certain issue, there were disagreements as to the legal import of the specific precepts and practices of the Prophet, a disagreement which was at least in part the outcome of the absence of a clear and elaborate methodology.

Coming back to Ibrâhîm, although direct reference to legal theory in him is almost non-existent, some of its main features can be constructed with the help of his casual remarks and other indirect evidences.

So far as the Qur'ân is concerned, its authoritativeness can be taken for granted from the very beginning. The Quranic prescriptions had not only an influence on positive doctrines, but had also stimulated the consideration of a large number of legal questions. In fact, the Qur'ân seems to have been one of the strongest stimuli in the formulation of positive doctrines: insofar as it circumscribed the scope and determined the subject-matter of positive doctrines. This is borne out even by a cursory

glance at the traditions from the Companions and the Prophet transmitted by Ibrâhîm as well as from his own doctrines embodied in the works of the second century, particularly the Âthâr of Abû Yûsuf and of Shaybânî,[102] and the theoretical priority of the Qur'ân as against traditions, etc., is postulated in the famous tradition with regard to Fâṭimah b. Qays and 'Umar on the question of post-divorce maintenance. In a tradition transmitted by Ibrâhîm, 'Umar is reported to have said: "We shall not follow the doctrine of a woman and leave the Book of Allâh, when we do not even know whether she spoke the truth or lied".[103]

Ibrâhîm was also conscious of the question of repeal of Quranic verses. His references suggest that the theory of repeal (naskh) was well-known, was generally accepted, and not infrequently used. Ibrâhîm was of the view, for instance, that the original Quranic doctrine regarding the testimony of ahl al-Kitâb in matters of testamentary disposition (Qur'ân V. 106), had been repealed by another Quranic verse (LXV. 2).[103a]

Next to the Qur'ân came the traditions — the main source of positive doctrines. The traditions transmitted by Ibrâhîm represent the traditionalist strand in the early Islamic outlook.[104] These traditions are not only from the Prophet, but also from the Companions; in fact, a greater

number of them was from the latter. Fifty-three traditions transmitted by Ibrâhîm from the Prophet are embodied in Âthâr A.Y. and twenty-six traditions from the Prophet in Âthâr Sh.[105] Aside from these, there are 147 and 104 traditions from the Companions in Âthâr A.Y. and Âthâr Sh. respectively.[106]

Thus traditions from the Prophet as well as from the Companions were adduced by Ibrâhîm as authoritative. These traditions consist not only of legally-relevant statements but also practices out of which ethical or legal norms could be derived.[107] It is largely on arguments drawn out of this mass of traditions that his positive doctrines rested.

So far as the traditions from the Prophet are concerned, their authority was beyond dispute. This is established by the fact that the contents of the traditions from the Prophet always constitute the doctrine followed by Ibrâhîm.[108] That Ibrâhîm considered the precepts and practices of the Prophet to be authoritative is also established by the following traditions which have been transmitted by Ibrâhîm:

> Âthâr A.Y., 830. With regard to a dispute between the buyer and the seller, the famous Companion Ibn Mas'ûd declared that he would decide the question in the manner it had been decided by the Prophet.
>
> Ibid., 338. With regard to witr prayers

Ibrâhîm cites a tradition from two Companions according to which the Prophet performed this prayer in the early, middle and later part of the night, so that the Muslims could perform it in comfort (li takûna si'atan li al-muslîmîn).

Ibid., 390. During the life-time of the Prophet, the number of takbîrs in the funeral prayers was not uniform. 'Umar, according to Ibrâhîm, summoned the Companions and asked them to report what the practice had been in the last funeral prayer performed during the life of the Prophet and formulated the doctrine on that basis.

Ibid., 478. Ibrâhîm mentions that 'Umar asked a child about the rituals of Hajj. On finding his replies to be correct, he observed: "You have been guided to the sunnah of your prophet."

Ibid., 535. Ibrâhîm reports that 'Umar once addressed the Black Stone of Ka'bah and said: "I know well that you are only a stone. . . and had I not seen the Prophet kiss you, I would not have kissed you."[109]

The number of traditions from the Prophet cited by Ibrâhîm was, however, quite small.[110] This phenomenon could be interpreted as an indication of the absence of any but a few traditions from the Prophet in Ibrâhîm's time, and this in turn could be regarded as an evidence of the view that the large number of traditions from the Prophet found in the works of the second and the third centuries was put into circulation during the intervening period.[111]

This apparently reasonable line of argument rests on a number of presuppositions. The first presupposition is that Ibrâhîm (or for that matter any faqîh of that period) would have mentioned all the traditions which

were known in his time.[112] Not only that, it is also assumed that all these traditions would have found their way into the early works of fiqh-âthâr, such as Âthâr A.Y., Âthâr Sh. It cannot be over-emphasised that these should be treated as presuppositions rather than as axioms.

For, the primary concern of the early jurists was to propound correct doctrines and define and elaborate Muslim religious ethic, rather than to marshal arguments in support of those doctrines — whether systematic or traditional. To provide arguments in support of them was only a secondary concern. It is for this reason that we find, for instance, that Ibrâhîm's preference of the doctrine of one Companion against another, is generally followed neither by systematic nor by traditional arguments.[113] Even though there is no doubt that in the early part of the first century, even as prior and subsequent to that, the dicta of the Prophet were used to support legal doctrines,[114] yet they were not deemed sine qua non for the acceptance of every doctrine. Hence it was natural that scholars of the second and third generations of Muslims should have expressed their doctrines without invariably adducing traditional or systematic arguments in support of their doctrines, even though they might have known those arguments. In our view it was only when controversies had become acute, and when one felt forced to advance

arguments to justify one's doctrines that care began to be taken to mention the relevant traditional and/or systematic argument in their favour. This is corroborated even by the well-known fact that Âthâr Sh. contains only 26 traditions from the Prophet transmitted by Ibrâhîm, although the Âthâr of his predecessor, Abû Yûsuf, contains 53 such traditions.[115] It is also corroborated by the fact that the same tradition which is found as having been narrated from the Prophet in Âthâr A.Y. through Ibrâhîm is mentioned merely as a doctrine of Ibrâhîm in Âthâr Sh.[116] It is for the same reasons that we find that one and the same author attributes a statement simultaneously to earlier as well as to later authorities. Hence, the fact that a tradition in Âthâr A.Y. or Âthâr Sh. goes up only to Ibrâhim, or to some Companion, through Ibrâhîm, does not necessarily prove that in fact it did not go back to the Prophet. What such a tradition establishes for sure is the doctrine which Ibrâhîm followed, without necessarily implying that it had or did not have a higher authority to support the doctrine.

To return to the doctrines of Ibrâhîm: the bulk of the traditions which served as the bases of his positive doctrines, as we have seen, was from the Companions.[117] Apart from the traditions of the Companions which express

the doctrines followed by Ibrâhîm, he also cites variant traditions from the Companions and chooses out of these conflicting traditions the one which should be followed without assigning any explicit reason.[118] It is significant that divergence from the doctrines of one Companion is invariably in favour of the doctrine of another Companion, which shows the importance assigned to the doctrines of the Companions.[119] No wonder, therefore, that the consensus of the Companions was regarded as highly authoritative and Ibrâhîm made explicit reference to it.[120]

What was the rationale of the authoritativeness of traditions from the Companions? We have suggested that the authoritativeness of the traditions from the Companions was a part of the process of the growth of a traditional outlook in early Islâm as a result of which the doctrines of the Companions were generally regarded as valid per se.[121] Their authority was, nevertheless, a derived one, and therefore, subordinate to it. This derivative character is evident even from the word ashâb (Companions). itself which points to the source wherefrom their authority was derived — the Prophet. A careful scrutiny of the traditions from the Companions transmitted by Ibrâhîm shows that part of the reason for this attitude was the same as adduced later by "the ancient schools", viz. that the Companions knew the teachings of the Prophet better.[122]

Apart from the traditional strand, however, the handling of legal subjects always involved the use of reason-termed in classical Islamic literature as ra'y.[123] The term was more comprehensive than qiyâs which was a more disciplined form of the use of ra'y. Ibrâhîm used ra'y in its less as well as more disciplined forms. We get some idea of the earliest use of ra'y in a sense wider than qiyâs even from the doctrines coming down from the middle first century as embodied, inter alia, in Tr. II, etc.[124] A comparison of these doctrines with the doctrines of Ibrâhîm as embodied in Âthâr A.Y. and Âthâr Sh. forces the conclusion that Ibrâhîm played a considerable part in popularising the use of qiyâs.

There are numerous examples, however, of the use of ra'y in a sense which cannot be subsumed under qiyâs.

> Âthâr A.Y., 27. On a person's return from a journey, he is kissed by his aunts [i.e., the sisters of his father and mother] or any other woman who falls within the prohibited degree of marriage: the kissing would not make wudû' obligatory. On the contrary, wudû' will become obligatory if he is kissed by a woman whom he is permitted to marry. (Cf. Ibid., 53; and Athâr Sh., 19).
>
> Ibid., 637. A slave-wife with whom the husband had not consummated his marriage and who, on being manumitted, preferred not to remain that person's wife: she would not be entitled to sadâq, for separation had taken place on her initiative.
>
> Ibid., 114. If a person finished his prayer to the extent of tashahhud, the prayer is complete even if something causes breach of wudû' [i.e., before the formal ending of the prayer by salutation].

Ibid., 175. The same wudû' is enough for the zuhr and 'asr prayers for a mustâhâdah, provided she performs the wudû' in the later part of zuhr.

Ibid., 141. The use of veil by slave-girls is disapproved, for it would make them resemble free women.

Ibid., 201. The use of sadal in prayer is disapproved.[125]

Apart from this, however, we find in Ibrâhîm the use of ra'y in a more restricted form — in the form of qiyâs — i.e. analogy and systematic reasoning. The following examples will bring this out:

Âthâr A.Y., 618. If a woman gives herself unreservedly to a man and the man accepts her in the presence of witnesses, the marriage has been concluded and she will be entitled to mahr mithl. If there are no witnesses, then she will receive sadâq in case the consummation does not take place.

Ibid., 619. A sick man divorced his wife. If the wife was in 'iddah at the time of his death, she would be entitled to inheritance but not otherwise.

In case the marriage had not been consummated and the husband divorced his wife during his [mortal] sickness; she would be entitled to half the sadâq, but would not be entitled to inheritance.

Ibid., 451. Drawing a parallel between salâh and zakâh, Ibrâhîm pointed out that in the same manner as salâh became obligatory only when a person attained majority, so was the case with zakâh.

Ibid., 133. The right of a woman, who was in the labour of child-delivery, to dispose her property was considered by Ibrâhîm to be restricted to one-third. This was certainly owing to considering the case to be parallel to that of a sick man in his mortal sickness.[126]

The main achievement of Ibrâhîm was that he surveyed the entire field of legal doctrines and in so doing he formulated the tentative framework of Kufian doctrines. Thanks to his interest in the positive doctrines as a whole rather than merely in parts of it, he brought about greater coherence and systematic consistency. This was partly owing to a more frequent use of qiyâs on his part, which marks an advance in the direction of the use of ra'y according to a methodological discipline. This development seems to owe itself, to some extent, to Ibrâhîm's conscious search for greater coherence and consistency. Underlying this quest — perhaps a sub-conscious quest — for coherence and consistency there seems to have been some vague notion that the teachings of the Prophet were embodiments of general principles, rather than arbitrary fiats. It is this which enabled specialists like Ibrâhîm to make the Islamic norms relevant to a field wider than that explicitly mentioned in "the teachings of the Prophet". One of the main things that Ibrâhîm did was to make an attempt to deduce general propositions from the authoritative sources and then apply them to all relevant cases. The Qur'ân considers the liability of the slave to be half that of a free person.[127] Now, Ibrâhîm applies this principle consistently to a great number of cases — in respect of the hadd-punishment, with regard to the maximum number

of wives permitted, with regard to the period of waiting of divorced women or widows, with regard to the term of îlâ', etc.[128] In the same way, Ibrâhîm deduced the general proposition that whenever a sexual intercourse is regarded as not meriting hadd-punishment, it entails the payment of sadâq — a principle which he applies consistently.[129]

In Ibrâhîm we also witness the beginning of an interest in technical aspects of law.[130] This interest was, however, not at an advanced stage. This is corroborated by the conspicuously meagre reference to Ibrâhîm in connection with purely technical questions embodied in Tr. I and Tr. IX. In technical legal matters, Ibrâhîm generally applies analogy and tries to introduce systematic reasoning, and advances towards formalisation.[131] Nevertheless, there are numerous evidences that his juristic competence was far from perfect, if compared with that of the second century jurists, owing to the lack of a long-established juristic tradition.[132] At times he shows lack of systematic consistency owing to ethical[133] or pragmatic considerations,[134] a fact which is reminiscent of the attitude of his predecessors.[135] Moreover, in his attitude to legal problems, Ibrâhîm's doctrines manifest an informality and a lack of fixity which too he seems to have inherited from the earlier period of Islamic law. The following are some examples of this attitude:

Âthâr A.Y., 363. Ibrâhîm was asked for legal opinion on saying: "God have mercy on you" at the sneezing of one's neighbour during the ritual prayer. He replied: There can be no objection to it. Your brother should have prayed for you".

Ibid., 83. Asked whether a mu'adhdhin was permitted to speak during the adhân or iqâmah, Ibrâhîm expressed his opinion neither in the positive, nor in the negative.[136]

In Ibrâhîm we also find the beginning of a tendency which was to find great favour with the Kufians in the following century and to become one of their characteristics. This was the tendency of imagining various forms in which legal questions might arise and attempting to give appropriate rulings. As we know, the application of the "teachings of the Prophet" to new situations had begun quite early. What was new about this tendency was that rulings were given about questions and situations which might, in fact, not have arisen at all.

Even though this tendency is preceptible in Ibrâhîm, it was neither as conspicuous and extensive nor were the hypothetical questions posed by Ibrâhîm as remote from practical life as those in later works.[137] The following are some examples of this tendency in Ibrâhîm:

What is the legal effect of a person's saying: "If I marry such and such woman, she stands divorced?"[138]

What is the legal effect of adding "God

willing" to the pronunciation of talâq?"[139]

To conclude about Ibrâhîm's role: he surveyed the entire field of law, to some extent from a systematic point of view. He marked an appreciable advance upon his predecessors by purging quite a number of their doctrines of inconsistencies and technical irregularities. This advance was largely the outcome of, relatively speaking, of a more theoretical approach, the approach of a jurist, as distinct from the pragmatic approach of a judge. Nevertheless, this was among the first efforts of its kind and suffered, therefore, from the imperfections often inherent in all pioneering efforts. As for Ibrâhîm's legal theory, the picture that can be constructed is this: the Quranic legal verses and the precepts and practices of the Prophet as well as of his Companions were regarded as authoritative sources for deriving positive doctrines. At the same time, whenever these sources failed to provide any explicit guidance, appropriate doctrines were formulated in the light of common sense, or extended by recourse to analogy in cases wherein the traditional sources did not specifically refer to a certain question, and yet referred to a question analogous to it; or else appropriate doctrines were formulated in accordance with ethical and pragmatic consideration.

VII

Towards the turn of the century, the tentative outlines of substantive Islamic law had been formulated, particularly in the two main centres of juristic activity — Medina and Kufa. This formulation of positive doctrines among the Muslims had taken place under more or less the same impulses, in the light of basically the same sources, though under different milieux and by persons of different intellectual, cultural and social backgrounds and of varying capacities and inclinations — the factors which account for the peculiar combination of unity and diversity in Islamic law.

During this century the question of legal theory seems to have been scarcely discussed per se. As for positive doctrines, however, a great wealth of them accumulated during the course of the century. There were disagreements within each of the numerous centres, as well as between them. These differences made it incumbent that the doctrines should be justified in terms of those fundamental principles which were recognized by all concerned. The process began in an ad hoc manner[140] and without the conscious intent of formulating a legal theory. Nevertheless, once it had started, the process culminated, not before long, in the formulation of a full-fledged and

elaborate legal theory — a fact which indicates that the absence of explicit reference to legal theory should not be taken as the evidence of a vacuum. What seems to have taken place was to articulate, elaborate and systematise whatever elements of legal theory were already in existence.

One of the earliest questions to be considered was that of the theoretical justification of the use of human reasoning in legal matters, the legitimate extent of its use, and the relationship between human reasoning and its opposite tendency, athar.[141]

The two tendencies were not essentially incompatible. In the earliest period they seem to have existed side by side as complementaries. The use of ra'y had developed in Muslim legal tradition from the very beginning, to borrow Goldziher's expression, as an "undeniable postulate".[142] Its use had been forced by the confrontation of practical problems of day-to-day life, and hence, its most extensive use was made by the judges. A theoretical canonist might have comfortably denied the validity of ra'y, as Goldziher has pointed out, for he studied the traditional sources and was not concerned with the happenings of the daily life. But the practising judge, for instance of Iraq or of other conquered lands, who was faced with ever new problems could have ill afforded that.[143]

This was so because, as al-Shahrastânî (d. 548) has pithily put it, the provisions embodied in the authoritative sources are limited, while the situations arising in life are unlimited — a fact which rules out the possibility of there being a specific traditional ruling for every possible question.[144] It is this which made the introduction of the speculative element in the deduction of laws unavoidable. This was specially so outside Hijaz where the lawyers were confronted with circumstances different from Hijaz wherein the legal provisions of Islâm had been enunciated and with which they were vitally linked. This partly accounts for the great favour that ra'y and qiyâs found among the Iraqians. It is not that ra'y was not used elsewhere.[145] The peculiarity about Iraq was that the material conditions and the socio-economic structure of that country were so different,[146] that not only were ra'y and qiyâs used, but that their use was far too conspicuous to go unnoticed for long. Gradually the use of ra'y, which originally did not possess a fixed method or direction, acquired a method and a direction: it assumed "the logical form of analogy."[147] In the earlier period, to borrow once again from Goldziher, it was said: 'Whenever there no written or traditional positive laws are found, a jurist might invoke his own insight'. From now on it began to be said: 'The judgments of one's insight should be moved within the framework of analogy'.[148]

Iraq has been traditionally considered to be the home of ra'y and qiyâs.[149] This statement is not true if taken in the sense that the use of ra'y and qiyâs were confined to Iraq alone.[150] The difference between the various centres of Islamic law in their attitude vis-à-vis ra'y and athar was not that one centre was committed to one of these strands and totally opposed to the other. The difference lay in one centre being more inclined than the others to one of these two strands. The above statement about Iraq seems to be true, therefore, only in the sense that ra'y and qiyâs were used more frequently than elsewhere and also presumably that it is in Iraq that they were institutionalised.

We have noted earlier the factors which marked off the Iraqians from the rest of the Islamic world and have argued that because of a complex of reasons their intellectual outlook was somewhat different from that of the Muslims of other areas.[151] The same is true in respect of theological matters. Moreover, in the same way as other political movements arose from the Iraqian soil, so did the theological schools. It is here that the Khawârij,[152] the Jahmîyah,[153] the Mu'tazilah,[154] the Shi'ah,[155] the Qadarîyah,[156] and the Murji'ah[157] flourished and zestfully debated their controversial doctrines. This interest in theological matters created fresh insights which influenced the

Iraqian understanding of religion and consequently affected their approach to legal matters. It is our contention that the "climate of theological opinion" in Iraq played an important role in giving the Iraqian Fiqh its particular impress.

The Khawârij were among the earliest sects of Islâm who found in Iraq a fertile ground for the spread of their ideas. It is only one aspect of Khârijî thought with which we are concerned here — its emphasis on the righteousness of God.[158] "The development of Khârijî doctrine ... shows how the conception of the righteous God demanding righteousness from His creatures leads", in the words of Montgomery Watt, "by an irresistible logic to the doctrine of human responsibility with its corollary the doctrine of Qadar, namely that man has power to perform the duties imposed on him".[159] So far as the doctrine of Qadar is concerned, it was already well-known in Iraq circa sixties.[160] Thus, it is evident that at least some of the doctrines which were cherished by the Mu'tazilah of the second century, had already been formulated and were known in Iraq during the first century.

For the Mu'tazilah,[161] who generally called themselves ahl al-tawhîd wa al-'adl, righteousness was one of the most important aspects of their understanding of God. Their strong revulsion against the doctrine of Jabr, which

denied the reality of human action by attributing human acts to God, stemmed from the view that this was incompatible with God's justice and righteousness. Since a number of acts are evil, the Mu'tazilah argued that the doctrine of Jabr leads to the blasphemous conclusion that God commits evil. Furthermore, if all acts are the creations of God, there is no justification for praise or blame, for reward or punishment. It was again the same emphasis on God's righteousness owing to which the Mu'tazilah emphasised the doctrine that God does not impose on man a responsibility which is incommensurate with his capacity. In the same way as God is bound, in the Mu'tazilî view, by the dictates of justice and righteousness, He is also bound by maṣlahah and thus He does only that which is beneficial.[162] Thus in the Mu'tazilî view the will of God is guided by [rational] considerations of justice, wisdom, and benevolence.

That there was a reaction against Mu'tazilism — a reaction which emerged from within the womb of Mu'tazilism — is well-known. The reaction itself shows the strength of the Mu'tazilî ideas during the second and the third centuries. More significant, however, is the fact that the school of theology which was formed around the teachings of Abû Ḥanîfah took positions on several important questions which were markedly different from

those taken by what came to be known as the Ash'arî school. Abû Ḥanîfah and his master Ḥammâd are known to belong, or to be close to, the Murji'î school.[163] Even though on a number of theological issues it is difficult to figure out the authentic opinions of Abû Ḥanîfah, yet there are significant evidences which cannot be ignored. Fiqh Akbar I, which contains the authentic theological doctrines of Abû Ḥanîfah, embodies in the main the creed of the Murji'ah, and is confined on the whole, to the problems which concerned them. It revolves around the questions of relationship between faith and action.[164] There are certain other, and indirect, evidences which show, however, that Abû Ḥanîfah's interest in theology was not confirmed to the points of Murji'î interest. There is the report, for example, in al-Milal, that Ḍirâr (d. ?), the famous Mu'tazilite, had derived the whole of his conception of God from Abû Ḥanîfah.[165] Indeed, even the statement in Fiqh Akbar I that: "al-fiqh fî al-dîn afḍal min al-fiqh fî al-'ilm"[166] indicates that theological questions were not excluded from the over-all rationalistic attitude of Abû Ḥanîfah.

Of no less importance is the evidence of the attitude evinced by the followers of Abû Ḥanîfah in theology.[167] Significant about them is the fact that they maintained their identity, despite their orthodoxy and anti-Mu'tazilism, and remained distinct from the Ashâ'irah. For this, we

have the testimony of Ibn al-Athîr who states that for a long period of time, it was considered strange for a Ḥanafî jurist to belong to the Ash'arî school of theology.[168] On several crucial issues this school was closer to the Mu'tazilah, than to the Ashâ'irah.[169] Ṭaḥâwî, (d. 321), for instance, held a view divergent from that of the Ashâ'irah by affirming man's capacity to perform actions, both good and bad.[170] As for the doctrines of al-Mâturîdî (d. 333), the disagreements between him and Ash'arî are quite important. The following doctrines of Mâturîdî distinguished him from Ash'arî:

(1) That good and evil are inherent qualities;

(2) That God does not burden man with responsibility beyond his capacity;

(3) That God cannot commit wrong;

(4) That the acts of God are based on maṣlaḥah;

(5) That man has the capacity of performing actions.[171]

This obviously was long after the time of Abû Ḥanîfah. This does not mean, however, that these questions had not been considered earlier. Ash'arî mentions, for example, that the Mu'tazilah had discussed the question whether the ordinances of God had a ratio ('illah) or not. This would mean, possibly, that these questions had been spelled out during the second and third centuries.[172] As for the Mu'tazilî position that good and evil are rational categories,

and hence are obligatory even prior to revelation, this had already been formulated and is considered to be one of the doctrines on which the Mu'tazilî theologians were in agreement.[173]

The possible influence of ideas such as the above on the attitude towards law was to regard the provisions of the revealed law, not as arbitrary fiats of the Almighty, but as rules based on wisdom, as rules which had been formulated with a view to help the realization of certain commendable goals. It is this attitude which seems to have paved the way for the use of human reason in legal questions. For such an attitude makes one look at specific injunctions in the context of the purposes which they seek to serve, an attitude which seems to underlie the application of given laws to new situations. Without perhaps having much awareness in the beginning of the issues involved, the Iraqians tended gradually, and almost sub-consciously, to the position that human reason had an important role to play in legal matters, an attitude which was vitally linked with those currents of theological ideas which flowed from and through Iraq, and which provided a stimulus to ra'y and qiyâs.

This illuminates the significance of the deep aversion of the Traditionists for the ra'y-school of Iraq. It seems that not only was the legal method of the Iraqians

suspect. What is more is that the ahl al-Hadîth looked upon this legal method as the embodiment of those trends of thought in theology to which they were strongly opposed. This seems to lie behind Ibn Qutaybah's mention of ahl al-Kalâm (which signified at that period of time the Mu'tazilah) and ahl al-Hadîth as opposed to each other, and his identification of the former with ahl al-Ra'y.[174]

CHAPTER III

THE SEMANTIC EVIDENCE

A semantic analysis of some of the important terms which were used in the Fiqh literature of the period mainly under study (roughly speaking, the second century), throws valuable light on the stage of development of Fiqh, including the Fiqh in Kufa. The conclusions arrived at through this analysis should, however, be deemed as tentative and their evidence should be correlated with our other findings in this work.

What becomes evident from such a study, in the first place, is the comparative lack of fixity in the technical connotation of the terms in use. A number of concepts — some of them of quite fundamental importance in law — had been in operation for quite sometime. Nevertheless, they had as yet not acquired a fixed, technical expression. Hence, these concepts were expressed in a variety of ways. However, a number of terms had begun to acquire technical connotation and had gone considerably far in that direction. The impression that one gathers is that sufficient time had not as yet passed so that the non-technical usages of the terms should have disappeared. This presents a baffling problem for the student of the early period of Islamic Fiqh. The difficulty that presents itself is not merely that many

terms have gradually changed their connotation to a greater or smaller degree over the course of centuries. No less serious is the difficulty which arises owing to the use of these terms in a multiplicty of meanings. Despite this fluid and confusing state of affairs, the process of the terms acquiring an increasingly technical connotation is clearly noticeable and throws valuable light on the stage of the development of Fiqh.

I. Hadîth

In the early Islamic literature, the terms hadîth, athar, riwâyah and khabar were used more or less interchangeably. As yet hadîth did not exclusively mean [a report about] "the utterance, the action, the tacit approval and the sifah of the Prophet".[1] Nor was athar generally used in the technical sense in which it was used in the classical times, in the sense of a statement from some Companion[2] (as distinguished from a tradition from the Prophet).

Coming to hadîth, it would be instructive to examine carefully its use in Tr. IX[3] insofar as the conclusions thus arrived, are corroborated, in our view, by the study of the use of this term in other works of Abû Yûsuf and Shaybânî.

The term hadîth occurs in the work twenty five times. Out of these it is only on three occasions that it either

does not refer to the Prophet, or refers to others as well besides him.[4] Except for the three above-mentioned instances, all the rest of the uses of hadîth have reference to the Prophet. The following is an account of the uses of the term with reference to the Prophet:

(1) Hadîth rasûl Allâh. (Tr. IX, 2, p.14; 20, p.63; 50, p.135)

(2) Hadîth 'an rasûl Allâh. (Ibid., 5, p.29 and p.30, lines 6 and 8 and p.31, line 2; 20, p.64, lines 5 f., 22, p.69; 43, p.121)

(3) Hadîth rafa'ahû ilá rasûl Allâh. (Ibid., 1, p.11)

(4) Wa qad balaghanâ 'an rasûl Allâh 'an al-thiqât hadîth musnad 'an al-rijâl al-ma'rûfîn bi al-fiqh al-ma'mûnîn 'alayhim. (Ibid., 2, pp. 15 f.)

This expresses the growing formalism of the traditions from the Prophet, the higher value of the traditions which had isnâd and the transmitters of which were known for their moral and mental qualities.

(5) Iyyâka wa shâdhdh al-hadîth. (Ibid., 5, p.31. With slight modification, ibid., 5, pp.34 f., and 38, p.105)

This is a warning made after mentioning 'Umar's practice of not accepting "tradition from the Prophet" without the testimony of two witnesses.

(6) Al-ḥadîth fî hâdhâ kathîr wa al-sunnah fî hâdhâ ma'rûfah. (Ibid., 7, p. 38. With slight alteration ibid., 8, p. 40). (On both the occasions the statement is preceded by the mention of traditions from the Prophet).

(7) Fa 'alayka min al-ḥadîth fî mâ ta'rifuhu al-'âmmah. (Ibid., 5, p. 24. Repeated with slight modification ibid., 5, p. 31).

This last (i.e., p. 24) has been said in refutation of a tradition from the Prophet transmitted by Awzâ'î relating to the Prophet's apportioning of share in booty to those who had been killed. Abû Yûsuf says: "We do not know that the Prophet apportioned the share of anyone of those killed on the day of Badr, or Ḥunayn. . . although a number of well-known people was killed and we do not know that he apportioned the share [in the booty] to anyone of them. . ." After this he adds the expression quoted above, which is followed by a tradition from the Prophet.

(8) Inna al-ḥadîth sa yafshû 'annî. (Ibid., 5, p. 25).

The person to whom the saying is attributed is the Prophet himself.

(9) Mâ jâ'a fî hâdhâ min al-aḥâdîth kathîr. (Ibid., 7, p. 38).

The sentence is preceded by the words: "We do not know that the Prophet apportioned the share of women from

the booty. . ."

This shows that even though hadîth had not acquired its exclusivist technical connotation, viz. that the traditions about "the utterance, action, the tacit approval, or the sifah of the Prophet. . ."[5] which it did acquire in the following centuries in the literature of Fiqh and in the science of Hadîth. Nevertheless, it was heading in that direction and was fairly close to that point. This is evident from the fact that hadîth is used in an overwhelming majority of cases with reference to traditions from the Prophet, much less to traditions from the Companions. As for its use in the sense of "tradition" or "report" as such, this usage is quite rare.[6-7]

The above analysis also throws light on the process of the formation of technical terms. It shows how the increasing use of a term in a particular context made that context an almost essential part of the meaning of the term, at least in the scientific usage. To take up the instance of hadîth, it originally meant (besides meaning 'new') "communication".[8] In the pre-Islamic times it was used with reference to the narration of historical episodes, both religious and profane, particularly the episodes of the distant past. It referred to the glorious deeds of the tribes, the Ayyâm.[9] It was from this background that the word gradually developed its technical Islamic connotation.

And now since the Prophet (and his Companions) were looked upon as the heroes of the new society, the heralds of the new age, "communications" generally centred around them. Later, the context of the use of the term was increasingly narrowed down so that the term, even when explicit reference to the Prophet was not made, signified "communication" about or from the Prophet. In short, it was partly frequency of using a term in a certain context, combined with the strong consciousness of the paramount importance of the Prophet, which ultimately fixed its technical connotation.

II. Sunnah

Another key-word in the Fiqh literature of the early period is sunnah. The difficulty with regard to sunnah arises because it seems to be used in different meanings, and at times it is not quite sure whether the sunnah in question refers to the sunnah of the Prophet, or of the Companions, or to a principle derived from the sunnah of the Prophet and/or the Companions, sanctified by consensus, etc.

The root S.N.N. from which the word sunnah is derived seems to have referred originally to the "flow and continuity of a thing with ease and smoothness".[10] Hence, if a person poured water on another person's face in such a manner that

the water easily flowed away, the standard form of expressing this action was to say: "sanantu al-mâ' 'alá wajhihi".[11] It was because of this that sunnah began to be used in the sense of "way, course" (in the physical sense), presumably because it was easy to tread and traverse it, with the result that normally it was trodden. It is for this reason that the derivatives of S.N.N. were employed with reference to the course across which winds blew or along which water flowed.[12]

The word had, therefore, the nuance of ease and facility in its original usage. It was this nuance which presumably paved the way for the use of S.N.N. and its derivatives, particularly in Arabic poetry, with reference to the admirable aspects of the face — its brightness and polish, its being smooth and well-shaped, etc. This gave rise to the expression masnûn al-wajh meaning a person of comely shape, a person on whose face "flesh had been made even and smooth"[13], or even for its being "well-proportioned" (mu'tadil).[14] The use with respect to the admirable features of the face became so common that sunnah began to be mean face itself.[15]

The next stage in the evolution of the connotation of sunnah seems to have been the extension of the signification of the term to human behaviour. "Way and course" began to be used in the sense of sîrah. Sunnah began to

mean, therefore, sîrah "a way, course, rule, mode, or manner, of acting or conduct of life".[16] Apart from inheriting the meaning 'way and course' from the past, the root S.N.N. also retained the sense of ease, smoothness, etc. Sunnah therefore signified inter alia, a mode of behaviour which a person could adopt without difficulty.[17] This seems to be the background in which the term sunnah developed the nuance of moral appropriateness and normativeness.[18] Even if one might doubt that appropriateness and normativeness were essential ingredients of the meaning of the word sunnah, there can be no doubt that it generally carried that nuance. Hassân (d. 54), the famous poet of the Prophet, mentions a group of people as having "explicated a sunnah for the people which is followed".[19] Another poet speaks of the sunnah of al-Fârûq which contextually has a normative overtone.[20] The Umayyad poet Farazdaq (d. 110) refers to the sunnah of the two 'Umars which, in his words, is "a cure for the malady of the heart".[21] Another poet, exalting a person says that "his judgment is a sunnah, and his saying, a mathal".[22]

In the Qur'ân, the term sunnah (including its plural, sunan) has been used sixteen times in all. The expression which occurs most often is that of the "sunnah of Allâh", which seems to be a literary innovation of the Qur'ân. Sunnat Allâh refers to God's modus operandi with those

wayward peoples who had greeted God's message with contempt and hostility. This had led to their doom by virtue of the operation of God's law of retribution.[23] God's law of retribution, then, is the inalterable sunnah of Allâh.[24] Another usage of the sunnah of Allâh occurs in connection with God's mode of dealing with His prophets. The Qur'ân points out that when the bearers of God's message are received by a people with hostility, God supports His prophets and sustains their spirit, besides destroying those who oppose God's message. The other usual form in which the term sunnah has been used is: sunnat al-awwalîn.[25] This refers, as Bayḍâwî has pointed out, to the "sunnah of Allâh with regard to the ancients".[26] For the verses in which sunnat al-awwalîn has been used, the reference is to God's scourge which overtook the nations that had spurned His message.

The concept which was to play an important part in moulding Muslim thought, however, was not that of the "sunnah of Allâh", but of the "sunnah of the Apostle of Allâh". In the Qur'ân itself this expression is conspicuous for its absence. This seems to support the view that the concept which this expression embodies must be a later invention. This, however, is altogether erroneous. It seems natural that the ramifications of this concept should have unfolded gradually, but the essence of the concept is very clearly

and forcefully embodied in the Qur'ân itself which puts forth the conduct of the Prophet as conduct par excellence: "Certainly you have in the Apostle of Allâh a good example. . ."[27]

It was not surprising, therefore, that quite early in the history of Islâm, the expression "sunnah of the Prophet", began to be used, despite its not having been used in the Qur'ân, and the Prophet himself is said to have used this expression a number of times.[28] There seems no reason why the Prophet should not have used this expression since it accurately embodies the above-mentioned Quranic concept of the model-behaviour of the Prophet.

Leaving that aside, one of the earliest uses of the expression is attributed to 'Umar who is reported to have explained the function of his officials as consisting of the instruction of people in their religion and in the sunnah of their Prophet.[29] Another instance of the use of the expression "sunnah of the Prophet" is reported, and seems to be authentic — is on the occasion of the choice of the caliph after the death of 'Umar in the year 23. Questions were put to both 'Uthmân and 'Alî, the two candidates who stood the best chance of election, whether they were prepared to "work according to the sunnah of the Prophet and the sîrah of the two [preceding] caliphs"[30].

Another authentic writing of the first century wherein

the expression "sunnah of the Prophet" occurs is the letter of Ḥasan al-Baṣrî to the Umayyad caliph ʿAbd al-Malik (65-86). Ḥasan defends his doctrine of Qadar by pointing out that it was the doctrine of the forbears (salaf). Ḥasan extols these forbears because they "acted according to the ordinance of Allâh, narrated His Wisdom, and followed the sunnah of the Apostle of Allâh. . ."[31]

Again, in the letter of the founder of the Ibâḍîyah sect, ʿAbd Allâh b. Ibâḍ to Caliph ʿAbd al-Malik, the expression "sunnah of the Prophet" occurs several times. This letter is devoted to an apology of the Ibâḍî viewpoint in regard to ʿUthmân. The main point that Ibn Ibâḍ makes is that ʿUthmân introduced innovations and disregarded the Qur'ân, the sunnah of the Prophet, and the sunnah of the preceding caliphs — Abû Bakr and ʿUmar. He extols Abû Bakr for having followed the Book of Allâh and for having practised the sunnah of the Prophet, and hence none blamed him.[32] Contrary to this was the attitude of ʿUthmân who introduced innovations which were not in vogue in the time of his two predecessors.[33] Ibn Ibâḍ further accuses ʿUthmân of persecuting those who admonished him by referring to the Book of Allâh, the sunnah of the Prophet and traditions about the believers who had preceded him.[34] Ibn Ibâḍ also denies that the accusation of religious extremism (ghulûw fî al-dîn) applied to him. This allegation,

in his opinion, was applicable to those who attributed false things to God and were guided by things other than the Book of Allâh and the sunnah set by the Prophet.[35]

Considering the fact that only a few extent works of the first century have survived the ravages of time, not to mention the fact that only a few works were composed during that century, the above-cited examples at least establish that the expression "sunnah of the Prophet" was well in use even during the first century.

Before proceeding to analyse the term sunnah in the Fiqh literature of the second century, it is worthwhile examining its use in a treatise of unquestioned authenticity which was composed circa 140 A.H. This is the treatise of Ibn al-Muqaffa' (d. circa 140), al-Risâlah fî al-Sahâbah. Since Ibn al-Muqaffa' was a government official and littérateur, rather than a jurist, his usages of the word sunnah are of invaluable significance. For, the fact that he was not a jurist makes it unlikely that Ibn al-Muqaffa' would have used terms such as sunnah in any other except the generally accepted sense.

Ibn al-Muqaffa''s interest lies in administrative matters, in matters which are the primary concern of the ruler: "the sending forth of military expedition and recalling it; the collection and distribution [of the revenue]; the appointment and dismissal of officials;

passing judgments according to ra'y in matters regarding which there is no athar; the enforcement of hudûd and ordinances in accordance with the Book and the Sunnah..."[36] Ibn al-Muqaffa' adds that even though man should obey none when that involves disobedience to God, yet administrative matters, and the matters with regard to which no athar exists, are questions of purely governmental discretion and disobedience to the ruler in such matters is tantamount to perdition.[37] Ibn al-Muqaffa' also urges the ruler to realize that the claim to which he is entitled against his subjects is not without reservations. His right to claim obedience is conditioned with his enforcement of positive commandments and sunan.[38]

Ibn al-Muqaffa's view of the legal doctrines is tinged by his concern with administration. He desires to see the prevalence of a uniform code of laws everywhere. The spectacle that he observes around him, however, is one of shocking diversity: a diversity which is found in the doctrines of one town and the other, as well as within a particular town.[39] He is disconcerted at this diversity and tries to analyse its causes and hence denounces those who, in his view, are responsible for it. Says Ibn al-Muqaffa':

> As for those who claim adherence to the sunnah, among them are those who make into sunnah something which is not a sunnah. In this they go to such an

> extent as to shed blood without any bayyinah (evidence) or hujjah (proof) on the basis of something which they consider to be sunnah. And if they were to be asked about that, they would not be able to say that blood was shed in that case during the time of the Prophet or subsequently during the time of a'immat al-hudá.[40] And if it were said to them: "When was blood shed according to the sunnah which you claim?", they would say: "'Abd al-Malik b. Marwân or some other amîr from among the umarâ' did that". [They believe in such a doctrine even while knowing that the innovator of a doctrine] merely follows ra'y. And they reach such a point of adamance with respect to their opinion (ra'y) as to subscribe to those doctrines concerning matters of momentous importance for Muslims with which not even a single Muslim agrees. Then they do not feel distressed at their being isolated in this matter, and in enforcing judgments according to such doctrines, even though they acknowledge that they do not argue from any Book or any sunnah.[41]

What is striking in the above passage is the basis of Ibn al-Muqaffa"s stringent criticism. Ibn al-Muqaffa' says that people made the claim of sunnah even though they could not document that claim by establishing the existence of that practice during the life-time of the Prophet or of the early Caliphs, and all that they could adduce as evidence was the practice of 'Abd al-Malik or of some other rulers of a relatively late period, even though the practice concerned was based on their personal opinion, instead of being supported by arguments drawn from the Qur'ân and the sunnah.[42] In other words, true sunnah is that alone which can be traced back to the time of the Prophet and/or of the early Caliphs.[43]

To revert to the expression "sunnah of the Prophet":

the meaning is clear enough in cases wherein reference to the Prophet is explicit. Considerable difficulty arises, however, when one finds the term sunnah being used without any affix. It is also intriguing to find it being used with reference to others besides the Prophet. In fact the different uses of sunnah lead to the conclusion that it was used in a variety of meanings, and that though the term was in process of acquiring its technical connotation, so as to mean nothing else but "sunnah of the Prophet", yet that process had as yet not reached its culmination.[44]

Thus, the examples of the use of the expression "sunnah of the Prophet"[45] show the operation of a process similar to the one we have noted in regard to hadîth.[46] More important than these, however, are the few examples that we have of inadvertant substitution of the word "sunnah" for the expression "sunnah of the Prophet", which show that the former term had begun to be regarded, in general, as an equivalent of the latter. One of these examples occurs in Tr. IX. Awzâ'î is mentioned as having said: "Sunnah has come down from the Apostle of Allâh" (IX, 13). Abû Yûsuf refers to the same statement of Awzâ'î, but the expression "sunnah...from the Apostle of Allâh", is replaced by the word "sunnah", which indicates that sunnah in the sense of "sunnah of the Prophet" was a well-established usage of the time.[47]

Such a development could only have been the result of a fairly long period of the use of the term with reference to the Prophet. We have seen earlier the instances of its use during the first century as well as by Ibn al-Muqaffa', which is an illustration of its use by a non-jurist. Some of the instances of the use of "sunnah of the Prophet" by the specialists have been preserved in the fiqh-athar works of the second century. They show a consistent use of sunnah with reference to the Prophet.

In the Kufian fiqh-athar works of the second century, for example, one of the earliest instances of the use of sunnah of the Prophet occurs in traditions from Ibrâhîm. Ibrâhîm relates that a small boy replied accurately to questions regarding the rituals of pilgrimage at which 'Umar said: "You have been guided to the sunnah of the Prophet."[48]

Let us turn to Awzâ'î to examine its use by him.

(1) "Sunnah has come down from the Prophet that..."[49]

(2) Awzâ'î explicitly articulates the principle that the conduct of the Prophet is conduct par excellence (ahaqqu man uqtudiya bihi wa tumassaka bi sunnatihi rasûl Allâh).[50] At another place, Awzâ'î cites the Quranic verse which embodies this concept: "Certainly you have in the Apostle of Allâh a good example".[51]

p. 136 ?

The use of the word sunnah, however, is very scarce in Awzâ'î. Is this scarcity of reference any index of the extent of its importance in the doctrine of Awzâ'î? It is on this point that one realises the inadequacy of the results of a mechanically-contrived semantic analysis. For, the fact is that even though the term sunnah has not been used very frequently by Awzâ'î with reference to the Prophet, yet reference to the precepts and practices of the Prophet with the implication that they are authoritative, is very frequent.[52] This only emphasises the need of using the semantic evidence only tentatively and correlating it with other findings. For, the fact that Awzâ'î goes so far as to deny the religiously binding character of the institution of dîwân which had been introduced by 'Umar on the ground that it was a post-Prophetic institution, only serves to show the intimate relationship between the practice to which Awzâ'î often refers as a legal argument and the assumption of its introduction by the Prophet.[53] It is also worth remembering that Awzâ'î's references to the practice of the Muslims, but for a few exceptions,[54] are invariably preceded by reference to the Prophet as the initiator of those practices. Moreover, even when Awzâ'î refers merely to "practice", he seems to claim its authority on the ground that the practice concerned enjoyed the approval of all Muslims, particularly

of the 'ulamâ'. In fact when Awzâ'î cites a practice without claiming it to have been introduced by the Prophet, he seems to support it on the ground of ijmâ'.[55]

In Mâlik there is very frequent use of the term sunnah as such, but the expression "sunnah of the Prophet" occurs only rarely. As in the case of Awzâ'î, the scarcity of the use of this expression does not necessarily show that Mâlik did not subscribe to; or that he did not have much use for, the concept of the "sunnah of the Prophet". Such a view would be falsified even by a cursory reading of his Muwattá', which contains no less than 822 traditions from the Prophet.[56] In fact, Mâlik reports the following statement from the Prophet: "I forget or I am made to forget so that I may establish a rule (li asunna)",[57] which throws light on his view of the sunnah of the Prophet.[58]

In Abû Yûsuf, there are numerous instances of the use of the expression: "sunnah of the Prophet" as well as of sunnah without any affix. Of these we shall consider presently only a few instances of the former category, leaving the instances of the latter category for a later discussion.

Kharâj, pp. 14 and 115. 'Umar is reported as having stated that he had sent his officials to teach people their religion and the sunnah of

their Prophet.

Ibid., p. 76. Abû Yûsuf advises the Caliph that he should instruct the officials, inter alia, to administer according to the "sunnah of the Apostle of Allâh".

Ibid., p. 164. "Sunnah has come down from the Prophet and the two Caliphs..."

Tr. IX, 18 (p. 57). "No sunnah has come down from the Prophet, nor from any of his Companions".

Ibid., 5, p. 24. In matters of halâl and harâm one is not guided, says Abû Yûsuf, by the practice of people. In such matters one follows "the sunnah of [literally, from] the Prophet, and from the forbears: the Companions and the fuqahâ'.

In Shaybânî too we come across numerous instances of the expression "sunnah of the Prophet".

Muw. Sh., p. 315. Shaybânî cites the following statement of Mâlik: "There is nothing for you in the Book of God and we do not know that there is anything for you in the sunnah of the Apostle of Allâh". (The remark is in regard to a question of inheritance).

Ibid., p. 389. Shaybânî mentions a tradition according to which 'Umar b. 'Abd al-'Azîz wrote to Abû Bakr b. Hazm, asking him to look up to whatever

"ḥadîth or sunnah of the Prophet" there might be and asked him to commit the same to writing.[60]

Thus we find a consistent tradition of the use of the expression "sunnah of the Prophet" in poetry, literary prose as well as Fiqh writings, from a very early period. What does it mean, however, when it is used without any affix?

A scrutiny of the examples of the use of the word sunnah during the second century reveals its use in a multiplicity of meanings.[61] We shall consider below the main usages of the term, and the light they throw on the legal theory of the period under study.

(1) One of the usages of the word sunnah was in combination with the Qur'ân, In such cases the only satisfactory inference is that sunnah meant "sunnah of the Prophet". The following couplet of al-Kumayt, a poet of the first and early second century, serves a good instance in hand: Bi ayyi Kitâbin aw bi ayyati Sunnatin / Tarâ ḥubbuhum ʿârun ʿalayya wa taḥsabu.[62] The use of this juxtaposition of the Qur'ân and Sunnah grew with the passage of time. Even at the time when this couplet was composed(circa 100 or even before), the manner in which the term occurs here assumes that the sense in which it is being used was not a new one, but well-established.

In Fiqh literature, in particular, this Qur'ân-

Sunnah combination has been used very frequently. In such combinations the term sunnah could only mean the "sunnah of the Prophet". For, no other connotation of the term — e.g. practice, etc., could have been referred to because none could have enjoyed such an authority as to be mentioned side by side with the Qur'ân. The following are some of the examples of the Qur'ân-sunnah combination.

> Muw., p. 513. Nothing is [laid down] for you in the Book of Allâh and in the sunnah of the Apostle of Allâh. (Regarding a question of inheritance).[63]
>
> Tr. IX, 5, (p. 31). Abû Yûsuf warns against acceptance of shâdhdh traditions and lays down the principle that the hadîths which should be accepted should, inter alia, conform to the Qur'ân and Sunnah.
>
> Ibid., 5, (p. 32). "Make the Qur'ân and well-known Sunnah your guide".
>
> Loc. cit. ". . . whatever has not been explained in the Qur'ân and the Sunnah".
>
> Kharâj, p. 160. A man cuts the other person's hand deliberately. The latter, on being given the right of retaliation (qisâs), cuts his hand as a result of which the former dies. One view was that the 'âqilah of the former was liable to

pay diyah. Abû Yûsuf, however, considered him blameless because it was not he, but "the Qur'ân and the Sunnah" that had caused his death.

Hujaj, p. 212. 'Umar's instruction to Abû Mûsá' al-Ash'arî to have recourse to qiyâs in matters not found in "the Book or the sunnah".[64]

(2) "Sunnah and sîrah" is another combination in which the reference to the Prophet is implied, even when he is not referred to explicitly.

Tr. IX, 21, (p. 67). "The sunnah of the Prophet and his sîrah". The reference to the Prophet here is explicit.

Ibid., 6, (pp. 36 f.). "I did not think that anyone who knows sunnah and sîrah would be ignorant of this". Sunnah here can only mean sunnah of the Prophet, which is also proved by Abû Yûsuf's argument on p. 35.

(3) There is a number of instances which shows that "sunnah" and "hadîth" were not used as equivalents in the early period, though they were quite often used as such later by the scholars of the science of Hadîth.[65] Hadîth generally referred, in the early period, to a communication from the authorities (narrowed down subsequently when the technical terms were fixed) i.e., from the Prophet as well as others, particularly the Companions.[66] As for sunnah,

it referred to an established religious norm. Thus, hadîth provided the documentation of the sunnah, but was not sunnah itself. For every hadîth is not necessarily authentic or sunnah-yielding. As against a hadîth, therefore, sunnah constitutes an established norm of practical life which has come down, most probably from the Prophet, and/or from the Companions, or, in some instances, has been inferentially derived from their sunnah and has been sanctified by consensus.[67]

There are numerous instances which show that Abû Yûsuf made a sharp distinction between hadîth and sunnah. In Tr. IX, 5 (p. 31) he warns against shâdhdh (and he considered isolated traditions to be shâdhdh[68]) traditions and urges that only the traditions which are, inter alia, in harmony with the Qur'ân and the sunnah should be accepted. In fact, in the light of the writings of Abû Yûsuf, it appears that by sunnah he meant only those norms which were recognized as such by the Muslims in general, were accepted by the fuqahâ', and which had come down through reliable and learned people.[69] Hence there are numerous instances of Abû Yûsuf's emphasising the established character of sunnah such as: "sunnah mahfûzah ma'-rûfah"[70], "sunnah ma'rûfah"[71], "al-hadîth fî hâdhâ kathîr, wa al-sunnah fî hâdhâ ma'rûfah"[72], and "al-hadîth fî hâdhâ ma'rûf mashhûr, wa al-sunnah fîhi ma'rûfah".[73]

(4) It is this aspect of sunnah — its being a well-known and well-established norm which is emphasised when sunnah is used with words — either verbs or adjectives — derived from madá. Being well-established and coming from the past — which is suggested by the term madá — sunnah was regarded as reflecting the tendency which was diametrically opposed to innovation ihdâth or bid'ah.[74]

This brings us to the problem of the relationship between sunnah and the actual customs or practices of the Muslim society in the opinion of the second century jurists, particularly the Kufians. This relationship is an involved one. To some extent, the actual customs and practices were considered, or gratuitously assumed, to reflect the teachings of the Prophet. For, it was felt — and naturally so — that these teachings were not restricted to verbal transmissions but had become incorporated into, and therefore, had become an integral part of, the way of life of Muslims. However, it was not practice or custom per se which was considered to be authoritative.[75] It is well-known that the concept of practice plays a particularly conspicuous part in the doctrines of Awzâ'î. The practice to which even Awzâ'î refers, however, is the one which has, inter alia, not been disapproved by the 'ulamâ'.[76] In Abû Yûsuf we find an illuminating passage which proves that the concept of sunnah was not equivalent to 'actual practice', neither

in the opinion of his own school, nor in the opinion of the Medinese or Syrian jurists. In the passage concerned, Abû Yûsûf chides the Medinese for sanctifying their practices into sunnah even though these practices might probably have been introduced by some market-inspector or administrative official.[77]

Whether Abû Yûsûf's judgment about the activity of the Syrian and Hijazi lawyers is factually correct or false does not concern us here. What is of paramount importance is the biting indictment that his criticism contains. This bitter indictment makes it clear that there was no professed claim on anybody's part that practices were self-sanctifying, that they were synonymous with the sunnah. This is not only true of the Kufian jurists, but of the Hijazis and the Syrians as well. For, were it the case that the Hijazis and the Syrians had categorically proclaimed their practices per se to be synonymous with sunnah, Abû Yûsûf's indictment would have been pointless. After making a strong attack on 'practice', Abû Yûsûf articulates his own view of sunnah in the following words:

> In deciding questions of what is allowed and what is prohibited, one does not follow claims such as people have continually followed this doctrine. For, a majority of things that people have followed are not permissible and not proper. There are cases which I could mention where the great mass (ʿâmmah) violates a prohibition of the Prophet. In these questions one has to follow the sunnah from the Prophet and the forebears:

his Companions and the fuqahâ'.[78]

As against actual practice, therefore, Abû Yûsûf would have people derive their sunnah from the Prophet and the Companions through the fuqahâ'.[79]

(5) On the basis of the above, it is not difficult to see that the word sunnah came to be used figuratively in the sense of "established religious practice", "established religious doctrine", al-ṭarîqah al-maslûkah fî al-dîn.[80] In Mâlik, the expression "al-sunnah 'indanâ" means the same. Abû Yûsuf and Shaybânî also sometimes use sunnah in this sense.[81]

(6) Close to this is another expression which is peculiar to Mâlik: al-sunnah al-latî lâ ikhtilâf fîhâ 'indanâ". This refers not merely to "established doctrine", but also points to the source wherefrom its authoritativeness was derived — the consensus of the Medinese.[82] In Mâlik this is a very commonly used expression and seems to mean the same as al-amr al-mujtama' 'alayh 'indanâ.[83]

(7) An aspect of sunnah — and this flows from what we have said regarding the connotation of sunnah earlier — is that it was of an authoritative nature. Hence it was opposed to ijtihâd. Says Mâlik: "And in a matter with regard to which no fixed talion has come down from the Prophet, nor has any sunnah come down,

in such a case one resorts to ijtihâd".[84] In the event of finding any sunnah, i.e. authoritative rule, one may not use one's reasoning. Rabî'ah (d. 136) asked Sa'îd b. al-Musayyib (d. circa 93) the rationale of the apparently unjustifiable doctrine of 30 camels as diyah for 3 fingers, and 20 camels for four. Sa'îd b. al-Musayyib's reply was: "This is sunnah..."[85]

(8) It remains to be considered as to whose precept and practice constituted the sunnah which the Muslims were required to follow. That the Prophet's example was sunnah is obvious.[86] But side by side with the Prophet there was also the sunnah of the Companions, as we shall see.[87]

Both Abû Yûsûf and Shaybânî refer to the authority of the Companions, particularly to a'immat al-hudá (i.e. al-Khulafâ' al-Râshidûn),[88] and even more particularly to first two Caliphs.[89] In Hujaj in particular, Shaybânî confronts the Medinese again and again with the question whether their doctrines in question were supported by any traditions from the Prophet or from the Companions.[90] This shows the importance of the Companions in the opinion of Abû Yûsuf and Shaybânî.

Abû Yûsuf, for instance, says that in matters of halâl and harâm, practice is irrelevant. In such matters one follows "the sunnah from the Prophet and from the

for bears — his Companions and the fuqahâ'".[91] With regard to another problem, he remarks: "As far as we know, no sunnah has come down from the Apostle of Allâh, nor from any of his Companions. . ."[92] On another occasion, Abû Yûsûf mentions the sunnah of the Prophet and of the two Caliphs who succeeded him.[93] Abû Yûsuf refers to the adherence, by 'Umar b. 'Abd al-'Azîz, of the policy of 'Umar b. al-Khaṭṭâb, for which he uses the expression: "he followed the sunnah", and makes an explicit statement about the authoritativeness of the decisions of "al-wulât al-mahdîyûn", (which seems to mean the same as a'immat al-hudá).[94]

(9) Another usage of the sunnah refers to the degree of merit attached to a certain action. This usage too seems to have been well-established during the second century and has passed on to the classical Islamic Fiqh and means "recommended but not obligatory".[95] In this sense it was opposed, on the one hand, to farîḍah and wâjibah, and to nâfilah on the other. In this hierarchy its position was in between these two.

> Muw. p. 487. "Sacrifice [of animals] is a sunnah and not wâjib but I do not like that anyone who can bear the expenses should abandon it".
>
> Ibid., p. 347. "'Umrah is a sunnah and we do not know of any Muslim who has permitted its abandonment".

Ibid., p. 824. 'Umar is reported to have said: "Sunnah have been laid down for you and farâ'id have been made incumbent on you".

Âthâr A.Y., 404. Opposes sunnah to nâfilah.[96]

Hujaj, p. 143. Abû Ḥanîfah and Shaybânî agree that 'umrah is sunnah, but not wâjib. Whoever performs it does a good thing, and earns extra merit.[97]

Ibid., p. 45. There is disagreement as to whether witr is sunnah or wâjib.

The origin of the use of sunnah in this sense seems to have been owing to the realisation of some difference in the degrees of importance between the injunctions derived from categorical verses of the Qur'ân, and those derived from other sources. This is evidenced by expressions such as Shaybânî's remarks: "The mash of the head is a farîḍah [derived] from the Book of Allâh".[98] To some extent the Ḥanafî school retained this distinction.[99]

(10) The following are some stray examples of the use of the term sunnah:

If there is an ancient 'Ajamî sunnah, which Islâm has not changed and has not declared as bâṭil, and some people complain about the harm caused by that sunnah . . .[100]

A group of weavers came to Shurayḥ in connection with a dispute and said to him: "Our sunnah is so and so". Shurayḥ said: "Your sunnah is among yourselves."[101]

Abû Yûsûf extols the revival of sunan, but here he is referring not to the sunan of the Prophet, or of the Companions, but to the sunan set up by good people (al-ṣâliḥûn).[102] These refer to "usages" or to "good usages" without necessarily referring to the Prophet or Companions.

To conclude from the above, the following points emerge:

(i) The term has had an uninterrupted tradition of use with reference to the Prophet from the earliest period of Islâm, a fact which can only be explained in terms of the Quranic doctrine that the conduct of the Prophet is exemplary. This is evidenced not only by the formulation of the expression "sunnah of the Prophet" and its increasing use, but also by using the term sunnah as such in the sense of "sunnah of the Prophet".[103]

(ii) The Muslims, however, regarded as authoritative not only the precepts and practices of the Prophet, but also those of his Companions. We have seen that the authority of the Companions was already well-established circa 75.[104] It is noteworthy that the precepts and practices of the Prophet as well as of the Companions continued to be

characterised as sunnah. The only authentic example that we have of denying the religiously authoritative character of a sunnah of a Companion is Awzâ'î's objection to dîwân on the ground that it was a post-Prophetic institution.[105] This solitary example merely emphasises that practices generally derived their religiously binding character from their having some kind of association with the Prophet. This solitary instance notwithstanding, the early Islamic literature, especially the Kufian literature, frequently designated the practices of the Companions, especially of the first four Caliphs, as sunnah, which was deemed to be part of what Shaybânî calls "binding information".[106]

(iii) Besides references to the sunnah of the Prophet and of his Companions, there are also references to the sunnah of the fuqahâ[107] and of the virtuous people.[108] So far as the latter use is concerned, it seems to mean "good examples" as such. It has been used in a broad moral sense. As for the sunnah of the fuqahâ', to which Abû Yûsuf refers side by side with the sunnah of the Prophet and the Companions, the context elucidates the significance of its use. Abû Yûsuf mentions fuqahâ' while stressing that in deciding what is allowed and what is prohibited, it is not practice to which one should turn for guidance; one should rather follow the sunnah of the Prophet, the Companions, and the fuqahâ'. The obvious

question that arises is whether, in Abû Yûsuf's opinion, the fuqahâ' were entitled to declare something to be allowed or prohibited on their own authority? The obvious answer is 'no'. So far as declaring things to be halâl or harâm is concerned, Abû Yûsuf expresses the view that one should avoid saying that except on the basis of a categorical Quranic verse, and should use, instead, expression such as "This is makrûh", or "There is no objection to it", etc.[109]

Hence, there can be no doubt that Abû Yûsuf's attitude to the Companions is quite different from his attitude to the fuqahâ'. So far as the Companions are concerned, he frequently refers to them as authorities, and characterises their practices as sunnah. As for the fuqahâ', their value is secondary, and nevertheless important. Firstly, it is they who can rightly interpret the traditions from the Prophet, etc., and derive fighî norms therefrom.[110] Moreover, it is the traditions attested by the learned specialists which are to be regarded as authentic - an idea which Abû Yûsuf repeatedly stressed.[111] In fact this appears to be one of the reasons for Abû Yûsuf's distinction between hadîth and sunnah.[112] The expression sunnah in relation to the fuqahâ', therefore, seems to mean substantially the same as the following statement of Abû Yûsuf: "hadîth transmitted by trustworthy people and

supported by those noted for their fiqh (legal understanding)".[113]

(iv) Sunnah mâdîyah. As we have shown, this refers to normative rather than actual practices, and the assumption seems to be that the practice concerned originated in the time of the Prophet or of the Companions, and that it presumably embodied a religious norm. In Abû Yûsúf we find a protest against this attitude, and a demand for well-attested traditions,[114] instead of vague references to practices coming down from the past. In this respect Abû Yûsúf anticipated Shâfi'î.

In the light of the above, the conclusion that emerges is that the word sunnah was used in a multiplicity of meanings, especially with reference to the Prophet and his Companions, but was increasingly tending towards its restrictive connotation — owing to its steadily growing use with reference to the Prophet alone.

III. Ijmâ'

Consensus (ijmâ'), according to the classical Islamic theory, is one of the four 'roots' of Islamic law.[115] During the period under study, reference to consensus is quite frequent in all the schools of Islamic law that we know of — the Kufian, the Medinese and the Syrian.

During our discussion on sunnah we have seen that

being generally recognized by the community (or by its scholars in general) as normative was considered one of its essential characteristics.[116] If there had come down a certain practice from the past which had been generally considered by the Muslims to be meritorious, or at least unobjectionable, this fact naturally made a strong case in its favour. It is not difficult to see the importance of consensus during the first and second centuries when the compendia of traditions were in the process of coming into existence to enable judgments by referring to a known body of authoritative traditions. Hence, not only was "agreed practice" put forward as a barrier against isolated traditions, but was also used quite frequently as an argument for further authentification of the tradition which supported a certain doctrine, or sometimes even independent of traditions.

A semantic survey of the terms used for expressing the concept of consensus shows that the situation was approximately the same as in regard to sunnah: viz., that the technical terminology was in the process of development but the process had not reached its final point. Hence the concept was expressed in a variety of forms. Nevertheless, the concept of consensus was close to acquiring a technical term — ijmâ' — for its expression, as we shall see.

Before studying the Kufian case, let us glance at "consensus" in Syria and Medina.

Awzâ'î, the only Syrian faqîh whose views are known in some detail, makes frequent reference to consensus. The following points are noteworthy about the forms employed by Awzâ'î to express the concept of consensus:

> . . . In a majority of cases Awzâ'î's reference to 'consensus' follows his prior mention of the practice or doctrine in question as going back to the Prophet. Thus, consensus generally constitutes a supplementary argument which seeks to reinforce the claim that the practice in question was sunnah. Moreover, consensus perhaps also serves the purpose of reinforcing the evidence of the traditions[117] which, in the case of Awzâ'î, are devoid of isnâd. However, aside from referring to consensus by way of a corroborative evidence in favour of practices or doctrines allegedly introduced by the Prophet, consensus has also been referred to in a manner which shows that it was also deemed to be an independent source of law. Even though such instances are not many, yet they are there.[118]

The references to consensus in Awzâ'î are found in negative as well as positive forms. He supports a certain practice, for example, on the ground that "none has denounced this: neither any wâlî of the jamâ'ah (community), nor any 'âlim".[119] Besides this, however, there are inst-

ances of claims for positive consensus expressed by derivatives from "ajma'a".[120]

The notion of consensus in Awzâ'î is essentially that of continued Muslim practice, continued not only actually, but also normatively, i.e., practice backed by the conviction of being appropriate on the part of both the rulers and the 'ulamâ'.[121] The reference to 'ulamâ' seems to guarantee that the practice in question was religiously unobjectionable. Besides the consensus of a'immat al-hudâ[122] and a'immat al-Muslimîn and of 'ulamâ', Awzâ'î also makes use of the concept of the "consensus of all Muslims." This latter, however, is rather rare.[123]

Coming to the Medinese school, reference to consesus generally takes the form of claiming the consensus of the Medinese. The doctrine seems to have been well-established from the first century.[124] In his letter to Layth, Mâlik objects to his alleged deviation from the doctrines of the Medinese jamâ'ah as a whole. He quotes two Quranic verses (IX. 100 and XXXIX. 18) and derives therefrom the doctrine that "people are bound to follow [the doctrines of] the Medinese." He further supports this contention by saying: "It is to Medina that migration took place; it is here that the Qur'ân was revealed, declaring what is permissible to be permissible, and what is prohibited to be prohibited. The Prophet was among

them . . . who ordered them and they obeyed him; who set up examples (sunan) for them and they followed him. . ." After the Prophet's death, says Mâlik, people followed what they had come to know and asked others about matters which they did not know, always accepting the best doctrines. The same was the practice of the succeeding generations. Hence, deviation from what they had agreed about was not permissible for outsiders (ahl al-amsâr).[125]

Mâlik has numerous expressions for consensus. These expressions generally reflect the local character of his concept of consensus. Some of these are "al-amr al-mujtama' 'alayh 'indanâ"; or "al-sunnat al-latî lâ ikhtilâf fîhâ 'indanâ";[126] or "al-amr al-ladhî lam yazal 'alayh al-nâs 'indanâ";[127] or "'alá dhâlika ahl al-'ilm fî bilâdinâ".[128] This proves the lack of existence of a standard technical term. At times this consensus meant concurrence to consider a certain tradition, to the exclusion of others, to be authentic;[129] but it is not confined to that. In actual operation, consensus does not signify the complete uniformity of opinion among all Medinese scholars but merely the consensus of "approved scholars", in fact, only of their majority.[130]

Coming to the Kufians,[131] as distinguished from the parochial concept of consensus of the Medinese, and also perhaps of the Basrians,[132] their concept of consen-

sus seems to have a universal character. The Kufians refer to the "consensus of [all] people",[133] and to the "consensus of scholars in all countries".[134] Shaybânî refers to "all Muslims without a dissenting voice", that is, all Hijazis and Iraqians,[135] and to the consensus of the Kufians and the Medinese.[136]

To come to the expressions employed by the Kufians to express consensus, they are quite numerous. Abû Yûsuf, like Awzâ'î, expresses this concept in negative as well as positive forms.

In the negative form, it assumes some such form as in his statement: "No disagreement on the question has come down from anybody".[137] More frequent, however, is reference to positive agreement.

Tr. IX., 42, (p. 120). 'alá hâdhâ jamâ'at fuqahâ'inâ lâ yakhtalifûn (a claim of ijmâ' backed by a tradition from the Prophet).

Kharâj, p. 174. On the question of stealing 'Umar consulted people, and "they concurred (ajma'û) that . . ."

Ibid., p. 165. Abû Yûsuf reports that the drinking of intoxicants was punished by forty stripes during the time of the Prophet and Abû Bakr, but by eighty lashes during the time of 'Umar. This is followed by the statement: wa al-ladhî ajma'a 'alayh

ashâbunâ...thamânîn.[138]

Ibid., p. 166. The question whether the testimony of a convicted qâdhif was acceptable or not was a disputed issue in the early period, as we have seen.[139] Using the same expression, ajma'a ashâbunâ, Abû Yûsuf claims that the scholars of his school had arrived at consensus on the doctrine that his testimony should not be accepted.

Ibid., p. 167. "If a slave, whether male or female, commits illegitimate sexual intercourse", says Abû Yûsuf, "our ashâb have concurred [Abû Yûsuf uses the same expression as above] that each of the two shall receive fifty stripes".

Ibid., p. 59. Abû Yûsuf refers to the consensus of the Companions of the Prophet. He blames the Khawârij for not following a doctrine regarding which the Companions of the Prophet had concurred in the following words: "Lam ya'khudhû bi mâ ijtama'a 'alayh ashâb rasûl Allâh".

Âthâr A.Y., 98 and 278. In a tradition from Ibrâhîm the consensus of the Companions is invoked in the following words: "Lam yajtami' ashâb Muhammad kamâ ijtama'û 'alá. . ."

Shaybânî also argues from consensus quite often. To him it is authoritative and binding, and therefore,

he opposes it to ra'y,[140] which is not so. Indeed, in him we find a specific argument justifying ijmâ': a tradition from the Prophet: "Whatever the believers consider to be good is good in the sight of Allâh and whatever they consider bad [literally, ugly] is bad in the sight of Allâh".[141] Shaybânî refers to the consensus of all Muslims[142] as well as to the consensus of fuqahâ',[143] particularly of the fuqahâ' of his own school,[144] and also to the fuqahâ' of Kufa and Medina.[145]

He generally refers to consensus in the following ways:

(i) Shaybânî declares one doctrine to be preferable to its opposite and adds: "Wa huwa al-qawl al-ladhî ajma'a 'alayh ahl al-Kûfah".[146]

(ii) Regarding a certain ritual prayer which was made congregational by 'Umar, Shaybânî holds the view that that act on the part of 'Umar was all right. Why? "Li anna al-muslimîn qad ajma'û 'alá dhâlika wa ra'awhu hasan".[147]

(iii) On another occasion he remarks: "Wa hâdhâ al-amr al-mujtama' 'alayh lâ ikhtîlâf bayn al-fuqahâ' fîh".[148]

(iv) Shaybânî remarks in the vein of Awzâ'î: [This is the] well-known hadîth from the Prophet which is not doubted and the affairs of the Muslims [i.e., practice] are run according to it all over.[149]

The above survey regarding consensus forces the

conclusion that even though the concept of consensus of all Muslims as well as of fuqahâ' was quite well-known and frequently referred to, it had as yet not acquired a standardised form of expression. However, it was well on the way to acquiring a fixed technical term for its expression which is proved by the use of the derivatives of ajmâ'a in a majority of cases in which consensus was claimed.

IV. Ra'y, Qiyâs, Istihsân

(A)

Ra'y is the genus of which qiyâs and istihsân are species. As we have seen, ra'y signified the use of human reasoning, and it was for this reason that the school of law of Iraq, where the use of human reasoning was relatively more prominent, came to be known as the school of ra'y and qiyâs.[150]

In a society which was committed to the authority of revelation, the problem of the use of human reasoning in handling what were essentially religious laws, was understandably a delicate and involved one. Human reasoning, to say the least, could be used only to a certain extent — and the fixation of this extent naturally differed from one person to the other. It is also not difficult to imagine the constant danger of overstepping

the proper limits within which human reasoning should operate. It was this danger which was articulated by the opponents of the so-called ra'y-tendency. However, even those who seem to have resorted to ra'y very frequently or were more or less consciously committed to the legitimacy of its use, opposed it to what they called "athar" or "khabar lâzim", implying a distinction between the two, and the relatively inferior position of ra'y.[151] A few instances would illustrate this.

In his letter to Ḥasan Baṣrî, 'Abd al-Malik asks whether the doctrine of Qadar was based on the Qur'ân or any tradition from some Companion of the Prophet, or was it a ra'y (personal opinion) at which he had himself arrived.[152] This testifies to the consciousness that ra'y was different from other sources and also throws some light on the dichotomy between ra'y and what Shaybânî (and subsequently, Shâfi'î) termed "binding information".[153] In his reply Ḥasan claimed that his doctrine was the one upon which the forebears were agreed and that people had innovated a doctrine — the opposite of his doctrine — and in so doing they were driven by "their misguiding desires" (al-ahwiyah al-mudillah).[154]

In Ibn al-Muqaffa' too we find this problem as well as the use of the term ra'y. According to Ibn al-Muqaffa', God has ensured man's felicity by means of two things:

(1) religion and (2) reason (_'aql_). Reason is a benediction of God, says Ibn al-Muqaffa', and yet it is incapable of the cognition of true guidance unless this true guidance is revealed by God. Except for the things which have thus been authoritatively laid down, God has left the rest of the things to _ra'y_ and has entrusted its administration to the rulers.[155] This is one use of _ra'y_ — which seems to mean deriving correct inferences from authoritative sources, and using ingenuity and discretion in enforcing them. This is the use of _ra'y_ in a good sense. There is, at the same time, an instance of the use of _ra'y_ in a bad sense. It is in the context of introducing objectionable practices merely on the basis of _ra'y_ (personal opinion) without any reference to the "Book" or "the _Sunnah_"; and even though that doctrine was an isolated one to which no Muslim subscribed. It is sheer vanity that a person should regard such a doctrine as enforceable particularly when enforcing it entailed violation of the sanctity of human lives.[156] In this context _ra'y_ denotes arbitrary opinion.

In Abû Yûsuf and Shaybânî too we find the use of the term in both good and bad senses. It is used consistently in a good sense when it is used in the context of deriving a doctrine on some question on which there was no authoritative information. 'Umar, according to a tradi-

tion cited by Abû Yûsuf, asked Ibn Mas'ûd to make judgment according to his ra'y[157] on a question on which nothing authoritative was known.

The favourite Iraqian forms of the use of ra'y are the expression alâ tará or ara'ayta.[158] It is only when one uses ra'y at the cost of something which is authoritative, e.g., athar, sunnah, or consensus, that ra'y is considered to have overstepped its proper limits.[159] In his Hujaj Shaybânî criticises the Medinese again and again for using ra'y in an arbitrary manner and for not basing their doctrines on athar. For this, he also uses the term tahakkum.[160]

(B)

The works of Abû Yûsuf and Shaybânî show an increasing use of qiyâs and a clear formulation of its concept. When this is compared with the comparatively rare use of the term in the Medinese or Syrian writings, the obvious conclusion that follows is that it is the Iraqians who popularised the use of the term in legal discussions.[161] The references by Shâfi'î to the Iraqians as the "adherents of qiyâs"[162] or his statement that the "Iraqians allow none to diverge from qiyâs",[163] also testify the leading role played by the Iraqians in making this term familiar.

The following are the main usages of qiyâs in Abû Yûsuf and Shaybânî which will show not only that its use was quite standard, but also that the term itself had been precisely defined and its connotation fixed.

Tr. IX, 5, (pp. 31 and 32). Abû Yûsuf stresses that everything ought to conform to the Qur'ân and the sunnah [in the latter instance, to sunnah ma'rûfah]. Besides, Abû Yûsuf admonishes that the Qur'ân and the sunnah should be used for the purpose of "measuring" everything which has not been laid down in them. Abû Yûsuf claims that Abû Hanîfah derived the doctrine that the pregnant Muslim woman who comes from dâr al-harb may not be taken into marriage by means of qiyâs from the saying of the Prophet which prohibited intercourse with a pregnant captive woman prior to child-birth.

Tr. I, 51. On the question of muzâra'ah, Abû Yûsuf disagrees with the doctrine of Abû Hanîfah and in addition to citing traditions from the Prophet which testify to its legitimacy, he also asserts that muzâra'ah is parallel to mudârabah [and, therefore, permitted]. He claims: "This qiyâs of ours is in addition to the athar".[164]

Kharâj, p. 178. Qiyâs is distinguished from athar on the one hand, and istihsân on the other.[165]

In Shaybânî we find even a more precise and sharper formulation of the doctrine of qiyâs.

Hujaj, p. 6. "In respect of that for which there is no athar, what should be done is to resort to qiyâs (analogy) on the basis of athar with regard to something which is parallel to it".

Ibid., p. 9. Repeats the same idea in almost the same words.

Ibid., p. 235. A similar expression.

Ibid., p. 234. Shaybânî points out that copper and lead do not resemble stones. They rather resemble gold and silver and hence the rule of zakâh regarding gold and silver should be applied to copper and lead, rather than the rule with regard to stones. In view of the above Shaybânî criticises the Medinese for having "erred in making qiyâs".

Ibid., p. 212. Shaybânî cites the instructions of 'Umar to Abû Mûsá al-Ash'arî urging him to find out parallel cases and to apply qiyâs: "wa qis al-amr 'inda dhâlik".

Ibid., p. 46. Opposes qiyâs to athar, and points out that there can be no qiyâs when there are âthâr i.e., on issues on which there are specific rulings in the authoritative sources. In such matters one should follow athar.

In Abû Yûsuf we have seen instances of opposing qiyâs to istihsân, a feature which is even more prominent in Shaybânî, as we shall see in our discussion on istihsân.[167]

It may also be pointed out that even though the word qiyâs seems to have already developed into a technical term by the time of Abû Hanîfah, yet the use of expressions such as bi manzilah,[168] or that of a ra'ayta and a lâ tará[169] shows that alternate expressions were still in use. Moreover, the actual application of analogy by the Kufians evidences considerable technical skill as well as a fairly clear notion of qiyâs. In applying qiyâs the Kufians seek the element which is common to both the original and the assimilated case, but they do not use the term 'illah, which is the later term for it.[170] This is only one among several examples of the semantic lag and which only proves that semantic developments followed, rather than preceded, conceptual developments.

(c)

Coming to the usages of the term istihsân in Abû Yûsuf and Shaybânî one gets the impression that the term was formulated in opposition to qiyâs and the purpose was not to deny the legitimacy of qiyâs as such, but to restrict its scope so as to avoid the unhappy consequences that

might follow from adhering to qiyâs rigidly and to affirm the validity of the jurist's discretion to depart from strict analogy on the strength of some overridingly important consideration.

> Kharâj, p. 178. A ruler or his judge sees a man commit theft or illegitimate sexual intercourse, etc. He should not enforce hadd merely on the basis of his own observation without (any other) testimony. Abû Yûsuf designates this as istihsân, and the basis for this is an athar from Abû Bakr and 'Umar, even though qiyâs required that the hadd should be enforced.[171]
>
> Ibid.,p.189. Regarding a harbî who enters dâr al-Islâm: if some Muslim steals from his property, or deliberately amputates his hand, qiyâs demands that the hand of the Muslim should be amputated. Abû Yûsuf is of the opinion, however, that this doctrine would not be followed, and he decided to give preference to a doctrine opposed to this doctrine in deference to the authority who followed the opposite doctrine.[172]

Istihsân, in the view of Shaybânî, however, does not justify deviation from athar, but merely from qiyâs. He accuses the Medinese of having resorted to istihsân as against "a hadith from the Apostle of Allâh".[173]

As for opposing istihsân to qiyâs, we have seen its examples in Abû Yûsuf. In Shaybânî this opposition is a

regular feature. In Jâmiʿ Saghîr, for instance, istiḥsân occurs eighteen times, out of which it is only nine times[174] that it has been used without reference to qiyâs.[175] The following are a few examples of istiḥsân.[176]

Jâmiʿ Saghîr, p. 21. A group of people prayed on horseback. According to qiyâs, this is sufficient and acquits them of their duty; according to istiḥsân, it does not.

Ibid., p. 61. A person who confessed about another person that the latter was his son, and subsequently the latter died. That person and his mother would be entitled to inheritance according to istiḥsân, though, according to qiyâs, the woman was not entitled to inheritance for the person might have had sexual intercourse with the woman in shubhah (misunderstanding), not knowing that she was a free woman.

Ibid., p. 83. If some people commit theft and make one from among themselves carry the stolen goods: while qiyâs demands that only the hand of the person who was carrying the stolen goods should be cut, istiḥsân demands that punishment in respect of all the culprits.

Ibid., p. 69. A person says to his wife (who is already within the house): "If you enter into the house you are divorced". According to qiyâs, this statement would be tantamount to ṭalâq, whereas

according to istihsân, divorce becomes operative only if the woman re-enters the house.

Ibid., p. 107. A person usurped a slave, then he sold him to someone who, in turn, manumitted him. Subsequently the original owner allowed the sale of the slave. According to istihsân it is permitted.[177] (Shaybânî, however, does not hold it to be permitted, probably owing to its irregularity from the technical legal point of view).

Schacht has disagreed with the conclusion of Goldziher that istihsân was introduced by Abû Ḥanîfah and has argued that istihsân existed even before Abû Ḥanîfah as a part of Iraqian legal reasoning, although the technical term for it appeared later, for the first time in Abû Yûsuf.[178] Whatever sources are available to us seem to confirm this. As for the connotation of the term, the above-cited examples lead to the conclusion that it signified departure from qiyâs, sometimes on the ground that athar seemed to be opposed to the qiyâs in question; or else it signified departure from qiyâs in favour of considerations of equity and justice, or in favour of a doctrine which might have been formally less systematic, but more appealing to the commonsense.[179]

V. Scales of Religious and Legal Evaluation

The classical Islamic law developed a scale for the evaluation of human acts in terms of their religious merit or demerit. This led to the formulation of the following five-fold scale:

(1) Wâjib, fard.

(2) Sunnah, mandûb, mustahabb.

(3) Mubâh.

(4) Harâm.

(5) Makrûh.

Besides this, it also developed a scale of legal validity[180] consisting of the following four categories:

(1) Sahîh.

(2) Makrûh.

(3) Fâsid.

(4) Bâtil.

The fiqhî writings of the period under our study show that even though the concepts expressed by these terms were in use, yet the forms of expressing them do not appear to have been standardised. Hence, a wide range of alternative expressions was used. The use of long sentences for what was in later times expressed by a word or two, also shows that a number of technical terms had as yet not been definitively fixed.

We shall take up the scale of religious qualifications first and scrutinize the phraseology that was employed to express the concepts embodied by the terms of this scale.

(i) For the expression of the idea of religious obligatoriness, the terms which were generally used were derived from wajaba and farada.[181]

(ii) The concept of mandûb[182] was expressed in numerous ways of which we shall list below only some important examples:

> Muw. Sh., p. 73. Ibrâhîm tries to justify his doctrine that taking bath on Friday and the two 'Îds is religiously indifferent. In order to express this idea, Ibrâhîm points out that if one took bath on those occasions, it was good; but if one did not do so, it would not be reckoned against him. When asked how this doctrine could be justified in spite of the saying of the Prophet: "Whoever goes to [the] Friday [prayer], should take bath", Ibrâhîm replied: "This is all right, but it is not obligatory". This (i.e., the exhortation to take bath), argues Ibrâhîm, is similar to the ones contained in the Quranic verses II. 282 and LXII. 10. The last of these says that after the Friday prayers people should disperse. It was not

blameworthy, says Ibrâhîm, if a person did not disperse after the Friday prayer.[183]

Loc. cit. Shaybânî himself expresses the same idea by using the term afdal, which reflects some measure of both doctrinal and semantic development.[184]

Ibid., p. 225. Some other forms of expressing this concept are to characterise something as hasan, with the clarification that it is not wâjib;[185] or by using the phrase: ahabbu ilayya (or ilaynâ), etc.[186]

(iii) Again, instead of any precise word or expression for the concept of ibâhah (indifference) there were numerous expressions. The most common of these was lâ ba's[187] or mustaqîm jâ'iz[188] or ma'rûf hasan jamîl[189] or halâl[190] or fî sa'ah[191] or jâ'iz.[192]

(iv) The concept of harâm was expressed by various terms. Sometimes the word harâm[193] itself was used, on other occasions kariha or its derivatives, or lâ yahillu.[194]

(v) The concept of "disapproved but not sinful" was used, but not necessarily expressed by the term makrûh,[195] which is the classical term for it. So far as the concept itself is concerned, we find it expressed in statements such as the following:

Âthâr Sh., 57. Regarding the question whether the mu'adhdhin might speak during the adhân: Abû Hanîfah and Shaybânî were of the view that he should not do so, but if he does, that would not nullify (intaqada) his adhân.

Hujaj, pp. 148 f. Shaybânî distinguishes between disapproval in the sense of harâm, and for the sake of tanzîh. (This distinction, as well as this terminology, became an integral part of classical Hanafî tradition).[196]

Siyar Kabîr, p. 148. Shaybânî reports 'Alî's opinion that he considered marriage with Christian women in dâr al-harb to be makrûh. Shaybânî observes that this opinion was because of the fear that the progeny would be left in dâr al-harb. He clarifies that 'Alî did not consider it to be harâm.

Tr. IX, 23, (p. 73). Abû Yûsuf reports that Ibrâhîm preferred to say: "This is makrûh" instead of saying: "This is harâm".

Thus, the concept of 'makrûh' in its classical sense was well known and used, but there was no uniform term for expressing that concept.

Coming to the scale of legal validity, the consideration of acts in terms of their legal as distinct,

though not altogether divorced from, their religious value, constitutes an important aspect of the development of Islamic jurisprudence. This applied to rituals as well as to contracts. The basis of this line of development rests on distinguishing between the religious-moral and legal quality of acts. A certain act might be makrûh in terms of its religious evaluation, and yet acquit the person who performs it of his duty. A contract might have an element which, in religious terms, might not be approved, and yet it is legally valid and therefore, enforceable. The idea that a man's act was disapproved, and yet valid is often expressed by Shaybânî in the following form: "ajza'ahu dhâlika wa asâ'a".[197] Shaybânî also gives expression to the view that an act might entail penalty, even though the person concerned might not have sinned. The problem on which he expresses this view is that of the woman who is in the state of consecration for pilgrimage, and is coerced by her husband into sexual intercourse: would she be liable to kaffârah (expiation) or not? The Medinese argued that since the act was not performed voluntarily it was not sinful and, therefore, did not necessitate expiation. Abû Ḥanîfah and Shaybânî, on the other hand, argued that at times one was obliged to

make expiation [owing to a formal breach of some rule], even though one had not committed a sin. This is proved by the obligation to pay blood-money even for homicide without intent and to make expiatory sacrifice if one had unintentionally killed an animal in the state of consecration for pilgrimage.[198] Thus, there was a growing trend towards a purely legal evaluation of acts, the consideration of acts in terms of their legal effects which follow from them side by side with, and yet distinguished from their religious or moral value. Subsequently, this distinction became increasingly vivid, and led to the formulation of the four-fold scale of legal validity.[199]

It will be noticed that the semantic development lagged behind the conceptual one in this case even as it generally lagged behind in other cases. The concept of sahîh was generally expressed by the term "ajza'a", yujzi'u.[200] As for fâsid, bâtil, and makrûh, these were used quite frequently, but not necessarily in the sense in which they were used in the classical fiqhî literature. Their connotations not being precisely fixed, these terms seem to have been used interchangeably.[201]

VI. Conclusion

The above discussion leads to the following conclusions:

(1) That there was a marked lag between the conceptual and semantic aspects of the development of Fiqh. A number of concepts remained in use for a long period of time before they could acquire standard, technical phraseology for their expression. This fact reinforces the testimony of other evidences that some of the fundamental concepts such as the sunnah of the Prophet, consensus, etc., are anterior to the period when they began to be expressed by means of technical terms.[202]

(2) That even though there was a semantic lag, yet the formulation of technical terms with accurate connotations was well on its way and considerable progress seems to have been made in that respect. Some of these concepts had already acquired full-fledged technical terms for their expression such as qiyâs and istihsân. There were others which seemed to be on the verge of that point — such as the concept of sunnah (as a source of law) and mandûb, and makrûh, etc.

On the whole, the Kufians seem to have prepared the ground not only for the conceptual contribution made by Shâfi'î,[203] but also for his semantic contribution which consisted of a more precise definition of terms such as sunnah, athar, etc.

(3) The semantic evidence, despite being fragmentary, reflects the general direction in the development of Fiqh.

The increasingly elaborate terminology that was coming into use, the neat distinctions which the technical terms were beginning to express, the more and more precise definition of terms that was taking place — all these reflect corresponding developments in Fiqh itself: a more vivid usûl-consciousness reflected in the growing recognition of distinctions between the various sources of positive doctrines, and its corollary, an increasing formalism and finesse in technical legal thought.

CHAPTER IV

KHABAR LÂZIM[1]

The classical Islamic Fiqh, as is well known, defined its theory about the sources of positive doctrines through the well-known formula of "four-fold shar'î evidences" (adillah arba'ah): the Qur'ân, the Sunnah, Ijmâ', and Qiyâs. This formula was not categorically stated by any of the Kufian jurists of the second century, nor by their contemporaries in other parts of the Islamic world. However, even though the formula was not explicitly articulated during the second century, it portrays, in substance, what the fuqahâ' of that period considered to be the main sources of their positive doctrines.[2]

So far as the last of these four adillah is concerned, viz. qiyâs, its nature is somewhat different from the other three sources. The reason for this difference lies essentially in the revelatory character of the Islamic law: in the fact that its fundamentals are considered to express the will of God, communicated through an inspired person — the Prophet. In course of time, consensus too came to acquire a status somewhat comparable to "the teachings of the Prophet".[3] (As for qiyâs, it signified the method which is appropriate in regard to the use of the three above-mentioned sources, a relation-

ship which is, in a way, comparable to the relationship between reason and data in general). Behind this development was the idea that the will of the Muslim community (and of its scholars) could not err in the determination of good and bad,[4] and that in any case, an opinion held by all, or even by the predominant majority, is much more trustworthy than an individual opinion or isolated tradition.[5]

Be that as it may, the distinction between what is more and what is less authoritative, what is necessarily binding and what is not so, seems to go back to a very early period of Islâm.[6] In a comparatively later period, it is evidenced by statements to the effect that in case there is an athar, there remains no justification for qiyâs.[7] Shaybânî gives a lucid expression to this distinction by saying that nothing is valid in law unless it is based on khabar lâzim or analogy.[8]

The following pages will be devoted to elucidating as to what were the constituents of khabar lâzim in the opinion of the Kufian jurists of the second century.

A. The Qur'ân

So far as the Qur'ân is concerned, its position as a "binding" source of law seems to have been taken for granted from the very beginning.[9] We have already seen

that one of the main achievements of the Prophet consisted of establishing the authority of revelation.[10] Hence, it is natural that the rules contained in the Qur'ân should have influenced positive doctrines from the very beginning. This *à priori* judgment is corroborated by some of the findings of modern research with regard to the early period of Islâm.[11] The influence exerted by the Qur'ân on positive doctrines appears in two different forms. Firstly, this influence is reflected in the positive doctrines which are directly derived from the legal verses of the Qur'ân (even though specific reference to the relevant Quranic verse might not have been made). No less important than this was another aspect of the Quranic influence. This consisted of stimulating a large number of questions[12] so that not only in the early period, but also subsequently, discussions about *fiqhî* doctrines revolved around the questions raised by the legally relevant Quranic legal prescriptions.[13] In fact, this was responsible, in a large measure, for the infra-structure of unity in Islamic law despite the diversity of positive doctrines. It was also responsible for the fact that discussions in various centres of jurisprudence were broadly focussed on the same questions, a fact which shows that the questions had emanated from a common source.

There was one important difference between deriving doctrines from the Qur'ân and deriving them from the rest of the sources, particularly from authoritative traditions. For, the latter did not exist in a composite form, while the former did. Moreover, a large number of people had memorized the Qur'ân. Thanks to these factors, it was much easier to refer to the relevant portions of the Qur'ân when one was faced with a particular question. Nevertheless, it was natural that all the legal implications of the Qur'ân should not have been worked out at once. As new questions arose or old ones were more searchingly discussed, the relevance of certain Quranic verses to these questions was perceived.[14]

We have already discussed the problems posed by the character of Quranic teachings and the peculiar form in which Quranic legal prescriptions were embodied.[15] To this must be added the natural fact that human beings differ from one another in respect of their intellectual capacity and aptitude, their biases and sympathies. These differences are also related to variations in socio-economic conditions, even as they are related to diversity of outlook and disagreements with regard to hierarchy of values. It can hardly be overstressed that even though the authority of the Quranic legal verses was never disputed, still there remained the problem of interpreting

these verses and determining their relevance to the legal questions to which an attempt was made to apply these verses. Owing to the above-mentioned reasons, different doctrines were derived from the Qur'ân by different people: sometimes even at the same period of time, not to mention the fact that people derived different doctrines from the same Quranic verses at different periods of time.

A study of the positive doctrines of the early period of Islâm reveals Quranic influence at every stage. To understand the role of the Qur'ân during the early period, it is necessary to bear in mind the process of the formulation of positive doctrines during that period of time. The need to formulate positive doctrines seems to have been actuated primarily by some of the practical needs of the early Islamic community. Mere intellectual curiosity or theoretical considerations seem to have played only a subsidiary role, and that too at a secondary stage. What seems to have happened during the earliest period was not, at least mainly, that a group of specialists sat down to elaborate a system of legal doctrines per se. What rather happened was that actual life-situations pressed the Muslims to lay down appropriate principles of action relative to these situations. It was in this connection that the authoritative sources were

referred to, and the Qur'ân was obviously one of them. Even as early as during the Caliphate of 'Umar, the second caliph is reported to have referred to the Qur'ân, along with the consideration of public weal, in order to support his opinion regarding the disposal of land in the conquered lands.[16] This reference to the Qur'ân, and we have no strong reasons to doubt its authenticity, shows that when faced with complicated problems, the Qur'ân was referred to even at this early stage.

With the passage of time, the Muslims encountered an ever-increasing number of problems of growing complexity. Thus, gradually the relevance of Quranic verses to the actual problems of life was perceived, and their implications worked out. Moreover, it also seems that over the course of time, the interpretations of certain Quranic verses were altered and more details were worked out with explicit reference to the Qur'ân. It is perhaps this phenomenon which has led Schacht to the conclusion that "apart from the most elementary rules, norms derived from the Koran [sic.] were introduced into Muhammadan Law almost invariably at a secondary stage"[17], and that in the early period only "the most perfunctory attention was given to the Koranic norms".[18]

Schacht's view seems to be quite exaggerated insofar as it attributes to the early generations of Muslims

too little achievement in the realm of deriving legal norms from the Qur'ân. This creates a gap in the account of the development of Islamic law and renders it unrealistic. The fact, however, is that the Qur'ân continually remained the focal-point of Muslim legal and dogmatic speculation. Hence, it was natural that the relevance of the Quranic legal verses to the problems which confronted the later generations was noticed, in general, by the later generations, rather than by the earlier ones; or that regarding a few questions which had been considered during the earlier period of Islamic law, it is the later generations who saw the relevance and significance of certain Quranic verses.[19] This, however, can hardly justify the assumption that in the early period only "the most perfunctory attention was given to the Koranic norms".[20]

So far as explicit statements that the Qur'ân is an authoritative source of legal doctrines are concerned, they do not occur very frequently.[21] The Qur'ân seems to have been taken so much for granted that it hardly provoked any controversial questions as to its authority. The few examples that we have of reference to the position of the Qur'ân as a source of legal doctrines, however, indicate its fundamental importance. Abû Yûsuf says, for instance, that rulings about halâl

and harâm should be based on categorical Quranic verses, without inference or explanation (bayyin bilâ tafsîr); that is, when categorical Quranic verses are not available, one should refrain from characterising things as halâl or harâm. The practice of the earlier fuqahâ, Abû Yûsuf points out, was to use moderate expressions such as "there is no harm in it" and "this is disapproved", instead of using the expressions of harâm and halâl.[22]

Shaybânî is not different from Abû Yûsuf in this respect. Statements about the position of the Qur'ân as a source of legal doctrines are almost as rare in the works of Shaybânî as they are in the works of Abû Yûsuf. Again, like Abû Yûsuf, Shaybânî's statements indicate the absolute importance attached to the Qur'ân. For, he considers it obligatory "to consider what has been made halâl by the Qur'ân to be halâl, and to consider what has been made harâm by the Qur'ân to be harâm".[23] Moreover, Shaybânî cites the famous instructions of 'Umar to Abû Mûsá al-Ash'arî, in which the primacy of the Qur'ân (along with the sunnah) has been clearly postulated. What is quite obvious from this citation is that Shaybânî shared the same view.[24] The same is evident from those statements of Shaybânî in which he rejects doctrines on the plea that they do not conform to the Qur'ân and the sunnah.[25]

So far as these statements of Abû Yûsuf and Shaybânî about the Qur'ân are concerned, there is no evidence to suggest that they were conceptual innovations. On the contrary they are merely expressions of the attitude which, in our view, was so well-established as to be taken for granted viz., that the Qur'ân is the fundamental source of positive doctrines.

One of the problems in connection with deriving doctrines from the Qur'ân was that posed by the seeming contradiction between two Quranic verses.

On the question of 'iddah, for instance, one Quranic verse (II. 234) lays down the 'iddah of a widow to be four months and ten days and another verse (LXV. 4) lays down that the 'iddah of a pregnant woman, who has become divorced, ends with child-birth. There was no categorical Quranic injunction, however, relative to a pregnant widow. Moreover, part of the case of the pregnant woman seemed to be covered by the one, and part of it by the other verse. In such a circumstance, the standard procedure was to invoke the principle of naskh[26] and to declare one verse to have been repealed by the other. In this particular instance, LXV. 4 was considered to be the verse which was to prevail since it was presumed to have been revealed later and therefore as having repealed the other verse (i.e. II. 234).[27]

Besides this, there were occasions when the legal import of some Quranic verses seemed to be divergent from that of some tradition or practice. We shall illustrate this by the following examples.

The Quranic verse (LXV. 6) categorically lays down the right of the widow to lodging during the period of waiting. This was the Medinese doctrine. The Iraqian doctrine was based on this verse except that they considered her entitled to board as well.[28] Against this doctrine was adduced a tradition from Fâṭimah bint Qays which claimed that when she was divorced, the Prophet had decreed in her favour neither lodging nor board.[29] This was not acceptable since it was merely the opinion of a woman about whom it was not sure whether she was telling the truth or lying, even though it amounted to a departure from the Book of Allâh.[30]

On the question whether there was any fixed limit of land produce which was exempt from zakâh, the Medinese view was that there was such a limit and that it was five awsaq. The Medinese supported this doctrine on the basis of traditions from the Prophet.[31] The original Kufian doctrine, going back to Ibrâhîm, was opposed to this.[32] In opposition to the Medinese doctrine the Kufians adduced the Quranic verse (IX. 103), and the saying of the Prophet: "On whatever has been watered by the heavens, one tenth

[is payable as zakâh]. Thus neither God nor the Prophet have made any distinction, they pointed out, "between one kind of produce from land and the other".[33] This, however, was only part of the argument, and was used as a reinforcement to the argument which attacked the tradition concerned for being an isolated one. The argument runs as follows: After the Prophet Abû Bakr, 'Umar, 'Uthmân and 'Alî administered the collection of sadaqât for a long period of time. There is no report that they subscribed to this doctrine, nor has any person except Abû Sa'îd al-Khudrî transmitted this doctrine from the Prophet. Thus, apart from its being an addition to the Quranic injunction, the doctrine was rejected for being based on an isolated tradition. Later, the Kufian school abandoned this doctrine and Abû Yûsuf and Shaybânî adopted the Medinese doctrine.[34]

On the question whether it was permissible to cut down and burn trees and destroy enemy property, etc., Awzâ'î's position was different from that of the Kufian school. Awzâ'î based his doctrine on the famous instructions of Abû Bakr. The Kufians, on the other hand, supported their doctrine by referring to the Quranic verse (LIX. 5) which permitted the cutting down of trees, etc., and thus seemed to be opposed to Abû Bakr's instructions.[35] Awzâ'î held on to his doctrine inspite of

this and did so on the plea that "Abû Bakr and his Companions knew the meaning of this verse better than Abû Hanîfah".[36] In other words, Awzâ'î's argument was that since it was Abû Bakr who had issued the instructions, they could not possibly be against the intent of the Qur'ân. On the other hand, even though the Kufians adhered to their doctrine, they did so without disputing the validity of Abû Bakr's instructions. With regard to the instructions of Abû Bakr, the Kufians came forward with two explanations to show that the instructions notwithstanding, their doctrine was correct:

First, they claimed that these instructions had been issued since Abû Bakr knew that the enemy territory would come under the dominance of Muslims[37] (and that the cutting down or burning of trees, etc., would, therefore, be injurious to Muslim interests).

The second and more subtle than the above was the argument that Abû Bakr's instructions referred to destruction, etc., after victory had been achieved, but not before that. Abû Yûsuf's closing sentence of the discussion, however, is significant: "The Book of Allâh has greater claim to be followed".[38]

The relationship between the Qur'ân and the traditions from the Prophet and the Companions was increasingly brought into discussion during the second century. There

seems to have been a tacit agreement, notwithstanding a few instances to the contrary, that traditions from the Prophet could restrict the scope of the application of the Quranic legislation (although on such occasions, the Kufians tended to judge the traditions embodying the divergent doctrine according to unusually exacting standards).[39] A significant case is that of the Quranic prescription of hundred lashes for illegal sex-intercourse (XXIV.. 2). On the ground that the Prophet had applied lapidation to married adulterers, the application of this Quranic punishment was restricted to non-married persons.[40] When a Quranic verse, however, seemed to be irreconcilably opposed to some tradition, the theoretical formula was to reject the latter and to make the former prevail.[41]

An illuminating example in this connection is the question whether a case might be decided in favour of the plaintiff on the basis of the testimony of one witness and the oath of the plaintiff or was it obligatory to have no less than two male witnesses, or one male and two female witnesses (as prescribed by the Qur'ân). The latter was the Kufian doctrine which was supported by reference to the Quranic verse II. 282.[42] The Medinese doctrine was based on a tradition going back to the Prophet that he himself decided a case on the basis of the testimony of one witness and the oath of the plain-

tiff.[43] The Kufian contention was that the Medinese doctrine was opposed to a categorical Quranic provision.[44] Besides the Quranic argument, however, the Kufians cited traditions which testified that the Medinese doctrine did not embody the original practice.[45]

We have already noted above some examples of the application of this principle that traditions which seemed to contradict, or restrict any Quranic legal prescription, were discarded, inter alia, on the ground that they were opposed to the Qur'ân.[46] There was a group of people which went farther than the rest of the second century jurists in the tendency to reject traditions because of their alleged opposition to the Qur'ân. This group is identified as ahl al-Kalâm,[47] who drew the fire not only of Shâfi'î, but also of the Kufians for rejecting the traditions all too easily.[48]

To appreciate the Kufian position it would be useful to bear in mind that during the period under discussion, viz., the second century, fabrication of traditions took place on a fairly wide scale and there were no compendia of traditions about whose authenticity there might be general agreement. In such circumstances, the purpose that the Qur'ân served (along with sunnah, and to some extent, ijmâ') was that of a criterion for the acceptance or rejection of traditions, of a barrier

against the intrusion of foreign elements in the body of Islamic law. This seems to be illustrated by the statements of Abû Yûsuf. After sounding the warning that none except those traditions which are commonly known should be accepted, Abû Yûsuf states:

> The Prophet said: 'Verily hadîth from me will spread. Whatever comes to you and agrees with the Qur'ân, is from me; whatever comes to you from me which does not agree with the Qur'ân, is not from me'. ...Riwâyah multiplies so much so that some of it [i.e., traditions] which is traced back through chains of transmission is not well-known to the fuqahâ', nor does it agree with the Qur'ân and the sunnah. Beware of solitary tradition (shâdhdh al-hadîth) and follow the hadîth which is followed by the community (jamâ'ah) and which agrees with the Qur'ân and the sunnah. Measur things accordingly, and whatever opposes the Qur'ân is not from the Prophet, even though there might be a tradition containing it...[49] The Prophet said during his last illness: 'Verily, I hold as prohibited that which the Qur'ân has prohibited. By god, they shall not take shelter behind me in anything'. So let the Qur'ân and the well-known sunnah serves as your guides..."[50]

With regard to reference to the Qur'ân as a source of law, there is another notable fact — that even when certain doctrines or traditions embodied some Quranic teaching, the relevant Quranic verse was often not explicitly referred to.[51] This only shows that it was not always deemed necessary to cite the relevant authoritative evidence from the sources whence a doctrine had been derived — a fact which has considerable bearing on the assumptions which modern Western scholars have adopted—

seemingly as postulates of a critical, historical method — for the study of Islamic law and traditions from an historical point of view.

B. Sunnah and Traditions

Besides the Qur'ân, another source to which reference was frequently made was Sunnah. From Shâfi'î onwards, the term Sunnah, as a source of Islamic legal doctrines, has generally signified the "sunnah of the Prophet".[52] And the "sunnah of the Prophet" has been regarded as almost synonymous with authentic traditions from the Prophet.[53] During the period of time which mainly concerns the present study, however, the situation was somewhat different. Neither had sunnah fully acquired this exclusive connotation, nor were traditions from the Prophet considered to be the only means, besides the Qur'ân, whereby one could know what the sunnah on a certain legal question was.

Western scholarship has tended in recent years to deny that the concept of the "sunnah of the Prophet", not to mention formal traditions from the Prophet, has played any important role in the development of Islamic legal doctrines during their formative phase. This trend in Western scholarship began with questioning the authenticity of the corpus of traditions from the Prophet.

Goldziher doubted the authenticity of a great many of these traditions and tried to show the process by which doctrines of a later period were "back-projected" to the Prophet.[54] Since then, the general view has been that the so-called traditions from the Prophet are products of the quest for continually higher authorities, a quest which led to the attribution of these doctrines (which had actually been formulated without reference to the "sunnah of the Prophet") to ever-higher authorities of the past till they were put ultimately under the aegis of the Prophet.[55] Lammens[56], Margoliouth[57], Hurgronje[58], Wensinck[59] and Alfred Guillaume[60], all share this thesis and it underlies their researches about the early period of Islamic history, particularly of Islamic law and dogma. This has led in course of time to the notion that in the early period sunnah did not primarily refer to the Prophet, and that the concept of the "sunnah of the Prophet", particularly with reference to legal matters, is a later growth.[61]

This trend has reached its culmination in Schacht. Were we to summarise his thesis, two points emerge as fundamentally important: First, that the "sunnah of the Prophet" is a relatively late concept, a concept which was "introduced into the theory of Islamic law, presumably towards the end of the first century, by the scholars

of 'Irâq".[62] Secondly, that the traditions of the Prophet are the products of "back-projection" alone, a line of argument which Schacht pushes ruthlessly to the point of denying the authenticity of every single legal tradition. In his own words: "Hardly any of the traditions, as far as matters of religious law are concerned, can be considered authentic. . ."[63]

I

So far as the concept of the sunnah of the Prophet is concerned, we have already argued that it is erroneous to consider it to be a late growth.[64] Our semantic analysis of the usage of the term sunnah also corroborates that the concept as well as the expression "sunnah of the Prophet" goes back to the earliest period of Islâm.[65] Not only this, we have also shown that references were made to dicta of the Prophet in legal discussions as final arguments even in the earliest period.[66]

In order to have a fuller picture of Islamic juristic thinking before Shâfi'î, it is essential to remember that the term sunnah was not used exclusively with reference to the Prophet, but also included the Companions.[67] This semantic phenomenon itself evidences the authority of the Companions, alongwith the authority of the Prophet. This conclusion, based on our semantic analysis,

is corroborated by numerous statements which clearly testify to the authority of the precepts and practices of the Companions. For instance, in order to refute a doctrine, Abû Yûsuf points out: "As for his [i.e., the opponent's] doctrine . . . no sunnah has come down from the Prophet or from any of his Companions."[68] On another question he points out: "We have heard nothing from the Prophet or from any of his Companions. . ."[69] With regard to another question Abû Yûsuf supports the doctrine of his school by saying that: "We have come to know from the Prophet and his Companions. . ."[70] On still another question Abû Yûsuf points out that questions of harâm and halâl are not decided by considerations of [actual] practice. [In such matters] one follows the sunnah from the Prophet and the forbears — the Companions and the fuqahâ'.[71]

The authority of the Companions is also implied in Abû Yûsuf's blame of Awzâ'î that the latter's doctrine was opposed to that of 'Umar.[72] It is also reflected in a tradition which mentions that Mujâhid, a jurist of Mecca (d. circa 102), came to know of a tradition from 'Alî which was opposed to a doctrine which he had enunciated. On having heard the tradition from 'Alî, Mujâhid remarked that had he known the tradition, he would have followed it in his fatwá, and that in future his doctrine

would be in accord with that tradition.[73] It is also reflected in a statement such as the following: "Sunnah has come down from the Prophet and the two caliphs after him that the testimony of women in hudûd is not permitted".[74]

Statements which indicate the authority of Companions are also quite numerous in Shaybânî: "Let us know if you have any athar from the Prophet or from any of his Companions."[75] Shaybânî asks the Medinese if they had any sunnah from the Prophet or athar from any of his Companions. . ."[76] Shaybânî supports the doctrine of qunût in witr prayer by saying: "It is supported by many âthâr and the Companions never missed it."[77] The Kufians, according to Shâfi'î, had explicitly formulated the principle that a doctrine of the Companions on which no other Companion was known to have disagreed was binding.[78]

Besides these statements, there is another evidence of the authority of Companions. In the works of Abû Yûsuf and Shaybânî, whenever the doctrine of a Companion is not followed, this is almost invariably in favour of a divergent doctrine attributed to some other Companion.[79]

II

References to the doctrines of Companions, of Successors, of jurists, and to established practice, which are quite frequent in the writings of the second century, can be misconceived as evidences of lack of vivid consciousness that the sunnah of the Prophet, besides the Qur'ân, constituted the ultimate and paramount authority. It is perhaps owing to a lack of proper appreciation of this phenomenon that Coulson has tended to the view that the Muslims of the earliest period did not consider themselves bound by the "sunnah of the Prophet".[80] So far as the earliest period is concerned, we have already seen that this conclusion is untenable.[81] Nor is it corroborated for the secondary stage in the development of Islamic Fiqh, viz., the last decades of the first century and the second century, as we shall see presently. Our evidence consists of: (i) statements which either imply or explicitly refer to the paramount authority of the precepts and practices of the Prophet, as well as the vogue to adduce the precepts and practices of the Prophet as final arguments; and (ii) examples of alterations in their own doctrines or in the doctrines of their school by the Kufian jurists of the second century such as Abû Ḥanîfah, Abû Yûsuf and Shaybânî on

account of traditions from the Prophet which were opposed to their own doctrines or to those of their school.

(i)

A person, according to Ibrâhîm, put a legal question to Ibn Mas'ûd, to which he replied: "I have heard nothing from the Prophet about that..."[82]

With regard to the question of returning the oath to the plaintiff in case the defendant declines to take oath, Abû Ḥanîfah said: "I will not return the oath to him [i.e. the plaintiff] and it will not be moved from the place where the Prophet put it".[83]

With regard to taxes in Hijaz, Yemen, etc., Abû Yûsuf was of the view that they should neither be increased, nor decreased. The reason for this view, according to him, is that since they had been fixed by the Prophet, the imâm was not entitled to alter them.[84]

Abû Yûsuf mentions that the Companions of the Prophet wished that 'Umar should distribute the land-estates of Syria in the manner the Prophet had distributed the land-estates of Khaybar.[85]

Abû Yûsuf points out that sometimes the Prophet distributed the estates of the conquered people among

the soldiers, and sometimes he left them in the ownership of the original proprietors. From this Abû Yûsuf concludes: "Therefore, the imâm has option. If he distributes it as the Prophet did, it is all right. And if he leaves it in the ownership of the original proprietors as the Prophet had left it in cases other than Khaybar, even then it is all right".[86]

A statement from Ibn 'Umar: "I narrate to you from the Prophet and you still say so".[87]

Regarding the proper rituals of funeral, the question was decided on the consideration of the last funeral in the life of the Prophet.[88]

'Umar questioned a boy about certain rituals of pilgrimage and on his having answered correctly, declared: "You have been guided to the sunnah of your Prophet".[89]

In the determination of what is permitted and what is prohibited, says Abû Yûsuf, one follows the sunnah from the Prophet, and from the forbears — the Companions and the fuqahâ'".[90]

Abû Yûsuf says: "How can we follow the tradition from Hasan and Ibn Sîrîn as against a tradition from the Prophet . . .?"[91]

The authority of the Prophet is also implied in

such statements as the following:

"We have heard nothing about this from Prophet or from any of his Companions..." [92]

"We do not know that the Prophet or any of the salaf did..." [93]

The same idea finds expression at several places in the writings of Shaybânî of which the following examples are noteworthy:

Shaybânî asks the Medinese to produce, provided they have, any sunnah from the Prophet or any athar from any of his Companions in support of the doctrine in question.[94]

The mawâqît, says Shaybânî, were fixed by the Prophet and so none may change them.[95]

On the question whether the walâ' of a manumitted slave could be transferred or vested merely in the former master, Shaybânî insists on the authoritative role of a decision of the Prophet as against the doctrine of some Companions.[96]

The normativeness of the precepts and practices of the Prophet is also implied in such statements as the following:

The Prophet went to bed without having washed himself even though he was in the state of ritual

impurity [implying thereby that it was permissible to go to bed without washing].[97]

'Alqamah (d. 62) performed two sijdahs because of some omission in the ritual prayer and pointed out that the Prophet had done the same.[98]

'Umar is reported to have said: "We saw the Prophet practice mash, and so we did the same."[99]

'Alî is reported to have claimed that the manner of his wudû' was the same as that of the Prophet.[100]

The permissibility of a certain practice is implied in the reference of that practice to the Prophet.[101]

Mash 'alá al-khuffayn was held permissible by Ibrâhîm on the ground that it was practised by the Prophet (upto the last year of his life).[102]

Mûsá b. Talhah did not consider zakâh to be payable on any thing else (among land-produce) except wheat, barley, dates, etc. His evidence in support of this doctrine was a manual from the Prophet which had been composed for Mu'âdh.[103]

Regarding the question whether it was permissible to return the greeting while one was

praying, it is stated that the Prophet and the Companions used to return the greeting [in the beginning] and then the Prophet forbade that practice.[104]

Regarding a question of sale, Ibn Mas'ûd is reported to have said: "I shall judge according to the verdict of the Prophet", a statement which is followed by a saying of the Prophet.[105]

A certain person claims that his mode of praying resembles most closely that of the Prophet.[106]

Ibn 'Abbâs is reported to have said: "I did as the Prophet did. . ."[107]

Regarding tamattu' in pilgrimage, a Companion, Sa'd b. abî Waqqâṣ said: "The Prophet did that and so did we along with him."[108]

Regarding a certain ritual during the circumabulation of the Ka'bah, it is claimed that the Prophet practised that.[109]

(ii)

The paramount authority of the precepts and practices of the Prophet is also established by the numerous instances of departure from the established doctrine of

their school by Abû Ḥanîfah, Abû Yûsuf and Shaybânî, or of the alteration of their own previous doctrines, for the explicit reason that they came to know some tradition from the Prophet which was opposed to their doctrine or that of their school. The following are some instances:

> Abû Ḥanîfah disagrees with Ḥammâd, Ibrâhîm and Ibn Mas'ûd on the question whether the sale of a married slave-girl constituted divorce or not. The basis of disagreement is a tradition from the Prophet.[110]
>
> On the question whether sijdah had to be performed while reciting a certain portion of the Qur'ân, Abû Ḥanîfah departed from the doctrine of his predecessors [i.e., Ḥammâd and Ibrâhîm], embodied in a tradition from Ibn Mas'ûd. As against that he follows a tradition from the Prophet through Ibn 'Abbâs.[111]
>
> On the question whether an apostate woman ought to be put to death or not, Ibrâhîm was of the view that she should be. Abû Ḥanîfah's doctrine was opposed to this. The possible reason was a tradition from Ibn 'Abbâs[112] and another from the Prophet.[113]

The same was the case with regard to Abû Yûsuf.

On the question of muzâra'ah, Abû Yûsuf disagreed with his master, Abû Ḥanîfah, who considered it prohibited. The main reason for this departure was the decision of the Prophet with regard to the disposal of the land of Khaybar.[114]

On the question whether an apostate woman may be executed, (cited above), Abû Ḥanîfah's position, as we have seen, was that she may not be executed. Abû Yûsuf's original position was against his master's, but later he changed his view and argued: "How can they [i.e., the apostate women] be killed, when the Prophet has prohibited the killing of mushrik women in war? These are similar to them".[115]

On the question whether a rider was entitled to the same or twice the share of a foot-soldier on behalf of his horse, Abû Yûsuf disagreed with the doctrine of Abû Ḥanîfah on the strength of a tradition from the Prophet.[116]

On the question whether horses are liable to zakâh, Abû Yûsuf departed from the doctrine of his school. The doctrine of his school was supported by a tradition from 'Alî. Abû Yûsuf's departure was caused by a tradition from the Prophet transmitted by "well-known persons".[117]

In Shaybânî, who almost consistently expresses his

variant doctrine whenever he disagrees with the doctrine of his school, such examples are even more numerous.

> On the question of zakâh on grazing horses, Shaybânî departs from the doctrine of his school on the ground that a tradition from the Prophet was opposed to that.[118]
>
> On the question of prayer for rainfall, Shaybânî abandons the doctrine of Ibrâhîm and Abû Ḥanîfah because of the fact that traditions from the Prophet were opposed to that doctrine.[119]
>
> On the question whether there was any defined limit of agricultural produce which was exempt from zakâh and whether vegetables were also liable to zakâh, Shaybânî disagrees with the doctrines of his school because of traditions from the Prophet.[120]
>
> On the question whether a person who cannot perform prayer in standing position should be made the leader of those who are praying in the standing position, Shaybânî gives up the doctrine of his own school because of an explicit statement from the Prophet against that practice.[121]
>
> On another question, Shaybânî supports the doctrine of the Medinese as against that of his own school because traditions from the Prophet

were opposed to the doctrine of his school.[122]

Shaybânî, differing from his Iraqian predecessors, bases his doctrine on traditions from the Prophet which he takes over from the Medinese.[123]

Thus our à priori view that the concept of the "sunnah of the Prophet" has played an important role in legal matters even during the first two centuries of Islâm, is also supported by weighty à postriori evidence. Any explanation of the development of Fiqh during its early period which ignores this fact is bound to present a distorted picture of that development.

III

In addition to traditions from the Prophet, reference was made quite frequently by the ancient schools of law not only to traditions from the Companions, but also to 'practice' and to traditions from the Successors, etc. What is even more intriguing is that occasionally traditions from the Companions or 'practice' prevailed even over traditions from the Prophet.[124] It would be a gross misinterpretation, however, if this were to be considered an evidence against the view that the authority of the sunnah of the Prophet was paramount, as we shall see.

So far as the precepts and practices of the Companions are concerned, we have argued earlier that the ancient schools of law strongly believed in their authority.[125] The sunnah of the Companions had not derived its authority, however, at the cost of, but through the sunnah of the Prophet. In fact, the belief in the authority of the sunnah of the Companions implies the paramount importance of the sunnah of the Prophet. The very vogue of the term "Companion" indicates that the source wherefrom this authority was derived was the Prophet himself: it is by virtue of their "companionship" with the Prophet that the precepts and practices of the Companions were deemed to have a normative value. It is for this very reason that the Companions were regarded as best qualified to interpret the true intent of the Qur'ân,[126] as well as of the precepts and practices of the Prophet.[127] Moreover, even the justifications offered by the ancient schools of law for making traditions from Companions prevail also imply that the paramount authority was vested in the Prophet.[128]

In other words, the authority of the Companions was a derived and subsidiary one, and there was no question of its being regarded as on par, not to say of being regarded as higher than that of the Prophet. The use of traditions from the Companions alongside traditions from

the Prophet, or at times even having the former supersede the latter did not and could not mean that the authority of the Companions was deemed to be higher than that of the Prophet as we shall see in detail later. What it really meant was that at times a tradition from some Companion was considered to be an even more trustworthy evidence of the teachings of the Prophet than a formal tradition from the Prophet on that question.[129]

Similar observations are apt for 'practice' to which reference was often made by the ancient schools of law. This reference to 'practice', and sometimes its characterisation by the term "sunnah", is also liable to create misunderstandings.[130] In our opinion there never was the view, neither in Medina nor anywhere else, that the Muslims were bound by all that was currently operative in their society, what to say of being bound per se by the practices of the pre-Islamic Arabian society.[131] Among the "ancient schools of law" it is the Medinese who referred most frequently to 'practice'. The Medinese cited Zayd b. Thâbit as saying that whatever is followed by the people of Medina, amounts to sunnah.[132] Mâlik's elaboration of the authority of the Medinese doctrines is itself quite illuminating. Briefly stated it is this: Medina was the abode of those who were the first to have responded to the call of Islâm; it was there that the

bulk of the Qur'ân was revealed and what is permitted and what is prohibited enunciated; it was there that the Prophet lived: ordering his followers, who obeyed him; and creating behaviour-patterns (sunan), which they followed. This was continued by the succeeding generation of people who put into practice what they knew, and inquired about things which they did not know. The Successors (Tâbi'ûn) adhered to the same course and "followed these sunan". It was for this reason that Mâlik regarded the people of other areas to be bound by the doctrines of the Medinese.[133] This only shows that the primary reason for considering practice to be authoritative was the general assumption, even if it was not stated explicitly, that it had originated with the Prophet and had been, therefore, maintained by the Companions and the succeeding generations of Muslims. Even if a practice had originated with the Companions without its having been originated in the time of the Prophet, it was generally considered to be authoritative because of the high estimate that the Companions had come to enjoy in the sight of the succeeding generations of Muslims.[134]

The importance of 'practice' is understandable in view of the fact that the Prophet had a profound impact not only on the outlook, but also on the practical lives of the early Muslims. In other words, the early generations

had acquired their knowledge of the totality of their duties not only through traditions which had been transmitted either verbally or through the written word, but also through actual practices. Thus on the one hand there was verbal or written transmission of what the Prophet (and the Companions) had said or done because of the belief in its normativeness. On the other hand, there were 'practices' of the Muslim community about which it was presumed that they were rooted in the precepts and practices of the Prophet or of his Companions. This was for two reasons. First, it was assumed that many of the teachings of the Prophet had been put into effect so that in many cases the actual also represented the ideal. Second, even when people failed to do so in actual practice, there was a recognition of this failure which presupposed certain norms of judgment, a phenomenon for which it would be proper to use the expression 'normative practice'. The reason for reference to 'practice' was the assumption that it embodied what was normative, thanks to the assumption that 'established practices' had originated in general with the Prophet or his Companions.[135] Its essence as well as rationale lay in its being normative, rather than its being merely actual.[136] And since the lives of the Prophet and of his Companions had come to be regarded as exemplary, 'practices'

derived their normativeness from the explicit or implied claim of their having originated with them. It is on account of this that often when such an assumption did not appear to be justifiable for certain practices, they were denied the status of sunnah.[137]

As a source of law, however, 'practice' was characteristically, though not exclusively, a Medinese concept. This is understandable in view of the fact that others, for instance, the Kufians could not possibly produce as impressive arguments in support of their 'practices' as the Medinese could.[138] The legal theory of the Kufians, even though it was not altogether devoid of reference to 'practice', rested, on the whole, on traditions from the Prophet and from the Companions, supplemented by traditions from the Successors and the doctrines of specialists.[139] As compared with the Medinese and the Syrians, reference to 'practice' was rare among the Kufian jurists.[140]

IV

Besides traditions from Companions and 'practice', reference was also made to traditions from Successors. In each of the two works Âthâr A.Y. and Âthâr Sh., the number of traditions from Successors is greater than the number of traditions from the Prophet and the Companions

combined.[141]

Were we to go back to the time of Ibrâhîm (i.e., the last quarter of the first century), there does not seem to have been any consciously-formulated theory that the doctrine of the Successors had a binding authority. This is natural in view of the fact that it was still the age of Successors. It is presumably for this reason that we find Ibrâhîm citing only a negligible number of traditions from the Successors.[142] Hence whatever authority the doctrines of the Successors were invested with seems to have been a development of the early decades of the second century.

The evidence available to us for mid-second century, however, testifies that the doctrines of the Successors, unlike those of the Companions, were not considered binding per se. This is established, apart from indirect evidences, by a large number of categorical statements. An Iraqian, for instance, calls Sa'îd b. Jubayr a Successor whose opinion carries no weight.[143] In the same way, Shaybânî objects to Shâfi'î's mention of the opinions of Ibn al-Musayyib , Ḥasan al-Baṣrî, and Ibrâhîm al-Nakha'î on the ground that they were not authoritative.[144] By so saying, however, Shaybânî makes himself vulnerable to the criticism of Shâfi'î, (since he does often quote and follow the doctrines of Ibrâhîm). In the words of

Shâfi'î: "If Shaybânî's argument is that Ibrâhîm al-Nakha'î has said so, then he himself says that Ibrâhîm and other Successors are no authority."[145]

Schacht has pointed out that this theoretical position (viz., that of not recognizing the authority of Successors) "contrasts strangely with the extensive use that had been, and still was being, made of them."[146]

This position, however, is no more paradoxical than the citation of the doctrines of later authorities (i.e. fuqahâ'), even though their authority was not considered binding. The authority of the Successors was not binding in the sense that there was no notion that a man is not permitted, from the religious viewpoint, to make any departure from their doctrines while such a notion seemed to have been there with regard to the precepts and practices of the Prophet and of the Companions. The authority of the Successors, therefore, seems to have been declaratory, rather than constitutive.[147]

What seems to have given the doctrines of the Successors a certain amount of authority was the idealization of, and trust in, the past and its authorities. It was assumed, for instance, that the doctrines of the Successors would have had some authoritative basis;[148] and that even if they had inferred a certain doctrine themselves, they would have arrived at their doctrine through qiyâs,

which is the legitimate means of deriving doctrines.[149] The doctrines of the Successors were, therefore, looked upon with considerable respect and veneration. The normal expectation was that their doctrines would be sound, though not invariably so. Traditions from the Successors, therefore, furnished a vast treasure-house of divergent doctrines whereupon one could draw freely. The fact that a certain doctrine had come down from some Successor generally assured that it was not an "innovation", and was likely to be sound, though there was no absolute guarantee of that.[150]

The same remarks broadly apply to the doctrines of fuqahâ': for instance, to the doctrines embodied in Tr. I or Tr. IX or in Jâmi' Saghîr which contain the variant doctrines of some of the most noted legal authorities of the second century. The doctrine of a specialist is not considered to be binding insofar as a person (or a specialist?) may depart from it, an opinion which is testified to by the numerous departures made by Abû Yûsuf and Shaybânî from the doctrines of their predecessors.[151] And yet the fact remains that the doctrines of the fuqahâ' were adduced again and again, which could have been possible only if these specialists were considered competent to derive legal doctrines. This à priori judgment is in addition to the numerous statements which indicate the fact that a tradition

which was transmitted by learned persons, or declared authentic by the fuqâhâ', carried great weight.[152] It was also recognized that legal matters involved complicated considerations which required a special kind of understanding,[153] which explains the rationale of the doctrines of the fuqahâ', and of the element of authority that they possessed.[154]

V

Thus we have seen that during the second century the sunnah of the Prophet and of Companions was considered to possess decisive authority in so far as the succeeding generations were not considered entitled to have their opinions supersede them.[155] The Prophet and his Companions stood on a higher pedestal of authority than everyone else. As between the Prophet and his Companions, the Prophet obviously possessed the paramount authority since the authority of Companions was a derived one and was, therefore, of a subsidiary nature. To think otherwise can be ruled out as irrational on à priori grounds, not to mention the various statements which clearly articulate the higher authority of the Prophet.[156]

Hence, Shâfi'î did not introduce a radical conceptual, as distinct from methodological, change in Islamic law. On the conceptual plane his real contribution seems

to be his rejection of the authority of Companions, and his consistency in distinguishing between traditions from the Companions and those from the Prophet. On this question too, the difference between Shâfi'î and the ancient schools of law is not as radical as it appears on the first sight. For, Shâfi'î had not altogether rejected the authority of traditions from the Companions. He continued to use traditions from the Companions where no traditions from the Prophet were available.[157] The hierarchy of sources that he proffers in one of his significant passages is this: the Qur'ân, the Sunnah, the opinions of Companions, of which the opinions of the first Caliphs merit preference. "If no opinion is available from the Caliphs, the other Companions have sufficient status in religion to justify us in following their opinion, and we ought rather to follow them than those who came after".[158] The only major departure from the doctrine of the ancient schools of law was that he allowed qiyâs on the strength of a tradition from the Prophet to prevail over traditions from the Companions.[159] Traditions from the Companions were, nevertheless, authoritative enough not to allow them to be superseded by later authorities or by personal opinion (ra'y).[160] Moreover, Shâfi'î also accepts the interpretation of the Qur'ân by the Companions to be authoritative.[161] This shows that the difference with

respect to traditions from the Companions was not in the nature of either/or, but of more or less, and that he still assigned to the doctrines of the Companions a considerably important position in his legal theory.

The most important difference between Shâfi'î and the ancient schools of law, however, was that for Shâfi'î sunnah (by which he meant sunnah of the Prophet alone), was synonymous with (well-authenticated) traditions from the Prophet,[162] even if these traditions were isolated ones.[163] This almost completely negated the authority of 'practice'.[164]

The attitude of Muslims jurists before Shâfi'î was markedly different. The sunnah of the Prophet was not identical with formal traditions. In addition to formal traditions, it had other evidences as well. Traditions were merely reports, and constituted one of the evidences of sunnah, but not its only evidence. They did not exhaust the sum-total of authoritative norms which had come down from the Prophet or from the Companions. Nor was every tradition from the Prophet regarded as acceptable.[165] It is this which explains, at least partly, the rather tantalizing passage of Abû Yûsuf wherein he opposes sunnah to traditions and puts forth the former as one of the criteria for the acceptance or rejection of the latter.[166]

For a proper appreciation of the situation it is imperative to bear in mind the factors which influenced

the attitudes of the early generations of Muslims, and the situation as it obtained in the second century.

In the first place, it is to be remembered that the motive which actuated the early juristic activity was overridingly a practical one: the necessity to define Islamic norms relative to actual life-situations. The primary concern was not to collect arguments in support of right doctrines, but to lay down the right doctrines themselves. In this connection the jurists referred to a number of sources — the Qur'ân, traditions from the Prophet and Companions, 'practices', etc. The attitude of the early jurists towards these sources was relatively an informal one, and was characterized with trust in the soundness of the doctrines of those who were acknowledged as authorities, and in the continuity and purity of those 'practices' which constituted the Islamic way of life. As long as this trust remained unchallenged, formal criteria played a less important role than in the subsequent period in deciding which out of the numerous sources ought to prevail in a given case. In the earlier period, there were no hide-bound formulae which guided the jurists in these matters. A good deal depended upon subjective factors such as the use of common sense, intuitive conviction, etc. Hence, when Shâfi'î judged his predecessors and contemporaries according to his

strict standards, he found their doctrines and their legal reasoning a mass of inconsistencies.

The writings of Shâfi'î provide some of the most illuminating evidences of the inconsistencies of the "ancient schools of law" as well as of the underlying reasons of these inconsistencies. Among the questions on which Shâfi'î ruthlessly attacked the "ancient schools" one was that of the relationship between traditions from the Prophet, traditions from the Companions, traditions from the Successors, and 'practice': in short, the question of the determination of hierarchy with regard tothe evidences of the sunnah.

Shâfi'î accused the Medinese, for instance, of neglecting traditions from the Prophet on the strength of an analogy based on the opinion of Ibn 'Umar. The Medinese justified this by saying: "Ibn 'Umar cannot be ignorant of the doctrine of the Prophet".[167] With regard to another question on which the Medinese had departed from a tradition from the Prophet transmitted by Sa'd in favour of a doctrine of 'Umar, they apologized in the following manner: "'Umar would be better informed about the Prophet than Sa'd".[168] In the same way, this informal attitude is evident from the Medinese assumption about the Successor Ibn al-Musayyib, the well-known authority of the Medinese, that he could not have given

any opinion unless it were based on his knowledge of some authority.[169]

The Kufians, in whose school formal and objective considerations seem to have appeared earlier and to have played a more important role than in the Medinese school,[170] also occasionally betray an informal attitude and were, therefore, also vulnerable to criticism from strictly formal standards. Shâfi'î articulates their original attitude in these words: "If they [the Successors] express opinions on questions on which there is no Quranic text and no sunnah, you infer that they have arrived at their decision by means of qiyâs, rather than on the basis of ra'y".[171]

Like Medinese, the Kufians also sometimes allowed formal traditions from the Prophet to be superseded by arguments which, according to formal and objective criteria, do not appear to be very weighty. For instance, on the question of decision in favour of the plaintiff on the basis of one testimony and the oath of the plaintiff, Mâlik cites a tradition claiming that the Prophet decided according to the above-mentioned procedure. Shaybânî counters this by two traditions: one from Zuhrî and the other from 'Aṭâ', both of whom were Successors. Zuhrî asserted that this practice was an innovation and the one who introduced it was Mu'âwiyah. According the other

transmitter, the Meccan 'Aṭâ', two witnesses were required in the early judicial procedure, and the first person who decided on the basis of the testimony of one witness and the oath of the plaintiff was 'Abd al-Malik.[172]

On the question whether there was any limit of exemption for zakâh on land-produce, the Medinese fixed this limit at five awsaq, while the original Kufian doctrine did not accept this exemption.[173] The Medinese supported their doctrine by adducing traditions from the Prophet.[174] The Kufians considered this to be an unwarranted addition to the Qur'ân and to a well-known tradition from the Prophet which was accepted by all.[175] In addition to this, they claimed that this doctrine had not been reported by any of the first four Caliphs who had administered the collection of sadaqât for a long period of time and in fact it had been reported by no more than one transmitter — Abû Sa'îd al-Khudrî.[176] The upshot of the argument is that even though they did not have a formal tradition from the Prophet to support their doctrine, yet there were strong evidences to show that the tradition in support of the Medinese doctrine was not trustworthy. From a formal point of view, however, this amounted to preferring traditions from the Companions to a formal tradition from the Prophet.[177]

Around the year 100, this informal and rather

subjective attitude began to loosen its hold. Hitherto the doctrines of local scholars seem to have been accepted generally more or less without much questioning. It is true there had been disagreements on specific questions even among local specialists. They were, however, neither too many nor too serious to shake the deeply-rooted confidence in the local authorities. In fact it is this confidence, combined with relatively primitive material conditions which hampered a speedy and regular diffusion of doctrines and traditions, as well as the non-availability of compendia of traditions which were recognised by more or less all Muslims as authentic, which had led to the formation of regional schools prior to the rise of schools centred around the doctrines of individual jurists.[178] It was owing to this confidence in local authorities and in the purity and continuity of 'practice' that little need was felt by the scholars of the early period to justify their doctrines by consistently adducing systematic or traditional arguments. They often stated their doctrines, presumably without feeling the necessity of mentioning the arguments which justified them or the sources whence they had been derived. In short, unless there were strong reasons which called for the scrutiny of a particular doctrine or 'practice', the general assumption was that it was sound.

It began to be realized gradually, however, that neither trust in 'practice' nor confidence in the doctrines of the local authorities was enough. Doctrines had to be justified, on the contrary, in terms of a set of objective criteria. There began to arise, therefore, a somewhat skeptical attitude so that the doctrines of local scholars and the purity and continuity of 'practice' in many cases could no longer be taken for granted. On the contrary, their validity had to be established by arguments.[179]

If we look at the circumstances of the early second century, it is not difficult to surmise the factors which presumably contributed to this skepticism. One of these was the rise of unorthodox sects which challenged orthodoxy, and all the consequent controversy, particularly the Khârijî and the Shî'î doctrines which challenged the soundness of several beliefs and practices of the majority.[180] Still more serious damage to this trust in the purity and continuity of 'practice' was caused by the growing awareness of the existence of considerable diversity of legal doctrines[181] — a development which was also caused by the increasing facilities of communication. Moreover, the meddling of unqualified persons such as ignorant and impious rulers, incompetent judges, etc., in legal matters, deprived 'practice' of

some of its former halo of sanctity.[182] Doctrines could often no longer be accepted, therefore, as readily as in the past if they were supported merely by vague claims of uninterrupted 'practice', or even on the authority of the specialists of a relatively late period. They were required to be backed by authentic traditions, from the Prophet or the Companions. And even these traditions were increasingly required to meet certain formal and objective criteria of authentification. The doctrines which were divergent from those of one's school began to be put to rigorous scrutiny, forcing each school to justify its doctrines. And this could have been done by referring to objective, and to a great extent, generally accepted criteria.

The second century was essentially a century of transition. It had inherited from the preceding century, notwithstanding the skepticism which had begun to raise its head and was becoming increasingly important, its share of the aforementioned informality and what might be characterised as the tradition of trust. As a result of this, undocumented references to 'practice' continued. No consistent care was taken to follow the objective criteria of the authenticity of traditions (e.g. that the chain of transmission should be complete, and each of the transmitters should be well-known and trustworthy, etc.).[183]

It was owing to the aforementioned heritage that doctrines were quite often stated without stating side by side with them the arguments — traditional and/or systematic — which supported them.

On the other hand, there was emerging an increasingly formal attitude — an attitude which stressed formal and objective considerations and looked askance at what appeared to be the informal and subjective attitude which had come down from the past. The impact of this attitude had many manifestations. It was owing to the emergence of this attitude that the mention of the doctrines of one's school began to be accompanied increasingly (though not consistently), by its supporting evidences. Even though undocumented reference to 'practice' persisted, it became less frequent. Reference to formal traditions from the Prophet and from the Companions increased and began to be adduced in forms which were more in accord with the formal criteria of authentification (such as isnâd, etc.). The actual application of these emerging formal criteria was naturally bound, however, to serve more as a tool of criticism of the doctrines of others, rather than as a means for a critical scrutiny of one's own doctrines. Gradually, however, it did serve the latter purpose as well, which is evident from the numerous departures of Abû Yûsuf and Shaybânî from the

doctrines of their school on the ground that they were at variance with traditions from the Prophet.[184]

It is owing to the co-existence of these two divergent attitudes — the old and the new, the informal and the formal, that the works of Fiqh and Âthâr composed during the second century appear to be confusing and full of apparent inconsistencies. Abû Yûsuf, for instance, rejects Awzâ'î's claim that a certain practice had continued since the caliphate of 'Umar and 'Uthmân on the ground that this claim did not fulfil the formal requirements for the authentification of traditions viz., that the transmitters should be known persons and should be trustworthy, etc.[185] He also condemns undocumented reference to sunnah and blames the Syrians and Medinese for claiming the sanctity of sunnah in favour of the practices introduced by administrative officials and the doctrines of incompetent jurists.[186] Abû Yûsuf also opposes sunnah to isolated traditions which he declares to be shâdhdh and, therefore, inacceptable.[187] Inspite of all this, he himself does not care to follow these standards strictly and quite frequently refers to traditions which are unsatisfactory according to the criteria which he himself mentions.[188] Instances showing this kind of inconsistency can be very easily multiplied.[189] Even though the Kufian jurists do not consider mursal traditions to be well-

authenticated,[190] they do not mind using mursal traditions and at times even consider a tradition with full isnâd as repealed by a mursal tradition.[191] In fact as late as in the time of Shâfi'î and in his own works, we find traces of this situation. We notice, for instance, considerable laxity and carelessness in Shâfi'î with regard to isnâd,[192] though he is far more advanced in this respect than his predecessors. In the same way, Shâfi'î's inconsistency is evident from his use of mursal traditions even though he disregarded them in theory.[193] These facts clearly bring out the hodge-podge nature of the attitude of jurists towards traditions during the second century. They testify to the co-existence of two divergent attitudes — the entrenched old and the emerging new. It was this which was responsible for so many inconsistencies.

Furthermore, the attitude of the "ancient schools" towards traditions, practices, etc., was influenced by the fact that as yet there did not exist exhaustive compendia of traditions which were generally recognized as authentic. Hence a formal tradition going back to the Prophet did not necessarily enjoy the same reverence and certitude about its authenticity as it began to enjoy from the third century onwards when the canonical collections of traditions were made after those traditions had been scrutinized

according to the canons of Ḥadîth-criticism.

The effect of the above-mentioned factor was heightened by the dearth of material facilities for the composition and spread of books over a wide area. This rendered it all the more difficult to consult, easily and as a matter of course, the traditions existing at a certain period of time.

It is in this context that we should consider the question of the relationship between sunnah from the Prophet, sunnah from the Companions, traditions from the Prophet and traditions from the Companions, 'practice', doctrines of Successors, etc., and the concepts and assumptions which underlay them. The picture that emerges appears to be this: As a concept the "sunnah of the Prophet" continued to exercise its influence even as it did before; it remained the main source of legal doctrines besides the Qur'ân (which itself had been transmitted through the Prophet). One of the major differences between the "sunnah of the Prophet" during the pre-and post-Shâfi'î periods, therefore, seems to stem to a considerable extent from the question as to how does one know what the sunnah relative to a certain problem is? Shâfi'î insisted that sunnah was synonymous with the precepts and practices of the Prophet[194] as expressed in well-authenticated traditions,[195] going back to the

Prophet and to him alone.[196]

As we have noted earlier, the Kufians, like the Medinese, occasionally allowed 'practice' or 'traditions from Companions' to supersede traditions from the Prophet,[197] a fact against which Shâfi'î directed his main criticism of both the major schools of his time.

A careful study of the instances of the supercession of traditions from the Prophet by traditions from the Companions, 'practice', etc., belies the notion that there was any idea that 'established practices' or precepts and practices of the Companions were more authoritative than the precepts and practices of the Prophet. The basic consideration on such occasions was whether a formal tradition from the Prophet did in fact represent any precept or practice of the Prophet or not. As we have seen, the jurists before Shâfi'î did not believe that sunnah could be known only through formal traditions from the Prophet. Before him, these were, at best, one of the various means of finding out sunnah. Moreover, as we have pointed out, there did not as yet exist any compendium of traditions which enjoyed more or less universal confidence among Muslims in respect of the authenticity of their contents, unlike the canonical collections of Hadîth during the third century.[198] Furthermore, even though technical

criticism of traditions was not quite elementary,[199] "it was left to Shâfi'î to introduce as much of the specialized criticism of traditions as existed in his time into the legal science".[200] Hence, a tradition which was more satisfactory according to formal standards was not necessarily accepted by the jurists for at times they were not convinced of its authenticity. On the contrary, sometimes the jurists accepted those evidences of sunnah which did not meet the formal criteria of authentification, and yet seemed to them to be authentic.

What was generally said in justification of this attitude illustrates our point. It shows, in the first place, that there was no doubt as to the paramount authority of the precepts and practices of the Prophet. The usual justification for the prevalence of some tradition from a Companion as against that from the Prophet was that it was unlikely that the Companion concerned would have been unaware of, or that he would have followed a doctrine or acted in a manner which was opposed to an authentic precept or practice of the Prophet. What this meant was that what had been rejected was inauthentic despite its being formally regular, and what had been preferred was authentic, even though perhaps it was not quite as regular from a formal viewpoint.[201] This was besides the fact that isolated

traditions as such were not esteemed very highly.[202] It was owing to this lack of certitude about the authenticity of many of the traditions that were cited at that time that the hierarchy with regard to traditions could not always conform to the hierarcy with regard to sunnah (viz., the Prophet, the first four Caliphs, Companions). Thus, the preference of a tradition from some Companion to that from the Prophet did not mean that the authority of the Companion was reckoned as such to be higher than, or even to be on par with, the authority of the Prophet. It simply meant that the former evidence was deemed to be more trustworthy than the latter.[203].

It was owing to the lingering skepticism with regard to quite a number of traditions that were in circulation during the second century that they were set aside on account of several considerations other than the lack of completeness of their isnâd or the lack of reliability of their transmitters. If some Companion of the Prophet had acted in contravention of the principle embodied in a tradition from the Prophet, the tradition was considered to be suspect,[204] particularly so if the transmitter of the tradition had himself acted in contravention of that principle.[205] In the same way, occasionally if there was some authentic tradition embodying the doctrine of some Companions, especially of noted Companions such as 'Umar,

Ibn 'Umar, etc., which was opposed to some tradition from the Prophet, the latter was considered doubtful because of the assumption that the Companions could not have been ignorant of the teachings of the Prophet.[206] In this connection the practice of the first Caliphs was considered highly authoritative. It was presumed by some, if not all, that there was no sunnah of the Prophet which had not been put into effect by the first Caliphs.[207] It is owing to this widespread and strong belief that the practices of the first Caliphs constituted an important consideration in judging the authenticity of traditions that Shâfi'î had to insist again and again that the practices of the Caliphs, even as the agreement of some Companions, did not confirm the authority of traditions from the Prophet; nor did the divergence of their doctrines [or of their practices] from traditions from the Prophet weaken their authority.[208]

Although what has been said above applies both to the Medinese and the Kufians, the examples of the divergence of the latter from traditions from the Prophet in favour of practices and traditions from the Companions are considerably less than the former. This partly explains Shâfi'î's relatively more trenchant criticism of the Medinese.[209]

One significant example, however, is that found in Kharâj (pp. 164 f). Abû Yûsuf relates a tradition from

'Alî according to which the Prophet used to award forty stripes as a punishment for drinking wine, Abû Bakr used to award forty, and 'Umar eighty. Abû Yûsuf adds: "All this is sunnah, and our companions are agreed that the punishment for drinking wine, whether in small or in big quantity, is eighty stripes".

Still another example is that on the question of option in sale, the Kufians abandoned a well-authenticated tradition from the Prophet merely because 'everyone', viz., "the muftîs of our time", that is, those who were neither Companions nor Successors, had abandoned it.[210]

A few cases notwithstanding, there can be no doubt that traditions from the Prophet, in the opinion of the Kufians, prevailed over those from other authorities, which is an index of the relatively greater importance attached to traditions from the Prophet by the Kufians as compared with the Medinese. This, in addition to the fact that the Kufians referred to 'practice' only rarely,[211] shows that they had, to a great extent, anticipated Shâfi'î, and were markedly closer to his formal position than were the Medinese.

VI

The next important conclusion of Western scholarship is that legal traditions from the Prophet are exclusively

(as Schacht would say),[212] or mainly (as Coulson would say),[213] the products of the process of "back-projection" of doctrines.

The method which has been adopted by Schacht, (to take the most impressive, and best-argued presentation of this thesis), to establish this point has been succinctly stated by him in the following words:

> The best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed. . . . This kind of conclusion is furthermore made safe by Tr. VIII, 11, where Shaibânî says '[This is so] unless the Medinese can produce a tradition in support of their doctrine, but they have none, or they would have produced it.' We may safely assume that the legal traditions with which we are concerned were quoted as arguments by those whose doctrine they were intended to support, as soon as they were put into circulation.[214]

Schacht has made an extensive use of this argument — the argument e silentio — in order to show the growth of legal traditions.[215]

The e silentio argument — particularly the manner in which it has been used by Schacht — could be justified only if the following assumtpions were regarded as valid for the period under study:

(1) that during the first two centuries legal doctrines were invariably, or almost invariably, recorded along with their supporting evidences, particularly tra-

ditions;

(2) that the traditions known to one jurist at a certain period of time would necessarily have been known to all the other jurists of the same period, irrespective of the area where that jurist lived;

(3) that all the traditions which were "in circulation" at a particular period of time were recorded at that time and preserved subsequently so that our failure to find something in the works of a particular generation is tantamount to its non-existence.

None of these assumptions, however, can be corroborated by historical evidence. The earliest collections of traditions which have come down to us were composed circa mid-second century and subsequently.[216] These works too were motivated by a complex of factors. One of these was the desire to collect the doctrines followed by one's masters. It was owing to this that at times it was deemed enough to record the doctrines of one's school, without necessarily supplementing them with supporting traditions from the ultimate authorities, i.e., the Prophet and the Companions.[217]

We have already seen that many a doctrine which was derived from the Qur'ân was recorded without any reference to the relevant Quranic verses.[218] There is overwhelming evidence to show that this was equally true

with regard to traditions. There are cases where a jurist recorded the doctrine of his school on a legal question but did not cite the tradition which was relevant to, and/or even supported, his doctrine, even though he doubtlessly knew that tradition.[219] Indeed, were one to compare the traditions found in the earlier works but not found in later works (i.e., following the method of Schacht in reverse), the results would be quite startling. The following is merely an attempt to apply this method so as to illustrate the inadequacy of the method employed by Schacht and several other modern scholars.

Shaybânî, as we know, was younger than Mâlik and he prepared an edition of Mâlik's Muwatta' in which, besides noting the doctrines and traditions of Mâlik, he also noted the variant doctrines of his own school and occasionally supported these doctrines by arguments, which generally consisted of traditions from the Prophet and/or the Companions. It would be instructive to compare the two works in order to illustrate our argument.

> The section on timings of the prayers in Muw. (pp. 3 ff.) contains in all 30 traditions, out of which only three have been mentioned in Muw. Sh. (pp. 42 ff.).
>
> On the question of the time of morning prayer, the disagreement between the Kufians and the Medi-

nese is well-known. The Medinese were in favour of praying early, when it was still dark, while Kufians were of the view that prayer should preferably be held a little later when there was some light. Muw. Sh. (p. 42) mentions this doctrine of the Kufians. Strangely enough, however, Shaybânî makes no mention of a tradition from the Prophet which supports the doctrine of his school and which is found in Muw. (pp. 4 f.).[220]

On the question whether touching of the genital part necessitated fresh ablution, Muw. (pp. 42 f.) has six traditions out of which Muw. Sh. (p. 50) records only two. The omitted traditions include one from the Prophet and another from Ibn 'Umar.

On the question of ghusl owing to janâbah, Muw. (pp. 44 f.) contains four traditions, out of which only one is found in Muw. Sh. (pp. 70 f.). The omitted traditions include two traditions from the Prophet.

The section of "ghusl al-mar'ah idhâ ra'at fî al-manâm. . .", Muw. (pp. 51 f.) contains two traditions, while Muw. Sh. (p. 79) contains only one. Of these, it does not contain a

tradition which has been recorded in Muw. (pp. 51 f.) as a tradition from the Prophet with the isnâd: Mâlik - Hishâm - his father - Zaynab bint Abû Salmah - Umm Salmah - Umm Sulaym - the Prophet.

The entire section entitled "al wudû' min al-qublah" in Muw. (pp. 43 f.), is not found in Muw. Sh.

The whole section entitled "al-tuhûr fî al-mâ'" (Muw. pp. 22 ff.) is not found in Muw. Sh.

The sections on "al-bawl qâ'iman" and on "al-siwâk" (pp. 64 ff.) are not found in Muw. Sh.

The section "al-nidâ' fî al-salâh" (Muw. pp. 67 ff.), if compared with the corresponding section in Muw. Sh. (pp. 82 ff.), shows that several traditions of Muw. (viz., nos. 1, 3, 5, 6, 7, 9) are not found in Muw. Sh.

The section entitled "Kafan al-mayyit", (Muw., pp. 223 f.) contains three traditions, of which Muw. Sh. (p. 162) contains only one (no. 7 in Muw.), a tradition from 'Abd Allâh b. 'Amr b. al-'Âs. Out of the two traditions which it does not contain, one reports the manner in which the Prophet was wrapped in the

coffin.

The section on "zakât al-fitr" in Muw. Sh. (p. 176) does not contain the tradition from Ibn 'Umar found in Muw. (p. 283).

The traditions contained in the sections of Muw. entitled "Man lâ tajib 'alayh zakât al-fitr" (p. 285), "Makîlat zakât al-fitr" (p. 284), and "Man tajib 'alayh zakât al-fitr" (p. 283), are not found at all in Muw. Sh.

In the section on "Isti'dhân al-bikr wa al-ayyim", three traditions are found in Muw. (pp. 524 f.), while only one is found in Muw. Sh. (p. 239). The missing ones include a tradition from the Prophet.[221]

The section on "Li'ân" in Muw. Sh. (p. 262) does not contain several traditions found in the corresponding section in Muw. (pp. 566 ff.).

The section on the prohibited forms of the sale of dates in Muw. Sh. (pp. 330 f.) contains only one out of the three traditions mentioned in Muw. (pp. 623 f.), even though all the three go back to the Prophet.

The same can be illustrated by comparing the works of Abû Yûsuf and Shaybânî, particularly Âthâr A.Y. and Âthâr Sh.[222]

Âthâr A.Y., 845, a tradition from Ibn Mas'ûd on mudârabah is not found in Âthâr Sh.

Âthâr A.Y., 830, a tradition from the Prophet regarding disagreement on price between the buyer and the seller, not found in Âthâr Sh.

Âthâr A.Y., 666, a tradition from 'Umar occuring in the section on divorce and 'iddah is not found in Âthâr Sh.

On the question of nafaqah and sukná, Âthâr A.Y. embodies several traditions, i.e., 592, 608, 726 and 728. These are not found in Âthâr Sh.

Âthâr A.Y., 704, 707 and 709 which are related to li'ân are not found in Âthâr Sh.

Âthâr A.Y., 492, 692, and 696 which deal with zihâr are not found in Âthâr Sh.

Âthâr A.Y., 857, a tradition from Sâlim on muzâra'ah, is not found in Âthâr Sh.

Âthâr A.Y., 779 and 780 which refer to farâ'id are not found in Âthâr Sh.

Âthâr A.Y., 399, 401, 597, 607, etc., on miscellaneous subjects are not found in Âthâr Sh.[223]

This shows that even though there is no reason to believe that Shaybânî did not know these traditions, his work does not record them — a fact which flasifies the

assumption which lies at the basis of the method which has been followed by Schacht in his attempt to establish the"growth of traditions." In this connection the following possibilities, each one of which is plausible, have been altogether ignored:

(1) That the person concerned might have heard and then forgotten that tradition.[224]

(2) That he might have heard that tradition, but might not have considered it authentic.

(3) That he might have known a tradition, but owing to the fact that not the entire quantum of traditions known to the jurists has come down to us, especially of the jurists of the relatively early period of Islâm, we might find no mention of those traditions in the works available to us, even though they might have been in existence. To overlook all these considerations and possibilities and to regard all legal traditions from the Prophet as products of "back-projection" of doctrines can hardly be considered a reasonable historical attitude.[225]

In brief, the critical study of traditions by Western scholars has gone a bit too far, has proceeded on the basis of highly questionable assumptions, which are based on an unrealistic picture of the period under study,[226] with the result that the conclusions to which

these scholars have been led, to say the least, are highly exaggerated.[227]

VII

Even though the attitude of the ancient schools of law with regard to traditions, practice, etc., was marked with an extent of similarity, there were differences of emphasis. From the vantage-point of the classical Islamic legal theory, the Kufians seemed to be ahead of the Medinese and represented those trends which paved the way for, and reached their culmination in, the rigorously formal and consistent legal theory of Shâfi'î.

The advance registered by the Kufians on the Medinese and the Syrians is evident from their relatively less frequent reference to practice.[228] The Kufian doctrines rest, almost as a rule, on traditions from the Prophet and the Companions, to which they refer as final arguments more frequently and more consistently than the Medinese do. Among the Kufians the influence of 'practice' was progressively on the decline, a development which corresponded with the increase in the influence of formal traditions. This is evident, inter alia, from the fact that Shâfi'î's criticism for neglecting traditions in favour of 'practice' was mainly directed towards the Medinese.[229] This is also established by the line of

reasoning generally adopted by Abû Yûsuf in his refutation of the doctrines of Awzâ'î. The former refused, for instance, to accept the latter's reference to a 'practice' regarding the distribution of booty in the enemy territory as going back to the time of 'Umar and 'Uthmân. Instead of this kind of anonymous and undocumented reference to 'practice', Abû Yûsuf called for formal traditions.[230] In fact Abû Yûsuf anticipated Shâfi'î by pointing out that undocumented reference to 'practice' was fraught with the danger that the status of sunnah might be claimed even for the practices which had been introduced by administrative officials.[231] Though the Kufians were not as iconoclastic with regard to 'practice' as Shâfi'î was,[232] they nevertheless used formal traditions more frequently and attached greater importance to them than the Medinese did.[233]

In addition to this, the Kufians insisted that traditions should meet certain formal criteria of authentification. One of these requirements was that of isnâd. It was required that the chain of transmission should be complete and it is for this reason that mursal traditions were considered to be inacceptable.[234] It was not even deemed enough for the authenticity of a tradition that all the persons mentioned in the chain of its transmission should be identifiable. The transmitters were also

required to be trustworthy and possessed of legal understanding.[235]

With the passage of time, the Kufians showed growing confidence in formal traditions. This is evident from the occasional change of opinion in respect of their own doctrines and also frequent departures from the doctrines of their predecessors by the Kufian jurists on account of traditions from the Prophet.[236] Another manifestation of the rising prestige of traditions from the Prophet was the decreasing importance of those considerations owing to which traditions from the Prophet were interpreted restrictively.[237]

> Abû Ḥanîfah had made the Prophet's decree that mawât belonged to whoever cultivated it dependent on the permission of the ruler. Both Abû Yûsuf and Shaybânî departed from this restrictive interpretation, in favour of a more strict and literal interpretation.[238]
>
> In the application of the rule, based on a tradition from the Prophet, that one may not sell anything of which one had not taken possession, Abû Ḥanîfah had exempted immovable property. Shaybânî departed from this restrictive ruling and refused to distinguish between movable and immovable property.[239]

We have noted that with regard to traditions from the Companions and from the Prophet, thanks to the fact that the latter were not always considered to be more authentic than the former, occasionally the former were made to supersede the latter. On this point, it is not the Kufians, however, but the Medinese who were the main target of Shâfi'î's criticism.[240] As compared with the Medinese, the cases wherein they allowed traditions from the Companions to supersede traditions from the Prophet are negligible.[241] This shows that owing to a formally more advanced attitude about traditions and a greater confidence in them, the Kufians were ahead of the Medinese in attaching greater importance to formal traditions, and thus making the hierarchy with regard to traditions conform more consistently to the accepted hierarchy with regard to sunnah.[242]

It is not difficult to see that among the two prominent schools of the second century, viz., the Medinese and the Kufians (besides the Traditionists),[243] Shâfi'î's attitude was, on the whole, closer to, and a continuation of, the attitude of the Kufians.

Side by side with the above-mentioned agreement or similarity between the Kufians and Shâfi'î, and notwithstanding that, the views of the Kufians were significantly divergent from those of Shâfi'î on several important ques-

tions.

One of the points of difference was with regard to traditions from the Companions. As we have already seen, the disagreement was not very significant in so far as Shâfi'î continued to use traditions from the Companions on questions on which there were no traditions from the Prophet,[244] even though he did not concede the appropriateness of designating their precepts and practices by the term sunnah.[245] This difference, viewed in the context of the fact that Shâfi'î continued to use traditions from the Companions as authoritative, becomes almost a verbal one. The main issues of disagreement with regard to traditions from the Companions, however, were in respect of interpretation of traditions from the Prophet in the light of traditions from the Companions, and the position of qiyâs vis-à-vis traditions from the Companions. The Kufians, contrary to the opinion of Shâfi'î, believed that traditions from the Prophet should be interpreted in the light of traditions from the Companions,[246] and that the latter ought to prevail over qiyâs.[247]

The differences between the Kufians and Shâfi'î stemmed from the fact that the former were rooted in the same ideas and attitudes which were cherished by the Medinese and the Syrians, and hence they did not share

Shâfi'î's robust confidence in the authenticity of traditions from the Prophet. We have noted earlier some of the considerations which, according to the ancient schools of law, made the authenticity of traditions from the Prophet doubtful, and have also mentioned Shâfi'î's refusal to concede the validity of those considerations, which illustrates the difference between the two attitudes.[248] The traditions from the Companions, or established practice, etc., on the strength of which the ancient schools occasionally allowed traditions from the Prophet to be superseded, appeared to Shâfi'î to be equally vulnerable to the charge of inauthenticity. Hence, traditions from the Prophet appeared to him as better-qualified to prevail.[249] In brief, Shâfi'î's attitude was that once there was a tradition from the Prophet which fulfilled the formal requirements of authentification — completeness of the chain of transmission and the reliability of its transmitters — it had to be treated as the only valid evidence of sunnah and had to prevail.

The Kufians, like the other ancient schools of law, were not as confident about the authenticity of the so-called traditions from the Prophet. This relatively deficient confidence of the Kufians is reflected, inter alia, in the many more reservations which they had with

regard to their acceptance than Shâfi'î.[250] Among these, the most important was their reservation with regard to isolated traditions. One of the persistently recurring features in Shâfi'î's polemics with the Kufians (as well as other ancient schools) was his emphasis on the decisive and authoritative character of isolated traditions. The main standpoint of the Kufians, on the other hand, was that isolated traditions could not be considered so trustworthy as to prevail over those doctrines which had been hallowed by consensus or the approval of specialists.[251] The whole point of the ancient schools was that isolated traditions could serve as arguments only if they had been transmitted in a manner which made them safe from the possibility of error.[252] It is here that the Kufians, like other ancient schools,[253] were opposed to a fundamental point in the legal theory of Shâfi'î.

Another aspect of this relatively deficient trust in formal traditions was that in case there were two contradictory traditions, the Kufians rejected one of the two traditions rather without much hesitation.[254] In fact, at times they went so far as to suppose that if two traditions were mutually contradictory, they cancelled each other out, leaving the way free for the use of analogy.[255]

It was owing to lack of full confidence in isolated

traditions that the Kufians had developed canons of Hadîth-criticism according to which traditions could be rejected on several considerations in addition to considerations relating to isnâd. One of these was that a tradition could only be accepted if it was:

(1) in agreement with the teachings of the Qur'ân;[256]

(2) in agreement with the sunnah of the Prophet;[257] a sunnah which is so well-known and has been received in such a manner as to exclude the possibility of doubt (sunnah ma'rûfah, mahfûzah ma'rûfah);[258]

(3) widely-diffused and generally accepted by the community;[259]

(4) transmitted by and/or known to and accepted by scholars and fuqahâ';[260]

(5) and related by transmitters well-known for their integrity and trustworthiness.[261]

Conclusion

All this shows that the Kufians occupied an intermediary position between the Medinese-Syrians and Shâfi'î. The Medinese-Syrians, whose trust in the purity and continuity of 'practice' and in the soundness of the doctrines of the past had not been as rudely challenged as that of the Iraqians, represented and clung more tenaciously to the early attitude which was characterized by frequent

reference to, and trust in 'practice' and to the doctrines of local authorities without necessarily referring to ultimate authorities and to formal traditions. The Kufians made a definite departure from this attitude which is evident from the fact that they supported their doctrines much more frequently than the Medinese and the Syrians did by reference to formal traditions from the Prophet and the Companions, which were required to conform to certain formal criteria for their authentification. Shâfi'î developed and formalized this concept (which to some extent the Kufians shared with the traditionists), and applied it with his characteristic rigour and consistency in scrutinising the validity of positive doctrines. The major departure made by Shâfi'î from the Kufian legal theory lay in his unwavering confidence in all well-authenticated traditions from the Prophet, including isolated traditions. He considered these to be unquestionably authentic, and therefore a trustworthy evidence of the sunnah of the Prophet. The uncompromising consistency shown by Shâfi'î on this point partly reflects the formalism and consistency which characterize Shâfi'î's thought and temperament as a whole. It also reflects, in no small measure, however, the impact of the advancements that were being made in the science of tradition itself. It is these advancements which had created grounds for

that robust confidence in the authenticity of the body of formal traditions from the Prophet which was in circulation in Shâfi'î's time. Unless there were any grounds for this confidence, Shâfi'î's legal theory would not have had any feet to stand upon.

C. Consensus[262]

Reference to consensus as an argument in legal matters was a well-established practice in the ancient schools of law. Even during the first century we find Ibrâhîm Nakha'î, a Successor, claiming consensus of the Companions in support of the Kufian doctrine regarding the time of morning prayer.[263] During the second century the ancient schools, as Schacht has shown, not only referred to consensus frequently, but also distinguished between the consensus of all Muslims on essentials, and of specialists on details.[264]

Just as the question of the correct kind of relationship between the Qur'ân and the traditions posed certain problems,[265] likewise did the question of relationship between consensus and traditions. Greater emphasis on one meant less emphasis on the other. This tension is manifest from the writings of Shâfi'î, who gradually qualified the use of ijmâ' and narrowed down the scope of its operation — an attitude which was directly linked with

his emphasising the authority of traditions from the Prophet. Ultimately, Shâfi'î arrived at the position of denying the validity of the consensus of scholars on details, and recognized only the validity of the consensus of all Muslims on essentials.[266]

The Medinese and the Syrians, who seem to represent a less advanced stage of Fiqh than the Kufians, had more frequent recourse to consensus as an argument in legal matters than the Kufians. The concept of consensus of all the ancient schools was closely connected, however, with the idea of 'practice'.[267] In other words, many of the norms which were considered to be binding were embodied not in formal traditions from the Prophet and the Compansions but in those 'practices' which enjoyed either the approval of the community in general, or of its recognized scholars. Generally, these 'practices' were regarded as having been introduced by the Prophet himself, or by his Companions, which had remained in continual operation. In addition, there were those 'practices' which even though they were of a later origin enjoyed the approval of the Muslim community as a whole and/or of its accredited scholars.

In Awzâ'î, consensus generally refers to the practices initiated by the Prophet,[268] or by the Qur'ân,[269] or by the early Caliphs,[270] and maintained thereafter

without interruption. Of these, what Awzâ'î most commonly refers to is the uninterrupted practice of the Muslims, beginning with the Prophet, maintained by the early Caliphs and by the later rulers, and approved by the scholars. This continuity of practice implies consensus, which is at times even explicitly referred to by Awzâ'î.[271] It is significant that in a preponderant majority of cases, reference to consensus has been preceded by the claim that the practice in question had originated with the Prophet. Thus, operationally, consensus seems to have been used by Awzâ'î as an evidence to corroborate and authenticate the claim that the practice concerned had originated with the Prophet. Besides this, however, Awzâ'î also often supports the validity of his doctrines on the ground that they had been put into effect by rulers, and approved by scholars; or supports the validity of these practices by making the negative claim that they had been disapproved neither by the rulers nor by the scholars.[272]

The Medinese attitude <u>apropos</u> consensus is broadly the same. One conspicuous difference, however, is the prominence of its local character. Among manifestations of the special status of Medina and the Medinese is the doctrine of the Medinese jurists that only those traditions which were agreed upon by the people of Medina should be

authenticated.[273] It was perhaps a logical extension of this attitude that the Medinese restricted their consensus, in theory as well as in practice, to the consensus of the Medinese scholars.[274] This provincialism also appears to be related to the Medinese claim that it was in Medina that the bulk of the Companions had lived and practised the teachings of the Prophet,[275] and their contention that "knowledge is transmitted in Medina as if by inheritance".[276]

The Kufian concept of consensus was rooted in those concepts and ideas about consensus which were in vogue in the ancient schools. At the same time, the concept as well as actual use of consensus among the Kufian jurists had its own characteristics. In fact, as in the case with traditions, the Kufians were ahead of both the Medinese and the Syrians, and to a considerable extent anticipated the attitude of Shâfi'î, as we shall see.

The Kufians doubtlessly shared the belief of the ancient schools in the consensus of the Muslims at large as well as of scholars, and often referred to them in legal discussions. Nevertheless, it is significant that the Kufian reference to consensus is less frequent than that of the Medinese and the Syrians. We have noted that Abû Yûsuf, as compared with Awzâ'î, made much less use of consensus and adduced traditions from the Prophet and the

Companions instead.[277] The same is evident from a study of Shaybânî's Hujaj (which is a record of the debate between Shaybânî, as the representative of the Kufian school, and the Medinese). A study of this work proves that the difference between the Kufians and the Medinese in respect of the use of consensus was the same as that between the Kufians and the Syrians.[278] In practice, the Kufians seem to have focussed their attention on traditions from the Prophet and the Companions rather than anonymous practice supported by consensus. This is part of the wider movement in Islamic law towards formalisation, an aspect of which was the attempt to overcome anonymity, as well as an index of the growing use and importance of traditions.

Even though consensus occupied an important position in the theory as well as the practice of ancient Kufian jurists, its importance was inversely related to the prestige of formal traditions, specially of isolated traditions[279] (as opposed to those which were accepted, boradly speaking, by the community in general[280]). It was, therefore, that the importance of consensus was on the decline. If a tradition was unanimously accepted, it amounted to a consensus about its authenticity and established its authority.[281] Moreover, even if there was a consensus of scholars on questions regarding which nothing explicit was

found in the Qur'ân or the sunnah, it was considered to be authoritative because of the supposition that it could not have been the outcome of ra'y which was bound to lead to disagreements. The only assumption that appeared to be reasonable, therefore, was that it would have been derived from some authoritative tradition.[282] Thus, consensus was considered to be infallible, and a final argument on all subjects.

The Kufians, like other ancient schools, referred to various kinds of consensus: to the consensus of all Muslims, of the Companions, of all scholars (of a generation), and of the scholars of a particular school and it appears that these various kinds of consensus reflected different grades of authority.

The consensus of all Muslims was, obviously, the consensus which was deemed to be the most authoritative of all. 'Umar is reported to have transformed the special prayers of Ramaḍân, which had not been consistently offered congregationally during the life of the Prophet, into congregational prayers. To pray congregationally became, subsequently, the established rule, (though it was considered supererogatory, rather than obligatory).[283] What legitimised the action of 'Umar was that "the Muslims agreed to that and considered it to be good." And it has been reported from the Prophet that "whatever the Muslims

consider to be good, is good in the sight of Allâh; and whatever the Muslims consider to be bad, is bad in the sight of Allâh".[284]

The reference to the consensus of all Muslims, however, was the exception, rather than the rule, which was to refer to the consensus of scholars. The concept of consensus of all Muslims was confined, in the main, to the essentials such as the main duties on which one could be absolutely certain as to the orders of God and of the Prophet, which was the same as "what is related by many from many" (mâ naqalathu al-'âmmah 'an al-'âmmah).[285] Hence, often when the consensus of all Muslims was referred to, it was preceded by reference to traditions. Abû Yûsuf, for instance, mentions a certain doctrine as based on a tradition from the Prophet, whereafter he adds: "and that is followed by the community and is the established practice and there is no disagreement about it".[286] In such instances, consensus further authenticated the tradition concerned.

Another category of consensus which was highly authoritative was the consensus of the Companions. The importance of the consensus of the Companions can easily be gauged from the importance attached to their doctrines by the Kufians as well as other ancient schools of law.[287] Abû Ḥanîfah, according to Shâfi'î, claimed about a certain

doctrine of his that it was not opposed to the doctrine of any single Companion.[288] In the same manner, it was Shaybânî's avowed principle not to diverge from the decision of any of the Companions when no other Companion was known to have disagreed.[289] This was tantamount to the consensus of the Companions.[290] Like their Medinese counterparts, the Kufian jurists claimed, in regard to several doctrines which had come down from prominent Companions such as 'Umar, that they were supported by the consensus of the Companions.[291]

> The Iraqian opponent of Shâfi'î; speaking for the ancient schools in general, explains that if one Companion relates something from the Prophet and no other Companion contradicts him, then it must be concluded that he related it in the midst of the Companions, and that they did not contradict him because they knew that he was right. So it can be considered as a tradition from the Companions in general. The same applies to their silence on a decision given by one of them.[292]

While the general form of reference to the consensus of the Companions was that of tacit approval, at times it also seems to point to the deliberate concurrence on the part of a considerably large number of Companions.[293]

The more common form in which consensus found its

expression in Kufa, as elsewhere, was the consensus of fuqahâ'. The characteristic feature of the Kufian idea of consensus, as contra-distinguished from the Medinese, is that it extends to all countries.[294] While the Medinese consensus of scholars denotes, in theory as well as in practice, the consensus of the Medinese, the Kufians refer to "the consensus of the scholars of all countries".[295] Shaybânî claims that a certain doctrine of his school was followed by all fuqahâ' without any disagreement.[296] With regard to another doctrine he claims that it enjoyed the consensus of the Kufians and the Medinese.[297] This consensus signified, however, the agreement of the majority, rather than of all scholars, taking the expression "all scholars" literally. This is evident, for instance, from the statement of Shaybânî that: "This is the agreed practice with regard to which there is no disagreement among fuqahâ' except those . . ."[298] or: "This is the doctrine of Abû Ḥanîfah and this is our doctrine and this is a doctrine regarding which there is consensus among fuqahâ'. [As for the opposite doctrine] . . . we are not aware that anyone held that doctrine except a few Medinese, one of whom is Mâlik".[299]

The theoretical Kufian position seems to be that they regarded the doctrines regarding which all the scholars agreed as authoritative. The doctrines on which the pre-

dominant majority of scholars agreed, the Kufians seemed to believe, were binding for the succeeding generations. The consensus of the scholars of all lands appeared to have been, (besides, of course, consensus of all Muslims on essentials and the consensus of the Companions) therefore, part of what Shaybânî has termed as khabar lâzim.[300] The difference between the Kufian position on this point and that of Shâfi'î was that in keeping with his characteristically formal attitude, Shâfi'î insisted that consensus could only mean unanimity, that is, absolute agreement without the dissent of even one single person.[301] Moreover, consensus to him seems to amount to deliberate agreement regarding a doctrine, rather than tacit approval. He denied that consensus of scholars could take place on the plea that they were never found together, nor could common information (naql al-'âmmah) be had about them.[302]

In practice, however, reference to the consensus of the school was much more frequently resorted to by the Kufians than the above-mentioned categories of consensus.[303] It is not clear, however, as to the extent to which consensus of one's school was considered authoritative. The Medinese, as we know, considered their local consensus not only as an argument which was valid for themselves, but presumably also binding upon others.[304] The Kufians, on the contrary, do not seem to consider their local consensus

sufficiently authoritative as to be religiously binding upon others. The reference to the consensus of the school without believing it to be "binding" is not a queer phenomenon and seems to be parallel to the standing practice of the ancient schools to refer to the doctrines of Successors or of later jurists, notwithstanding their doctrine that they were not binding.[305] This conclusion of ours is also in keeping with the broader concept of consensus in the explicit theoretical formulation of the Kufians as distinct from the Medinese.[306] This is also established by the fact that throughout Tr. IX, Muw. Sh. and Hujaj (i.e., those Kufian works wherein the sources of positive doctrines are mentioned more often and more explicitly), the consensus of the school has not been adduced as a decisive argument. In general, the reference to the doctrine of "the generality of our fuqahâ'" in Muw. Sh., or similar expressions in Kharâj (passim) seem to be statements of fact, rather than decisive arguments in legal discussions.[307] Hence, reference to the consensus of the school is parallel to the reference to a weighty and reckonable evidence, though not necessarily binding.[308]

Tr. IV shows the important position occupied by consensus in the ancient schools. As we have pointed earlier, its importance was inversely related to that of formal traditions, especially isolated traditions.[309]

This is illustrated by the fact that Shâfi'î, as compared with the ancient schools, assigns consensus a much less important role.[310] The tension between traditions and consensus is also quite evident from Tr. IV, (pp. 254 ff.) wherein the representative of the ancient schools mentions consensus as the final argument in all matters. Of considerable significance, in this connection, is the role of consensus as a means of authenticating traditions,[311] as distinct from its being a sanction behind the doctrines which were neither based on the Qur'ân nor on the sunnah. The importance of consensus in this particular context is evidenced, for instance, by Abû Yûsuf's admonition to follow only those traditions which are, inter alia, accepted by the community.[312] This is implied in such statements as the following of Shaybânî: "This is so on the strength of what has come down from the Prophet regarding which there is no disagreement",[313] or the statement of the representative of the ancient schools that he would accept only those traditions regarding the acceptance of which there was consensus.[314]

This use of consensus marks the Kufians off from Shâfi'î. It is for this reason that unless a tradition was an unquestionably authentic one (and it was consensus, that is, its common acceptance, which ensured that), they did not allow the Quranic injunction to be interpreted

restrictively.[315] However, since the Kufians had recourse to traditions more consistently than their contemporaries (i.e., the Medinese and the Syrians), in practice they argued less frequently on grounds of consensus than others and were a little closer to Shâfi'î than the other contemporary schools.

Moreover, in the past consensus was largely an informal concept. It was — and perhaps for this very reason — also anonymous. As Islamic jurisprudence advanced towards greater formalisation, the concept of consensus too was bound to be formalised. It is owing to lack of formalisation (one aspect of which was the anonymity) of the concept in the earlier period that Shâfi'î protests against the anonymous Medinese consensus: "I wish I knew who they are whose opinions constitute consensus, of whom one hears nothing and whom we do not know, Allâh help us! Allâh has obliged no man to take his religion from [private] persons whom he knows. Even if Allâh had done so, how would this justify taking one's religion from persons unknown".[316] It was again perhaps owing to lack of formalisation of the concept that the agreement of the majority was considered equivalent to consensus.[317] This lack of formalisation is also evident from the rather gratuitous claims of consensus of the Companions made by the ancient schools in support of their doctrines,[318] and from their

inability, when asked, to convincingly define the constitutive process of consensus. The following passages are significant:

> Shâfi'î: 'There were in Medina some 30,000 Companions, if not more. Yet you relate a given opinion of perhaps not as many as six, or only from one or two or three or four, separately or in union, while the great majority [of the Companions] held different views. Where, then, is the consensus? Give an example of what you mean by majority'. Opponent: 'If, for example, five Companions hold one opinion in common, and three hold a contrary opinion, the majority should be followed'. Shâfi'î: 'This happens only rarely, and if it does happen, are you justified in considering it a consensus, seeing that they disagree?' Opponent: 'Yes, in the sense that the majority agrees.' But he concedes that of the rest of the 30,000 Companions nothing is known. Shâfi'î: 'Do you think, then, that anyone can validly claim consensus on points of detail? And the same applies to the Successors and the generations following the Successors'.[319]

On another occasion Shâfi'î asks his opponent (who had stated his doctrine that consensus was constituted by the agreement of the majority, disregarding the minorities of scholars) to elaborate what he meant by the majority and (the negligible) minority. The opponent fails to define accurately regarding the majority the agreement of which amounts to consensus and merely says that it signifies the greater number. Shâfi'î: 'Is ten more than nine?' Opponent: 'They are close to each other.' Shâfi'î: 'Then, define what you want.' Opponent: 'I cannot define'.[320] (i.e., the exact numerical proportion between the majority and the minority).

Contrary to this informal and anonymous kind of consensus, Shâfi'î's own idea of the consensus of scholars, in keeping with his formal outlook, was a highly formal one. In order that consensus could be validly claimed, not only was it essential that there should be absolute unanimity, but also that the scholars concerned should have deliberately arrived at an agreement regarding the doctrines concerned[321] (instead of considering lack of information about the doctrines of any but a few persons of a generation to be an evidence of their tacit approval).

In actual practice the Kufians maintained the general features of the ancient concept of consensus, but they made several advances. As Schacht has rightly pointed out they "developed its theory much farther, overcame theoretically at least its original provincialism, and were the first to identify it with the teaching of individual authorities".[322] These developments are part of the Kufian formalisation of the legal theory. It will be noted that even though Shâfi'î's doctrine of consensus was in several respects different from the doctrine of the ancient schools insofar as he rejected the consensus of scholars, and recognized the consensus of all Muslims alone as authoritative, considerable ground had already been prepared for this doctrine by the Kufians. Notwithstanding the radicial difference between the concepts of

consensus in Shâfi'î and the Kufians, the latter contributed to the development of that concept by adopting, in general, a skeptical attitude towards anonymous practice-consensus, by focussing their attention on formal traditions as the main source for deriving legal doctrines, by overcoming the provincialism of the concept of consensus, and by taking the first steps towards identifying consensus with a definable group of persons. Even though Shâfi'î's doctrine of, and attitude towards, consensus constituted a major break with the past, it was not altogether divorced from the doctrines and attitudes of the Kufians.[323]

CHAPTER V

INFERENCE, ELABORATION AND SYSTEMATISATION

In addition to the question as to what are the constituents of khabar lâzim and in what manner are they inter-related, there was the question as to how appropriate positive doctrines could be derived from, or formulated in the absence of, khabar lâzim. This naturally led to the consideration of the question as to what extent human reason could be legitimately used in dealing with legal problems, a question which led to the formulation of different strands of opinion.[1] Again, if the use of human reason was permissible, the question was whether there was any particular method or not which had to be followed in applying human reason to legal matters, and the extent to which it could be used.

I

From its earliest period, ra'y has been used in Islamic law: not as an alternative to khabar lâzim, but as the means whereby the legal import of the latter was determined and whereby doctrines were formulated in its absence.[2] It seems natural that the earlier use of ra'y should have been less inhibited by methodological discipline than its use in later times. This greater freedom in the

use of ra'y seems to have been because of the relatively fluid state of legal doctrines and the relative lack of formalism. This was also because of the fact that as time passed, the results of human reasoning became sanctified, owing to the development of a traditional outlook, so that the doctrines of the predecessors were available to the later generations, a considerable part of which they considered to be binding, and the rest to be worthy of serious respect, even if not binding. Moreover, as it appears from the statement of Awzâ'î, the use of ra'y was common to all jurists, and was not confined to any particular place or personality.[3] The only difference between the Iraqians and others regarding the relationship between ra'y and traditional sources was, at best, not in the nature of either/or, but of more or less.

This relatively free use of human reason in legal matters has left clear traces in the doctrines of the various centres of Islamic jurisprudence of the second century, viz., Kufa, Medina and Syria.[4] Not only was ra'y frequently used in legal matters, but its use was not restricted to what later became, almost exclusively, its standard form viz., qiyâs. It was only gradually that it has moved, in the words of Schacht, "towards an increasingly strict discipline until Shâfi'î, consistently and as a matter of principle, rejected all individual arbitrariness

and insisted on strict systematic thought."[5] This development took place only after the legal methodology had been more or less definitively elaborated, after qiyâs had been given a rigid mould, after the ways of interpreting the authoritative texts had been categorically fixed and the compendia of authoritative traditions had come into being. It was these developments which gradually narrowed down the scope of ra'y and paved the way for the rigidly systematic position of Shâfi'î.

Ra'y played an important part in interpreting and working out the legal implications of authoritative texts,[6] as well as arriving at positive doctrines when no relevant texts were available. Ra'y was synonymous with considered opinion which was based on common sense and considerations of common good, of the broad interest of religion, of equity, etc. It was only when qiyâs had been generally acknowledged as the only reliable form of applying human reason to law that anything which did not conform to qiyâs began to be designated as ra'y in an opprobrious sense.[7] During the period under our study — the second century of the hijrah — not only was ra'y used side by side with qiyâs, but qiyâs was quite frequently superseded when it was seen to lead to inconvenience and iniquity, or was likely to harm the interests of the Muslims, or was even opposed to well-established customs and usages.[8]

One manifestation of ra'y was the introduction of some of the considerations stated above in interpreting authoritative texts: that is, the tendency to interpret authoritative injunctions not merely with reference to their outward meaning, but in terms of the objectives which they seemed to be designed to serve. This justified not only the use of common sense, but also practical convenience and administrative considerations in the actual application of legal doctrines.

> The Prophet had permitted women to go out and pray congregationally. Later this permission was considered likely to be misused.[9] Abû Hanîfah favoured this view, and using his juristic discretion, expressed the opinion that even though it had been permitted in the past, "women should not go out [for congragational prayers] in the present time except old women with regard to whose going out there is no objection".[10]
>
> In the time of the Prophet, according to Abû Yûsuf, one-fifth of the booty was divided into five portions, corresponding to the five items for the expenditure of the booty laid down in the Qur'ân.[11] Abû Bakr, 'Umar and 'Uthmân restricted its division to three items instead of five, thereby omitting two viz., of

the Prophet, and of his relatives. 'Alî also followed the practice of his predecessors. According to another tradition on the same question mentioned by Abû Yûsuf, 'Abd Allâh b. 'Abbâs relates that 'Umar offered the members of the Prophet's family their share provided they undertook that it would be used solely for the purpose of marrying the widows or paying off the debts [of the members of the Prophet's family]. Ibn 'Abbâs relates that the members of the Prophet's family did not accept the stipulation and 'Umar did not agree to hand over their share to them unreservedly.[12] In the same way, one of the [eight] items of sadaqât laid down by the Qur'ân viz., al mu'allafat qulubhum was considered obsolete.[13]

The Prophet granted a fief to Bilâl. During his caliphate 'Umar allowed him to keep the fief but made an exception with regard to mines.[14]

The authoritative doctrine regarding uncultivable land was that whosoever cultivated it, became its owner, This doctrine was supported by traditions. Abû Hanîfah considered that if this rule were to be applied unreservedly, it would lead to inconvenience and mutual conflict.

Hence, he bound its application with the permission of the ruler, i.e., the land made cultivable would belong to the person who cultivated it only if he had done so with the permission of the ruler.[15]

The Kufians considered every contract of sale wherein the object sold was not in the possession of the seller to be irregular. Abû Ḥanîfah, however, made an exception in favour of immovable property.[16]

The Medinese held sale of fruits before they were ripe to be prohibited, and based their doctrine on several traditions from the Prophet to the effect that fruits might not be sold till they were ripe.[17] The Kufians interpreted the traditions concerned to signify not a prohibition of all kinds of sale of fruits until they were ripe, but of the sale of unripe fruits with the stipulation that they would be left on the trees till they became ripe. They argued that it was this stipulation which introduced an element of gharar (risk, uncertainty) in the transaction. If this stipulation was not made a part of the contract of sale, the sale of unripe fruits was akin to the sale

of qasîl which might be sold unripe for the consumption of cattle. As for leaving fruits on the trees till they became ripe, that too was objectionable only if it was made a part of the sale of contract. After the transaction had been concluded, however, the buyer might leave them on the trees to become ripe provided the seller agreed. In that event, however, if any damage was done to the fruits owing to acts of God, the loss would be entirely that of the buyer.[18]

Awzâ'î cites a "sunnah from the Prophet" to the effect that the spoils of the enemy soldier belonged to the Muslim soldier who had killed him. Abû Yûsuf cites the doctrine of Ibrâhîm which is also the accepted doctrine of the Kufian school. This shows the tendency of restricting the interpretation or application of authoritative injunctions because of administrative or other considerations. The doctrine was that individual soldiers might be granted the spoils of the enemy soldiers whom they had killed provided the commander had made the announcement: "Whosoever kills a person to him belong the spoils".[19]

Abû Yûsuf cites a tradition from the Prophet according to which the Prophet had prohibited the sale of water. Abû Yûsuf adds: "The meaning (tafsîr) of this with us — and Allâh knows best — is that he [i.e., the Prophet] prohibited its sale before its having been stored, and this storage could only be in containers and vessels, but not in wells and cisterns".[20]

If a non-Muslim enters Islamic territory with amân and commits crimes such as adultery, theft, etc., Awzâ'î was of the opinion that the person concerned was liable to ḥadd punishments. Ibn Abî Laylá's view, at least in respect of theft, was the same. Abû Ḥanîfah and Abû Yûsuf were opposed to this, and based their view on the matter by referring to the question of competence of jurisdiction in respect of such persons.[21]

Another manifestation of ra'y was the explicitly-enunciated principle that the interests of Islâm and Muslims should serve as an important consideration in judging the appropriateness of positive doctrines:

Regarding the enforcement of ḥadd punishments in enemy territory Awzâ'î was of the view that all of them except the ḥadd of the amputation of hand might be applied. Abû Yûsuf points out

> Awzâ'î's arbitrariness in making a distinction between one hadd and the rest. He supports Abû Ḥanîfah's doctrine that no hudûd may be enforced by the commander of the troops in the enemy territory. One of the arguments adduced by Abû Yûsuf in favour of the doctrine is a tradition regarding the doctrine of Zayd b. Thâbit. The tradition states that hudûd might not be enforced in the enemy territory and the reason assigned for this is the fear that people might cross over to the enemy's side.[22]

Ra'y also qualified the application of traditions, including those from the Prophet by introducing the element of precaution.

> With regard to the legal implications of ridâ'ah (e.g., with regard to marriage, etc.), the doctrine of Ibn 'Abbâs, of Sa'îd b. al-Musayyib and of 'Urwah b. al-Zubayr was that only that breast-feeding had legal implications which had taken place uptil the age of two years, a doctrine which was inferentially based on the Quranic verse II. 233. Abû Ḥanîfah, according to Shaybânî, increased this term by six months out of precaution.[23]

Another manifestation of ra'y was the consideration shown by the Kufians to 'practice', even as the Syrians and the Medinese did, though it seemed to occupy a lower rank in the Kufian legal hierarchy as compared with the Syrians and the Medinese.[24] One aspect of this consideration for 'practice' consisted of the deference shown to linguistic usages in fixing the legal implications of statements, such as acknowledgments, public declarations, statements regarding marriage, divorce, manumission, etc.[25] Another aspect of it was the deference shown to actual usages which had been operative in the Muslim society and had generally enjoyed its approval. The importance of this last can be gauged from the doctrine of Abû Yûsuf that if there existed in some country a non-Arab custom (sunnah) which had neither been nullified nor modified by Islâm, the ruler was not entitled to alter it, even though some people might have grievances against that custom and might consider it to be harmful.[26-27]

Side by side with the numerous evidences which show continued recourse to ra'y throughout the second century, there are also unmistakable evidences of the tendency to restrict its scope. This is evident from the numerous departures of Abû Yûsuf and Shaybânî from the doctrines of their predecessors because of their

tendency to apply the outward meaning of the authoritative traditions and their growing tendency of not subjecting them to restrictive interpretation.[28] Moreover, even though the ancient schools had not substantially given up the use of ra'y, they were moving towards reckoning, from a theoretical point of view, only a specific form of ra'y viz. qiyâs, to be the valid form of its use.[29] In our view, as on other questions relating to legal theory, the formalistic view which later came to prevail in classical Islamic jurisprudence owes itself very considerably to the polemics between the ancient schools. In these polemics each of the schools accused the other of using ra'y arbitrarily, that is, in a manner which either involved going against athar and sunnah, or against qiyâs. Even before Shâfi'î it was common for the Kufians to accuse the Medinese for not basing their doctrines on sunnah or athar,[30] or for not using qiyâs where it should have been used,[31] or for making arbitrary judgments in legal matters.[32] A careful scrutiny of the denunciation of ra'y by the ancient schools in general and by the Kufians in particular, makes it clear that ra'y was not considered to be objectionable as such, but only arbitrary ra'y as opposed to systematic reasoning or to athar and sunnah or ijmâ'.[33] These polemics forced all the schools to justify their doctrines by reference to

objective standards, that is, by adducing those traditional or systematic arguments which could be vindicated on objective grounds, and to abandon those doctrines which could not be justified in that manner. This trend found its culmination in Shâfi'î who condemned the use of ra'y as such, and made the term synonymous with arbitrary opinion.[34] It was owing to this fact that ra'y, which had been considered opprobrious only when it was opposed to authoritative texts or systematic reasoning, gradually acquired an opprobrious connotation as such. It was also because of this that gradually the expression ahl al-Ra'y became an expression of derogation, and thanks to polemics, the Kufians were nick-named ahl al-Ra'y[35] even though the use of ra'y was a no less recognized practice of the Medinese and the Syrians than it was of the Kufians.[36] The difference between them lay perhaps in the fact that ra'y was used in Kufa more often than it was elsewhere, and that it continued to be used under the name of istihsân even after the concept of qiyâs had been formalised.[37]

It seems that as early as the first half of the second century, the Kufians were hard pressed to defend their position on that question which seems to be the reason for their investing istihsân, a term which originally signified a jurist's approval or preference of a

doctrine in a non-technical sense, with a technical connotation.[38]

II

As compared with ra'y, qiyâs[39] was generally considered to be an authoritative means of arriving at legal doctrines on matters which had not been directly covered in the authoritative sources. In such cases, according to the principle of qiyâs, the accepted rule with regard to a parallel case was extended to the case concerned.

Qiyâs was already in vogue in the first century.[40] Its use was on the increase as new problems cropped up for which no categorical rules were found in the authoritative sources. The ancient schools were generally agreed about the legitimacy of this method and considered it to be "the established [source of] knowledge which knowledgeable people agree is right".[41] In fact the reason that was adduced in vindication of the general trust in the doctrines of the Successors was the assumption that they would have derived them through qiyâs.[42] This was despite the fact that qiyâs involved the use of fallible human reason and that its results were, therefore, liable to error.[43] This is the reason why its use was considered improper if any relevant athar was available. It is for this reason that qiyâs was opposed to athar[44] or to

khabar lâzim,[45] which were considered to supersede qiyâs.[46] In fact the Kufian position was that even a tradition from Companions, let alone from the Prophet, was more authoritative than qiyâs.[47] In the same way, the Kufians allowed istihsân to supersede qiyâs.[48]

The use of qiyâs was common to the ancient schools,[49] even as the use of ra'y was common to them all.[50] There seems to have been the impression that the Kufians used it more frequently than others, somewhat parallel to the impression regarding their use of ra'y. Shâfi'î, for instance, calls them to be ahl al-Qiyâs,[51] and his opinion that qiyâs is a fundamental principle of their legal theory is evident from his remark that the Iraqians did not allow anyone to diverge from qiyâs.[52] Ishâq b. Râhwayh's attack on the Kufians has been quoted by Ibn Qutaybah in a manner which implies the fundamental importance of qiyâs in the Kufian attitude to legal matters.[53]

The early qiyâs of Kufa, as Schacht has shown, evidences " crude and primitive reasoning".[54] Even though qiyâs was used during the first century, it was applied generally for the purpose of extending the authoritative rules to elementary problems. As more and more legal questions were brought under discussion, the use of analogy became more and more frequent and acquired refinement.

Ibn Abî Laylá (d. 148), who was a judge and there-

fore, exhibited some of the characteristic attitudes of the early qâḍîs,[55] despite his having largely assimilated the doctrines of the fuqahâ' proper. We find several instances of the use of qiyâs in him, some of which are the following:

> A person hands over cloth to another person and asks him to sell it; or grants him a piece of land in order to construct a building on it and let it out on rent, and stipulates that the profit would be shared on a half and half basis. Ibn Abî Laylá held both these transactions to be permissible owing to the parallel between them and the contracts of muzâr'ah and mu'âmalah with regard to land and palm-dates [which were held by him to be permissible].[56]
>
> A person purchases an article with option for the seller for a certain period of time, and takes possession of it. Thereafter the article perishes during the term of option. Ibn Abî Laylá did not consider the buyer to be liable for the loss since his position in the case concerned is analogous to that of a trustee [who is not held liable for loss].[57]
>
> A polytheist thayyibah commits illegitimate sexual intercourse. Ibn Abî Laylá's doctrine

was that she was liable to hadd punishment. He deduced this doctrine analogically from the report that the Prophet had imposed hadd punishment on the Jews, both male and female.[58]

The established doctrine regarding zakâh on dînârs and dirhams was that the minimum on which zakâh was payable was 20 mithqâl of gold and 200 dirhams. If a person has had 10 mithqâl of gold and 100 dirhams for one year, Abû Ḥanîfah's doctrine was that the two should be added up, (which makes the amount fall within the taxable minimum) and thus he should pay zakâh. On the contrary, Ibn Abî Laylá thought that neither of these was liable to zakâh unless each one of them amounted to the minimum laid down for zakâh, and that the two should not be added up. He derived this by analogical reasoning based on the case of a person who had 30 goats, 20 cows, and 4 camels. None of these comes within the taxable minimum though if they were added up, the entire stock would be liable to zakâh. Now, since the established rule in respect of the latter case was not to add them up, they may not be added up in the former case as well.[59]

> If a person makes hibah (donation) during his sickness, and the donor dies before the donee has taken possession of the donation, will that donation be valid? Ibn Abî Laylá held this to be valid and fixed the maximum donation which is legally valid at one third of the donor's property. This doctrine was derived presumably by considering the case to be analogous to that of legacy.[60]

As compared with Ibn Abî Laylá, the examples of qiyâs in Abû Ḥanîfah are much more numerous, which is partly because of the fact that we have access to a much greater number of doctrines held by Abû Ḥanîfah than of Ibn Abî Laylá and that his doctrines are quite often mentioned along with the arguments adduced by him in support of those doctrines. More significant, however, is the fact that Abû Ḥanîfah's use of qiyâs represents a more advanced stage than the qiyâs of Ibn Abî Laylá. In part, this was because of the predominantly theoretical orientation of Abû Ḥanîfah's legal thought. Being a speculative jurist, Abû Ḥanîfah attached much less value to material and ethical considerations than attached to them by Ibn Abî Laylá, Awzâ'î and other contemporaries. Apart from these causes there was also the concern for methodological appropriateness and systematic consistency.

The following are a few examples of the use of qiyâs by Abû Ḥanîfah:

> If a Muslim woman, who has come from dâr al-ḥarb is pregnant, she may not marry till the delivery of the child. Abû Ḥanîfah arrived at this doctrine by considering this case to be analogous to that of the female captives of war, the authoritative rule with regard to whom was embodied in the following saying of the Prophet: "There may be no sexual intercourse with the pregnant [captives] till they have given birth".[61]
>
> Abû Ḥanîfah considers it makrûh to sell captives of war to the enemies, for they would be a source of strength for the latter. Abû Yûsuf argues on behalf of Abû Ḥanîfah, and the main reason, which he seems to have taken over from Abû Ḥanîfah, is to consider this case analogous to that of the sale of arms, horses, camels, etc., to the enemies, which is not permitted.[62]
>
> In regard to the question whether the property of the orphan was liable to zakâh, Abû Ḥanîfah was of the view that it was not. This doctrine was supported by an analogical deduction from the established rule that ritual prayer, even as other religious duties, was not incumbent on the orphan.[63]

> A man who is killed leaves behind him two sons who are his only walîs, one of whom is major, and the other is minor, and there is no heir besides them. With regard to qisâs, Abû Ḥanîfah was of the view that the major may produce evidence in which event the judgment of qisâs would be made in his favour and the judgment in the case was not required to be deferred till the minor walî attained majority. Ibn Abî Laylá considers the position of the minor walî to be analogus to that of the "absent" (ghâ'ib) [plaintiff] and the accused may not be executed till the absent [plaintiff] has arrived.[64] Abû Ḥanîfah, however, did not accept this analogy and argued: "The absent is not similar to the minor for the walî takes qisâs on behalf of the minor, but not on behalf of the absent major, except by wakâlah (procuration)." (Ibn Abî Laylá accepted wakâlah in cases of murder with deliberate intent and made judgment in favour of qisâs while Abû Ḥanîfah's doctrine was opposed to this).[65]

Abû Yûsuf's legal doctrines pre-suppose quite a highly developed tradition of the use of qiyâs, which was not in any significant way different in orientation from

that of his master, Abû Ḥanîfah, except Abû Yûsuf's relatively greater concern for practical and administrative considerations, presumably owing to his being a judge.

> On the question whether kharâj should be imposed on the 'ushrî land which had been purchased by a dhimmî, or double the amount of 'ushr, Abû Ḥanîfah was in favour of the former view. Abû Yûsuf, disagreeing with his master, made an analogical deduction from an established principle with regard to taxation on merchandise, viz., that the dhimmîs should pay double the amount paid by the Muslims. He concluded, therefore, in favour of imposing double the amount of 'ushr on dhimmîs instead of kharâj.[66]

A person from dâr al-ḥarb concludes marriage with five women in one marriage contract. Subsequently, he and his wives embrace Islâm and migrate to dâr al-Islâm. Abû Ḥanîfah was of the view that he should be separated from all of them. Abû Yûsuf supports this doctrine by analogical reasoning. Apart from rejecting Awzâ'î's tradition from the Prophet as being shâdhdh, Abû Yûsuf argued that the Qur'ân held only marriage with

four women to be permissible. "Anything above that is prohibited by God in His Book. So, the fifth wife, and marriage with one's mother, or with one's sister are all alike in that respect, and prohibited. Similarly, were a harbî to marry a mother and her daughter, will you allow him to remain in wedlock with the two? Or if he married two sisters in one contract, will you leave the two in wedlock, even though he has had consummation of marriage with the mother and her daughter, or with the two sisters? The same is the case with regard to marriage with five women in one contract".[67]

The question of the remuneration of the rulers from public treasury was settled by analogy with the right of the walî of the orphan in the latter's property as laid down in the Quranic verse IV. 6.[68]

Abû Ḥanîfah and Ibn Abî Laylá considered pearls and ambergris which were obtained from the sea as not liable to tax, for they were the same as (bi manzilah) fish. With regard to walnut, almond, etc., provided they are found on tree-tops, in mountains or deserts or in caves, the established rule was that no kharâj or 'ushr might be imposed on them for they were the same as (bi manzilah) fruits in mountains and valleys [which were tax-free].[69]

'Alî is reported to have been of the opinion that buffaloes and camels of Bukht (i.e. Bactriana) are similar to camels and cows, and in this respect the nature of the inter-relationship between buffaloes and cows, etc., is the same as between ma'az (a species of goats) and sheep, both of which come under the category of shâh.[70]

The doctrine on rakâz and kanz is based on a tradition from the Prophet. It is, however, illustrated by pointing out that they were parallel to ghanîmah (booty), so that the same rules which are applied in respect of the latter also apply in respect of the former.[71]

Abû Yûsuf points out that the rule with regard to the treatment of the non-Arab non-Muslims should be the same as the rule applied with regard to the ahl al-Kitâb of Arabia.[72]

The question of muzâra'ah and musâqâh was decided on the basis of traditions. They were reinforced, however, by an analogical argument pointing out the parallel between muzâra'ah and musâqâh on the one hand, and mudârabah on the other.[73]

A man reclaims a piece of land in an island from inundation and brings it under cultivation.

> Abû Yûsuf considered this case to be analogous to that of ard mawât, and hence decided that it belonged to him.[74]

In addition to a consistent use of qiyâs, Shaybânî also explicitly lays down rules with regard to the occasions and the manner in which qiyâs may appropriately be used. According to Shaybânî, qiyâs may be used only in the absence of directly relevant provisions in the authoritative sources (âthâr).[75] In fact, he considers qiyâs to be irrelevant even if there is a tradition from some Companion on the question concerned.[76] Thus, qiyâs may be resorted to only when there is no authoritative rule which is directly relevant to the question concerned in the Qur'ân, or in traditions from the Prophet and his Companions, or in consensus.[77] As to what is the proper method of qiyâs, the answer is evident from Shaybânî's reference to the alleged instructions of 'Umar with regard to questions which are not mentioned in the Qur'ân and the sunnah, viz., to look up to parallel cases (al-ashbâh wa al-nazâ'ir) and to make qiyâs [literally, to measure] accordingly.[78] Shaybânî defines this method more precisely and elaborately when he says: "Regarding whichever matter no athar has come down, one should resort to analogy from a similar question regarding which there

is some athar."[79] In fact Shaybânî gives the impression that if there does exist an analogical case, one must resort to analogical deduction. This is well illustrated by the argument he develops on the question of the sale of articles which are not in the possession of the seller at the time of sale. The Kufian doctrine, which was also followed by Shaybânî, was that such a sale was invalid. The Medinese doctrine agreed with that of the Kufians insofar as foodstuffs were concerned, and was embodied in a tradition from the Prophet. The Medinese were not prepared to extend the application of this rule to any other article. As against this doctrine Shaybânî argued that: "People are obliged to resort to qiyâs in questions regarding which there is no athar on the basis of the questions on which there is an athar."[80]

The following examples will illustrate the use of qiyâs by Shaybânî:

> The Kufian doctrine was that blood-money (diyah) if it was paid in dînârs, was 1000 dînârs; if paid in dirhams was 10,000 dirhams. The Medinese disagreed with the Kufians with regard to the latter, and considered the blood-money paid in dirhams to be 12,000 dirhams. Both the parties cited traditions from 'Umar in favour of their respective doctrines.

Shaybânî reinforces the Kufian position by means of qiyâs. His argument is as follows:

Each of the two parties has related traditions from 'Umar and I will see which of the two traditions is closer to the doctrines of the Muslims in matters other than the present one: that one is correct. All Muslims are agreed without any dissenting voice - that is, all the Hijazis and Iraqians - that there is no sadaqah on less than 20 dînârs of gold, and on less than 200 dirhams of silver. From this Shaybânî deduces that one dînâr is to be reckoned as equal to 10, rather than twelve dirhams. He urges that the basis of reckoning applied in the case of zakâh should also be applied in the case of blood-money, and cites a tradition from 'Alî and Ibn Mas'ûd that the hand of a thief might not be cut for theft for any amount less than 10 dirhams or one dînâr, which implies the above-mentioned rate of exchange.[81]

If a person purchases a slave who has some property, to whom does that property belong: to the slave or to the buyer of the slave? The question was considered to be analogous to that of buying palm-trees which have well-formed dates on them. In the same way as the

dates would belong to the vendor unless the buyer expressly stipulates otherwise (a doctrine based on a tradition from the Prophet),[82] so with the property of the slave.[83]

If someone cannot perform ramy al-jimâr because of sickness or childhood, and has someone else perform it on his behalf, he need not perform that ritual himself even if the causes of his incapacity are gone. The doctrine was supported by claiming it to be analogous to the following two questions:

(a) A person performs prayer with tayammum owing to non-availability of water. If water becomes available after he has performed his prayer (even though the time of the prayer was not over), he need not make ablution and repeat the prayer.

(b) Another parallel is the case of the man who cannot pray in the standing position owing to sickness. A little later and before the expiry of the time of that prayer, his strength is restored. He need not repeat the prayer in the standing position.[84]

If a person donates all his property to charitable purposes despite the admonition of

the Prophet not to donate more than a third of his property, will this decision be valid? The Kufian doctrine was that it was valid, even though the course adopted by the person concerned was not be a laudable one. The doctrine was justified by pointing out the parallel between this case and that of zihâr and talâq, both of which are morally disapproved, and yet become legally effective if pronounced.[85]

The question was whether the consumption of vinegar, which was manufactured by adding salt, etc., to wine is religiously permitted. The Medinese doctrine was that both its consumption and sale were prohibited. Shaybânî supported the Kufian doctrine, viz., that both its consumption and sale were permissible on the ground of qiyâs. Shaybânî pointed out the parallel between this case and that of the dead body of the animal, which is "forbidden by God." But the skin of the dead animal became permissible after having been tanned, and so did the wine which had been changed into vinegar.[86]

If a man starts his prayer with tayammum and learns during the prayer that water is

available, he should break up the prayer and perform ablution. The basis of this doctrine is that tayyammum becomes void in the event of the availability of water. This doctrine was justified by an analogy: "Do you think that a person who is obliged to make expiation (kaffârah) owing to [breach of] oath and does not have the means to make kaffârah by manumitting a slave, or feeding and clothing people, does three days of fasting not absolve him?" The Medinese replied: "Yes". Shaybânî: "If he fasted for two days and part of the third day when he became rich and thus acquired the means to make kaffârah, will he be absolved of making kaffârah by means of manumission or providing food and clothing, by completing the three-day term of fast?" This systematic argument is followed by the citation of two other examples. A person who does not have the means of making sacrifice in connection with tamattu' is required to fast for a certain number of days. In case he acquires the means whereby he could make the prescribed sacrifice before he has completed the full term of fasting, he will be required to make expiation by

offering that sacrifice instead. Likewise, a person who commits zihâr and does not possess the means to manumit a slave, he may expiate by fasting two months consecutively. Now, even if there is only one day left for the required term of fasting to be over when he acquires the resource whereby he can manumit a slave, the only proper thing for him to do is to expiate by manumitting a slave. In the same manner, if water is available before the prayer has ended, he should withdraw himself from the prayer, make ablution and then complete the prayer.[87]

The minimum of travelling required for the application of the rule of qasr in ritual prayers for travellers was fixed analogically from the rule (embodied in a tradition from the Prophet) that a woman may not travel without any male companion, who is within prohibited degree of kinship, for more than three days and three nights.[88]

A man dies without having paid his due of zakâh and makes a will that it should be paid from his inheritance. The Medinese considered this to be wasîyah and the zakâh due against

offering that sacrifice instead. Likewise, a person who commits zihâr and does not possess the means to manumit a slave, he may expiate by fasting two months consecutively. Now, even if there is only one day left for the required term of fasting to be over when he acquires the resource whereby he can manumit a slave, the only proper thing for him to do is to expiate by manumitting a slave. In the same manner, if water is available before the prayer has ended, he should withdraw himself from the prayer, make ablution and then complete the prayer.[87]

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A man dies without having paid his due of zakâh and makes a will that it should be paid from his inheritance. The Medinese considered this to be wasîyah and the zakâh due against

him to be analogous to a debt against a dead person. The Kufians rejected this analogy and considered it to be merely wasîyah, and proceeding on this premise, they denied that the zakâh that he was required to pay was in the nature of debt.[89]

The Medinese doctrine was that a pilgrim may not marry in the state of ihrâm. The Medinese considered marriage to be tantamount to obtaining the right of sexual intercourse. Shaybânî pointed out that conclusion of marriage was analogous to the purchase of a slave-girl, which was held permissible for a muhrim.[90] In other words, Shaybânî distinguished sharply between acquiring the right of sexual intercourse, and the sexual intercourse itself.

Shaybâni's method of the application of the principle of qiyâs is well illustrated by the following question:

There was a tradition from the Prophet which was accepted by the Medinese as well as the Kufians: "Whosoever buys foodstuff may not sell it until he takes possession of it." The Medinese confined the principle of the prohibition of sale against articles which are not in the possession of the seller to

foodstuffs alone. The Kufians extended it to all articles on the basis of qiyâs. Hence they were of the view that if a man buys any article (whether foodstuff or something else) on the basis of deferred delivery, he may not sell it till he takes possession of it. The principle was expressed in the following words: "People are obliged to resort to qiyâs in matters regarding which there are no âthâr on the basis of the matter on which there is an athar."[91] Shaybânî asks the Medinese the reason why they hold as prohibited the sale of foodstuffs which are not in the possession of the seller. The Medinese say: "Because an athar has specifically come down on this question." Shaybânî: "Then, make qiyâs accordingly with regard to non-edibles."[92] He is told by the Medinese that the prohibition with regard to foodstuffs was based on a tradition from the Prophet that one might not sell foodstuffs without being in possession of it. To this Shaybânî replies: "Did the Prophet say that there is nothing objectionable with regard to things other than foodstuffs?" The Medinese: "We did not hear that." Shaybânî:

"Then one should resort to qiyâs on the basis of the ḥadîth of the Prophet and it should not be opposed . . ."[93]

With regard to the question of a slave who has property, the Kufians as well as the Medinese decided the question of the ownership of his property by considering it to be analogous to the purchase of a tree which has fruit. Since the accepted principle with regard to the latter was that the fruit belonged to the seller unless the buyer had stipulated otherwise, it was deduced analogically that the property of the slave would be owned by the seller of the slave.[94]

The sale of animal against meat was considered to be analogous to muzâbanah and muḥâqalah, that is, the sale of the dates on palm-trees against dried dates, and the sale of corn in its spike against wheat by measurement (kaylan).[95] Mâlik was of the view that wheat might be exchanged against barley only in equal quantities (since the two essentially belonged to the same species). He permitted exchange with unequal quantities only when the items exchanged belonged to

> altogether different species, such as date and wheat. Shaybânî, on the contrary, applied the analogy of the exchange of gold against silver, in which case exchange with unequal quantities was permitted.[96]

Qiyâs was, therefore, a well-established method of deriving positive doctrines, which was frequently used by the Kufian jurists of the second century. Gradually, the concept was becoming formalised owing to a clear definition of the method and scope of its use, a process which increasingly paved the ground for challenging the validity of ra'y and also for its diminished use. Both in respect of a clear definition of qiyâs and in respect of dexterity in its application to specific questions, the Kufian school had reached its apex in Shaybânî.

III[97]

We have already seen that in the earlier period the use of ra'y was not confined to the strict method of qiyâs, that with the formalisation of jurisprudence and an increasingly strict definition of qiyâs, the scope of ra'y was progressively narrowed down.[98] Despite the fact that formalism became one of the characteristics of Islamic law at least from the second century on, it nevertheless

remained permeated with the ethical ideals of Islâm side by side with systematic considerations. In the legal doctrines of the judges and jurists of the early period, these ideals occupied a position of such vital importance that formal and systematic considerations were not infrequently ignored. There were considerations of material justice and common good, of the broad interests of Islâm, of established practice, of administrative and judicial convenience, etc., which influenced legal doctrines from the earliest period. With the growth of formalism, there developed the trend that every doctrine had to be necessarily justified in terms either of authoritative sources, or of qiyâs based on them. So overridingly important, however, were some of these considerations that they could not be ignored just for the sake of formal and systematic reasons. Hence, these considerations had to be accommodated within the framework of the legal theory. This was done by the Kufians by the formulation of the term and concept of istihsân (juristic approval). The concept of istihsân at once testifies to the importance attached to, as well as the limitations imposed upon, the operation of qiyâs.

Of fundamental importance in this regard is the fact that while istihsân was considered a justification for departure from qiyâs, it could not justify departure

from âthâr.[99] Shaybânî accuses the Medinese, for instance, of having used istihsân even though there was a hadîth from the Prophet (to which their istihsân was opposed).[100] The concept of istihsân was that out of deference for considerations of public welfare, the broad interests of Islâm, convenience, good common sense, etc., the strict application of qiyâs could be abandoned if it led to undesirable results.[101]

The following examples of istihsân will amply illustrate its use by the Kufian jurists:

> A slave marries without the permission of his master and obtains the permission after the marriage has taken place. From a strict and formal point of view, the marriage is invalid. Such a marriage was held to be valid, however, by Abû Yûsuf and Shaybânî on account of istihsân.[102]
>
> The husband of a minor Magian girl (who, however, is capable of understanding Islâm), embraces Islâm. What will be the effect of his conversion on their marriage? The Kufian doctrine was that Islâm would be offered to her: if she embraced Islâm, the marriage would remain intact; if she declined to do so, they would be separated according to istihsân.[103]

Quite often istihsân signified departure from a too literal interpretation of statement or a too formal application of the authoritative rules, disregarding the broad interests of Islâm, and the considerations of common good and equity. The following examples are typical:

> If a person says to a woman: "If you enter this house, if you enter this house, my slave will become free." According to qiyâs that person is liable to fulfil the undertaking only if the woman enters the house twice; but according to istihsân, he is liable even if she enters once.[104]
>
> Four persons gave evidence of zinâ against a person, and two others testified that he was a muhsin, as a result of which he was punished with lapidation. What should be done in case it was found subsequently that the witnesses were slaves, or in case the witnesses withdraw their testimonies while the accused was still alive — although injured owing to lapidation? According to qiyâs, he should be subjected to the punishment of a hundred lashes, which is the doctrine of Abû Yûsuf and Shaybânî; whereas istihsân demands that they should be excused

from all kinds of punishment whatsoever.[105]

Witnesses are brought against a person that he has committed illegitimate sexual intercourse and the judge sentences the accused to be punished with a hundred lashes. Before the completion of the enforcement of the hadd, or subsequent to its enforcement, two witnesses testify that the convict is a married person. According to qiyâs, he should be subjected to lapidation; whereas according to istihsân, he should be excused from lapidation as well as the residue of lashes, if there is any part of it outstanding against him. (Abû Yûsuf and Shaybânî, however, were of the opinion that if the former hadd had been fully enforced, the convict would be spared lapidation; and vice versa).[106]

A person dies, leaving behind three slaves each of equal value and has no other property besides them. The inheritor says to one of the slaves: "The deceased did not manumit you," and then says: "He manumitted you." He said the same to the second and the third. According to istihsân, all of them will become free and will, therefore, not be required to work

and pay for their freedom. And if he said to all of them: "He did not manumit you,"[107] and said subsequently: "He manumitted you:"[108] according to qiyâs, all will become free, and will be required to make no payment for the purchase of liberty, whereas according to istihsân, they will be made to work and pay off from their earnings two thirds of their value.[109]

A Muslim army lays siege of a fort or a locality and a group of the besieged people begs for the security of their property and their relatives in lieu of which they promise to open the gate of the fort for the Muslims, a promise which they do fulfil. Those people were considered to be entitled to security. However, if they claimed that the good articles belonged to them and that the good captives were their relatives: according to qiyâs, their claims should not be accepted unless they produce the evidence of 'udûl Muslim witnesses. Shaybânî adds, however, that it would be difficult to apply qiyâs in this situation for it is unlikely that 'udûl Muslims would be found at that place. He points out

a parallel case, a case in which evidence concerns matters which are not likely to be known to men. In such a case, an exemption is made from the normal rule. In the same way the requirement of testimony itself may be dispensed with in the case in question and one should rather follow istihsân, according to which if the captives verify the claim made by those who have been granted security, their claim should be accepted as true and the captives should be granted security.[110]

If the non-Muslims (seeking security), say: "Grant us security with regard to our children" and they have children as well as grand-children. According to istihsân, the amân would cover children as well as grand-children, whereas according to qiyâs, it would cover only the former.[111]

The person in-charge of the fort said: "Grant me security in regard to my fort or my city on the condition that I will surrender [literally, open] it to you." If the conversation indicates that what was meant was the fort or the city per se, then the

security would cover only the fort or the city (as the case might be), without including the security of their inmates or of their properties therein. However, if there is nothing in the conversation to indicate this restriction, the doctrine would still be the same according to qiyâs. On the contrary, according to istihsân (if there was no positive indication of restricting security to the fort or the city alone) it would cover all that the fort or the city contains on the strength of 'urf.[112]

A person swore that he would not buy a certain article unless it was for less than ten dirhams and then bought it for nine dirhams plus one dirham. According to qiyâs, this does not entail breach of the oath; according to istihsân, it does.[113]

A person employs a labourer to dig for him a well which lies on the way of Muslims for which he has not obtained any permission from the ruler. Someone falls into the well and dies. According to qiyâs, the responsibility is that of the labourer. Abû Yûsuf, however, argues that qiyâs would not be followed in this matter because of [the presumption of]

the ignorance of the labourer. Hence, the responsibility would fall on the ʿâqilah of the employer.[114]

A ḥarbî enters dâr al-Islâm and some Muslim cuts his hand or steals his property. According to qiyâs, the hand of the Muslim should be cut. In deference to the doctrine of [some authority], says Abû Yûsuf, whose doctrine was opposed to this one, the conclusion from qiyâs should not be followed.[115]

A person cuts another person's hand, and the latter excuses him so that the culprit is not subjected to the punishment of the amputation of hand. Subsequently, the injured person dies because of the wounds caused by the other person. According to qiyâs, the culprit should be put to death; whereas according to istiḥsân, he is obliged to pay blood-money out of his property.[116]

With regard to the award of prize on having won a competition (e.g., race, etc.): if this is on behalf of one party only, it is permissible according to istiḥsân owing to the saying of the Prophet: "Believers are bound by their mutual stipulations;" whereas according to

qiyâs it is not permissible for it amounts to putting money at stake.[117]

A woman apostatises during her mortal illness. Abû Ḥanîfah and Abû Yûsuf decided that her husband would inherit her according to istiḥsân, which was the basis of Abû Yûsuf's distinction between apostasy in normal circumstances and aspostasy in the state of [mortal] illness. Abû Yûsuf pointed out that this was contrary to qiyâs, for on the basis of qiyâs no distinction could be made between apostasy in the states of illness and good health.[118]

A person claims that the goods or money found in the possession of some thieves belong to him. He fails to produce the required evidence in support of his claim. He is, however, an honest and trustworthy person who has never been accused of claiming for himself other people's possessions. He will be made to state his claim on oath, whereafter the things claimed by him will be handed over to him. "This," says Abû Yûsuf, "is istiḥsân, for it might probably not be possible for a person to produce evidence that the articles or money concerned belong to him, although the person himself is trustworthy and not one of those who make claims upon things which do not belong to them".[119]

A person usurped a slave, then sold it to someone who, in turn, set him free. This was held to be permissible according to istihsân; but Shaybânî, following Abû Ḥanîfah and Abû Yûsuf, held it to be impermissible on technical legal grounds.[120]

A group of people commits theft. Out of them one undertakes to carry the stolen articles. According to qiyâs, the hand of the person who is carrying the stolen articles, only his hand will be cut on charge of theft; whereas according to istihsân, the hand of each one of those thieves will be cut.[121]

A person says to his wife: "If you enter the house, you are divorced", and he says so at a time when his wife is present in the house. According to qiyâs, says Shaybânî, the presence of the wife in the house at the time of his making the statement amounts to the breach of that person's oath; according to istihsân, however, breach of oath will occur only if the woman re-enters the house after once having gone out of it.[122]

These examples prove beyond doubt that the considerations often designated as ra'y (say, by

Shâfi'î) continued to influence the Kufian doctrines. The invention of a full-fledged technical term for this purpose shows an attempt to legitimise the authority, even if to a limited extent, of non-juristic considerations, by assimilating them in the jurisprudential theory itself. The same fact — the formulation of the term istihsân and its consideration as a source of doctrines — also implies that systematic legal reasoning had already become normal. Within the total structure of Islamic law, istihsân played a role of minor significance at the period of time under our study as well as subsequently. It was used as a brake against carrying systematic reasoning, or literalistic formalism too far, and against setting aside those material ethical considerations which are vitally linked with the supreme objective of Islâm-man's spiritual and mundane welfare. For it is largely because of these considerations and objectives that the structure of Islamic law was erected, and they continued to influence Islamic law throughout its history.

IV

We have seen that one of the main problems which faced Islamic law from the beginning was that of applying certain given rules to an ever-increasing number of legal questions.[123] The earliest efforts in this connection

produced a considerable number of legal doctrines which seem to be the first efforts to work out the legal implications of the authoritative rules (and with regard to these authoritative rules too there was less certainty than there came to be from the second century on).[124] The bulk of the doctrines of Ibrâhîm as mentioned in Âthâr A. Y. and Âthâr Sh. is typical of this stage in the development of Islamic legal doctrines.[125]

By the turn of the first century, the tentative outlines of Islamic law had already been drawn in Kufa (as well as Medina). The accepted doctrines of that period represent, in general, elementary deductions from authoritative sources and are only rarely of an advanced technical legal nature. Secondary legal deductions and the consideration of technical legal details took place on a fairly impressive scale during the first half of the second century and subsequently. Abiding testimonies of this are available to us in the form of Tr. I and Tr. IX, which record the disagreements between Abû Ḥanîfah and Ibn Abî Laylá, and between Abû Ḥanîfah and Awzâ'î respectively. The questions discussed are generally related to law proper, using the term in its restricted sense, and usually concern their technical details.

There are several striking differences between the doctrines of Ibrâhîm and those of Ibn Abî Laylá and

Abû Ḥanîfah. In addition to the differences mentioned above (i.e. relating to the relatively elementary character of the inferences drawn from authoritative sources in the early period), there seems to have been another difference which has had a major impact on the course of the development of Islamic legal doctrines as well as of Islamic legal theory. Ibrâhîm and other jurists upto his time were generally concerned with those legal questions which had actually arisen and they had, therefore, felt called upon by the pressure of practical problems to lay down appropriate doctrines relative to those actual problems. By the end of the first century a class of legal specialists had already come into existence, of whom Ibrâhîm is a brilliant example. As contrasted with his predecessors, the concern of Ibrâhîm was not a few scattered legal questions considered in an ad hoc fashion; he was rather concerned with the entire body of legal doctrines. The emerging class of legal specialists began to take a professional academic interest in legal questions. Hence the attitude of these specialists appears to be perceptibly different from that of the earlier qâḍîs and muftîs. Their innovation lay in a comprehensive and systematic treatment of legal questions — a deliberate activity directed towards evaluating legal questions from the Islamic standards. Previously, legal

questions had been considered, in the main, under the pressure of practical needs. That pressure was now combined with professional academic interest. This seems to have gradually led more and more to pronouncing legal judgments on questions of a hypothetical nature. Even as early as in the time of Ibrâhîm, hypothetical questions seem to have been considered, though not frequently.[126] In the generation of Abû Ḥanîfah and Ibn Abi Laylá such problems were considered much more frequently — so much so that the consideration of hypothetical questions seems to have become an integral part of a jurist's vocational activity. Abû Ḥanîfah's doctrines show a considerable advance in this direction, and there seems to be substance in the reports which characterize him for that, though with derogatory motives.[127] Even though this method was not unknown to the Medinese, it was used so consistently in Kufa as to have acquired the reputation of being characteristically Kufian or Iraqian.[128] This method, which had been developed to an impressive extent by Abû Ḥanîfah, was further developed by Abû Yûsuf, and reacched its apex in Shaybânî whose works, specially Jâmi' Saghîr, Siyar Kabîr, and Jâmi' Kabîr (most particularly the last-mentioned work), testify to amazing juristic dexterity and subtlety, which found their expressions not only in the answers to

highly complicated and subtle questions, but also in the questions themselves.

A comparative study of the questions considered by Ibrâhîm, Abû Ḥanîfah, Abû Yûsuf, and Shaybânî will illustrate the ever-increasing consideration of hypothetical questions: increasing in range as well as complexity and subtlety. This will become quite evident from studying the doctrines of Ibrâhîm, or of his contemporaries mentioned in Âthâr A.Y. and Âthâr Sh., etc., with parallel sections in Tr. I, Tr. IX, and Kharâj, and then further comparing them with parallel chapters in Jâmi' Saghîr and Jâmi' Kabîr. The following examples have been picked at random merely for the purpose of illustrating this trend of development.

Zakâh

With regard to the question whether zakâh on money which had been loaned out should be paid by the owner or the person who used this money, the early Kufian doctrine viz., that of Ibrâhîm, was that it should be paid by the latter.[129] Abû Ḥanîfah disagreed with this view on the strength of a tradition from 'Alî according to which zakâh should be paid by the lender after the recovery of his money.[130] Âthâr Sh. also mentions through Abû Ḥanîfah a tradition from 'Uthmân

according to which, if a person is in debt, and at the same time owns some property, he should pay zakâh on the difference between his assets and liabilities.[131]

Apart from recording these traditions (Âthâr A.Y., 433, Âthâr Sh., 290), Tr. I records the following significant question on which Abû Ḥanîfah and Ibn Abî Laylá had disagreed.

If a person has 1,000 dirhams with him, owes the same amount to some people, and at the same time some other people owe him 1,000 dirhams, is he liable to pay zakâh? Abû Ḥanîfah was of the view that he need pay no zakâh till the recovery of the loan.[133]

In Jâmi' Saghîr (pp. 23 f.) and Jâmi' Kabîr (pp. 15-26), the few principles embodied in Âthâr A.Y. and Âthâr Sh. form the point of departure for elaborating the rules relative to zakâh, following the method mentioned above viz., applying the accepted rules to a large number of hypothetically conceived questions.

The following examples will illustrate the method as well as indicate the extent and direction of the elaboration of legal doctrines.

A person has had 1,000 dirhams against another who had refused to pay for several years, whereafter the plaintiff established his claim by means of evidence. The owner need not pay zakâh for the period during which

the debtor had refused to acknowledge the debt.[134]

Jâmi' Kabîr, (pp. 19 f.). A person has livestock and dirhams and dînârs and merchandise, but is also in debt to others. If the dirhams, dînârs and merchandise are all exhausted in the payment of the debt, then he will pay zakâh on whatever is left after that.[135]

A person has 5 camels, 30 cows and 40 grazing cattle and there is a debt of 1,000 [dirhams] against him and also in respect of those categories of livestock which he owns. What will be the rule according to which he will pay zakâh?[136]

A person has a claim of debt against a rich or a poor man and when the year comes to an end, the former makes hibah or sadaqah in favour of the latter. Does this absolve the former of zakâh?[137]

A person purchases a slave-girl for the sake of trade, then changes his mind and decides to use her for his service. If he changes his mind once again and decides to use her for the purpose of trade, he is not obliged to pay zakâh until he sells the slave-girl after which the liability of zakâh will be on the price of the slave-girl as part of his property.[138]

To take up another case, the accepted doctrine that 200 dirhams and 20 mithqâls of gold are the minimum for the payment of zakâh. A large number of questions

relating to this principle was hypothetically raised to which an attempt was made to apply this rule.

A person has a jug the weight of which equals 200 [dirhams] but its value is 300 dirhams. According to qiyâs from the doctrine of Abû Ḥanîfah and according to the doctrine of Abû Yûsuf, he should pay 5 dirhams as zakâh [that is, on the basis of weight]. According to Shaybâni, he should pay for the extra value as well, [that is, the basis of reckoning should be the price].[139]

Pre-emption

Âthâr A.Y., 766 and Âthâr Sh., 748, 749 and 750 show concern with two problems: (1) whether the neighbour was entitled to pre-emption or not;[140] and (2) whether pre-emption was confined to immovable property, or did it apply to all kinds of property, movable as well as immovable.[141] These rules evidently constitute the first questions which had presumably arisen in regard to pre-emption when an attempt was made to apply the principle of pre-emption. Hence, it is not unlikely that Ibrâhîm and Shurayḥ should have expressed their views on these questions as our sources claim.

As compared with these elementary questions regarding pre-emption, Tr. I records divergent opinions of Abû Ḥanîfah and Ibn Abî Laylá with regard to the following

questions which broadly show the advance that was gradually made.

If a woman had been given a portion of a house as her mahr, will pre-emption still apply to that portion of the house?[142]

A person buys a piece of land and erects a building on it whereafter pre-emption is claimed. Will this claim be still entertained (i.e., despite the erection of a building on that piece of land)?[143]

If a person buys a piece of land or a house, how long is any claimant of pre-emption entitled to make such a claim (i.e., whether it lapses with the lack of exercise of that right immediately after having come to know of it, or does it remain valid for some time after that)?[144]

A person becomes entitled to a house by pre-emption and pays the price for it to its buyer. In whom does the responsibility vest: the seller (i.e., the original owner) or the buyer?[145]

If the orphan is entitled to pre-emption: can this right be exercised on his behalf by his wasî, or does he become entitled to it on attainment of majority?[146]

What is the correct order of priorities in respect of the claimants of pre-emption: partners owning common property, partners with shares in the same property which have already been divided, and the next-door neighbour?[147]

A person buys a house and mentions a higher price for it than he had actually paid, wherefore the person entitled to pre-emption agrees not to exercise his right of pre-emption. Does the claimant remain entitled to pre-emption because of the buyer's mis-statement, or does he forfeit his right owing to his decision of not claiming that right, although this itself was the outcome of a false statement made by the buyer?[148]

These questions were considered by Ibn Abî Laylá as well as Abû Ḥanîfah. Abû Ḥanîfah and his colleagues considered a large number of other questions which has been mentioned in Jâmi' Saghîr:

Five persons purchase a house from some individual. Will a person's claim to pre-emption be entertained merely with respect to one fifth of the house, or will he be entitled to claim the entire house?[149]

A person buys a piece of land and its palm-trees which have fruit on them. Will the claimant of pre-emption be entitled to all that, including its fruit? And if the trees had no fruit at the time of sale, but bore fruit between the time of sale and the recognition of the claim of pre-emption, will his claim of pre-emption include the fruit as well: (1) in case the buyer had not cut them, and (2) in case he had cut them?[150]

A person buys half of a house which was not already

divided at the time of its purchase, and gets it divided after the purchase. Subsequently, a person's claim of pre-emption is granted. Will this person become the owner of that portion which had fallen to the share of the buyer, or will he have the right to choose between the two portions of the house?[151]

A person who has a ma'dhûn slave (who is in debt), sells a house. Will his ma'dhûn slave be entitled to pre-emption.[152]

Jâmi' Kabîr, which embodies the doctrines of Shaybânî (with occasional references to the doctrines of Abû Ḥanîfah and Abû Yûsuf), contains several dozens of questions relating to the problem of pre-emption and the motive seems to be to consider almost all conceivable questions which had arisen or which might arise in future in connection with pre-emption.[153]

Mudârabah

Âthâr A.Y., 731, 732, 733 and Âthâr Sh., 751, 752, 756 show consideration of the following problems:

(1) Whether mudârabah on the basis of half or one-third plus ten dirhams is permissible or not?[154]

(2) Whether wasî is entitled to invest the property of the orphan in mudârabah or not?[155]

(3) A person who had with him some money as wadî'ah

(deposit) in connection with mudârabah, dies with debt against him. Will the three categories of claimants - the depositors, the partners, and the creditors be treated on par, or will any one of these categories be treated preferentially?[156]

Tr. I, does not elaborate the problem very substantially and records only two questions: (1) A person hands over some cloth to another to sell it with the stipulation that the profit would be divided on the basis of half and half; or grants him a piece of land for construction, whereafter it would be let out on rent and the rent would be divided equally. Is this transaction valid?[157] (2) A person has some money in connection with mudârabah, which he loans out to someone else without any positive or negative instruction from the owner. Is the partner who had money in his custody liable or not?[158]

Jâmi' Saghîr (pp. 130-33) and Jâmi' Kabîr (pp. 337-46) record the opinions of Abû Hanîfah, Abû Yûsuf and Shaybânî on dozens of hypothetically conceived questions relating to mudârabah.

Aymân

The contents of the chapter on aymân in Âthâr A.Y. and Âthâr Sh. are restricted to the following questions: (1) A person fasts in order to expiate for breach of

oath (owing to non-availability of the means to expiate by means of feeding or clothing ten poor persons or by manumitting a slave, as laid down in the Qur'ân V. 89), and then before the required period of fasting [three days] is over, he comes to possess a slave whom he might manumit. Is he obliged to abandon his fasting and expiate in the aforementioned manner, or will the three-day fating be deemed enough for expiation?[159]

(2) An attempt is made to fix the details about the various forms laid down in the Qur'ân (V. 89) for expiation of breach of oath.[160]

(3) Whether certain expressions can be reckoned as constituting oath or not, so that their breach would necessitate expiation?[161]

(4) Does the freeing of a mukâtab, or of umm walad or of mudabbar fulfil the requirement of freeing a slave laid down in connection with expiation?[162]

(5) Does taking an oath twice necessitate expiation twice, or only once?[163]

(6) Whether the addition of in shâ' Allâh to oath releases a person from the responsibility of expiation if he commits the breach of that oath?[164]

(7) A person undertakes something on oath and discovers later that the undertaking was of a harmful nature. Should he abide by the undertaking or should he disregard

it and make expiation?[165]

If these few questions are compared with literally the hundreds of questions mentioned in Jâmi' Saghîr and Jâmi' Kabîr, it becomes evident that they were the result of trying to formulate doctrines covering all conceivable legal questions. The fantastic extent to which this particular method was used by the Kufian jurists of the second century (particularly by Shaybânî), surely points out that its original home was no other place but Kufa. Moreover, if a comparison of Kufian doctrines, elaborated by means of the application of the above-mentioned method, is made with the doctrines of the other contemporary centres of Islamic law such as Syria or Medina, it becomes still more obvious that this method had originated with, or that it had at least been mainly developed by, the Kufians. It is also not difficult to imagine that the elaboration of doctrines by this method would have helped to develop, refine and elaborate legal methodology in Kufa, for the application of this method is inconceivable without considerable juristic dexterity, which in turn is bound to be further developed and sharpened by the constant application of this method. Furthermore, although this particular method was not adopted wholeheartedly by the other centres of Islamic law, it was impossible for them not to be influenced at all by this

impressive pioneering work of the Kufians who, by their tremendous elaboration of legal doctrines, provided a pattern and framework for the elaboration of legal doctrines in other centres of Islamic law. This becomes obvious if Muw., Mudawwanah and Umm are studied in comparison with the works of Abû Yûsuf and Shaybânî.

V

"The development of technical legal thought", as Schacht has pointed out, "is an essential aspect of the history of early Muhammadan jurisprudence."[166] Our study confirms, in respect of Kufa, the general conclusion of Schacht that "technical legal thought, as a rule, tended to become increasingly perfect from the beginnings of Muhammadan juridprudence upto the time of Shâfi'î"[167] — the master architect of the classical Islamic legal theory whose work respresents at once the zenith of systematic legal reasoning and the most coherent and systematic exposition of legal theory. Our investigations not only confirm these findings, but also establish that the technical legal thought of the Kufians was more highly developed than that of the Medinese and other contemporary centres of Islamic jurisprudence.[168]

The development of technical legal thought in early Islamic law was a consequence of the gradual elaboration

of legal theory and methodology and the striving after systematic consistency and coherence, which owed themselves partly to inter-school polemics. It was also a result of the established Kufian tradition of elaborating Islamic law by applying the established rules of Islamic law to a large number of actual as well as imaginary legal questions.[169] This last presupposed a fairly advanced methodology and its actual practice, in turn, further contributed to clarification and elaboration of legal methodology and also to the development and systematisation of technical legal thought.

The Kufian jurists of the second century were inheritors to a fairly large number of doctrines of the legal specialists of the previous century, particularly of those who had lived in the last decades of that century. Of these, Ibrâhîm is most important. A study of Âthâr A.Y. and Âthâr Sh. shows that "the opinions of, and traditions transmitted by Ibrâhîm occur mostly in the legal chapters proper, much less in those concerning ritual, and hardly at all in those devoted to purely religious, ethical, and edifying matters. On the other hand, there are very few references to Ibrâhîm in Tr. I which treats of rather technical details of law."[170] It can be inferred from this that technical details of law had as yet not been formulated in Ibrâhîm's time. This

is evident from the fact that technical legal reasoning of Ibrâhîm was quite restricted in range, and relatively primitive in quality.[171]

In Ibn Abî Laylá and Abû Ḥanîfah, however, we find a considerable amount of explicit technical legal thought which is impressive both in its range and quality. Tr. I, Tr. IX, and Jâmi' Saghîr and Ḥujaj embody, inter alia, the technical legal thought of the Kufian lawyers of the second century. This means that in the second quarter of the second century, the Kufians had reached a much higher stage of development and refinement in respect of technical legal thought than is evidenced by Ibrâhîm's doctrines. It seems certain, therefore, that there was considerable legal activity in the generation of Ḥammâd — that is, roughly the last decades of the first and the first two decades of the second century, and it is the doctrines of this generation which served as the raw material for the legal doctrines of Ibn Abî Laylá and Abû Ḥanîfah. It would also not be unjustified to assume that many a doctrine which is ascribed in the works available to us to these two jurists had not been formulated by them for the first time, that they had rather been formulated by their predecessors or contemporaries, which they merely endorsed. The reason for the attribution of many of these doctrines to these two jurists is

the fact that a fairly large proportion of legal doctrines of that period was not recorded,[172] a fact which hinders making any cut and dried assessment of the contribution of Ḥammâd or of his contemporaries during this crucial stage of the development of Islamic law.[173]

Ibn Abî Laylá[174] (d. 148), was a Kufian judge and a contemporary of Abû Ḥanîfah. His doctrines, which are authentically recorded in Tr. I, show an impressive amount of technical legal thought side by side with numerous imperfections. The doctrines of Ibn Abî Laylá represent, to cite Schacht, "seemingly natural and practical common sense, and rough and ready decisions".[175] This practical common-sense "often takes material, and particularly Islamic-ethical considerations into account."[176] Connected with these material considerations is Ibn Alî Laylá's regard for actual practice, a tendency which was presumably reinforced by his holding the office of a judge.[177] His doctrines also occasionally evidence "downright primitive features, both material and formal".[178] These features, as we know well, increasingly regressed in Islamic law subsequently. Side by side with these features, which he seems to have inherited from the past, is his formalism which constitutes, to borrow from Schacht, "the most persistent single feature of his legal thought".[179] These were the component elements of Ibn Abî Laylá's legal

thought. The progress in the development of legal thought achieved by Ibn Abî Laylá was quite striking, notwithstanding the prominence of certain primitive features which he had inherited from the past, as we just noted. His achievement is evident from the fact that on a considerable number of questions his legal reasoning was of quite a high standard[180] so much so that on several questions he anticipated Shâfi'î.[181] The degree of systematisation achieved by Ibn Abî Laylá is evident from the fact that, in the words of Schacht, the "cases of remarkable systematic consistency definitely outweigh those where the inconsistency is obvious."[182]

The doctrines of Abû Ḥanîfah, however, represent on the whole a much higher level of technical legal thought than that of his contemporaries, for example, Ibn Abî Laylá and Awzâ'î.[183] In Abû Ḥanîfah too we find traces of many of those features which were prominent in the doctrines of Ibn Abî Laylá — regard for practice,[184] commonsense decisions and material considerations,[185] and primitive reasoning.[186]

These factors, however, have a much less influence on the doctrines of Abû Ḥanîfah than on the doctrines of Ibn Abî Laylá. Abû Ḥanîfah was a speculative jurist rather than a judge, and hence he showed much less regard for administrative and judicial practices. The advance

registered by Abû Ḥanîfah on Ibn Abî Laylá and Awzâ'î and other contemporary jurists essentially lies in his relegating some of the considerations which featured prominently in the doctrines of the latter into the background of insignificance, the foreground being occupied by the concern for systematic consistency. Again and again established practices were disregarded, considerations of administrative and judicial convenience were set aside, and even the demands of ethical considerations ignored by Abû Ḥanîfah in favour of the dictates of systematic consistency. The following will illustrate this:[187]

> A person took illegal possession of a slave-girl, then sold her to someone else who manumitted her. The consideration in favour of freedom made Ibn Abî Laylá consider manumission to be valid. In order to recompense the loss suffered by the original owner, however, he made the usurper pay the price of the slave-girl. Abû Ḥanîfah, followed by Abû Yûsuf, considered the first act void on technical legal grounds, and consistent with this premise held all the subsequent acts to be void.[188]

> A person purchased an article with the stipulation that the vendor would have option for one day. The article perished in the

possession of the buyer and before the lapse of the period of the vendor's option. Ibn Abî Laylá's decision was seemingly just and reasonable, but it was refuted by Abû Ḥanîfah's technical legal reasoning. He rigidly held to the formal position that since the contract of sale had been concluded, the article was, at the time of its perishing, the property of the buyer.[188a]

If the debtor hides himself away from the creditor till the latter reduces the amount due against the former on the condition that the former paid back part of what was due against him. Ibn Abî Laylá, moved by the consideration that the enforcement of the reduction of debt would be counter to material justice and harm the legitimate interests of the creditor, decided that this reduction was legally void. Abû Ḥanîfah, consistent with his doctrine that declarations had their legal effects, irrespective of the circumstances in which they were made,[189] decided that the reduction was valid.[190]

The problem is whether the wasî of an orphan is entitled to invest the latter's property in trade or in mudârabah transaction. Ibn Abî Laylá, motivated by the consideration of protecting the

interests of the orphan, considered these transactions valid only if they were in the interest of the orphan, not otherwise. On the contrary, Abû Ḥanîfah's approach was a purely legal one i.e., whether the wasî had the legal right to do so or not. If he had that right, he could invest it, irrespective of the profit or loss that the exercise of that right might lead to.[191]

Regarding the identification of slaves by seals of lead attached to their necks and of the official correspondence between judges, Ibn Abî Laylá's doctrine was based on the recognition of both the practices, which were presumably well-established. Abû Ḥanîfah totally declined to recognize the validity of these practices and adduced weighty technical legal arguments against them. The departure from practice was so radical and the consideration of judicial administration had been so grossly neglected in Abû Ḥanîfah's doctrine that Abû Yûsuf reverted to the doctrine of Ibn Abî Laylá.[192]

A person bought a piece of land and erected a building thereon, whereafter pre-emption was claimed (and the validity of the claim was recognized). Now, in deference to the fact that the buyer has

already spent his money and has erected the building, Ibn Abî Laylá tried to arrive at a doctrine which would neither cause inconvenience to the buyer, nor nullify the right of pre-emption. His doctrine, therefore, was that pre-emption would be enforced if the claimant paid not only the price at which the land had been sold, but also the value of the building. Abû Ḥanîfah, followed by Abû Yûsuf and Shaybânî,[193] took a purely legal view of the matter. The basic question which they faced was whether the claim of pre-emption was valid or not. And once it was recognized to be valid (as even Ibn Abî Laylá did), they ruthlessly followed up the legal consequences of this recognition.[194]

A person sells his share in a house without making it clear as to what portion of the house is owned by him. Ibn Abî Laylá's consideration in the formulation of his doctrine was practical expediency and hence he permitted it in case the number of owners of the house was small (two or three), but not so if the number was large. Abû Ḥanîfah's decision had a technical legal basis: whether the sale of an object was valid if its

amount was not precisely determined? Abû Ḥanîfah, consistent with his view that transactions were valid only if the quantity of the property was precisely known,[195] held this transaction to be void.[196]

A slave is jointly owned by two persons of whom one enters into mukâtabah contract with the slave, without the approval of his partner, who subsequently expresses his disapproval of this contract before the mukâtab had paid any instalments of his mukâtabah contract. Ibn Abî Laylá was moved by the consideration in favour of the freedom of the slave, which was combined by him with the concern to safeguard the right of the disapproving co-owner of the slave [secured by the doctrine that he would receive money proportionate to his share in the value of the slave]. Hence he declared the contract concluded by the partner to be valid, although he did not consider the manumission of the slave by the act of one of the two partners to be valid [for, in this case, the interests of the partner had not been duly secured]. Abû Ḥanifah, followed by Abû Yûsuf, took a strictly legal view of the act and declared it to be void.[197]

In the same way as Abû Ḥanîfah's legal thought was considerably more advanced than that of Ibn Abî Laylá, it was similarly more advanced than that of his Syrian contemporary, Awzâ'î[198] and his younger Medinese contemporary, Mâlik, who died about three decades after him.[199]

> The Syrians as well as the Medinese admitted the practice of carrying back surplus meat and fodder from the battle-field, without making it part of the booty. Awzâ'î, moved by ethical considerations, expressed the view that if a person sold that before the distribution of the booty, he should put the money in the booty; and if he sold that after the booty had been distributed, he should distribute it as charity. Abû Ḥanîfah, followed by Abû Yûsuf, rejected this inconsistent position. The main question before them was: is it permissible to carry surplus food home? From a strictly formal point of view this was not permissible, for the surplus after consumption on the battle-field was part of the booty.[200]
>
> If a private raider carried out an expedition in the enemy territory, what should be done with the booty that he might capture? Awzâ'î considered this to be primarily an administrative problem and hence decided that the ruler had the option either

> to punish the raider and deprive him of the booty altogether, or to excuse him and deduct one-fifth of it [which is the rule with regard to booty], thus leaving the rest of it for the raider. Abû Ḥanîfah, judging on technical legal grounds, considered this case to be divergent from the case of booty.[201]

Hence, Schacht's conclusion that "Abû Ḥanîfa [sic] played the role of a theoretical systematiser who achieved a considerable progress in technical legal thought,"[202] is quite accurate. Abû Ḥanîfah is indeed an important landmark in the early history of Islamic law insofar as he had reached the highest level of technical legal thought that had been achieved upto his time so much so that "in his doctrine systematic consistency has become normal".[203] He represents the shift in emphasis from the material considerations, which were still prevalent in his time, to the technical and formal qualities of legal thought.[204] In trying to achieve systematic consistency, Abû Ḥanîfah shows, on many occasions, a ruthless disregard of material considerations such as administrative convenience, established practice, etc. Abû Yûsuf's main role, as we shall see, was to re-accommodate some of these considerations. But Abû Ḥanîfah had given Islamic law such a formal orientation that

their accommodation was possible only by a fusion of material and technical legal elements.[205]

Abû Yûsuf's contribution to the development of technical legal thought lay primarily, as we have remarked above, in restricting technical legal thought by material considerations, and thereby partly restoring its old practical orientation. Abû Yûsuf, as we know, was a judge. He could not, therefore, ignore the practical problems of judicial administration, the importance of established practice, and the realities of day-to-day living. He had, therefore, a moderating influence on the Kufian doctrines. His doctrine was not, however, in any radical manner different from that of his master which is in fact pre-supposed in his own doctrine. His contribution was, therefore, in the nature of effecting slight modifications and improvements which were generally designed to bring legal doctrines closer to the realities of practical life and judicial administration.

Tr. I, 17. Abû Yûsuf reverts to a seemingly just and natural solution of Ibn Abî Laylá.[206]

Ibid., 21. Abû Yûsuf reverts to a convenient, but systematically inconsistent doctrine of Ibn Abî Laylá.

Ibid., 23. A person declared bankrupt by the

judge, according to Abû Ḥanîfah, was still entitled to carry on monetary transactions such as sale, purchase, manumission, gift, and charity. Ibn Abî Laylá, obviously moved by regard for the legitimate interests of the creditor, considered all these transactions to be void. Abû Yûsuf followed the doctrine of his master but effected a modification which was inspired by the ethical consideration in favour of freedom. His doctrine was that all transactions, except manumission, are void.

Ibid., 28. Abû Ḥanîfah's doctrine is technically more satisfactory, but less practicable. Abû Yûsuf returns to the doctrine of Ibn Abî Laylá.

Ibid., 32. Abû Ḥanîfah is systematically consistent, while Ibn Abî Laylá's doctrine takes into consideration the dictates of practical expediency. Abû Yûsuf, by accommodating the practical consideration in his doctrine which pre-supposes technical legal thought, brings about a fusion of the two strands.

Ibid., 54. Regarding compromise concluded

under duress Abû Ḥanîfah takes a ruthlessly formal attitude, which reflects a neglect of practical realities. Abû Yûsuf, while following the doctrine Abû Ḥanîfah in its essentials, takes these realities into consideration and thus considers void the compromise which was concluded on the point of the sword, but not otherwise.

Ibid., 60. Abû Yûsuf reverts to Ibn Abî Laylá's doctrine which gives greater consideration to practice and expediency, as against Abû Ḥanîfah's doctrine which seems to be technically sound, but perhaps practically inconvenient.

Ibid., 107 and 110. Abû Yûsuf takes judicial practice into consideration which had been ignored by Abû Ḥanîfah, and hence reverts to the doctrines of Ibn Abî Laylá.[207]

Ibid., 228. Divergence in the evidence of two witnesses, according to Abû Ḥanîfah, made the evidence void. Ibn Abî Laylá adopted a more reasonable and expedient doctrine, which was also in keeping with the dictates of judicial administration, and Abû Yûsuf followed him.

At times, Abû Yûsuf's technical legal reasoning represented an improvement on the legal thought of Abû Ḥanîfah,[208] but such instances are not many. Moreover, it is partly offset, as Schacht has pointed out, "by cases where Abû Yûsuf's legal thought appears weak and superficial".[209]

In the same way as Abû Yûsuf's doctrine pre-supposes the doctrine of Abû Ḥanîfah, so does the doctrine of Shaybânî pre-suppose that of Abû Yûsuf. It is significant that in a vast majority of questions on which Abû Yûsuf had diverged from the doctrine of Abû Ḥanîfah, Shaybânî followed the doctrine of Abû Yûsuf.[210] His use of <u>istiḥsân</u>, almost as frequently as that of Abû Yûsuf, reflects the accommodation of practical considerations.[211] From the viewpoint of technical legal thought, however, the level achieved by Shaybânî is perceptibly higher than that of both Abû Ḥanîfah and Abû Yûsuf. This is evident from the improvements and refinements introduced by him in the doctrines of his predecessors,[212] as well as from the elaboration of legal doctrines on a tremendous scale which he carried out — an enterprise in which he remained at a level of technical legal thought theretofore unattained by anyone else.[213] At times Shaybânî reverted to the doctrine of Abû Ḥanîfah as against that of Abû Yûsuf, generally because Abû Ḥanîfah's doctrine was

sounder from the technical legal point of view.[214] The best evidence of the greatness of the technical legal thought of Shaybânî is a comparison of his doctrines with those of his Medinese contemporaries (particularly Mâlik), which brings him out almost invariably as the superior,[215] and with the doctrines of Shâfi'î[216] whose technical reasoning seems to be generally of a higher standard than of Shaybânî. Sometimes, though not often, however, Shaybânî's legal thought approximates the standard of Shâfi'î: at times, he anticipates him;[217] and sometimes, though rarely, he even surpasses him.[218]

VI

It would be evident from the above that Kufa remained the centre of intense juristic activity of a high standard throughout the second century. The record of the doctrines of this period which has come down to us testifies to the superiority of the Kufian jurists from the viewpoint of technical legal thought over those of all other centres of Islamic law.

We have already seen that Abû Ḥanîfah's technical legal thought was more developed than that of his Syrian contemporary, Awzâ'î.[219] The same is confirmed by a comparison between the doctrines of Abû Ḥanîfah and the Medinese jurists recorded by Shaybânî in his Ḥujaj.

Although the doctrines of Abû Ḥanîfah have been recorded, in general, without reproducing his own arguments in support of those doctrines, they generally represent a higher standard of technical legal thought than that of Mâlik.[220] What has been said of Abû Ḥanîfah can be said even more vehemently of Shaybânî. A comparison of his technical legal thought with that of Mâlik conclusively proves the superiority of Shaybânî over his Medinese contemporary, and over the Medinese school as a whole.

> A person's property which had been loaned out to someone was received back by its owner after several years.
>
> Abû Ḥanîfah, and the Kufian school along with him, held the view that [the ownership of the property being the efficient cause of zakâh] the owner was liable to pay zakâh for the entire period. The Medinese jurists took into consideration the fact that the property had not been in the use of the owner, and were, therefore, of the opinion that the owner should pay zakâh for the period of one year only.
>
> Shaybânî easily shows the untenability of the Medinese position by pointing out that either the loaned money was liable to zakâh, or it was not; and that in both cases there could be no question

of paying it for a period of one year. Either the person was not obliged to pay zakâh at all, or he was obliged to pay for the entire period.[221]

Is a person obliged to pay sadaqat al-fitr on behalf of his wife and servants as well? Abû Hanîfah as well as his school was of the view that he was obliged to pay only on his own behalf and that of his minor children and slaves who were not meant for trade. As for his major children and wife, they were obliged to pay it themselves if they owned sufficient property, otherwise not. The Medinese doctrine, on the contrary, was that a person was obliged to pay on behalf of his wife, and that of one of the slaves of his wife, but not on behalf of all her slaves.

Shaybânî's arguments in refutation of the Medinese doctrine show a markedly higher degree of technical thought. First, that the wife being a major, was bound by the same rules by which all Muslims were bound in respect of zakâh in their properties. In the same way as it was the wife herself who was liable to pay zakâh on behalf of her property, likewise she was liable to pay sadaqat al-fitr on behalf of herself. Hence, if a person had sufficient property which

made him liable to pay zakâh on his property, he was also liable to pay sadaqat al-fitr; and in the same way as a person was obliged to pay zakâh on his own behalf [and not on behalf of his wife], so was the case in regard to sadaqat al-fitr. Secondly, a person's financial obligations towards people were to be distinguished from the obligation of paying zakât al-fitr. For, the former related to mundane life so that neglecting the discharge of such obligations (say, towards a minor child or wife) might lead to ruination. As for sadaqah, it was a means of currying the favour (taqarrub) of God. Hence, sadaqat al-fitr was obligatory on those who had property and were liable to pay zakâh, and on none else.[222]

Concerning the limit of the validity of tayammum, Abû Ḥanîfah was of the opinion that it was the same as in the case of wudû', while the Medinese were of the view that a fresh tayammum should be performed for each ritual prayer.

The Medinese argued that if one intends to pray one is obliged (as laid down in the Quranic verses IV. 42, and V. 6) to seek water for ablution and should perform tayammum in case

water is not available. The Kufian doctrine is not only more logical but the arguments adduced by Shaybânî show a much higher level of reasoning. The argument runs as follows: What nullifies tayammum is not lack of success in the search for water, but either the availability of water or ḥadth (i.e. breach of wuḍû') whereafter it is not permissible to pray without having performed wuḍû' [or without having renewed tayammum]. Suppose a person wants to perform supererogatory prayers, and owing to non-availability of water, makes tayammum and performs two rak'ahs: should he renew the tayammum if he wants to pray another two rak'ahs [the wuḍû' having been nullified by the first prayer]? The Medinese had justified their doctrine by distinguishing between obligatory and supererogatory prayers which Shaybânî shows, by citing a number of relevant cases, is false.[223]

A man performed tayammum because of non-availability of water and entered into the prayer whereafter someone brought water for wuḍû' while the person concerned was still in the state of prayer. Abû Ḥanîfah was of the opinion that he should break away from the prayer and make wuḍû', while the Medinese were of the opinion that he might continue

his prayer. Shaybânî argued by pointing out that tayammum was a substitute for wudû', and hence if water was available, the matter reverted to the original injunction, viz., wudû'.[224]

The Medinese were of the opinion that a person was not permitted to marry if he was in the state of ihrâm [for sexual intercourse is prohibited in the state of ihrâm]. Abû Ḥanîfah sharply distinguished between concluding the contract of marriage and the acts which this contract validates such as kissing, sexual intercourse, etc., and pointed out that it is these last which he ought to abstain from. Shaybânî adduced a persuasive analogical argument which shows a high degree of techincal legal reasoning.[225]

A woman is forcibly subjected by her husband to sexual intercourse in her state of ihrâm. The Medinese, who did not distinguish as sharply between religious-ethical and legal aspects of acts as the Kufians did, did not consider that woman to be liable to expiation. Their opinion was based on the consideration that since the act had been committed against the will of the wife, she had committed no sin (and hence there was no question of expiation). Abû Ḥanîfah's

doctrine viz., that she was obliged to make expiation was sound from a technical legal point of view. Citing the case of homicide with and without deliberate intent, he pointed out that even though the two acts were not the same from the view-point of sinfulness, expiation was obligatory, nevertheless, in both the cases. Shaybânî pursued this line of reasoning still further and adduced impressive analogical arguments. He considered this case to be analogous to the case of the person who kills an animal by mistake while he is in the state of ihrâm. Such a person will be required to make expiation, Shaybânî points out, even though he has not sinned.[226]

A sells a slave to B on deferred payment (of 100 dînârs). A approaches B with the proposal that he would pay B 10 dînârs if B agrees to cancel the sale in which event A would also excuse him from the payment of the 100 dînârs due against him. Or B approaches A with the proposal that A should cancel the contract in which even B would pay A 10 dînârs either immediately or at a date later than that fixed for the payment of the price of the slave.

The Medinese were of the view that any cancellation with addition to the price from the buyer's side was invalid, but there was nothing objectionable if the addition was made by the seller.

The Kufians took a position which was supported by a sound technical legal consideration. Elaborating the Kufian argument Shaybânî pointed out that the distinction between addition from the buyer's side as against that from the seller's side was purely arbitrary.[227] The transaction envisaged could, of necessity, either be considered an annulment of the original contract of sale, or the conclusion of a new contract. If the former was the case, any addition was void. And if the latter was the case, it would amount to the sale of an article not in the seller's possession (bay' mâ lâ yaqbid) [which is not permitted]. In both the cases, the distinction between addition from one party as against the other has no sound basis.[228]

A person buys an orchard the fruits of which have begun to blossom and he takes possession of it. Then some calamity befalls and destroys all or

part of the produce.

The Medinese [obviously out of sympathy for the afflicted buyer], held the view that the seller should return to him upto one third of the price in order to compensate for his loss.

Abû Ḥanîfah, and the Kufian school as such, disregarded this consideration of compassion in favour of a doctrine which, from the technical legal point of view, appears to be consistent and reasonable. Abû Ḥanîfah's reasoning was that once the buyer had taken possession of the merchandise, it became his property and any loss thereafter was a loss of his property and nobody else's.

Shaybânî particularly attacked the fixation of one third by the Medinese as arbitrary. He considered this unjustified because it was not supported by any sunnah or athar. Why should someone else not increase the limit of damage, which the buyer is liable to compensate for, to half?[229]

Abû Ḥanîfah was of the opinion that if a man sold his orchard he could stipulate an exception of such a determinate (ma'rûf) amount as 1/3 or 1/4, etc., but if the amount excepted was indeter-

minate (majhûl), such as three palm-trees (without specifying those trees), this rendered the sale invalid (fâsid). The basis of the doctrine was the determinateness or otherwise of the amount excepted.

The seller, according to the Medinese, could make exception for any amount upto one third but not more.

Shaybânî again attacks the Medinese for their arbitrary fixation of one third,[230] for in his view this was not based on any athar from the Prophet or from any of his Companions. "But if you make this distinction between two things which can not be treated as distinct on the basis of your ra'y", said Shaybânî, "it cannot be accepted".[231]

A person buys a sword, etc., which has silver in it and pays for it in dirhams. Abû Ḥanîfah was of the view that if the silver in the sword was less in weight than the weight of the dirhams, the sale was valid; but it was invalid if the silver in the sword weighed the same or more than the weight of the dirhams.

If the dirhams weighed more than the silver in the sword the transaction would be valid, for

it was valid to receive dirhams against the same amount of silver in the sword, and the dirhams in excess of the quantity of the silver in the sword would be exchanged against the sword itself. The Kufians were also of the view that if the amount of silver in the sword was not precisely known, the transaction would be invalid.

The Medinese were of the view that if the value of the sword was two third, while that of the silver in it was one third, the sale was valid.

It is obvious that the Kufian school combined in this case an ethical consideration of material justice with technical legal reasoning.[232]

A person gives defective dirhams to another on promise of deferred payment and receives dirhams which are of full weight so that he receives in return more silver than he paid.

The Medinese held this to be valid, while the Kufians did not. Shaybânî pursuasively establishes the point that this is nothing but ribâ. His argument is: Suppose a man has given someone what amounts (in terms of the weight of silver) to one dirham less than 100, and then receives 100 dirhams. How can one justify this addition of one dirham? Did he not receive something in

excess of the amount of silver he had lent out to the other person? If it is not permissible for the creditor to receive hundred dirhams in return for ninety-nine, is there any basis for supposing that the transaction in question is different from that?[233]

A person sells to someone a lot without excepting anything and the buyer pays the price for it. Later on the seller decides to buy a part of it.

Abû Hanîfah was of the opinion that if the buyer had not taken possession of it, he might not buy any quantity, whether big or small; but if the buyer had taken possession of it, he could buy any quantity of it that he wanted to buy.

The Medinese thought that he could buy upto the maximum of one-third of the lot, but not more.

Shaybânî attacked the Medinese for their arbitrary exception of one-third and claimed that this exception was not supported by any athar from the Prophet or from his Companions. The only thing that could be adduced in support of this exception was the doctrine of an al-

Ṣaghir b. ʿAbd Allâh, who was once the governor of Medina and owing to whose practice Mâlik was persuaded to abandon his previous doctrine. Shaybânî adds: "It is not proper to abandon what conforms to the Qur'ân and the sunnah in these involved (mukhtalitah) matters and follow [the doctrine of] al-Ṣaghir b. ʿAbd Allâh or those who are [even] inferior to him".[234]

With regard to exchange of olives against olive oil, Abû Ḥanîfah was of the opinion that it is permissible only if it is known for sure that there is less oil in the olives than the amount of oil that will be received in exchange.[235]

It is significant that Shaybânî supports this ethical consideration by a technical legal argument, which shows the merging of the two.[236]

The Medinese believed that the seller and they buyer had option in respect of sale until they separated. They supported it by a tradition from ʿAbd Allâh b. ʿUmar.[237] After citing this tradition, however, Mâlik adds: "For this we have no fixed limit and no established practice".[238] The Kufians, however,

interpreted the tradition concerned in quite a different manner.[239] In their view the traditions on option meant that option was permitted but only if it had been specifically stipulated in the sale-contract: As for a sale-transaction in which option was not stipulated, there was no question of option at all and the transaction was considered to become operative immediately, a doctrine which was supported by reference to traditions from 'Umar and Shurayḥ.[240]

Ḥujaj, pp. 249 f. Abû Ḥanîfah was of the opinion that it was not permitted to borrow animals, for they could neither be weighed nor counted in the manner money or eggs, etc., [i.e., those articles all units of which are of equal value] are counted. There were things which could not be subjected to weight, measurement, and even reckoning in the same way as articles such as eggs, etc., were, each unit of them being of equal value. Hence, it was not permitted that animals, cloth, utensils, etc., should be made objects of loan [i.e., with the stipulation that an animal would be returned in lieu of the

animal borrowed, etc.].

The Medinese, on the contrary, considered such transactions to be permitted if the quality of the articles was specified and the debtor was obliged to pay the article of the same quality. The Medinese, however, made an exception with regard to slave-girls for fear that the debtor might take more liberty with her than permissible.

Shaybânî points out several inconsistencies in the Medinese doctrine:

(1) [Legally speaking], there is no difference between male and female slaves.

(2) If the Medinese fear sexual intercourse between the debtor and the slave-girl, this is contrary to their own doctrine, viz. that the buyer of a slave-girl may return her to the seller for any defect subsequently discovered in her, even after he had had sexual intercourse with her.

(3) The Medinese also held that if a person usurps a slave or camel, etc., and it perishes, he is liable to its value reckoned on the basis of its value on the day when he took possession of it. This was contrary to the

> doctrine in question which should have required that the usurper should be forced to return a slave or camel of the same quality, rather than to pay the value of the slave or the camel in terms of money.

It is also significant that possibly since the Kufians belonged to an area with greater commercial activity they were inclined to take a permissive attitude towards a number of transactions which the Medinese disapproved of for fear that they might lead to involvement in prohibitions, e.g., ribâ, and justified this by technical legal reasoning. The Kufians disapproved of the excessively precautionary attitude of the Medinese, which was likely to stand in the way of commercial activity. What is significant is the ability of the Kufians to support their doctrines by cogent and sharp-sighted technical legal arguments:

> A person exchanges dirhams against dînârs. After the exchange has been concluded, the person discovers that a few dirhams were counterfeit. Abû Ḥanîfah was of the opinion that if the defect was that the silver in those dirhams was of an inferior quality, those dirhams should be replaced by others with silver of the required quality. But if

the dirham coins were made of spurious silver or of lead, these dirhams should be deducted from the contract of exchange and adjustment made in accordance with the rate of exchange between dirhams and dînârs. But the exchange itself would be held valid in respect of the remaining amount.

The Medinese, on the other hand, considered the transaction void.[241]

Two persons exchange dînâr against dînâr so that the weight of gold with one party is slightly in excess of gold in the possession of the other party. Abû Ḥanîfah was of the view that the slight excess of one party's gold could be paid for by the other person in dirhams.[242]

The Medinese disapproved of this doctrine, considering it to be a means leading to ribâ.

Shaybânî: "How is that a means to ribâ?" Medinese: "If it is permitted to buy this slight surplus according to its value once, it will be permissible to do so over and over again." Shaybânî: "And what is wrong if he buys the slight surplus according to its value over and over again? All this is

permitted. What the Prophet has prohibited is the taking of excess when gold is exchanged for gold, but if there is anything extra in the possession of one of the two parties and the other party pays for it by means of something else than gold, then what is wrong with it? [What has happened in this case is that] some people have fled from harâm to halâl, and if you pronounce against this transaction on the basis of conjectures (tawahhum) then [it should be known that] merely conjectures may not invalidate things."[243]

A person buys wheat on deferred payment and takes possession of it. What is the legal judgment in respect of the following two cases if they arise from the above transaction? (i) If the buyer exchanges wheat against dates from the same party, before that party has received the dînârs which were due against the other party. (ii) If the original seller buys dates from someone else than the original buyer before he has received payment from him in dînârs and transfers the claims against himself to the original buyer.

With regard to case (i), Shaybânî points out that it does not fall under any of the possible categories of prohibition viz., gharar, (uncertainty) and exchange of debt against debt. "And if they say," says Shaybânî, "that it amounts to the exchange of wheat against dates, then there is nothing objectionable about it."

With regard to case (ii), the Medinese, as opposed to the Kufians, considered it to be permissible. Shaybânî repeated Abû Ḥanîfah's argument for considering this to be invalid viz., that debt introduced the element of gharar in the transaction, for it was not certain that the debt would actually be realized.[244]

A man concludes a contract of sale with regard to foodstuffs on the stipulation of deferred delivery. At the stipulated time, however, the seller is able to deliver only a part of the promised quantity. Abû Ḥanîfah was of the opinion that the transaction could be regarded as valid upto the extent of the quantity that was available, and should be deemed as cancelled for the rest and the

price proportionate to the quantity cancelled should be returned to the buyer.

The Medinese disapproved of this transaction and considered it to be similar to the prohibited transaction designated as "bay' wa salaf", and they argued that even if this transaction did not fall under that category directly, it was a means to that kind of transaction.

Shaybânî: "This is not a means to anything and your invalidation of the sale transactions and mutual agreements between people is merely on the basis of conjectures although 'Umar b. al-Khaṭṭâb has said that agreements between people are permitted except those which turn ḥalâl into ḥarâm and ḥarâm into ḥalâl." (Ḥujaj, pp. 217 f.).

One aspect of the development of technical legal thought was to make distinction between the religious quality and purely legal effects of acts. This aspect of the development of Islamic Fiqh led to the formulation of two different scales of evaluation — the religious and the legal. The five well-known categories of the religious scale were: obligatory, recommended, indifferent, prohibited and disapproved. Side by side, how-

ever, there developed another, an almost purely legal scale of evaluation, which was concerned not with the religious quality of an action, but with merely its legal effects. This, in the classical Fiqh, comprises the following categories: (1) Saḥîḥ, valid if both its nature (aṣl) and its circumstances (waṣf) correspond with the law; (2) makrûh, reprehensible, disapproved, if its aṣl corresponds with the law but something forbidden is connected with it; (3) fâsid, defective, if its aṣl corresponds with the law but not its waṣf; (4) bâṭil, invalid, null and void.[245]

The Kufians played a significant role in making this distinction sharp, as will be obvious from the following examples:

> If a husband coerces his wife into cohabitation in the state of iḥrâm, does this obligate expiation on the part of the wife? The Medinese, whose distinction between the religious and the purely legal aspects was not as keen, did not think that the wife was obliged to expiate, for she had not committed any sin. The Kufian doctrine, on the contrary, was that it was obligatory. The principle which they enunciated in this connection was significant: that expiation was not inalienably connected

with the notion of sin. There were certain actions which were not sinful, they argued, and yet entailed compensatory obligations. For instance, the person who committed homicide by mistake, did not commit a sin, and yet he was obliged to pay blood-money. In the same way, if a muhrim killed some animal by mistake, he was not a sinner but was obliged to expiate, nevertheless.[246]

It was reported that the Prophet had instructed people to give away not more than a third of their property in charity. It was obvious that any person who gave away the whole of his property in charity would be going against this instruction of the Prophet. The question, therefore, was whether such a decision was legally operative or not. The Medinese considered that the maximum limit of legal validity in respect of donation for charitable purposes was one-third of one's property. The Kufians, owing to their clearer distinction between the religious-moral and purely legal aspects of acts, disagreed with this view. They considered the action in question to be analogous to the pronunciation

of repudiation or of zihâr. Both these were reprehensible from the religious viewpoint, and yet they had their legal effects.[247]

Thus, there can be no doubt that the technical legal thought, even as the legal theory of the Kufian jurists, was better developed than that of the Syrians and the Medinese, and in many significant ways, it anticipated Shâfi'î. It represented an intermediary stage between the other ancient schools and Shâfi'î, who further improved and refined the Kufian technical legal thought. Despite Shâfi'î's denunciation of the Kufian jurists, his technical legal thought was closer to the legal thought of the Kufian jurists than of the jurists of other centres.[248]

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CONCLUSION

Our account in the foregoing pages of the development of Fiqh in Kufa (which is vitally linked with its over-all development), is perceptibly different from that accepted to be true by the majority of the present-day Orientalist scholars. The main reason for this difference is our disagreement with some of the hypotheses with which the Orientalist scholars proceed and the assumptions which underlie their method of inquiry.

What is of basic importance in this connection is the question of the outlook and attitude of the Prophet vis-à-vis legal matters. The generally accepted assumption in Western scholarship about the Prophet is that he had only a peripheral interest, if at all, in legal matters. We have established, on the basis of Quranic legislation and some of the incontrovertibly authentic incidents of the life of the Prophet, that this assumption is invalid. On the contrary, we have shown that even though the basic concerns of the Prophet were religious and moral, they do not detract from the fact that he took a positive interest in legal matters and that his religious and ethical concerns provided him with a frame of reference to judge legal questions. This seems

to be related to the Prophet's desire to build up the proper institutional framework within which his religious and moral ideals could prosper. Significant in this connection is the fact, as we have shown, that the Muslim judicial organisation had come into being in the Prophet's own life-time. The establishment of the judicial organisation is, on the one hand, an index of the Prophet's attitude to legal matters. On the other hand, this development makes it probable that many more legal problems would have been faced by the first generation of Muslims than is generally imagined. In fact, this provides a substantial ground for concluding that a good many legal questions would have been encountered by the Prophet himself and by his Companions, as the classical Islamic sources claim. The lack of recognition of this fact seriously distorts the whole approach to an historical investigation of the development of Islamic law. In fact it assumes or creates a gap which does not fit in with the over-all picture of the history of Islamic law.

Thus we start from pre-suppositions which are quite different from those of the Orientalist scholars. For their <u>à priori</u> denial of all the rulings of the Prophet on legal questions as later formulations has no solid basis.

Moreover, our investigations show that neither

in the earliest period, nor subsequently, was law considered to be outside the jurisdiction of religion. On the contrary, the idea that religion is vitally relevant to legal matters seems to underlie the Quranic legislation and was a corollary of the fundamental revolution that the Prophet had brought about — the establishment of the authority of revelation. This conclusion is further corroborated by the fact that the discussion of legal questions remained centred on those question which are related to, or had been stimulated by, the Quranic legal prescriptions. In this connection special attention has been paid to investigating whether the concept of the sunnah of the Prophet existed in the earliest period of Islâm or was it a later development, as some Orientalist scholars claim. Our own conclusion is that the concept goes back to the earliest period of Islâm and any other conclusion is untenable on à priori as well as à postriori grounds.

The legal speculation of the early generations was motivated by the desire to practise the teachings of the Prophet, a desire which naturally enough led to the question: what are the teachings of the Prophet? It is by trying to find out and apply these teachings to the problems which arose in their lives that the legal[1] doctrines came into being.

In the relatively early period, although there was a body of legal rules, however, there was scarcely any legal science.

The reason was that at this stage attention was directed to specific legal questions which were considered more or less in an ad hoc fashion. During the last decades of the first century, however, a class of specialists arose. These people were concerned with the entire body of laws, rather than merely with specific legal questions. It is this development which paved the ground for the development of a legal science and for its attendant results — the clear formulation of a legal theory, the elaboration of positive doctrines in a systematic fashion, and the development and refinement of technical legal thought.

Ibrâhîm al-Nakha'î is a good example of this new class of specialists. A study of his doctrines — which have reached us in an authentic manner — testifies to the authority of the precepts and practices of the Prophet, even as in the period before him. Moreover, it shows the importance attached to the precepts and practices of the Companions. Furthermore, it appears that while the outlines of Islamic law had been formulated by the time of Ibrâhîm, its technical details had yet to be worked out.

Kufa — the legal thought of which this work attempts to study — was one of the earliest centres of Islamic legal speculation. For a number of reasons — the historical background of Iraq, the nature of its population, the role of the Iraqians in the early political history of Islâm, its socio-economic structure, etc., Kufa became not only an important centre of Islamic legal thinking, but its Fiqh also acquired an impress of its own. In this connection, apart from other factors, the peculiar "climate of theological opinion" found in Iraq seems to have contributed to giving the Kufian Fiqh its peculiar orientation.

The period on which this study is focussed, however, is the second century. We began investigating the stage of development of Fiqh in Kufa during this period by means of a semantic survey of the terms in use. The main conclusion of this survey is a lag between the conceptual and semantic development — the former always remaining ahead of the former. Hence, while some of the positive results of semantic analysis can be considered to be trustworthy, its negative results cannot be trusted too much.[2] A number of concepts remained in use for a long period of time before they could acquire standard, technical phraseology for their expression. This fact reinforces the testimony of other evidences that some

of the fundamental concepts such as the sunnah of the Prophet, consensus, etc., are anterior to the period when they began to be expressed by means of technical terms.

Even though there was a semantic lag, yet the formulation of technical terms with accurate connotations was, at this stage, well on its way and considerable progress seems to have been achieved in that respect. Some of these concepts had already acquired full-fledged technical terms for their expression such as qiyâs and istihsân. There were others which seemed to be on the verge of that point — such as the concepts of sunnah, mandûb and makrûh, etc.

On the whole, the Kufians seem to have prepared the ground not only for the conceptual and methodological contribution made by Shâfi'î, but also for his semantic contribution which consisted of a more precise definition of terms such as sunnah, athar, etc.

The semantic evidence, despite being fragmentary, however, reflects the direction of the development of Fiqh. The increasingly elaborate terminology that was coming into use, the neat distinctions which the technical terms were beginning to express, the more and more precise definition of terms that was taking place — all these reflect corresponding developments in Fiqh itself:

a more vivid usûl-consciousness reflected in the growing recognition of distinctions between the various sources of positive doctrines, and its corollary, an increasing formalism and finesse in technical legal thought.

Owing to the fact that Islamic law is based on revelation, it has always made a distinction between what is authoritative in a binding sense and what is not. This distinction was sharply articulated by Shaybânî when he pointed out that khabar lâzim and qiyâs alone were relevant in legal matters. Basing ourselves on this distinction, we have attempted, first to explore the constituents of khabar lâzim, and then the process of inference, elaboration and systematisation of legal doctrines.

The first constituent of khabar lâzim, of course, was the Qur'ân. So far as the Qur'ân is concerned, its position as a "binding" source of law seems to have been taken for granted from the earliest period of Islâm. Hence, it is natural that the rules contained in the Qur'ân should have influenced positive doctrines from the very beginning. The influence exerted by the Qur'ân on positive doctrines appears in two different forms. (1) It is manifest from the positive doctrines which are directly derived from the legal verses of the Qur'ân (even though specific reference to the relevant Quranic verse might not have been made).

(2) No less important than this is another aspect of the Quranic influence. This consisted of stimulating a large number of question so that not only in the early period, but even subsequently, legal discussion remained centred around the questions raised by the Quranic verses which had a legal relevance.

We have also scrutinized the view that only a perfunctory attention was paid to the Qur'ân. The fact of the matter is that the Qur'ân continually remained the focal-point of Muslim legal and dogmatic speculation. Hence, it was natural that the relevance of the Quranic verses to the problems confronted by later generations was noticed, in general, by the later rather by the earlier generations. Moreover, occasionally the legal interpretations of certain verses underwent change with the passage of time. These, however, do not justify the conclusion that the attention paid to the Qur'ân was perfunctory.

The problem of the relationship between the Qur'ân and the traditions posed certain problems. The traditions were generally considered entitled to restrict the application of the Quranic legislation, although in such cases a high degree of confidence in their authenticity seems to have been required.

However, since formal traditions as yet were not as

prestigious as they became later the purpose that the Qur'ân served along (with the sunnah) and ijmâ' — was that of a barrier against the intrusion of doctrines which did not fit in with the teachings of the Prophet.

The second component of khabar lâzim was the sunnah. The discussion on sunnah occupies a considerable portion of the work and leads to the following conclusions:

(1) That the authority of the precepts and practices of the Prophet, contrary to the findings of some Western scholars, has remained unquestioned all through.

(2) That the authoritative sunnah consisted, however, not merely of the sunnah of the Prophet, but included the sunnah of the Companions as well. The sunnah of the Companions did not derive its authority at the cost of, but through the sunnah of the Prophet. In fact the belief in the authority of the sunnah of the Companions implies the paramount importance of the sunnah of the Prophet. The vogue of the word 'Companion' itself indicates the source wherefrom this authority was derived — the Prophet himself. It is by virtue of their "companionship" with the Prophet that the precepts and practices of the Companions were deemed to be normative. In other words, the authority of the Companions was a derived and subsidiary one, and there was no question of its being

regarded as on par, not to say of its being regarded as higher than that of the Prophet.

(3) Consistent with the above, it is natural to find that traditions from the Companions were frequently referred to as the bases of legal doctrines. What is intriguing, however, is that occasionally traditions from the Companions were allowed to prevail over traditions from the Prophet. This did not and could not mean that the Companions were deemed to be possessed of greater authority than the Prophet. What it generally meant was that at times a tradition from some Companion was deemed to be more trustworthy mirror of sunnah than a tradition which claimed to have come down from the Prophet, this claim being considered of doubtful validity.

(4) Apart from traditions from the Companions, reference was also made to established 'practice'. The sanction behind practice, however, was, in general, the assumption that it had originated in the time of the Prophet or of the Companions, and that its introduction was either on their initiative or approval. As for the supercession of traditions from the Prophet by 'practice', the remarks about the relationship between traditions from the Prophet and traditions from the Companions apply to this question as well.

(5) Furthermore, traditions from the Successors and

doctrines of accredited jurists were also often adduced. These were considered to be weighty, but not binding. Their credential for acceptance was the assumption that they were likely to be sound, though there was no absolute guarantee of that. The authority of the Successors or of the fuqahâ' was declaratory, rather than constitutive, and hence did not form part of khabar lâzim.

(6) So far as the paramount authority of the precepts and practices of the Prophet is concerned, it seems to be quite obvious. It is established, inter alia, by the explicit statements of the Kufian jurists of the second century on that subject as well as by the numerous departures from the established doctrines of their school made by Abû Hanîfah, Abû Yûsuf and Shaybânî, and by the numerous alterations of their own doctrines since they came to know traditions from the Prophet which were opposed to those doctrines.

(7) The fundamental difference between the ancient schools and Shâfi'î was that to the latter sunnah was identical with well-attested traditions from the Prophet. In the ancient schools, sunnah was not necessarily embodied in the form of traditions from the Prophet. Traditions from the Prophet were merely one evidence of sunnah. There were, however, other evidences as well, such as 'practice' and traditions from the Companions. The attitude of the ancient schools is to be explained by the fact that by the

time under study formalisation of law had not reached the point of culmination which it did in the doctrine of Shâfi'î. It is also to be explained by the less advanced stage of development in the science of tradition and the relative deficiency of trust in formal traditions (a fact which is understandable since those compendia of traditions which elicited universal confidence of Muslims had as yet not come into being).

(8) The Kufians, however, were ahead of their contemporary Medinese and Syrians insofar as they paid less attention to 'practice' and generally based their doctrines on traditions from the Prophet and from the Compansions. Moreover, they gradually tended towards greater strictness in the application of traditions which is evident from the diminished influence of those considerations which had restricted the application of traditions, and from the decrease in the use of ra'y in their interpretation and enforcement. On the whole, the Kufians were closer to, and in several aspects prepared the ground for, Shâfi'î's identification of sunnah with well-attested traditions from the Prophet, including the isolated ones. Moreover, a careful comparison of the legal theory of Shâfi'î and the ancient schools shows that Shâfi'î did not introduce any basic conceptual, as distinguished from methodological, change in Islamic

law.

(9) Western scholars have also concluded that traditions from the Prophet are products of the process of "back-projection" of doctrines. This conclusion, along with the assumptions underlying the method which led to it, has been thoroughly scrutinized. Our scrutiny shows that the assumptions on the basis of which a particular method was evolved by these scholars in order to study traditions from the Prophet from an historical point of view are invalid and the conclusion, highly exaggerated.

To sum up the position of the Kufians on the question of sunnah and traditions, it seems that although the ancient schools shared a degree of identity of approach and outlook, the Kufians were ahead of the Medinese and the Syrians. For while the Medinese and the Syrians clung to the early attitude which was characterized by frequent reference to, and trust in, 'practice', the Kufians departed from this and based their doctrines, almost as a rule, on traditions from the Prophet and the Companions, and stressed that these traditions should conform to certain objective criteria of authentification. Shâfi'î further developed and formalized this trend and applied it with his characteristic rigour and consistency so that he identified sunnah completely with well-attested traditions from the Prophet, and from him

alone.

As for the third constituent of khabar lâzim, viz., consensus, the Kufians represented a more advanced theoretical formulation of the concept of consensus and were closer to Shâfi'î, even in this respect, than other contemporary schools. The fact that the scope and importance of consensus in the Kufian theory and practice is narrower than in the Medinese is also significant in view of the severe restrictions imposed upon it by Shâfi'î. The reason seems to be the close relationship between consensus and practice in the Syrian and Medinese doctrine — a concept which was rejected, though in varying degrees, by Shâfi'î as well as the Kufians.

The Kufians referred to the consensus of all Muslims, of the Companions, of all fuqahâ', and of the fuqahâ' of their own school. These various types of consensus represent a descending scale of authority. The last of these, however, even though it was often advanced, was not deemed to possess binding authority, but was considered to be fairly weighty, nevertheless. Noteworthy also is the fact that the Kufians overcame the provincialism of this concept in the Medinese theory.

The constituents of khabar lâzim, therefore, were the Qur'ân, the sunnah of the Prophet and the Companions, and the consensus of the Muslims, of the Companions, and

of the fuqahâ'.

The above-mentioned authoritative sources served as a reservoir wherefrom positive doctrines were derived and elaborated. With the passage of time the process of formulating and elaborating legal doctrines assumed an increasingly defined mould. In the earlier phase, there was a relatively free use of ra'y, that is, jurist's discretion based on considerations of common good, the broad interest of religion, administrative convenience, substantive justice, etc. By and by, the use of ra'y assumed its standard from, viz., that of qiyâs. Nevertheless, the above-mentioned considerations continued to exert their influence, although less than before, and were accommodated in the legal theory under the name of istihsân. The importance of qiyâs is a measure of the formalisation which had developed in the legal science. Both in respect of a clear definition of qiyâs and dexterity in its application to specific questions, the Kufian school was ahead of other ancient schools.

In the elaboration of doctrines, the Kufians made use of a method which seems to be their characteristic contribution to Islamic law. The method was to imagine all conceivable questions relating to a subject and then apply the accepted rules to them. This method

seems to have been born and developed in Kufa. It provided a standard pattern according to which elaboration of doctrines could be carried out. This method contributed not only to the elaboration of doctrines, but also refined technical legal thought.

Another aspect of the development of Fiqh was the development of technical legal thought. Our inquiry confirms that Schacht's conclusion, i.e., "thechnical legal thought, as a rule, tended to become increasingly perfect from the beginnings of Muhammadan jurisprudence upto the time of Shâfi'î", applies to Kufa as well.

Our investigations also establish that the technical legal thought of the Kufians was more highly developed than that of other contemporary schools. This development reflects a diminishing influence of material and ethical considerations, and the trend towards according more and more importance to the considerations of systematic consistency and technical soundness. The technical legal thought of the Kufians reached its zenith in Shaybânî, and represented the highest level of technical legal thought achieved by Islamic law uptil the time of Shâfi'î. In this respect, as in other respects, the Kufians represented an intermediary stage between the other ancient schools and Shâfi'î who further improved and refined technical

legal thought.

To sum up: Islamic legal doctrines were formulated as a result of the desire to define and elaborate the religious ethic of the Muslim community. This was naturally done with reference to the teachings of the Prophet. Hence, Islamic law has had a religious character from the beginning and retained this character throughout the centuries. With the emergence of specialists in law, Islamic legal thinking increasingly turned towards formalism. From the vantage-point of the classical Islamic Fiqh, in respect of legal theory as well as technical legal reasoning the Kufians outpaced other contemporary schools, and anticipated and paved the way for Shâfi'î on several important questions. The Kufians, therefore, represent the indispensible historical link between the ancient schools and Shâfi'î, a link without which the early development of Islamic law cannot be fully appreciated.

NOTES

1. This writer was not able to consult this work owing to its non-availability.

2. Cited hereafter as Zahiriten.

3. Cited hereafter as Muh. St. We have used in this study the second edition (Hildesheim, 1961 A.D.). Another work which throws light on the development of Islamic law within the total frame-work of the development of various intellectual trends among Muslims is his Vorlesungen über den Islam, (Heidelberg, 1910 A.D.); Arabic tr. Muḥammad Yûsuf Mûsá, et al, al-'Aqîdah wa al-Sharî'ah fî al-Islâm, II edition, (Cairo, circa 1959 A.D.).

4. The Origins of Muhammadan Jurisprudence, III impression, (Oxford, 1959 A.D.), p. 4 and n. 2. Cited hereafter as Origins.

5. See below p. 194 and nn. 56 ff. The contribution made by these authors to the early development of Islamic jurisprudence was only nominal. One major trend, however, was developed by Margoliouth and Lammens — that the concept of sunnah during the early period of Islâm was fundamentally different from the concept of sunnah in the classi-

cal Islamic usage. Schacht took this idea from these two scholars and further developed and elaborated it in his Origins.

6. See I. Goldziher, "Principles of Law in Islâm", The Historian's History of the World, ed. H.S. Williams, (New York, 1904 A.D.), vol. VIII, p. 302. This article of Goldziher will be cited hereafter as Principles, and the book as Historian's History.

7. See below, p. 195 and n. 62.

8. It is to be noted that, as Fazlur Rahman [sic] has pointed out, Goldziher "had maintained that immediately after the advent of the Prophet his practice and conduct had come to constitute the sunnah for the young Muslim community and the ideality of the pre-Islamic Arab sunnah had come to cease". See his Islamic Methodology in History, (Karachi, 1965 A.D.), p. p. 4.

9. Cited hereafter as History.

10. Ibid., Foreword, p.v.

11. Coulson criticises Schacht for holding the view that "the evidence of legal traditions carries us back to the year A.H. 100 only" and for Schacht's denial of the authenticity of practically every alleged ruling of the Prophet (Ibid., pp. 64 f.). He himself is of the opinion that "an alleged

ruling of the Prophet should be tentatively accepted as such unless some reason can be adduced as to why it would be regarded as fictitious". (Ibid., p. 65). This opinion is radically at variance with the views of Schacht whose fundamental premise is that "every legal tradition from the Prophet, until the contrary is proved, must be taken as the fictitious expression of the doctrine formulated at a later time". (Origins, p. 149). It is obvious that the two attitudes are quite divergent. Compare with this Coulson's insistence that "the thesis of Joseph Schacht is irrefutable in its broad essentials and that the vast majority of the legal dicta attributed to the Prophet are apocryphal and the result of the process of "back-projection" of legal doctrine..." (Ibid., p. 64. See also p. 69 where he repeats this statement).

12. Another noted Orientalist Montgomery Watt has taken a less skeptical view of the early sources. The subject of Watt, however, is sîrah, rather than legal traditions. His views are nevertheless significant. See below, p. 243, n. 227.

The exaggerated skepticism of some of the modern scholars in regard to traditions seems to

to be as immature as of those scholars who, during the first half of the present century (of the Christian era) had "denied the genuineness of the whole body, or of all but a fraction, of pre-Islamic Arabic poetry". (H.A.R. Gibb, Arabic Literature, second revised edition, Oxford, 1963 A.D., p. 21. For a general acquaintance with this trend of argument, see ibid., pp. 20 f.). Their conclusion, as we know, has been falsified by more recent researches. See ibid., p. 21 and Nâṣir al-Dîn al-Asad, Maṣâdir al-Shi'r al-jâhilî wa qîmatuhâ al-ta'rîkhîyah, (Cairo, 1956 A.D.), passim, especially pp. 617 ff.

13. An investigation into the image of the historical development of Islamic law in the mind of the Muslim scholars of the past falls outside the scope of this thesis. Although the subject has not been studied thoroughly by this writer, it seems safe to say, on the basis of a cursory reading of the Muslim scholars of the past, that even though the vision of an average educated Muslim might have been hazy, outstanding Muslim scholars were quite conscious that Islamic law had passed through a process of development. They realized that like other historical objects, it had also "developed";

that inspite of its revealed bases, it had not always been the same. For an illustration of this, see the views of three well-known Muslim scholars of the past: Ibn al-Qayyim (d. 751), I'lam al-Muwaqqi'în, ed. Muhammad Muhy al-Dîn 'Abd al-Ḥâmid, 4 vols, (Cairo, 1955 A.D.), vol. I, pp. 11 ff.; Ibn Khaldûn (d. 808), Muqaddimah, (Cairo, al-Maktabah al-Tijâriyah, edition, n.d.), pp. 446 ff. and 452 ff.; Walî Allâh al-Dihlawî (d. 1176), Hujjat Allâh al-Bâlighah, 2 vols., (Cairo, 1332), vol. I, pp. 112 ff.

14. In this work, we have used its VII edition, (Cairo, 1960 A.D.).

15. See his series of books (passim) beginning with Fajr al-Islâm. For a list of the books of Aḥmad Amîn, see the bibliography at the end of this work.

16. See below, pp. 10 f.

17. Fazlur Rahman, op. cit., p. 6

18. See loc. cit. Moreover, as will be evident from the citation above, his concept of the sunnah of the Prophet is also different from the concept which is generally accepted by the Muslims.

19. See the works of Khuḍarî, Abû Zahrah, Dawâlîbî, Zarqâ', 'Alî Hasb Allâh, Faruki [sic], Maḥmaṣânî, etc., in the bibliography.

20. See Muṣṭafá al-Sibâ'î, al-Sunnah wa Makânatuhâ fî al-Tashrî' al-Islâmî, (Cairo, 1380/1961 A.D.), pp. 213 f.

21. See also above pp. 6 f.

22. See Sibâ'î, op. cit., pp. 212 ff.

23. (Cairo, 1377/1958 A.D.).

24. See Sibâ'î, op. cit., pp. 12 ff., and 305 ff.

25. Sibâ'î's work, which is of a respectable scholarly standard (though marred occasionally by a polemical style), was followed by two works from a young Syrian scholar, Muḥammad 'Ajjâj al-Khaṭîb. Although his works seem to be marely elaborations of Sibâ'î's arguments, they embody a considerable amount of research. These works are al-Sunnah qabl al-Tadwîn, (Cairo, 1963 A.D.) and Abû Hurayrah, (Cairo, 1964 A.D.).

26. In the Indo-Pakistan sub-continent discussion has continued on more or less the same questions. The denial of the authenticity and/or authority of the traditions from the Prophet was initiated by Muḥammad Aslam Jayrâjpûrî (d.c. 1957 A.D.) and is presently spearheaded by Ghulâm Aḥmad Parvêz. (On Ghulâm Aḥmad Parvêz see the doctoral dissertation of Miss Sheila McDonough (typescript), submitted to the Institute of Islamic Studies, McGill

University, Montreal, 1963 A.D., although this particular aspect of the ideas of Parvéz has not been treated at length. For his writings, see the bibliography therein). The expression of skeptical views about Ḥadîth aroused a considerable amount of polemical writing on the one hand, and a substantial amount of scholarly work, on the other. See, especially, Manâẓir Aḥsan Gîlânî, Tadvîn-i Ḥadîs, (Karachi, 1375/1956 A.D.); M.Z. Ṣiddîqî, Ḥadîth Literature, (Calcutta, 1961 A.D.); Muḥammad Ḥamidullah [sic] Ṣaḥîfah Hammam ibn Munabbih [sic], V edition, (Hyderabad, 1380/1961 A.D.), see especially its "Introduction"; Muḥammad 'Abdu-r-Rashîd Nu'mânî, Ibn Mâjah awr 'Ilm-i Ḥadis, (Karachi, 1960 A.D.), see particularly its "Introduction". Of these only Ṣiddîqî has taken a serious notice of the views of Orientalist scholars, such as Goldziher, on Ḥadîth. The recent article by S.M. Yûsuf also deserves mention, being a serious, scholarly attempt to explain: "The Sunnah — its Transmission, Development and Revision", Islamic Culture, vol. XXXVII, pp. 271-82 and vol. XXXVIII, pp. 15-25.

27. Cf. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", Law in the Middle

East, vol. I, ed. Majid Khadduri and Herbert J. Liebesny, (Washington, 1955 A.D.), p. 41. Cited hereafter as Law in the Middle East.

28. Origins, p. 6 and passim.

29. It has been observed with regard to the Khâriji and Shî'î legal doctrines that they differ from the legal doctrines of the Sunnî schools no more than these last differ from one another. This feature apparently makes it plausible to conclude that the features common to Khâriji, Shî'î and Sunnî schools "are older than the schisms which split the Islamic community within its first century". (Origins, p. 260). It also points to a possible common source wherefrom these doctrines were derived. Schacht considers this conclusion unwarranted (loc. cit.), but on grounds which are themselves open to question. In fact on this point he seems to argue in a circle. The subject is important and challenging enough to form the theme of a separate study.

30. See on this subject, S.G.V. Fitzgerald, "The Alleged Debt of Islamic to Roman Law", The Law Quarterly Review, vol. LXVII, pp. 81-

102 and J. Schacht, "Foreign Elements in Ancient Islamic Law", Journal of Comparative Legislation and International Law, vol. XXXII, (1950 A.D.), pp. 9-16. The two writers represent two conflicting views.

31. Out of these, the works of Abû Yûsuf (d. 182) and Shaybânî (d. 189) are the fundamental sources of our study, for they constitute an authentic collection of the doctrines of the Kufian jurists from Ibrâhîm to Shaybânî.

32. See R.G. Collingwood, The Idea of History, Galaxy Books, III Galaxy printing, (New York, 1959 A.D.), passim, especially pp. 249 ff.

33. It would be pertinent, perhaps, to point out that besides the objective canons of historical inquiry — and in our view they are important and a good deal of confusion on our subject has resulted from the failure to apply these canons adequately — the outlook, attitudes and inherited biases of the investigator on the sub-conscious level also influence his findings to a considerable degree. This observation applies to those scholars with whom this writer has frequently disagreed in this work, as well as to the writer himself. (An interesting

work which illustrates the influence of the life-experiences, personal convictions, etc., of five eminent Western scholars viz. Goldziher, Becker, Hurgronje, Macdonald and Massignon, on their academic findings in the field of Islamics is J. Waardenburg, L'Islam dans le Miroir de l'Occident, II edition, (Paris, 1962 A.D.). See passim, especially pp. 264-314). On the whole, the Western scholars seem to be possessed of a skepticism which, to this writer, appears to be unwarranted; and it will be no surprise if several of these Western scholars will find this writer's attitude bordering on uncritical credulity. Academic honesty demands that this element of sub-conscious, perhaps super-rational bias be frankly recognized.

This writer can hardly illustrate this better than by citing a personal incident, for the mention of which indulgence is craved. This writer was once reading a section of the Muwatta' of Mâlik with a very learned Western scholar. We read together a tradition which stated that 'Abd Allâh b. 'Umar sold a slave for 800 dirhams with barâ'ah. The buyer later complained that the slave had some defect which Ibn 'Umar had not disclosed and the matter was referred to 'Uthman b. 'Affân. The

plaintiff having made his complaint, Ibn 'Umar pointed out that he had sold the slave with barâ'ah. 'Uthmân asked Ibn 'Umar to state on oath that at the time of the sale he was not aware of any defect in the slave. Ibn 'Umar declined to state that on oath [on account of piety] and the slave was returned to him and the sale cancelled. Subsequently the slave became healthy and was sold for 1500 dirhams. (See Mâlik b. Anas, Muwatta', ed. Fu'âd 'Abd al-Bâqî, 2 vols., (Cairo, 1370/1951 A.D.), vol.II, p. 612, cited hereafter as Muw.). About this tradition, particularly the last part of it, the learned scholar pointed out that he could regard it as nothing else but sheer fabrication on the part of the Muslims of some later period in order to create a halo of piety around the personality of Ibn 'Umar. On the contrary, this writer failed, and still fails to see why it could not be a true story — a man's refusal to drag in God's name for the sake of petty pecuniary gain. What seems to lie at the base of these two different attitudes is not so much a disagreement in the application of the historical method, but perhaps certain pre-suppositions, at the sub-

conscious if not at the conscious level, about human nature and our general estimates of the piety and moral character of the early Muslims.

34. It is not suggested that only à priori arguments have been adduced in favour of this judgment. The à priori judgments seem, however, to have coloured the interpretation of à postriori evidence.

35. See below pp. 39 ff.

36. K. al-Âthâr, ed. with comments by Abû al-Wafâ' al-Afghânî, (Cairo, 1355), cited hereafter as Âthâr A.Y. Reference has been made according to the numbers of the traditions.

37. K. al-Âthâr, (Karachi, circa 1960 A.D.), cited hereafter as Âthâr Sh. Reference has been made according to the numbers of the traditions.

38. Cf. Schacht: "We must regard the alleged opinions and traditions of Ibrâhîm as being fully as fictitious as those of his contemporaries.... Ḥammâd or someone using his name is therefore, mainly responsible for attributing later doctrines to Ibrâhîm". (Origins, p. 236). For our views, see below p. 92 and n. 88.

39. Origins, p. 27. See for instance, Ibn Qutaybah, Ta'wîl Mukhtalif al-Ḥadîth, (Cairo, 1326), passim, see especially pp. 64 f.; al-Khaṭîb al-Baghdâdî,

Ta'rîkh Baghdâd, 14 vols., (Cairo, 1349), see for instance, vol. XIII, p. 386 ff., and often. See also Ibn Khaldûn, op. cit., pp. 444 and 446 f.

CHAPTER I

THE BEGINNING

1. See Qur'ân II, 170; V. 104; VII. 28 and 70; XXI. 53 f.; XXVI. 74 ff.; XLIII. 23.

2. It is true that in the more prosperous commercial cities such as Mecca, the conditions were not altogether primitive and city states of sorts were emerging. Nevertheless, the authority of the tribe had not been substantially weakened to render our statement incorrect.

3. The plural of this word is hakamah. S.v. al-Mu'jam al-Wasît, 2 vols., ed. Ibrâhîm Mustafá, et al, 2 vols., (Cairo, 1380). As for the word hukkâm, (see Qur'ân, II. 188), it is the plural of hâkim, and this latter means the same (certainly at least in the usage of the post-Jâhilî period) as hakam. S.v. the standard Arabic dictionaries such as Lisân al-'Arab, Tâj al-'Urûs, etc.

4. See E. Tyan, Histoire de l'Organisation Judiciaire en pays d'Islam, II edition, (Leiden, 1960 A.D.), pp. 27 ff.; J. Schacht, An Introduction to Islamic Law, (London, 1964 A.D.), pp. 7 f., cited hereafter as Introduction; J. Wellhausen, "Tribal Life during the

Epic Period", Historian's History, vol. VIII, pp. 284 ff.

5. See the Qur'ân VII. 70; XXI. 54 and passim. See also n. 1 above. Significant also is the Quranic term to designate the pre-Islamic past of the Arabs: "jâhilîyah" (Qur'ân V. 50; XXXIII. 33; and XLVIII. 26). This seems to epitomise the Quranic disdain for the time when the "forefathers" of the Arabs did not enjoy the privilege of being directed by heavenly dispensation. For the Quranic attitude to the pre-Islamic past, see the Quranic verse III. 103: "You were on the brink of a pit of fire, then He saved you therefrom".

6. See, for instance, the Qur'ân II. 213; IV 60 f.; V. 47 and 49; and XXIV. 48, and often.

7. See the Qur'ân passim, especially V. 45 ff.

8. With regard to the Qur'ân one can have either of the two following hypotheses: either it is revelation from God to the Prophet, as the Muslims believe; or that the Prophet's claim of its being revelation from God is incorrect. In both the cases our above-mentioned observation is accurate. If it is true that Gabriel revealed it to the Prophet's heart (as the Qur'ân says, vide. II. 97; XXVI. 193 f., etc.), it is obvious that this fact was bound to become the

predominant factor in the shaping of the mental attitude of the Prophet. On the contrary, if one does not accept this and starts with the other hypothesis, the intimacy between the outlook of the Prophet and the Qur'ân will still remain undeniable.

9. See the Qur'ân, passim, especially IV. 65: "But no, by your Lord they do not believe [in reality] until they make you a judge of that which has become a matter of disagreement among them, and then do not find any straitness in their hearts as to what you have decided and submit with entire submission."

10. To cite Gibb: "During its first century the Muslim religious community presents, in general, the features of an ethical society.... Its ethics are... revealed ethics, not the product of rational speculations or of social experience. Their authority and validity are derived from the belief that they conform to the will of an all-controlling personal God, the motive behind them is ideally one of religious devotion, their sanctions are supernatural and eschatological... Viewed in the light of the ultimate principle which regulates human existence, all human institutions take on a new significance. They are not immaterial

to religious life, they either express or do not express the Will of God for men, and they either conduce or do not conduce to a life of true submission to God". (Studies on the Civilization of Islam, ed. S. J. Shaw and W. R. Polk, London, 1962 A.D., p. 197. Cited hereafter as Civilization of Islam.). What is most crucial, it may be pointed out, is not the inherent religious relevance of a question, but the attitude of mind which perceives it to be religiously relevant.

11. Cf. Schacht: "But he [i.e., the Prophet] wielded his almost absolute power not within but without the existing legal system; his authority was not legal but, for the believers, religious and for the lukewarm, political" (Introduction, p. 11). Schacht also observes for a slightly later period: "As had been the case in the time of the Prophet, law as such fell outside the sphere of religion, and as far as there were no religious or moral objections to specific transactions or modes of behaviour, the technical aspects of law were a matter of indifference to the Muslims" (Ibid., p. 19).

12. IV. 10. See also for instance, II. 81. "Yea! whoever earns evil and his sins beset him on every side, these are the inmates of the fire: in it

they shall abide."

13. Coulson, op. cit., p. 12.

14. See, for instance, the doctrine of Ibn Abî Laylá (d. 148) in Tr. I, 3.

Schacht, for instance, remarks: "Generally speaking, Muhammad [sic] had little reason to change the existing customary law. His aim as a Prophet was not to create a new system of law; it was to teach men how to act, what to do, and what to avoid in order to pass the reckoning on the Day of Judgement.... Had religious and ethical standards been comprehensively applied to all aspects of human behaviour, and had they been consistently followed in practice, there would have been no room and no need for a legal system in the narrow meaning of the term. This was in fact the original ideal of Muhammad; traces of it, such as the recurrent insistence on the merits of forgiveness, in a very wide meaning of the word, are found in the Koran [sic] and the abandonment of rights is consequently treated in detail in Islamic Law. But the Prophet eventually had to resign himself to applying religious and ethical principles to legal institutions as he found them. (Introduction, p. 11). (Emphasis is our own). Rahman expresses the view that: "Now,

the overall picture of the Prophet's biography — if we look behind the colouring supplied by the Medieval legal mass — has certainly no tendency to suggest the impression of the Prophet as a _pan-_ legist neatly regulating the fine details of human life from administration to those of ritual purity. The evidence, in fact, strongly suggests that the Prophet was a moral reformer of mankind and that, apart from occasional decisions, which had the character of _ad hoc_ cases, he seldom resorted to general legislation as a means of furthering the general Islamic cause.... For one thing it can be concluded _à priori_ that the Prophet, who was, until his death, engaged in a grim moral and political struggle against the Meccans and the Arabs and in organizing his community-state, could hardly have found time to lay down rules for the _minutiae_ of life." (Fazlur Rahman, _op. cit._, pp. 10 f.) Both the excerpts indicate a certain attitude of mind which is no less significant than the actual opinions. Common to both of these writers is the fact that the Prophet's interest in legal questions was, on the whole, a nominal one. See also Coulson, _op. cit._, pp. 11 ff., and 'Abd al-Qâdir, _op. cit._, pp. 20 f. See also n. 21 below.

15. L. Ostrorog, The Angora Reform, p. 19, cited by S. D. Goitein, "The Birth-Hour of Muslim Law", Muslim World, vol. L, p. 24; Fazlur Rahman, op. cit., p. 10; Coulson, op. cit., p. 12.

16. For the legal aspect of the Qur'ân, see Abû Bakr al-Jaṣṣâṣ, Ahkâm al-Qur'ân, 3 vols., (Cairo, 1347).

17. According to Coulson, (op. cit., p. 12), 600 verses.

18. Ostrorog cited in Goitein, op. cit., p. 12.

19. Goitein, op. cit., p. 24.

20. For this we might borrow Schacht's expression: "applying religious and ethical principles to legal problems and relationships." (Introduction, p. 11).

21. Cf. J.N.D. Anderson's observation: "It is evident that Muḥammad himself made no attempt to work out any comprehensive legal system, a task for which he seems to have been singularly ill-suited; instead, he contented himself with what went little beyond 'ad hoc' amendments to the existing customary law." ("Recent Developments in Sharî'a Law", Muslim World, XL, p. 245); Fazlur Rahman, op. cit., p. 10 and Coulson, op. cit., p. 13.

22. Qur'ân. IV. 7.

23. G. Bergsträsser, Grundzüge des islamischen Rechts, (Berlin, 1935 A.D.), cited in Coulson, op. cit., p. 16 and n. 2. Schacht attributes the same motive to the Quranic attitude to polygamy. (See Introduction, p. 14).

24. For its text, see Ibn Ḥishâm, al-Sîrah, ed. Muḥammad Muḥy al-Dîn 'Abd al-Ḥamîd, 4 vols., (Cairo, 1937 A.D.), vol. II, pp. 119 ff.

25. Goiten, op. cit., p. 25.

26. Ibid., p. 27.

27. Loc. cit. A Muslim, such as the present writer, would be inclined to look at this matter in a different light. The two phases of the Prophet's life — Meccan and Medinan — seem to the Muslims to be the gradual unfolding of a Divine plan, a plan according to which the stress on dogmatic and ethical aspects preceded the expounding of legal prescriptions. This generally appears to the Muslims to be unrelated to fortuitous circumstances. It seems to follow a wise scheme in which first things come first. See, for instance, Faruki, op. cit., pp. 20 ff.

28. Goiten, op. cit., p. 29.

29. See immediately below.

30. See below pp. 39 ff.

31. Cf. Introduction, p. 12. This writer takes a different view. See also Quranic injunctions relating to sarqah, (V. 38 and LX. 12) and qadhaf, (XXIV. 4 f.), etc. The same is true of several other Quranic injunctions, for example, those relating to family law and inheritance (see especially IV. 7, and 11-13); regarding the procedure of li'ân (XXIV. 6-9), and regarding the distribution of booty (LIX. 6-7), etc.

32. For further discussion, see below pp. 39 ff.

33. It is not suggested by this that there existed from the earliest period of Islâm a consistent and sharp distinction between the judicial and executive functions. (See below pp. 49 f.). Nor is it suggested that the transition took place overnight. (See below pp. 48 f.).

34. Cf. Tyan, op. cit., pp. 61 ff.; Schacht, Introduction, pp. 24 ff.; and Origins, p. 190.

35. Qur'ân. V. 44 ff.

36. II. 188.

37. That the dispenser of justice continued to be called hakam, or hâkim and its derivatives continued to be used for dispensation of justice, is plausible. Nevertheless, the nature of the function of the hakam gradually changed, beginning with the modifications

introduced by the Prophet. It is also possible that during the first century of Islâm the terms qâḍî and ḥakam (and ḥâkim?) were used interchangeably. This does not detract from the fact that the institution itself had substantially changed. See below pp. 46 ff.

38. See Tyan, op. cit., pp. 67 ff. and 83 ff. In this he has been followed by Schacht who, in fact, has taken over the entire thesis of Tyan as an historically established fact. See Introduction, pp. 24 ff.; "Pre-Islamic Background", Law in the Middle East, pp. 29 ff.

As for our conclusion, it is supported, inter alia, by "Constitution of Medina" (mentioned in Ibn Hishâm, op. cit., vol. II, pp. 119 ff.), which outlines the administrative structure of Medina under the Prophet. See paragraphs 23 and 42 of the said constitution (according to the paragraphing of M. Watt, Muhammad at Medina, (Oxford, 1956 A.D.), pp. 223 ff.

39. Tyan, op. cit., pp. 27 ff.

40. Ibid., p. 64.

41. Ibid., pp. 64 f. In the case of the last-mentioned verse, the actual words of the Qur'ân are: "Wa li kulli ummatin rasûl fa idhâ jâ'a rasûluhum

qudiya baynahum bi al-qist wa hum la yuzlamûn. (And for every nation there is an apostle. When their apostle comes, the matter will be decided between them with justice and they shall not be dealt with unjustly).

42. Ibid., p. 65.

43. Ibid., p. 69.

44. Ibid., p. 70.

45. Rather than by a court of law!

46. Ibid., p. 73.

47. Ibid., p. 77.

48. Loc. cit.

49. Ibid., pp. 78 ff. See below nn. 64 ff.

50. For the latter part of the statement, see the Qur'ân XXXIII. 21.

51. This should also be read in conjunction with the denunciation of the pre-Islamic taḥkîm (Qur'ân V. 50, etc.) and with the insistence of the Qur'ân that disputes should be referred to the Prophet alone (Qur'ân IV. 65). As for the Prophet's discretion to decline judgment of disputes (Qur'ân V. 42), referred to by Tyan (op. cit., p. 65), the reason is not what Tyan suggests, viz., the arbitral jurisdiction of the Prophet. It has rather been hinted in the following Quranic verse: "How come

they unto thee for judgment when they have Torah, wherein Allâh hath delivered judgment [for them]? Yet even after that they turn away. Such folk are not believers" (V. 43).

52. Tyan, op. cit., p. 64.

53. See above pp. 41 f.

54. See above p. 44.

55. Indeed, it continues to function even to-day and in the most primitive as well as the most advanced societies.

56. This, however, was not the case in the question under discussion. For, as we have pointed out above, arbitration does not necessarily exclude the existence of a publicly administered system of justice. It can also supplement that system.

57. See below p. 50, nn. 61 f.

58. Tyan, op. cit., pp. 69 f.

59. Another tradition, however, places the total period of his judgeship at 60 years. Wakî', Akhbâr al-Qudâh, 3 vols., ed. 'Abd al-'Azîz Mustafá' al-Marâghî, (Cairo, 1366), vol. II, p. 200. Moreover, according to Schacht the death of Shurayḥ occured sometimes between 76 and 99, though Schacht inclines to the view that he died sometime before 80 (Origins, p. 229). (According to a tradition cited by Wakî',

op. cit., vol. II, p. 199, he died in the year 86). The argument of Tyan consists of showing the legendary character of Shurayḥ, inter alia, on the ground that Kufa was founded between 17 and 19, and Shurayḥ died circa 80 (which makes it impossible that he should have served as a judge for sixty-five years). See Tyan, op. cit., p. 75.

60. See Ibid., pp. 77 f.

61. Cf. Wakî', op. cit., vol. I, pp. 280 f. "Abû Mûsá was the amîr and the qâḍî till 'Uthmân removed him towards the end of 28 or in 29."

62. The office of judge was combined sometimes with that of police, sometime with public exchequer and quite often with that of qassâs. See Kindî, K. al-Wulâh wa K. al-Quḍâh fî Miṣr, ed., R. Guest, (Beirut, 1908 A.D.), pp. 303, 311, 317 and 348.

63. Tyan, op. cit., pp. 78 f.

64. K. al-Kharâj, (Cairo, 1352), p. 117. (Cited hereafter as Kharâj). According to Ḥamidullah, however, the earliest work in which excerpts of this instruction are found is the Jâmi' of Ma'mar b. Râshîd (d. 132). One manuscript of this work is found in Istanbul and another in Ankara.

65. See K. al-Ḥujaj, (Lucknow, 1888 A.D.). The sentence mentioned has relevance to legal theory. This

epistle has also beenmmentioned by Sarakhsî in his Mabsût, 30 vols., (Cairo, 1324-31), see vol. XVI, pp. 60 ff., as having been taken from Shaybânî. The fragments of Shaybânî's K. al-Aṣl (found in the form of manuscript in Egypt and Turkey), also contain excerpts from the epistle of 'Umar in the chapters on Sulh and Da'âwî. For the citation of a sentence of this letter, without any mention of the name of Ash'arî, see Muw., p. 720.

66. The information about the manuscripts of Jâmi' of Ma'mar and about Aṣl of Shaybânî is based on a letter of M. Hamidullah to this writer. Hamidullah claims that he has been able to locate the complete text of this letter in twenty seven works, and excerpts in the works of five authors of the early period. For a fuller discussion, see al-Nu'mân b. al-Firâq, Ta'rîkh al-Basrah, ed. Hamidullah, under print in Kuwait.

67. See the classical works on Usûl al-Fiqh, e.g., Sa'd al-Din Taftâzânî, al-Talwîh 'alá al-Tawdîh, (Cairo, n.d.), 2 vols., see vol. I, p. 26.

68. Schacht, Intorduction, pp. 17 f. Cf. Coulson: ". . . there was no suggestion at this stage, that the Prophet was any other but a human interpreter of the divine revelation; his authority lay in the

fact that he was closest, in time and spirit, to the Qur'ân and as such was the ultimate starting-point of the sunna" (op. cit., p. 43).

69. Cf. Fazlur Rahman, op. cit., p. 9. See also n. 75 below.

70. See ibid., p. 11. This underlies much of what Schacht says in his works passim.

71. See above, pp. 33 f. and n. 23.

72. Schacht, Introduction, p. 6.

73. This conclusion which, in this writer's view, is of very considerable significance, is based on a general survey of the subjects dealt with in the traditions found in the earliest extant works, viz., the works of Abû Yûsuf, Shaybânî and Mâlik, etc., in comparison with Quranic legal provisions. Cf. Coulson, op. cit., p. 22: "Suffice it to say here that Muhammad must have been faced during his rule at Medina with a variety of legal problems, particularly those which, as we have noted, arose out of the terms of the Qur'ân itself." See also ibid., pp. 64 ff.

74. The lack of exhaustive records of the sayings and doings of the Prophet, as contrasted with the case of the Qur'ân has been a standing argument against their untrustworthiness. See, for instance, D.S.

Margoliouth, The Early Development of Mohammedanism, (London, 1914 A.D.), pp. 79 f. Cited hereafter as Early Development.

75. Cf. the remarks of Fazlur Rahman: "That the Hadîth from the Prophet must have existed from the every beginning of Islam is a fact which may not reasonably be doubted. Indeed, during the lifetime of the Prophet, it was perfectly natural for the Muslims to talk about what the Prophet did or said, especially in a public capacity. The Arabs, who memorized and handed down poetry of their poets, sayings of their soothsayers and statements of their judges and tribal leaders, cannot be expected to fail to notice and narrate the deeds and sayings of the one whom they acknowledged as the Prophet of God. Rejection of this penomenon is tantamount to a great irrationality, a sin against history. Their new Sunnah — the Sunnah of the Prophet — was much too important (an importance so emphatically enshrined in the Qur'ân itself) to be either ignored or neglected...." (Fazlur Rahman, op. cit., pp. 31 f.). Cf. also the remarks of C.S. Hurgronje: "Violent disputes arose in the Muslim state concerning all kinds of measures.... The decisive argument in their disputes consisted from the beginning in

proving that the Prophet had acted or decided in a certain way; Muhammad's competence as a law-giver had not yet been established as an explicit doctrine, but the whole of the community took it for granted that whoever could quote a precedent of the Prophet was right. If this attitude was already an axiomatic truth when Muhammad was still alive, it is easy to understand that after his death it was less than ever likely to be called into doubt; it is not strange, indeed, that after his lips were foreever closed, more and more weight came to be given to his utterances." (Selected Works, ed. and tr. in English and French by J. Schacht and G.H. Bousquet, Leiden, 1957 A.D.), p. 270.

76. "The Earliest Biographies of the Prophet and their Authors", Islamic Culture, vol. I, pp. 536 ff.

77. See H.A.R. Gibb, Civilization of Islam, pp. 109 ff.

78. See his Introduction to Sahifah Hammam ibn Munabbih [sic] ed., M. Hamidullah, with English translation M. Rahimuddin, V edition, (Hyderabad, 1961 A.D.), pp. 43 ff. Cited hereafter as Sahifah of Hammam ibn Munabbih.

79. See, for instance, reference to the Sahîfah of 'Abd Allâh b. 'Amr b. al-'Âṣ, Ibn Sa'd, al-Ṭabaqât

al-Kubrá, 8 vols., (Beirut, 1380), see vol. IV, p. 262. For the early collection of traditions, see Hadîth Literature, op. cit., pp. 22 ff. Cf. Muh. St., vol. II, pp. 195 and 231 f.

80. After pointing out that 'Urwah used to state his sources, he writes: "Isnâd in its primitive form was then somewhere about the year 75 A.H. already established" (Horovitz, op. cit., p. 550). Cf. Islamic Methodology, p. 72 and n. 60.

81. "Treatise of Baṣrî", ed. Ritter, Der Islam, vol. XXI, (1933 A.D.), p. 67, cited hereafter as "Treatise of Baṣrî".

82. It is strange, indeed, that notwithstanding these evidences Schacht should have come to the conclusion that isnâd originated sometime early in the second century (Origins, pp. 36 f.). Stranger still is his interpretation of the traditions which refer to the fitnah as the starting-point of isnâd. Basing himself on Awzâ'î''s reference to the fitnah following the assassination of Walîd b. Yazid in the year 126 (Tr. IX, 3), Schacht argues that even though the statement is correct as to the time for the origin of isnâd (i.e., circa 126), the tradition itself is spurious, for its transmitter, Ibn Sîrîn had dies in 110 A.H. several years before the fitnah

(Origins, pp. 36 ff.). This is a colossal error. 'Fitnah' is a generic term which signifies civil war. It is because of this that Awzâ'î used this term with reference to the civil war which Awzâ'î had himself witnessed and which had had grave consequences. In early (as well as later) Islamic literature, however, fitnah usually denotes the civil war which roughly covers the five years following the assassination of the third Caliph 'Uthmân. A tradition in Hujaj (p. 139) with the isnâd Mâlik - Nâfi' mentions that Ibn 'Umar (d. 73) performed pilgrimage during the fitnah. Now, if Mâlik had in mind the fitnah of 126, he would obviously not have used the term for here the span of time between the death of the person referred to and the fitnah of 126 is no less than fifty-three years. The only fitnah that he could, therefore, have referred to would have been either the one following the assassination of 'Uthmân (circa 36) or that following the assassination of Ibn al-Zubayr (circa 73). For the use of the term fitnah, see:

(i) Abû Hanîfah al-Dînawarî (d. 282), al-Akhbâr al-Tiwâl (Cairo, 1960 A.D.), pp. 145, 158.

(ii) Bukhârî refers to three fitnahs, the first was that following the assassination of 'Uthmân,

the second that of 'Abd Allâh b. al-Zubayr. As for the third one, he mentions no particular event (see the section on Maghâzî). Bukhârî also refers to the 'umrah of Ibn 'Umar during the time of fitnah (see Section on Muḥassar). In the Book of Fitnah, too, there is reference to fitnah in a tradition which mentions Zayd b. Thâbit and 'Alî. Obviously enough, here nothing could have been meant except the fitnah which followed the assassination of 'Uthmân.

(iii) Ibn Mâjah, see the Book of Janâ'iz refers to the same.

(iv) In the Musnad of Aḥmad b. Ḥanbal this very fitnah is referred to (vol. I, p. 185), along with the fitnah of Ibn al-Zubayr (vol. I, p. 320; vol. II, p. 63).

(v) Wakî', op. cit., vol. I, p. 121; vol. II, p. 218, p. 397 and often.

(vi) Ibn Sa'd, op. cit., vol. VI, pp. 140 and 141.

Our own conclusion is that the isnâd had originated around the year 50, but it was not considered essential and was therefore not used very consistently. See also above p. 60 and nn. 80 f.

83. See Origins, passim, see, especially, pp. 141 ff.

84. Cf. Muh. St., vol. II, pp. 204 f.

85. Hamidullah, Sahifah, op. cit., (Introduction), p. 4, citing Balâdhurî, Futûh al-Buldân, Leiden edition, pp. 471 f. See also Ṣiddîqî, Hadîth Literature, op. cit., p. 41.

86. Loc. cit. See also Sahifah of Hammam ibn Munabbih, op. cit., p. 4 and nn. 2 and 3.

87. Among other factors, it may be noted that the first paper factory was established in Iraq in 178 (Civilization of Islam, p. 115). This would give some idea as to the material hindrances in the spread of information. The composition of written works began after the lapse of a considerable period of time after the death of the Prophet, and of the earliest composed works only a few are extant. "The [full-fledged] literary period of Islamic law, according to Schacht, began around the year 150." (Law in the Middle East, p. 50). For the earliest period of the composition of books, see also Early Development, pp. 39 f.

88 & 89. For a fuller discussion of this, see below pp. 234 ff.

90. For his use of this argument, see Origins, passim, especially, pp. 141 ff.

91. The following incidents of as late as the time

of Shâfi'î give some idea of the difficulties that would have been encountered by the earlier generations:

(1) In order to find out the true amount of jizyah exacted from the Jews and Christians in Yemen under the Prophet's regulation, Shâfi'î travelled over the whole of that country and asked for information in every province. (K. al-Umm, 7 vols., Bulaq, 1321-5, vol. IV, p. 101. Cited hereafter as Umm).

(2) In order to discover the true theory of waqf, he consulted many descendants of the Anṣâr and the Muhâjirs. (Ibid., vol. III, p. 276).

(3) He consulted more than one member of the family of 'Umar and of the family of 'Alî about so and so. (Ibid., p. 281).

92. Cf. Coulson's moderating considerations regarding sweeping about this line of argument, op. cit., pp. 64 ff.

93. Law in the Middle East, p. 46; Introduction, p. 34.

94. Coulson, op. cit., pp. 64 f. This less skeptical approach to the corpus of traditions, as a whole, does not mean denial of the need for a critical study of the traditions, and judging each on the basis of its merit. Although it is difficult to

elaborate here the criteria that should guide such a critical study, it should be pointed out that while isnâd is important, yet it is not enough. Perhaps a little more use should be made of the canons of internal criticism which are known to the Muslim scholars as dirâyah and which have also been developed during the last few centuries by the science of history. Cf. the attempt made by F. Rahman, op. cit., pp. 27 ff., to suggest and apply some such criteria. His attitude, however, appears to the present writer as leaning towards skepticism to an unwarranted extent.

1. See above pp. 27 ff.

2. See immediately below and pp. 68 f.

3. Loc. cit.

4. Traditions on this question are found in almost all the standard works of Ḥadîth. For a collection of these traditions see al-Shawkânî, Nayl al-Awṭâr, 8 vols., (Bulaq, 1297), see vol. V, pp. 337 ff.

5. Personally, this writer believes that Abû Bakr's attribution of the ruling in question to the Prophet was genuine. There seems to be no ground to suppose that he would have forged a saying of the Prophet which was detrimental to the material interests of his own daughter, 'Â'ishah. This is apart from the fact that fabrication of this kind hardly coheres with the historical picture that we have of his personality.

6. For Shî'î criticism of Abû Bakr's ruling (as being opposed to the Qur'ân, etc.), see Ibn Kathîr, al-Bidâyah wa al-Nihâyah, 14 vols., (Cairo, 1351-58), vol. V., pp. 290 f. Cf. the noted Shî'î muffasir Ṭabrasî's remarks, Majma' al-Bayân fî Tafsîr al-Qur'ân, 30 vols., (Beirut, 1955-56 A.D.), see vol. XXI., p. 31.

7. For the account of the problem given by the historians, see al-Balâdhurî, Futûḥ al-Buldân, (Beirut, 1957 A.D.), pp. 41 ff., cited hereafter as Futûḥ al-Buldân; al-Ya'qûbî, Ta'rîkh, 2 vols., (Beirut, 1379), vol. II, pp. 12 f.; al-Ṭabarî, Ta'rîkh al-Umam wa al-Mulûk,, 8 vols., (Cairo, 1358), vol. II, p. 448; Ibn al-Athîr, al-Kâmil fî al-Ta'rîkh, 9 vols., (Cairo, 1349), vol. II, p. 152; Ibn Kathîr, op. cit., vol. V, pp. 282 f., al-Dhahabî, Siyar A'lâm al-Nubalâ', 5 vols., (Cairo, 1367), vol. II, p. 89; idem., Ta'rîkh al-Islâm, ed. Salâḥ al-Dîn al-Munajjad, et al., 3 vols., (Cairo, 1962 A.D.), see vol. I, pp. 346 ff.; and al-Mas'ûdî, al-Tanbîh wa al-Ishrâf, ed. 'Abd Allâh Ismâ'îl al-Ṣâwî, (Cairo, 1938 A.D.), p. 350. For traditions, see Shawkânî, loc. cit.

8. For these events, see Ya'qûbî, op. cit., vol. II, pp. 127 ff.; Ibn Sa'd, op. cit., vol. IV, pp. 65 ff.; Futûḥ al-Buldân, pp. 131 ff.; Dhahabî, Ta'rîkh al-Islâm, op. cit., vol. I, pp. 344 ff. See also Kharâj, p. 80, where Abû Bakr is reported to have said: "If they declined [to pay even] a rope which they paid to the Prophet, I will strive against them".

9. See above pp. 27 f.

10. See Ibn al-Nadim, al-Fihrist, (Cairo, al-Maktabah al-Tijârîyah, n.d.), pp. 42 ff.

11. See above pp. 58 f.

12. See above pp. 59 f.

13. In the early period, mosque was the main centre of intellectual activity, including doctrinal discussion. See art. "Masdjid", in E.I., vol. III, pp. 315 ff., especially pp. 350 f. For the discussion on dogmatic questions, see, for instance "The Treatise of Baṣrî", op. cit., passim. The dominant interest of the Muslims at this period, however, lay in matters which are part of Fiqh. (See Civilization of Islam, pp. 197 f.).

14. For this, see above pp. 39 ff.

15. See below pp. 76 ff.

16. One of the tasks which engaged the attention of the Muslims in the early period was, therefore, to collect, all available authoritative traditions. See also n. 12 above.

17. Qur'ân II, 222.

18. Âthâr A.Y., 175 f.; Âthâr Sh., 47 f.

19. Ibid., 522.

20. Âthâr Sh., loc. cit. Here the parallel seems to have been drawn from the doctrine of mahr mithl.

See also Tr. I, 214.

21. See Âthâr A.Y., 122 ff.

22. Âthâr A.Y., 363; Âthâr Sh., 177 ff.

23. We are proceeding on the assumption that the Âthâr of Abû Yûsuf and that of Shaybânî contain, on the whole, authentic information regarding the doctrines of Ibrâhîm. See below p. 92 and n. 88.

24. Qur'ân IV. 23.

25. Muw. Sh., p. 242; Âthâr Sh., 442 ff. Cf. Wakî', op. cit., vol. II, p. 403.

26. Ibid., vol. III, p. 20; Âthâr A. Y., 584.

27. Âthâr Sh., 426.

28. Ibid., 425; Tr. I, 217 f.

29. II. 230 ff., 236 f.; LXV 1 f., 6 f., etc.

30. Âthâr Sh., 472 f.

31. Ibid., 501, 509, 516 ff.; Âthâr A.Y., 632, 634. For doctrines on divorce coming down from the first century, see Tr. II, 10(e), (g), (h) and (j).

32. Tr. II, 12(a).

33. Âthâr A.Y., 871.

34. Tr. II, 11(b); Wakî', op. cit., vol. II, p. 230

35. On qisâs, see Qur'ân II, 178; V. 45

36. Âthâr Sh., 580. Cf. Tr. I, 171 and Tr. VIII, 1.

37. Wakî', op. cit., vol. III, pp. 8 f.

38. For these, see the earliest works of fiqh-âthâr, especially Âthâr A.Y. and Âthâr Sh., passim. See also Tr. II:

39. See above, pp. 29 ff.

40. See above, pp. 35 ff.

41. II, 241.

42. Wakî', op. cit., vol. II, p. 266.

43. Kindî, op. cit., p. 344. It is interesting to note that the same judge took a purely legal view of this deviation from piety in respect of another question. He regards such a person as having lost the requisite moral qualification for evidence.

44. See ibid., p. 357. Cf. ibid., p. 350. On this see also Wakî', op. cit., vol. II, pp. 287, 327, 343 and often. Cf. Muw. Sh., p. 262.

45. Ibid., Wakî', op. cit., See also Kindî, op. cit., vol. II, pp. 384 f., 395; vol. III, p. 32. This question rested on the interpretation of the Quranic verse XXIV, 4.

46. For these non-Quranic sources, see below, pp. 193 ff.

47. See Qur'ân II. 106. For a variant view, see Ahmad Hasan, "The Theory of Naskh", Islamic Studies,

vol. IV, pp. 181-200.

48. See Tr. II, 10(b), a tradition from ʿAlî supporting the view that the pregnant widow's period of waiting ended either with the completion of four months and ten days or with the delivery of the child depending on whichever occurs later. For other traditions on the subject see Âthâr A.Y., 650, 656, 670, Muw. Sh., p. 258.

48(a). See above p. 75.

49. Qur'ân XXIV. 4 f.

50. See also p. 78 above and n. 44.

51. See A. Jaffery, Materials for the History of the Text of the Qur'ân, (Leiden, 1936 A.D.), pp. 36, 126, 197.

52. Âthâr A.Y., 698; Âthâr Sh., 428. See also n. 46 above.

53. See above, p. 60, nn. 80 ff.

54. Even though this situation subsequently continued to improve it persisted till as late as the second half of the second century which is evidenced in Trs. I, II, III and IX, etc.

55. See the remark of Ibn al-Qayyim, (op. cit., vol. I, pp. 64 ff.) about the use of ra'y by the earlier generations. See also Muḥammad Abû Zahrah, Abû Ḥanîfah, (Cairo, 1966), pp. 102 f

56. See below Chapter V, passim.

57. We are not necessarily suggesting that the word futyâ was used at the period under discussion, though it might well have been in use. (See, e.g., Wakî', op. cit., vol. II, p. 251 and often). There can be no doubt, however, that the institution of futyâ did exist during the first century.

58. See above, pp. 69 ff.

59. That is, a systematized body of knowledge dealing with the "practical shar'î ordinances derived from their detailed evidences". S.v. Al-Sharîf al-Jurjânî, al-Ta'rîfât, (Cairo, 1983 A.D.).

60. See below, pp. 179 ff.

61. Cf. Origins, p. 214.

62. Cf. Schacht remarks: "... this common body of doctrine is, generally speaking, not the result of a converging development from original diversity towards later unity, but that the common ancient doctrine came at the beginning and was subsequently diversified in the several schools". (Origins, p. 214). Schacht would, in all probability, disagree from our opinion expressed above insofar as he would date the "beginning" to be

much later than we have done, for this "beginning" in his view, was the result of scrutinizing the practices of the Umayyad period. (See Origins, p. 190). To cite from Schacht again: "The existence of a common body of ancient doctrine...does not imply that Muhammadan jurisprudence was cultivated exclusively in one place, but that one place was the intellectual centre of the first theorizing and systematizing activities which were to transform Umayyad [sic] popular and administrative practice into Muhammadan law. The ascendency of a single centre of Muhammadan jurisprudence must have been maintained for an appreciable period, because we find that the common ancient element sometimes comprises several successive stages of legal doctrine." (Origins, pp. 222 f.). In his view, this centre was Iraq and not Medina (loc. cit.).

This view of the "Origins" of Islamic jurisprudence does not seem to be unjustified for if the last decades of the first century were to be regarded as the earliest period of Muhammadan jurisprudence, this would mean a too rapid development of legal doctrines after the year 100 A.H. If that is so, would it be justifiable to hold the view that..." the ascendancy of a single centre

must have been maintained for an appreciable period ....?" Indeed the only historically justifiable pre-supposition is that from the earliest times of Islâm there has existed a common element which became diversified owing to the attempt to define and elaborate it-owing to the existence of a common source of positive doctrines from the very beginning. Moreover, the phenomenon that the Fiqh was more highly developed in Iraq in the second century than it was in Hijaz, does not prove that Iraq was the original home of Fiqh and that Iraq retained its ascendancy for a considerable period of time. The common element in the legal doctrines of all schools of the early period which Schacht perceives, owes itself, as we have pointed out, to a common source of inspiration. As for derivation and elaboration of positive doctrines, they were carried on simultaneously at various places, but proceeded in Iraq on a faster pace, as we shall see.

63. See above, pp. 76 ff.

64. See above, pp. 82 ff.

65. Tr. II, 18 (a).

66. Ibid., 18 (k).

67. Ibid., 19 (h) and (j).

68. Ibid., 11 (a).

69. Ibid., 11 (c).

70. Ibid., 12 (j).

71. There is some error of printing, but the doctrine undoubtedly is as we have stated. Cf. Âthâr Sh., 418.

72. Tr. II, 10 (h).

73. Ibid., 10 (e) Cf. Muw. Sh., pp. 226 f.

74. Ibid., 10 (g). The above examples are all taken from Tr. II, which records traditions from 'Alî and Ibn Mas'ûd. This writer seriously doubts the authenticity of the attribution of several of these traditions to these two Companions. These have been mentioned by Shâfi'î in order to show the extent of the deviation of the Iraqians from the doctrines of their two avowed authorities among the Companions, a fact which seems to have led to a considerable relaxation of Shâfi'î's standards of criticism in respect of traditions. Nevertheless, these doctrines seem to belong to the period around the middle of the first century.

75. Kindî, op. cit., p. 345. The technical irregularity of this judgment at a late stage, second half of the first century, is a pointer to the state of affairs in the first half of that century. For an even more accurate and direct evidence, see

Tr. II, passim.

76. Ibid., p. 318.

77. Ibid., pp. 344 f. See also p. 346. Cf. on the question of evidence Wakî', op. cit., vol. II, pp. 194 f, 195 f, 200 ff., 252, 273 and 308.

78. Kindî, op. cit., pp. 317 f. The examples given here are those of judges. Somewhat less irregular than these, and yet far from the standards of technical soundness of later juristic schools, were the decisions of the legal specialists of the early period. This would become evident by comparing the doctrines of Shurayḥ, a judge (as embodied in Wakî', op. cit., vols. II and III), and those of Ibrâhîm (as embodied in Âthâr A.Y. and Âthâr Sh.).

79. The representatives of the class referred to above were, for instance, the so-called "seven jurists of Medina", the Meccan jurist, 'Aṭâ' b. Abî Rabâḥ (d. 113). In Kufa, there were 'Alqamah (d. 66), Masrûq (d. 63) and Sa'îd b. Jubayr (d. 95). A fairly important early second century judge-cum-jurist was Sha'bî (d. 114). The most prominent and competent of them all, however, seems to be Ibrâhîm al-Nakha'î (d. 95 or 96).

It may be noted in passing, in respect of the Medinese school, that it would have taken a consi-

derable period of time before the "the seven jurists of Medina" would have been able to establish their reputation. That there should have been disagreements as to who did and who did not belong to this group, seems to be natural and can hardly be adduced as a serious argument against the fact that a class of specialists in law had come into being. The fact that the second century sources mention this group, the members of which generally died towards the end of the first century, makes a strong case in favour of considering that there was a core of truth behind this semi-legendary reputation. Cf. the views of Schacht, Origins, pp. 243 ff.

80. Ibid., pp. 8 f.

81. For biographical as well as bibliographical information about Awzâ'î (d. 157), s.v., E.I. His doctrines are mentioned in Tr. IX, and Ṭabarî, Ikhtilâf al-Fuqahâ', ed. J. Schacht, (Leiden, 1933 A.D.), and ed. Kern, (Cairo, 1902 A.D.).

82. For Iraq, s.v. "al-'Irâḳ", E.I., vol. II, pp. 513 ff., "Kûfa", ibid., vol. II, pp. 1105 ff., "Baṣra", ibid., vol. I, pp. 1085 f., See also, Futûḥ al-Buldân, pp. 387 ff., 414 ff., 483 ff.; Yâqût al-Ḥamawî, Mu'jam al-Buldân, 5 vols., (Beirut, 1374-76), see vol. IV, pp. 491-94. S.v., Basra and

Iraq). Fajr al-Islâm, pp. 182 ff.; Duḥá al-Islâm, vols., I and II, passim. Fu'âd Ḥannâ Ṭarazî, Muslim b. Walîd, (Beirut, 1961 A.D.), pp. 19 ff. The following paragraphs are broadly based on the information contained in the above mentioned sources.

83. For the role of the non-Arab Muslims, see Fajr al-Islâm, pp. 84 ff. and pp. 152 ff.; idem., Duḥá al-Islâm, IV edition, 3 vols., (Cairo, 1365), vol. I, pp. 5 ff. See especially his views on the impact of intermixture of races and peoples, ibid., pp. 9 ff.

84. For a cursory acquaintance with the contribution of non-Arab Muslims to Fiqh, see Fajr al-Islâm, pp. 153 ff., see especially (pp. 154 f.) the citation from al-'Iqd al-Farîd. For a glance at the contribution of non-Arab Muslims to the purely "Arabic sciences", see Duḥá al-Islâm, vol. II, pp. 243-318, passim. For the contribution of the Iraqians in this connection, see ibid., pp. 283 ff. See also Ibn al-Nadîm, op. cit., pp. 65 ff. and pp. 95 ff.

85. See Tr. IX, passim.

86. See below, pp. 114 ff.

87. See above, pp. 88 f. and n. 79.

88. Cf. Origins, pp. 233 ff. and 105 and n. 1. See below, n. 91.

89. For these, see Âthâr Sh., passim, especially, 2, 14, 19, 22, 23, 52, 66 ff., 115, 121 ff., 155 f., 177 f., 206 f., 220, 396, 442, 575 f., 708 f., 719 f., 722, 757, 777, 791.

90. Cf. Origins, pp. 234 f.

91. Schacht's view, to reproduce it in his own words, is the following: "Judging from Âthâr A.Y. and Âthâr Shaib., which are the main sources for Ibrâhîm's doctrine it appears that opinions of, and traditions transmitted by Ibrâhîm occur only in the legal chapters proper, much less in those concerning ritual, and hardly at all in those devoted to purely religious, ethical, and edifying matters. On the other hand, there are very few references to Ibrâhîm in Tr. I which treats of rather technical details of law on which Abû Ḥanîfa and Ibn Abî Laylá disagree. These technical legal questions, therefore, were in any case elaborated only after the time of "Ibrâhîm" or whosoever may be responsible for the opinions contained in Âthâr A.Y. and Âthâr Shaib." (Origins, p. 234). The fact that Ibrâhîm's name was mentioned neither in connection with purely religious, ethical and edifying matters, nor in connection with the technical details of law, but to legal questions proper

(albeit of a less technical nature), is presumably an evidence in favour of the authenticity of the doctrines ascribed to Ibrâhîm in the Âthârs. For, it seems plausible and natural that doctrines pertaining to purely religious and ethical matters should have received prior attention and should have been discussed before discussing purely legal questions, and that the discussion of these latter would have taken place prior to the discussion of technical legal details. Furthermore, the consideration of elaborate technical legal questions by Abû Ḥanîfah and Ibn Abî Laylá, which took place at the latest in the second quarter of the second century, pre-supposes several decades of discussion of what may be termed as non-technical, or less technical legal questions. Is it reasonable to suppose, then, that someone would have formulated doctrines around the year 120 (which underlies Schacht's conclusion that the opinions attributed to Ibrâhîm date, in fact, only from the time of Ḥammâd, ibid., p. 234, n. 5), and that within three decades after that all this wealth of doctrines on technical details of law which are embodied in Tr. I came into existence? Does this not postulate an unreasonable leap instead of natural growth and

development?

Another line of argument adopted by Schacht against the authenticity of the doctrines attributed to Ibrâhîm is that "the opinions attributed to him express secondary stages in the development of the Iraqian doctrines..." etc., (ibid., p. 235), and are, therefore, spurious. He illustrates this by pointing out that: "The technical legal thought, for instance, which underlies the doctrine attributed to Ibrâhîm in Tr. I, 140, and which is explicitly ascribed to him in the parallel passages in Âthâr A.Y. and Âthâr Shaib., is so incisive and abstract that the historical Ibrâhîm cannot possibly be credited with it. It must belong either to Ḥammâd himself, who comes in the isnâd between Abû Ḥanîfah and Ibrâhîm Nakha'î, or to his period. Further, Ibrâhîm's alleged statement on the three degrees of intention in unlawful homicide is technically so well reasoned that it is not feasible in the time of Ibrâhîm, and again it must belong either to Ḥammâd himself or to the period of Ḥammâd." (Origins, p. 235). It would perhaps suffice to point out, in order to show the utter weakness of this line of reasoning, that Ibrâhîm died in the year 95 and Ḥammâd in 120, which means that the intervening period between the two

does not exceed 25 years. A legal doctrine of which Schacht is sure that it dates from the time of Ḥammâd (i.e., at the latest 120), can it be rejected à priori as impossible for the year 95?

92. The other possible reason for this attribution, from Schacht's point of view, could be what he terms as "a literary convention which found particular favour in Iraq and by which a legal scholar or author put his own doctrine or work under the aegis of his master. Shaybânî, for instance, refers at the beginning of every chapter of his Jâmi' al-Saghîr and at the beginning of Kitâb al-Makhârij fil-Hiyal [sic] to the final authority of Abû Ḥanîfa, as transmitted to him through Abû Yûsuf; this does not mean that the books in question were in any way based on works or lectures of Abû Ḥanîfa and Abû Yûsuf but implies only the general relationship of pupil to master. We must take the standing reference of Ḥammâd to Ibrâhîm as meaning the same." (Origins, p. 238). Schacht refers for evidence in support of this conclusion to ibid., pp. 156 f. and 165, (for which, see our views below, pp. 234 ff.), and to Shaybânî, Makhârij fî al-Hiyal., ed. J. Schacht, (Leipzig, 1930 A.D.), "Introduction", p. 66, (which is inconclusive). See also Origins, p. 238 n. 5. and n. 89 above.

93. For "traditionalism", see Max Weber, From Max Weber: Essays in Sociology, ed. Tr. H. Gerth and C. Mills., (New York, Oxford Books, 1958 A.D.), pp. 296 ff.

94. See above, pp. 27 ff., and 67 ff.,

95. The very use of the term Companions which seems to be very early illustrates this attitude. At the same time it also hints at the rationale of this idealization - their association with the Prophet. Its use in the correspondence between ʿAbd al-Malik and Ḥasan al-Baṣrî suggests a fairly early use of the term. See "Treatise of Baṣrî," op. cit., passim.

96. Ibid., p. 67. Emphases are our own.

97. Ibid., p. 68. This sentence reveals not only that the early times had been idealized, but also brings to light the reason adduced for this idealisation. The idea seems to have been that being nearer to the Prophet in point of time, the earlier generations followed the "Sunnah of the Prophet" and were, in general better qualified to appreciate the implications of the "teachings of the Prophet".

98. Loc. cit. The note, which according to H. Ritter, was the forwarding remark of al-Ḥajjâj, repeats the expressions of Ḥasan (Ibid., p. 80).

99. See below pp. 111 ff.

100. See below p. 112 and chapter V, passim.

101. One of the reasons was that communication of doctrines between the various centres of juristic thought was not as regular and thorough as it became later. In this work we have used the recent Cairo edition of the work, ed. Aḥmad Muḥammad Shâkir, (Cairo, 1358).

102. See the two works passim.

103. Âthâr A.Y. 608. Apart from this, for reference to the Qur'ân, see ibid., 643, 651, 652, 666, 698, 745, 763, 770 and often, including sometimes without explicit reference to it, for instance, 811 f.

103a. Ibid., 763. For other instances see ibid., 444, 651, 652, 698 and 770. See also above p. 80.

104. See above pp. 94 ff.

105. Origins, p. 33.

106. Loc. cit. The number of traditions from the Successors transmitted by Ibrâhîm is negligible, i.e, 15 and 11 in Âthâr A.Y. and Âthâr Sh. respectively (loc. cit.). This is understandable in view of the period to which Ibrâhîm belonged, a period when quite a number of Successors were alive.

107. For reference to practical conduct, as disting-

uished from the verbal statements, see Âthâr A.Y. and Âthâr Sh. passim. See especially Âthâr A.Y., 4, 6, 94, 114, 412, 732, etc., (for practices of the Companions), 62, 65, 69 f, 42 f, 45, 119 ff, 471 f, etc., (for practices of the Prophet). It is evident that from practices norms were derived, that is, in this case the attitude, mental capacity, etc., of the jurist generally played a more important role than in the case when a principle was embodied in the form of a verbal statement. For instance, ibid., 94 reports that Ibn Mas'ûd and his Companions performed 'asr prayer late. From this it can be derived either that it is meritorious or at least permissible to do so. To take another instance: ibid., 114 states that while in journey Ibn 'Umar used to perform supererogatory prayers on his mount, without any regard for direction [i.e., without taking care that he was facing the Ka'bah]; but when he prayed fard or witr, he dismounted and prayed on earth. From this can be derived the rule that while it is proper to perform supererogatory prayers on the mount, without regard for direction, one should perform fard and witr prayers on the ground.

108. See Âthâr A.Y. and Âthâr Sh. passim. For an

exception to this rule, see Âthâr A.Y., 38 and 52. The former states that the Prophet lay down on his back and slept. Then he woke up and prayed without making wudû'. The latter tradition states the doctrine of Ibrâhîm that any one who slept standing, sitting, etc., is not obliged to make wudû', while the one who slept while lying down is obliged to do so before performing the ritual prayer. The only possible explanation is that this doctrine was based on the theory of the personal privileges of the Prophet. See Âthâr Sh., 162.

109. We are assuming that the principle embodied in these traditions — that one is bound by the Prophet's precepts and practices — was shared by Ibrâhîm, and it is for this reason that he transmitted these traditions.

110. That is, 53 in Âthâr A.Y. and in Âthâr Sh. (Origins, p. 33). There are several early works e.g., Muw. Sh., Hujaj, etc., which contain several more traditions from Ibrâhîm.

111. Assumptions such as these underlie the arguments of Schacht on the "growth of legal traditions". See ibid., pp. 140 ff.

112. Cf. Loc. cit.

113. See Âthâr A.Y. and Âthâr Sh., passim.

114. See above pp. 67 ff.

115. See above p. 99.

116. See Âthâr A.Y., 651, 652 and 654. Traditions 651 and 652 mention the doctrine of Ibn Mas'ûd, based on a Quranic verse: that the pregnant woman's period of waiting ends with child-birth. The same doctrine is mentioned in ibid., 654 as the doctrine of Ibrâhîm without any mention of Ibn Mas'ûd or of the Quranic argument on the basis of which Ibn Mas'ûd supported the doctrine. To take another example, Âthâr Sh., 598 mentions the doctrine of Ibn Mas'ûd that if an unmarried man and woman had sexual intercourse, they should be beaten with lashes (the punishment prescribed by the Qur'ân) and banished for one year. It also records the variant doctrine of 'Alî that banishment could lead to morally reprehensible consequences (fitnah). Âthâr Sh., 599 merely repeats the statement that it was fitnah, without the mention of 'Alî or any other authority.

117. For statistics, see above p. 99.

118. See Âthâr A.Y. and Âthâr Sh., passim, e.g., Âthâr A.Y., 633 and 635 and Âthâr Sh., 598 f. and often.

119. This also represents the growing technical interest in the collection of traditions as such.

120 See, for instance, his statement: "The Companions of Muḥammad agreed on nothing relating to salâh as they agreed on..." (Âthâr A.Y., 93). See also ibid., 390 and 418, which refer to the practices of the Companions, in such a manner as to imply their ijmâ', but without categorically stated it as such.

121. See above pp. 94 f. and n. 95.

122. See below pp. 188 f., and 220 ff.

123. See also below pp. 160 ff., and pp. 268 ff.

124. For these, see Tr. II, passim. Even if these doctrines do not represent authentic traditions from the authorities to whom they are attributed, they represent a very fairly stage in the development of law around the middle of the first century.

125. For further examples, see ibid., 10, 25, and Âthâr Sh., 115, 121, 220, etc.

126. Cf., ibid., 457 and Tr. I, 88.

127. Qur'ân IV. 15.

128. See, e.g., Âthâr A.Y., 598, 601, 650, 656, 679.

129. Ibid., 629. For application of this principle to various questions. See, for instance, ibid.,

58, 597 and 618.

130. See ibid., 618, 619, 633, 634, 637, 656, 679, 717, 720.

131. See ibid., 618, 619, 626, 627, 637, 679, 728, 741, 742, 758, 869; Âthâr Sh., 387, 757, etc.

132. See Âthâr Sh., passim. See especially 177, 442, 575 ff., 622, 634.

133. See, for instance, Âthâr A.Y., 434 and 778.

134. See, for example, question of evidence of minors, Âthâr Sh., 634. Cf. the more formal attitude of Shaybânî (loc. cit.).

135. Cf. Tr. II; Wakî', op. cit., passim; and Kindî, op. cit., passim.

136. An important aspect of the development of Islamic Fiqh was the trend towards greater formalism and strictness, which led to placing an ever higher value on systematic consistency.

137. For the culmination of this trend, see Shaybânî, al-Jâmi' al-Kabîr, ed. Abû al-Wafâ' al-Afghânî, (Cairo, 1356), passim. Tr. I, marks the beginning of this trend.

138. Âthâr A.Y., 623.

139. Ibid., 628.

140. We see the vague beginnings of this trend in references such as the one contained in Âthâr A.Y.,

98, for which see n. 120 above.

141. This term is used here to signify the opposite tendency of ra'y, and thus denotes authoritative doctrine or precedent, rather than "traditions from the Companions", which is the classical connotation of the term. For the classical connotation of athar, see below, p. 121 and n. 2. For this kind of use of athar, see Tr. IX, 50; and Hujaj, passim.

142. Zahiriten, p. 5.

143. Ibid., pp. 5 f.

144. Muḥammad b. 'Abd al-Karîm al-Shahrastânî, al-Milal wa al-Niḥal, ed. M.S. Kîlânî, 2 vols., (Cairo, 1961 A.D.), vol. I, p. 199.

145. See below pp. 113 ff. and 268 ff.

146. There were, besides these, other factors as well which contributed to familiarising the use of ra'y in Iraq. See below pp. 113 ff.

147. Zahiriten, p. 11.

148. Loc. cit. Ra'y and qiyâs together represented one out of the two main strands. For the traditionalist strand, see above, pp. 27 ff., 67 ff., and 94 ff.

149. See, e.g., Ibn al-Nadîm, op. cit., p. 298; Ibn Qutaybah, Ta'wîl Mukhtalif al-Ḥadîth, op. cit.,

pp. 15 ff. and often.

150. See below, pp. 278 ff.

151. See above, pp. 89 ff. and p. 112.

152. S.v. "Khâridjites", E.I., vol. II, pp. 904 ff.

153. S.v. "Djahm", E.I., vol. I, pp. 1001 f. See also W.M. Watt, Free Will and Predestination in Early Islam, (London, 1948 A.D.), pp. 99 ff. Cited hereafter as Free Will and Predestination.

154. S.v. "al-Mu'tazilah", E.I., vol. III, pp. 787 ff. See also Zuhdî Ḥasan Jâr Allâh, al-Mu'tazilah, (Cairo, 1366).

155. S.v. "Shî'a", E.I., vol. IV, pp. 350 ff.

156. S.v. "Ḳadarîya", E.I., vol. II, pp. 605 f.

157. S.v. "Murdji'a", E.I., vol. III, pp. 734 f.

158. Free Will and Predestination, pp. 34 ff.

159. Ibid., p. 38.

160. See the "Treatise of Baṣrî", passim.

161. For their doctrines, see Shahrastâni, op. cit., vol. I, pp. 43 ff.; Abû al-Ḥasan al-Ash'ârî, Maqâlât al-Islâmîyîn, ed. M. M. 'Abd al-Ḥamîd, 2 vols., (Cairo, 1369), see vol. I, passim, esp. pp. 217 ff. (Cited hereafter as Maqâlât). See also Free Will and Predestination, pp. 61 ff.

162. Maqâlât, vol. I, pp. 217 ff.; and Shahrastânî, op. cit., vol. I, p. 45. It must be emphasised

that the opponents of the Mu'tazilah (e.g., al-Ash'arî, d. 333) were not trying to stress the arbitratiness of God's Will. Their opposition to Mu'tazilism seems to have been motivated by their emphasis on God's Omnipotence and the inscrutability of His ways. The difference between the two approaches was subtle, and yet significant. The Mu'tazilî position seems to have been, at least in the sight of their opponents, that God was righteous because (and only as long as?) His operations conformed to a set of norms of goodness and righteousness. On the other hand, al-Ash'arî, we might say, considered God to be righteous unreservedly, to be the One Whose operations could not be subjected to the human criteria of evaluation. His view was that whatever God willed was right owing to the very fact of His willing it, irrespective of whether it seemed to affect men advantageously or adversely. For the views of al-Ash'arî, see al-Ash'arî, The Theology of Ash'arî, (embodying two treatises of al-Ash'arî) ed. and tr. R. J. McCarthy, (Beirut, 1953 A.D.), pp. 76 ff., and 97 ff., idem., al-Ibânah 'an Usûl al-Diyânah, tr. Walter C. Klein, (New Haven, 1940 A.D.), pp. 107 ff. The above

conclusions are based on this writer's paper: "Man's Moral Responsibility: The Significance of al-Taftâzânî's views on Taklîf assessed in terms of the Historical Development of such Views", (typescript, contributed to Dr. W.C. Smith's Seminar, Institute of Islamic Studies, McGill University, Montreal, January, 1963 A.D., I.I.S. Library, Vertical File), see especially pp. 5 ff.

163. Shahrastânî, op. cit., vol. I., p. 146; Maqâlât, vol. I, pp. 202 ff.

164. See al-Mâturîdî (d. 332), Sharh al-Fiqh al-Akbar, II edition, (Hyderabad, 1356), passim. For its translation see A.J. Wensinck, The Muslim Creed, (Cambridge, 1932 A.D.), pp. 103 f.

165. Shahrastânî, op. cit., p. 91.

166. Sharh al-Fiqh al-Akbar, op. cit., p. 5.

167. We are not suggesting that the ideas expressed during the third and fourth centuries go back to Abû Hanîfah. What we are suggesting is that since these ideas did not come out from the vacuum, the absence of any evidence to the contrary justifies the conclusion that more or less the same ideas, in vague and embryonic forms, constituted what we have stammeringly termed,

owing to lack of clearer evidence, the "general climate of theological opinion."

168. Ibn al-Athîr, op. cit., vol. VIII, p. 120.

169. Schacht remarks the same with regard to Mâturîdî on the basis of his study of the manuscript of K. al-Tawḥîd of Mâturîdî (still unpublished). See J. Schacht, "New Sources for the History of Muhammadan Theology", Studia Islamica, Paris, vol. I, (1953), p. 35. See also his remark on p. 42: "Mâturîdî shows himself very hostile to the Mu'tazilah, while at the same time being in no small degree influenced by their doctrine...."

170. Feewill and Predestination, p. 151.

171. Sayyid Murtaḍá, Itḥâf al-Sâdah al-Muttaqîn, 10 vols., (Cairo, 1311), see vol. II, pp. 5 ff. We take this as an accurate formulation of disagreements between al-Ash'arî and al-Mâturîdî. Even though this writer has not been able to use K. al-Tawḥîd of Mâturîdî, the general remarks of Schacht about the attitude of the author and about the contents of the book corroborate the correctness of this conclusion. See Studia Islamica, vol. I, pp. 35, 41 and 42.

172. Maqâlât, vol. II, p. 144. It is significant that a group which denied that God's ordinances

were related to 'ilal, also denied qiyâs, and vice versa. Loc. cit. See also Taftâzânî, al-Talwih 'alá Kashf Haqâ'iq al-Tawdîh, cited in Zahiriten, p. 12.

173. Milal, vol. I, p. 45. What we are suggesting is that a conscious affirmation of the role of human reason in religious matters, and the notion that religious ordinances are based on wisdom created a basis for a conscious application of human reason to what were considered to be revealed laws, and this possibly accounts for the comparatively greater vogue of ra'y and qiyâs in Iraq.

174. Ta'wîl Mukhtalif al-Hadîth, op. cit., pp. 15 ff.

CHAPTER III

THE SEMANTIC EVIDENCE

1. 'Abd al-Nabî b. 'Abd al-Rasûl, Dustûr al-'Ulamâ', 4 vols., (Hyderabad, 1329), see vol. II, p. 15. (Cited hereafter as Dustûr al-'Ulamâ').

2. Ibid., vol. I, p. 37; Tâj al-'Urûs, vol. III, p. 4. It is significant that Shâfi'î, generally reserved the term athar for traditions from the Companions (Origins, p. 16).

3. Whenever page numbers of Tr. I or Tr.IX have been cited in this chapter, they refer to the editions of these treatises published under the editorship of Abû al-Wafâ' al-Afghânî. (For details, see the bibliography at the end).

4. The instances of this kind of use are the following:

(i) For a tradition regarding the distribution of booty during the caliphate of 'Umar and of 'Uthmân. (Ibid., 1, p. 5).

(ii) For a tradition from 'Umar and 'Alî (Ibid., 15, p. 52).

(iii) Another use: "We have received none except one hadîth from the Prophet or his Companions." (Ibid., 9, p. 41. Emphasis is our own).

To these should be added the following examples of the use of the term with reference to traditions from the Companions in other works of Abû Yûsuf and Shaybânî: See Kharâj, p. 19, (in connection with 'Umar's approval of a certain principle in the distribution of booty); p. 65, (referring to several traditions with the same content, attributed to the Prophet and to 'Umar); p. 70 (a tradition from 'Umar with which Ibn 'Abbâs agreed); Muw. Sh., p. 323, (a tradition from 'Alî); ibid., p. 97, (a ḥadîth from 'Umar). See also Ḥujaj, p. 164, etc.

5. See above p. 121, n. 1. For the examples of its use in the sense of 'tradition' as such, without any reference to the Prophet and/or the Companions, see Kharâj, p. 6, where Abû Yûsuf mentions to the Caliph that he has written for him "good aḥâdîth". See also ibid., p. 39 where a shaykh of al-Ḥîrah (according to another manuscript, al-Jazîrah), from whom Abû Yûsuf had inquired about the agreements concluded between the conquering Muslims and the local populace, etc., writes to Abû Yûsuf the information available to him, making it clear that it was not derived from the fuqahâ', but consisted of aḥâdîth of the specialists in these matters (man yûṣaf bi 'ilm dhâlik).

6. For a few instances of ḥadîth in the sense of traditions from the Prophet, see Kharâj, p. 89 (aḥâdîth from the Apostle of Allâh); p. 121 (ḥadîth from the Apostle of Allâh); p. 18 (reference to aḥâdîth and âthâr followed by citation of two traditions from the Prophet); Muw. Sh., pp. 261 and 389; Hujaj, p. 2, p. 3, p. 15, p. 51, p. 57, p. 189 (al-ḥadîth al-mustafîḍ from Ibn 'Abbâs that the Apostle of Allâh); p. 201, lines 3 and 5; p. 230, and often.

7. See n. 5 above.

8. Fayrûzâbâdî, Qâmûs, II edition, 4 vols., (Cairo, 1952 A.D.), vol. I, p. 170.

9. Muh. St., vol. II, p. 3.

10. Aḥmad b. Fâris b. Zakarîyah, Mu'jam Maqâyîs al-Lughah, ed. 'Abd al-Salâm Muḥammad Hârûn, 6 vols., (Cairo, 1368), vol. III, pp. 60 f.

11. Loc. cit. See also Zamakhsharî, Asâs al-Balâghah, (Cairo, 1372), p. 222.

12. See Ibn Fâris, op. cit., p. 60, (The expression "jâ'at al-rîḥ sanâ'in" was used when winds came through the same course). See Zamakhsharî, op. cit., p. 222, especially the quotation of the couplet of 'Umar b. Abî Rabî'ah: "Qad jarrat al-rîḥ bihâ ḍhaylahâ/wa ustanna fî

atlâlihâ wâbilu".

13. See Ibn Fâris, op. cit., p. 60, and Zamakhsharî op. cit., p. 222.

14. Loc. cit.

15. Lane, Lexicon, ed. Stanley Lane-Poole, Book I in 8 parts, (New York, 1893 A.D.), see part IV, p. 1438. (Cited hereafter as Lexicon). See also Ibn Manẓûr, Lisân al-'Arab, 15 vols., (Beirut, 1374-76), vol. XIII, p. 224. (Cited hereafter as Lisân). See further for the use of sunnah in this sense: Dîwân Hassân b. Thâbit, ed. 'Abd al-Rahmân al-Barqûqî, (Cairo, 1929 A.D.), p. 24, line 3; Abû al-Faraj al-Iṣfahânî, K. al-Aghânî, 21 vols., (Beirut, 1956-57 A.D.), vol. V, p. 143, line 3; vol. VI, p. 227, line 7; vol. VII, p. 180, line 3; vol. X, p. 241, line 12. (Cited hereafter as Aghânî). Tâj al-'Urûs, vol. IX, p. 244, lines 7 and 8; Lisân, vol. XVII, p. 88, lines 9 and 11; al-Mufaddalîyât, ed. Ch. Lyall, (Oxford, 1921 A.D.), p. 185, line 15 (repeated p. 542, line 12 and p. 791, line 1); Farazdaq, Dîwân, ed. 'Abd Allâh Ismâ'îl al-Ṣâwî, (Cairo, 1936 A.D.), p. 329, line 4; Dhû al-Rummah, Dîwân Shi'r Dhû al-Rummah, ed. C.H.H. Macartney, (Cambridge, 1919 A.D.), p. 4, line 11; p. 266, line 4; 'Umar b. Abî Rabî'ah, Dîwân, ed.

Muḥammad Muḥy al-Dîn ʿAbd al-Ḥamîd, (Cairo, 1935 A.D.), p. 25, line 14; p. 133, line 7; al-Akhṭal, Shiʿr al-Akhṭal, (Beirut, 1891-92 A.D.), p. 278, line 6; Dîwân ʿUbayd al-Abraṣ al-Saʿadî al-Asadî, ed. Charles Lyall, (Leiden, 1913 A.D.), p. 67, line 13; Ṭabarî, Taʾrîkh, vol. V, p. 123, line 5; vol. VII, p. 281, line 1.

16. Lexicon, part IV, p. 1438.

For instances of the use of the term sunnah in this sense, see Dîwân Ḥassân, p. 24, line 3, Aghânî, vol. VI, p. 128, line 8; vol. VII, p. 179, line 2; vol. IX, p. 139, line 2; vol. XII, p. 379, line 4; vol. XIII, p. 73, line 13; Jâḥiẓ, K. al-Ḥayawân, ed. ʿAbd al-Salâm Muḥammad Hârûn, 7 vols. (Cairo, 1943 A.D.), vol. VII, p. 84, line 2; Tâj al-ʿUrûs, vol. I, p. 256, line 14 (sunnah of al-Fârûq, i.e. ʿUmar, the second caliph), Lisân, vol. XIV, p. 291, line 20, (a sunnah and its leader, Labîd); Mufaḍḍalîyât, p. 830, line 1; Dîwân Farazdaq, p. 308, line 3; Dîwân Kuthayyir b. ʿAbd al-Raḥmân al-Khuzâʿî, (n.p., 1930 A.D.), p. 35, line 7; ʿUbayd Allâh b. Qays, al-Ruqayyât, ed. Muḥammad Yûsuf Najm, (Beirut, 1378), p. 9, line 12; al-Qâlî, Simṭ al-Laʾâlî, ed. ʿAbd al-ʿAzîz al-Maymanî, (Cairo, 1936 A.D.), p. 393, line 18,

(qadâ'uhu sunnah wa qawluhu mathal); Naqâ'id bayn Jarîr wa Farazdaq, ed. Anthony Ashley Biran, vols., (Leiden, 1908-09 A.D.), vol. II, p. 1015, (the sunnah of the two 'Umars, i.e., of 'Umar b. al-Khaṭṭâb and 'Umar b. 'Abd al-'Azîz); Ṭabarî, Ta'rîkh, vol. VII, p. 38, line 1; Buḥtarî, K. al-Hamâsah, (Beirut, 1910 A.D.), p. 23, line 10 (a couplet of Zuhayr). That sunnah and sîrah were synonymous is proved by the fact that the famous couplet of Khâlid b. 'Utbah al-Hudhalî: Fa la tajzi'anna 'an sunnatin anta sirtahâ/ Fa awwalu râḍin sunnatan man yasîruhâ. (Aghânî, V, p. 128, line 8), has been reported with slight variations which are significant. In one instance, sirtahâ has been replaced by sanantahâ (Ibid., vol. XIII, p. 73, line 13) and in the two other instances the word sunnah in the first line of the couplet has been replaced by sîrah (Tâj al-'Urûs, vol. IX, p. 244, line 7; Lisân, vol. I, p. 377, line 12). See also Appendix II.

17. Ibn Fâris, op. cit., p. 61.

18. Cf. Fazlur Rahman, op. cit., pp. 2 ff.

19. Dîwân Hassân b. Thâbit, p. 248, line 1.

20. Tâj al-'Urûs, vol. I, p. 256, line 14; Lisân, vol. I, p. 377, line 12.

21. Naqâ'iḍ, p. 1015, line 15.

22. Simṭ al-La'âlî, p. 397, line 18. For other instances showing the normative nuance of the word see Dîwân Farazdaq, p. 308, line 3; Mufaḍḍalîyât, p. 830, line 1; Ruqayât, p. 9, line 12; al-Mu'allaqât al-'Ashar, ed. al-Shanqiṭî, (Cairo, 1353), p. 105, line 6; Tâj al-'Urûs, vol. IX, p. 173, line 18.

23. Qur'ân XL. 85; XLVIII. 23; XXXIII. 38; etc.

24. XXXIII. 43; XLVIII. 23.

25. VII. 38; XV. 13; XVIII. 55; XXXV. 431. Cf. III. 137: "Sunnahs have passed before you...." which, in this writer's view, refers to the same theme.

26. Bayḍâwî, vide. his Commentary, verse VIII. 38. Cf. Hurgronje's remark: "Sunna [sic]....can be taken both in the active and the passive sense: a man's sunna is both the way in which he usually acts, and the way in which things happen to him. The manner in which Allah has usually treated, and still treats the generations who reject His Messengers, is repeated by Allah's sunna in the Koran, whereas the 'sunna of the former generations' refers repeatedly to the manner in which, or the rule according to which, they had been treated. Thus

the 'sunna of the Prophet' is the way of acting, or, following an extension of the meaning which the later system applied to this term, the way of acting which he prescribed to others during his lifetime, or which he allowed to go on around him without reproof." (Hurgronje, op. cit., p. 268).

27. Qur'ân XXXIII. 21. This is not an isolated remark about Muḥammad, but seems to be the consistent view of the Qur'ân with regard to the prophets as such. See, for instance, LX. 4.

28. See, for instance, Muslim, "Masâjid", "Îmân"; Tirmidhî, "Salâh"; Abû Dâwûd, "Ṭalâq", and "Sunnah", Ibn Mâjah, "Ṭalâq", "Nikâḥ"; Nasâ'î "Qudâh"; Aḥmad b. Ḥanbal, Musnad, vol. II, p. 124.

29. Kharâj, pp. 14 and 115. Cf. Fazlur Rahman, (op. cit., pp. 8 f.) who argues on circumstantial grounds for the possible genuineness of this statement attributed to 'Umar.

30. Ṭabarî, Ta'rîkh, vol. III, p. 297. Schacht considers the connotation of the term sunnah in this particular case to have been political and administrative rather than legal (Introduction, p. 17). It is true that the occasion when this sentence was uttered the subject of the conversa-

tion was primarily administrative and political. This does not warrant, however, the conclusion that the expression itself signified this restricted scope of the sunnah.

31. "Treatise of Basrî", p. 68. (Emphasis is our own). This letter was written to 'Abd al-Malik and hence between the years 75 and 86. Cf. Islamic Methodology, p. 12 for the views of Fazlur Rahman as to the content of the concept of the Sunnah of the Prophet as embodied in this letter. (It is incorrect, however, to state, which Rahman does, that... " "Hasan tells 'Abd al-Mâlik b. Marwân that although there is no Hadîth from the Prophet... " (Ibid., p. 12). Cf. also Origins, pp. 74 and 141. It needs to be pointed out here that the sunnah of the Prophet has not been put forth by Hasan as the argument in support of his doctrine of Qadar, which is the claim of Rahman and Schacht. What he is saying is that the doctrine of Jabr did not constitute an item of belief to which the salaf subscribed. Hence the main argument of Hasan against the opponents is that the salaf did not subscribe to this doctrine and hence it is an innovation, a statement which he even explicity makes. (See ibid., p. 68).

Here he is merely trying to fortify the authority of the salaf by stating their merits and one of those merits is that they followed the sunnah of the Prophet.

32. See his letter in Barrâdî, K. al-Jawâhir, (Cairo, 1302), p. 157.

33. Ibid., 158. On p. 160 the same accusation is repeated in the following words: "hakama bi ghayr mâ anzal Allâh wa khâlafa sabîl Allâh wa sabîl sâhibayh."

34. Loc. cit. For other examples of the expression "sunnah of the Prophet", see p. 165 (twice), and p. 166.

35. Ibid., p. 164. He says that on the contrary those who are indignant at [the sight of] the disobedience to God and summon towards the "Book of Allâh and the sunnah of His Apostle and the sunnah of the believers...." cannot be accused of extremism. (Loc. cit.). The expression sunnah of the believers is significant. It seems to refer, broadly, to the way of life of the Muslims as a whole which was based on the Book of Allâh and the sunnah of the Prophet. Ibn Ibâd's reference to "sunnah of the believers" is broadly the same as the concept of practice. For practice, see below

pp. 209 ff.

36. "Risâlah fî al-Sahâbah", in Muhammad Kurd 'Alî, ed. Rasâ'il al-Bulaghâ', IV edition, (Cairo, 1954 A.D.), p. 121.

37. Loc. cit.

38. Ibid., p. 122.

39. Ibid., p. 126.

40. This meant the first four Caliphs. (See Hujaj, p. 32). Another expression for the same was "al-khulafâ' al-râshidûn" (the reference, in both the cases, being to the first four caliphs) and was used, for instance, by Layth in his letter to Mâlik. (See Ibn al-Qayyim, I'lâm al-Muwaqqi'în, vol. III, p. 96).

41. Ibid., p. 126.

42. This indictment is much the same as Abû Yûsuf's indictment of al-Awzâ'î and the Hijazis. (See Tr. IX, 1, p. 11, and 3, p. 21).

43. Cf. Origins, pp. 58 f., pp. 103 f. and 137.

44. Cf. above pp. 121 f.

45. See Appendix II.

46. See above pp. 124 f.

47. See Tr. IX, 25. For a similar example see the letter of Layth b. Sa'd (d. 165) the well-known Egyptian jurist in I'lâm al-Muwaqqi'în, vol. III,

p. 95. Speaking of the Companions who were sent to different places for jihâd, Layth says: "And in each of their battalion there was a group who taught the Book of Allâh and the sunnah of His Prophet and who exercised ijtihâd in matters which the Qur'ân and the sunnah had not explained for them." It will be noted that in the last part of the sentence "sunnah of the Prophet" was inadvertantly replaced by the term "sunnah" which shows their equivalence.

48. Âthâr A.Y., 478.

49. Tr. IX, 13.

50. Tr. IX, 50.

51. Qur'ân XXXIII. 21 cited by Awzâ'î in Tr. IX, 23. Only once does Awzâ'î use the term sunnah without explicit reference to the Prophet. (See ibid., 37).

52. For these references, see Tr. IX, 1, (a practice of the Prophet); 2 (a saying of the Prophet); 3 (a practice of the Prophet); 4 (the denial of the religious relevance of an institution because of its non-existence in the time of the Prophet); 5 (a practice of the Prophet continued by a'immat al-hudá. See, for the meaning of this expression, n. 40 above); 7 (a practice of the Prophet subsequently followed by the Muslims); 8 (a practice of the Prophet subsequently practised by Muslim rulers); 9 (the same as

above); p. 46 (the same as above); 17 (a practice of the Prophet); 20 (a saying of the Prophet); 23 (a practice in the time of the Prophet); 26 (argues for the permissibility of a practice which was held as permissible in the time of the Prophet, supporting it by a saying of the Prophet); 31 (a saying of the Prophet); 34 (a practice of the Prophet); 48 (a practice of the Prophet (p. 129), and an analogy based on an event in the life of the Prophet (p. 130); 50 (a practice of the Prophet which, says Awzâ'î, has the greatest claim to be followed).

53. Ibid., 4.

54. For instances of reference to practice without the mention of the Prophet, see ibid., 3, 6, 9, 14, 19, 25, 32.

As for references to practice as a supplementary evidence and claiming its introduction by the Prophet, see its instances in n. 52 above.

55. See ibid., 6, 9, 19, 25 and 32. In several of these, the reference is to the a'immah and/or the 'ulamâ' which shows the continuity of practice and thus reinforces the claim of ijmâ'. The reference to the 'ulamâ' seems to serve the purpose of showing that the practice concerned was religiously unobjectionable.

56. Origins, p. 22, on the basis of Zurqânî.

57. Muw., p. 100. The purpose of the tradition is that even what the Prophet forgot (or was caused by God to forget) had a normative significance. For another example of the use of the expression "sunnah of the Prophet", see Muw., p. 513. For an instance where sunnah has been used without any explicit reference to the Prophet, but contextually it could mean nothing else but sunnah of the Prophet, see ibid., p. 314 where Mâlik states that in matters which are "faridah or nâfilah" one may not innovate, and may only follow that which the Muslims have followed. Mâlik thereafter adds that the Apostle of Allâh performed i'tikâf and the Muslims came to know thereby the sunnah of i'tikâf. For still another instance of the use of sunnah meaning "sunnah of the Prophet" see ibid., p. 77 where Mâlik quotes some scholars as holding the view that there had never been any call for prayer and iqâmah in the two 'Îds "from the time of the Prophet till to-day." Thereafter Mâlik adds: "And that is a sunnah with regard to which there is no disagreement among us."

58. For his view that the sunnah followed by the Medinese rested on the sunnah of the Prophet, see pp. 209 f. and n. 132 below.

59. Besides these, there are several uses of sunnah without explicitly relating it to the Prophet or to the Companions. For a few instances, see p. 130 above and pp. 148 f. below.

60. Besides these there are numerous references in Hujaj. See for instance p. 137 line 6 and line 2 from below; p. 141; p. 147; p. 169; p. 214; and often.

61. It may be recterated that the term sunnah was used in the classical Islamic literature and continues to be used even to-day in a variety of meanings. S.v. "Sunnah" in Thânawî, Kashshâf Istilâhât al-Funûn, (Calcutta, 1862 A.D.), p. 703 ff., (cited hereafter as Kashshâf); Abû al-Baqâ', Kulliyât, 2 vols., (Bulaq, 1253), p. 203 (cited hereafter as Kulliyât). According to Abû al-Baqâ' the term sunnah is not restricted as such to the sunnah of the Prophet; it means tarîqat al-dîn which is the model behaviour either of the Prophet (consisting of his sayings and deeds) or of his Companions. In Shâfi'î, however Abû al-Baqâ' point out, the use of the term sunnah is restricted to the "sunnah of the Prophet alone" (ibid., p. 203). According to Kashshâf (p. 703) one of the meanings of the term is sharî'ah. It also means that which is proved by

means of the sunnah (i.e., one of the four adillah) is also called sunnah (loc. cit.), and "established religious practice without its being made fard or wâjib and by this "established practice is meant that which the Prophet consistently practised such as the prayer of tarâwîh. And if deviation of any such sunnah is considered blameworthy then it is termed sunan al-hudá or sunnah mu'akkadah" (ibid., p. 704). Some of the examples mentioned by Abû al-Baqâ' are noteworthy: "Sunnat al-'ibâdah or sunnat al-ittibâ' such as pronouncing of talâq during the tuhr in which a person has not had sexual intercourse; and the sunnah of mashâ'ikh such as number nine in brushing teeth", etc., (Kullîyât, p. 203).

62. Hâshimîyât al-Kumayt, (Leiden, 1904 A.D.), p. 32, line 4. See Fazlur Rahman, op. cit., p. 8 for reasons why sunnah here can possibly mean "sunnah of the Prophet" only and nothing else. For another example of the use of sunnah along with the Qur'ân, see the treatise of Ibn al-Muqaffa', op. cit., p. 126.

63. Cf. Muw. Sh., p. 315.

64. See also ibid., p. 225; Muw. Sh., p. 315, and often.

65. This was the opinion of the majority of muhaddithûn,

but not their unanimous view. See, for example, Dustûr al-'Ulamâ', vol. II, p. 15.

66. See above pp. 121 ff.

67. For, as Goldziher has pointed out, sunnah referred to the substance of rules relating to practical life (Muh. St., vol. II, p. 12). See also the examples through which Goldziher illustrates the difference between sunnah and hadîth (ibid., pp. 11 ff.).

68. See Tr. IX, 9.

69. Ibid., 1 (p. 5), 2 (pp. 15 f.), 5 (pp. 24 f. and 30 f.).

70. Ibid., 14 (p. 49).

71. Ibid., 5 (p. 32).

72. Ibid., 7 (p. 38). The same seems to be the basis of distinction between athar and sunnah. See, e.g., Hujaj, p. 75, p. 77, and often.

73. Tr. IX, 8 (p. 40). See also Kharâj, pp. 95 and 96.

74. For this opposition of sunnah to innovation, see Muw., p. 314; Regarding matters which are religiously recommended or mandatory, says Mâlik, "one acts according to the sunnah which has come down from the past (bimâ madá min al-sunnah) and one is not entitled to innovate in that as against that which the Muslims have followed...." For its context see n. 57 above.

For usages of the word sunnah with madá, see ibid., pp. 290, 318, and often. In Abû Yûsuf, see Kharâj, p. 164; Tr. IX, 3, 13 (in a statement made by Awzâ'î), and 18 (in a statement made by Abû Yûsuf). See also ibid., (p. 11) (jarat al-sunnah); Kharâj, p. 59, (the same expression). For Shaybânî, see Muw. Sh., p. 290; Hujaj, p. 176 and often. See also the statement regarding Sha'bî that he was the most knowledgeable person in respect of sunnah mâdiyah, Wakî', op. cit., vol. II, p. 427.

75. Margoliouth has gone so far as to suggest that the acceptance of the Qur'ân and Sunnah as sources of law meant to the early generations, that wherever the Qur'ân had no positive commands, the ancient Arabian custom should prevail. He seems to suggest that the attitude of Islâm to "unobjectionable" customs was not just permissive, it was one of exalting them to the position of a full-fledged source of law. (See Early Development, p. 68 and "Omar's Instruction to the Kadi", J.R.A.S.) (1910 A.D.), p. 314. Such a view would have been tenable only if the sunnah of what the Qur'ân terms as jâhilîyah had been extolled by the Qur'ân. The most that can be said about jâhilî practices is

that the Qur'ân does not oppose them if they do not conflict with its teachings. This is quite different from putting the jâhilî practices and usages more or less on the same level as the Qur'ân.

76. Tr. IX, 6 (pp. 34 f.) and 8 (p. 42).

77. Ibid., 1 (p. 11). In a parallel passage Abû Yûsuf says that to say that 'alá hâdhâ kânat a'immat al-Muslimîn fîmâ salaf is like saying "bi hâdhâ madat al-sunnah" even though this might be the personal opinion (ra'y) of some of the mashâ'ikh of Syria who are neither well-versed in questions of wudû', nor tashahhud, nor usûl al-Fiqh (ibid., 3, p. 21). Even Ibn al-Muqaffa', who belonged to the class of secretaries of state, denounces the trend of considering administrative practices to be sunnah, without there being any evidence of their having been in existence in the time of the Prophet or of the early Caliphs. See above. pp. 132 f. and n. 40.

78. Ibid., 24 (p. 76).

79. For this inference of ours, see below pp. 150 ff.

80. Kashshâf, p. 703, Kulliyât, p. 203. See also Muw., pp. 226, 268, 273, 568 and 843. Hence the expression: "To walk behind the funeral is a

wrong sunnah." It is in the same sense that Mâlik quotes the tradition "Treat them in the same manner as you should treat ahl al-Kitâb" ("Sunnû bihim sunnat ahl al-Kitâb"). (Ibid., p. 278).

81. For Abû Yûsuf, see Kharâj, p. 90, p. 203 ("akhta'a al-hukm wa al-Sunnah"); Tr. IX, 15 (p. 53), and 41 (p. 116). For Shaybânî, see Hujaj, p. 77 (sunnat al-salâh); Muw. Sh., p. 250, "talâq al-sunnah", see also Hujaj, pp. 40 and 79, "al-sunnah fî al-jam' bayn al-maghrib wa al-'ishâ' fî al-matâr..." This usage seems to have some relation to the following usage of the term in Arabic poetry by Dirham b. Yazîd; Lâ narfa' al-'abd fawqa sunnatihi / Mâ dâma minnâ bi batniha sharafu (see Sharh Diwân Hassân, p. 279, line 11).

82. For this expression see Muw. passim. For Mâlik's reasons for attaching so great an importance to "established practice supported by the consensus for the Medinese", see his letter to Layth in al-Andalus, vol. XV, pp. 416 f.

83. For this expression see Muw. passim.

84. Ibid., p. 853.

85. Ibid., p. 860.

86. It may be noted, however, that along with this was the concept of the personal privileges of the Prophet so that a number of actions of his were

considered to be uniquely peculiar to him and were not normative for others.

See for instance, Tr. IX, 5 (pp. 24 and 34) and 39 (pp. 107 f.). For reference to it in Shaybânî, see Muw. Sh., pp. 178 and 180.

87. See, for instance, Tr. IX, 8, 24 and n. 90 below.

88. For the connotation of this term, see n. 40 below.

89. See n. 93 below.

90. See Hujaj, passim.

91. Tr. IX, 24 (p. 76).

92. Ibid., 18 (p. 57). Emphasis is our own.

93. Kharâj, p. 164. For the special position accorded to the first two Caliphs, see also the letter of Ibn 'Ibâḍ in Jawâhir, pp. 157 ff.

94. Ibid., 58. For a'immat al-hudá, see above n. 40.

95. Sunnah continued to be used in this sense even subsequently. See Kashshâf, p. 703; Kulliyât, p. 203; and Nasafî, Kash al-Asrâr, 2 vols., (Bulaq, 1316), vol. II, p. 2; Taftâzânî, op. cit., vol. II, p. 124.

96. This seems to be peculiar to the Kufian school and later became a part of the Ḥanafî scale of Shar'î values. See ibid., pp. 124 f.

97. Cf. Muw., p. 347.

98. Hujaj, p. 5.

99. Âmidî, al-Ihkâm fî Usûl al-Ahkâm, 4 vols., (Cairo, 1332), vol. I, p. 140; Taftâzânî, op. cit., vol. II, p. 124.

100. Futûh al-Buldân, p. 629.

101. Wakî', op. cit., vol. II, p. 372.

102. Kharâj, p. 5. Another interesting example is that of the use of sunnah in the sense of the creed of ahl al-Sunnah. See in Humaydî (d. 219), Musnad, ed. Habîb al-Rahmân al-A'zamî, 2 vols., (Karachi, 1382), his short treatise entitled: "Usûl al-sunnah", (vol. II, pp. 546-48). This meaning of the word sunnah is confirmed if it is read in conjunction with Ibn Qutaybah, Ta'wîl Mukhtalif al-Hadîth, op. cit., p. 59. See also ibid., p. 98.

103. See above n. 47.

104. Vide. "Treatise of Basrî", op. cit., passim.

105. Tr. IX, 4. Cf. Âthâr A.Y., 339 f., which shows, however, that a Companion's practice was not invariably considered to be authoritative. In Âthâr A.Y., 140, the basis of non-acceptance of a certain practice of Ibn 'Umar is that it was based merely on his ra'y and that he had no athar in support of it. See also Hujaj, pp. 12 f., where the Medinese support their doctrine in regard to washing by referring to a practice of Ibn 'Umar which the Kufians

reject on the ground that Ibn 'Umar was too meticulous in the matter of washing.

106. Tr. VIII, 3.

107. Tr. IX, 24. See also above pp. 143 ff.

108. See above p. 149. It is a non-technical usage and means "good example", or "good conduct".

109. See Tr. IX, 23.

110. See, for example, ibid., 2 and 20.

111. Ibid., 2, 5 and 9.

112. See above pp. 141 f.

113. Tr. IX, 2.

114. See ibid., 1, 2, etc.

115. See the standard works on Usûl al-Fiqh, for instance, Taftâzânî, op. cit., vol. I., p. 26; Âmidî, op. cit., vol. I, pp. 226 f.

116. See Section II above, especially pp. 145 f.

117. For example of Awzâ'î's reference to consensus as a supplement to the claim that the doctrine in question was based on the "sunnah of the Prophet", see Tr. IX, 2 (a continued practice backed by a saying of the Prophet), 3, 5, 13, 31. For a doctrine based on Abû Bakr's interpretation of the Qur'ân and followed by the Muslims subsequently, see ibid., 29.

118. See ibid., 5, 14, 15, 24 and 32. Awzâ'î's state-

ment (ibid., 9) apparently is a reference to consensus independent of traditions, etc., but Abû Yûsuf's observation (loc. cit.) seems to show that a tradition on that question did exist which seems to be pre-supposed in Awzâ'î's statement, but was not explicitly stated.

119. Ibid., 6. For a similar expression, see ibid., 14. In his reference to consensus as a supplementary argument the usual form that Awzâ'î adopts is to claim lack of disagreement, (see passim, e.g., 3), or to claim that the original practice introduced by the Prophet remained in operation till the assassination of al-Walîd (A.H. 126), see ibid., 1 and 3.

120. See ibid., 5 and 31. (On both the occasions ijmâ' is claimed with regard to a practice or doctrine introduced by the Prophet).

121. See ibid., 6, 9 and 14. In fact actual practice might even have ceased to be in operation. See, for example, ibid., 1 and 24.

122. For its meaning, see above n. 40.

123. See, for instance, Tr. IX, 3 (where reference has been made to uninterrupted adherence by the Muslims to a practice initiated by the Prophet without ever disagreeing about it, a statement which

seems to be motivated by the purpose of reinforcing the claim that the practice in question was a sunnah of the Prophet), and 24 (where reference has been made to an uninterrupted and undisputed practice of the Muslims upto the assassination of Walîd, but without any explicit reference to the Prophet).

124. See for reference to the consensus of the Companions by Ibrâhîm, above p. 103 and n. 120. See also n. 125 below.

125. See Mâlik's letter cited in the fragment of 'Iyâḍ, al-Madârik in al-Andalus, vol. XV, pp. 415 f.

126. See Muw. passim.

127. Ibid., p. 502.

128. Ibid., p. 522 and often.

129. See Tr. IV, passim.

130. Tr. III, 148, (p. 248). For the Medinese concept of consensus, see Origins, pp. 83 ff.

131. Cf. Origins, pp. 85 ff.

132. See the statement of a Basrian opponent of Shâfi'î in Tr. III, 148 (p. 245).

133. Ikh., 71.

134. Tr. IV, p. 256.

135. Tr. VIII, 1.

136. Hujaj, pp. 125 f.

137. Kharâj, p. 48. For another instance, see Tr.

IX, 17 and 42 (a statement about consensus made in the positive form, supplemented by the claim of absence of disagreement).

138. See also ibid., p. 129: 'alayhi al-jamâ'ah wa al-'amal.

139. See above p. 78.

140. Hujaj, p. 161.

141. Muw. Sh., p. 140.

142. Loc. cit. Cf. nn. 135 f. above.

143. Hujaj, p. 176.

144. See Hujaj and Muw. Sh., passim. Generally the expression is: "'âmmatu fuqahâ' inâ".

145. See n. 136 above.

146. Loc. cit.

147. Muw. Sh., p. 140.

148. Hujaj, p. 161. This seems to have been derived from Mâlik. Shaybânî also uses the expression: "Hâdhâ amr mujma' 'alayh", (ibid., p. 184).

149. Hujaj, p. 236. See also ibid., pp. 23 f.

150. See above pp. 110 ff.

151. For distinction between athar and ra'y, see above pp. 27 ff. and pp. 94 ff. and p. 111.

152. "Treatise of Baṣrî", p. 67.

153. Tr. VIII, 3.

154. "Treatise of Baṣrî", pp. 70 f. See also ibid.,

p. 72 for the use of the same expression. To these "misguiding desires", Ḥasan opposed the Qur'ân which is "light and life" (ibid., p. 70). The opponents of ra'y used the word in this sense when they denounced it. The motivation of the opposition was the fear that "misguiding desires" might distort religion. For an interesting discussion on ra'y, see Ibn al-Qayyim, op. cit., vol. I, pp. 53 ff. Ibn al-Qayyim cites the use of the word with both good and bad shades of meaning.

155. Ibn al-Muqaffa', op. cit., p. 122.

156. Ibid., p. 126. In the view of Ibn al-Muqaffa' ra'y, even in its logical and systematic form of qiyâs, could lead to unhappy consequence (ibid., p. 127). It is also interesting to note that this use of ra'y in a bad context is followed by its use in a good one. For instance, Ibn al-Muqaffa' advices the Caliph to codify legal doctrines in the light of "his ra'y inspired by God" (ra'yuhu al-ladhî yulhimuhu Allâh) which should serve as the legal code of the caliphate. Ibn al-Muqaffa' hopes that the fixation of doctrines according to the ra'y of the Caliph (bi ra'y amîr al-mu'minîn), would lead to the development of a uniform legal code.

157. Âthâr A.Y., 607. See also Muw. Sh., p. 244.

158. Tr. I and Tr. IX, passim. See also Kharâj, p. 19.

159. Hujaj, p. 168. See also ibid., p. 88, where Shaybânî finds it objectionable to use qiyâs and nazar — denoting thereby human reasoning — at the cost of sunnah and athar. See also Origins, pp. 98 ff. and 103 ff.; and Zahiriten, pp. 3 ff.

160. For tahakkum, see Hujaj, pp. 224 and 234.

161. This conclusion is based on a broad comparative study of the contemporary writings of the Medinese and Syrians on the one hand, and the Kufians on the other. The Medinese seem to have used the term ijtihâd either as an equivalent of, or in a sense close to, qiyâs. See its use in Muw. p. 858, lines 1 and 4 (laysa fî dhâlika illâ ijtihâd). See also ibid., p. 859 where Mâlik opposes it to al-amr al-mujtama' 'alayh. Conerning the use of this term and the use of the method of qiyâs, see Origins, pp. 116 f.

162. Tr. I, 137.

163. Ibid., 89.

164. See also Kharâj, p. 160. It may also be pointed out that bi manzilah and a ra'ayta and a lâ tará

were also frequently used to denote qiyâs.
See Tr. I and Tr. IX, and Hujaj, passim.

165. See also Kharâj, pp. 182 and 189, and passim.

166. For further examples, see Hujaj, p. 66, lines 9 and 10, p. 153, p. 158 (qiyâs as opposed to athar); p. 162, p. 174, and often.

167. See immediately below ff.

168. See n. 164 above.

169. See n. 164 above.

170. Origins, p. 110. For the actual use of qiyâs, see below pp. 280 ff. It may be noted that often when qiyâs was opposed to istihsân, the former generally signified a strict literalist or formalistic application of law in disregard of those considerations on which istihsân was based. For these examples, see below pp. 168 ff. and above pp. 300 ff. Noteworthy are also some of the conclusions of Schacht. According to him, a systematic conclusion from someone's doctrine was termed as qiyâs qaulih [sic]. (Origins, pp. 110). Moreover Shâfi'î often means by qiyâs not a strict analogy, but consistent systematic reasoning in a broader sense. (Ibid., p. 126).

171. Thus, istihsân sometimes also denoted avoidance of normal legal implications on account of athar.

172. For another instance, see Kharâj, p. 178, line 3 (In this case there is no reference to qiyâs).

173. Hujaj, p. 77. See for a similar accusation, ibid., p. 59.

174. See Shaybânî, Jâmi' Saghîr, (Lucknow, 1310). For reference to istihsân without specific reference to qiyâs, see pp. 32, line 2; p. 6, line 15; p. 107, line 2; p. 118, line 11; p. 120, line 14; p. 136, line,16; p. 137, line 7; p. 144, line 15; p. 156, line 1. For further examples, see the other works of Shaybânî, passim. See particularly Jâmi' Kabîr, ed. Abû al-Wafâ' al-Afghânî, (Cairo, 1356), passim. Cited hereafter as Jâmi' Kabîr.

175. For use with reference to qiyâs, see ibid., p. 21, line 8; p. 61, line 10; p. 69, line 16; p. 83, line 16; p. 84, line 15; p. 113, line 13; p. 124, line 15; p. 160, lines 5 and 7. See for further examples the works of Shaybânî, passim.

176. For further examples of istihsân, see below pp. 302 ff.

177. In the two above-mentioned examples, qiyâs denotes a literal and formalistic application of law, while istihsân signifies that over-ridingly important consideration which justifies departure from it.

178. Origins, p. 112.

179. For this see the examples cited above and those cited below pp. 302 ff.

180. For these scales, see Introduction, pp. 120 f.

181. For its use in Abû Yûsuf, see Âthâr A.Y., 56, 57 and 361. See also Kharâj and Tr. IX, passim. For its use by Shaybânî, see Muw. Sh., p. 48, p. 71, p. 73, p. 75 and p. 105. In this sense it is often opposed to what is recommended but not obligatory, for which the term was not yet rigidly fixed. All the above instances except that on p. 105, illustrates this. Shaybânî also defines wâjib, though only by implication. This shows that by wâjib he meant those acts the ommission of which entailed sin (ithm) (Ibid., p. 48). For fard and wâjib, see also Hujaj, p. 5 (farîdah fî Kitâb Allâh), pp. 6 and 9 (used in opposition to nâfilah), p. 17 and often; Athâr Sh., pp. 94, 122, and often.

182. For the basis of this concept in the Qur'ân, see II. 78 and 237.

183. The pains that Ibrâhîm takes in order to make his concept clear and the lack of sharp distinction between indifference and recommended, constitutes a forceful argument in favour of the authen-

ticity of this tradition. See the same doctrine of Ibrâhim, without any explanation, in Âthâr Sh., 66, 67, 68.

184. Muw. Sh., p. 73 and Âthâr Sh., 67. This is a favourite word of Shaybânî. See for its use, Muw. Sh., p. 138, line 3.

185. For other instances, see ibid., p. 75 and p. 150.

186. Âthâr A.Y., 310, 811, 812; Âthâr Sh., p. 45, p. 48 and p. 50; Muw. Sh., p. 82; Hujaj, p. 1 and often. See also Kharâj, Tr. IX, Tr. I, passim.

187. See Âthâr A.Y., Muw. Sh., Hujaj, etc., passim.

188. Kharâj, p. 68, Tr. IX, p. 13, 22, and other works, of Abû Yûsuf and Shaybânî, passim.

189. Âthâr A.Y., 842, and often in the works of Abû Yûsuf and Shaybânî.

190. Tr. IX, p. 23, 26, and often.

191. Kharâj, p. 68; Muw. Sh., p. 184, and often.

192. Tr. I, p. 18, and often.

193. For harâm, see Âthâr A.Y., 1003, 1007, 1009 and 1010; Hujaj, p. 256 and often.

194. For the use of makrûh in the sense of harâm, see Âthâr A.Y., 1012; Muw. Sh., p. 28, p. 261, p. 337; Hujaj, p. 235. This was the sense in which makrûh was generally used. Makrûh, however, was also used

in the more advanced sense, that is, disapproved but not prohibited or sinful. See below p. 173.

195. For its use in the sense of harâm, see n. 194 above. Schacht also tends to support this conclusion. (See Origins, p. 133).

196. See, for instance, Taftâzânî, op. cit., vol. II, p. 125.

197. Hujaj, p. 188, and often.

198. Ibid., p. 175.

199. It may be pointed out, however, that while the two scales were distinct, they were never quite unrelated to each other. What was harâm, for instance, was regarded as bâtil (i.e., legally void) as well.

200. See, for example, ibid.; p. 188, Âthâr Sh., 3, and often.

201. See Tr. I, Kharâj, Âthâr A.Y., Âthâr Sh., Hujaj, etc., passim.

202. This conclusion is partial and should be combined with what follows, particularly the conclusion no. 3 to appreciate the findings of this writer. For even though the concepts were there even when technical terms were in the process of being formulated, they lacked standardised forms to express them.

203. For this, see in Chapter IV below, the section on Sunnah and traditions, pp. 193 ff.

CHAPTER IV

KHABAR LÂZIM

1. The present and the following chapters are specifically devoted to portraying the Kufian Fiqh from the time of Abû Ḥanîfah to Shaybânî. For the meaning of the term, see below p. 179, n. 8.

2. That the uṣûl were four, however, is not literally correct. These four were the main sources of law and were supplemented by a number of subsidiary sources such as istiḥsân, al-maṣâliḥ al-mursalah, ʿurf, etc. For these, see the works on Uṣûl al-Fiqh, e.g., Sarakhsî, Uṣûl, ed., Abû al-Wafâ' al-Afghânî, 2 vols., (Cairo 1372-73), see vol. II, pp. 65 ff., and pp. 199 ff.

As for the formula of four-fold sources of law, even though the second century jurists would have agreed with it they would have disagreed as to the connotation of terms, e.g., with regard to sunnah, particularly if it was used in the restricted sense so as to exclude the precepts and practices of the Companions.

Regarding the formula on sources of doctrines in ancient schools, see Tr. IV, p. 225; Tr. VIII, 3. See also Tr. IX; and Ḥujaj, passim. Cf. Shâfi'i's views in Risâlah, pp. 39, 284 f., 322, 476, 478 f., and Tr. III, 148 (p. 246).

3. There has remained a certain amount of disagreement as to the extent of the authoritativeness of consensus, and there have been some, though not many, who denied its authority altogether. See Ibn Ḥazm, al-Iḥkâm fî usûl al-Aḥkâm, ed. Aḥmad Shâkir, 8 vols., (Cairo, n.d.), pp. 494 ff., see especially p. 506.

4. See, e.g., Muw. Sh., p. 142.

5. This is evidenced by the greater authority claimed for the doctrines of the 'ammat al-fuqahâ', the higher degree of authenticity attached to the traditions which were generally accepted as against shâdhdh traditions. See for example, Tr. IX, passim, but particularly the works of Shaybânî passim. See below pp. 252 ff. See also the Medinese doctrine in Risâlah, pp. 534 f.

6. See 'Abd al-Malik's query whether a certain doctrine was based on personal opinion or on traditions transmitted by the Companions. See "Treatise of Baṣrî", cited above p. 94, n. 96. See also the

alleged statement of 'Umar on ra'y (Kharâj, p. 80).

7. See, for instance, Hujaj, p. 46: "Had there not come down any athar, qiyâs would have been in accordance with [the doctrine of] the Medinese. But there can be no qiyâs as against athar....", an idea which occurs quite frequently in the works of both Abû Yûsuf and Shaybânî. See also ibid., p. 7, where Shaybânî inquires of the Medinese whether their doctrine was based on any other or was it merely a ra'y; p. 54, where he remarks about the Medinese that on the question concerned they had no athar and that whatever they had was merely ra'y; p. 196, where he opposes nazar and qiyâs to athar, and often.

8. Tr. VIII, 3. See also Shâfi'î, Ikhtilâf al-Hadîth, on the margin of Umm, vol. VII, pp. 117 f. Cf. Cited hereafter as Ikh. Cf. Sarakhsî, Usûl, vol. II, pp. 105 ff.

9. This is proved by the fact that the bulk of the questions on which the attention of the jurists was focussed pre-supposed the Quranic provisions and had been mainly stimulated by them. For this see above pp. 75 f., and 97 f.

10. See above pp. 27 ff.

11. Schacht, for instance, concludes: "It is true that a number of legal rules, particularly in family law and law of inheritance not to mention cult and ritual, were based on the Koran [sic] from the very beginning." (Origins, p. 224). This, however, is only a part of his conclusions on the subject. For his full conclusion on the influence of the Qur'ân on Islamic law in the early period, see ibid., pp. 224 ff.

12. See above pp. 75 f.

13. Cf. Origins, pp. 224 ff.

14. See, e.g., Abû Yûsuf's citation of the Quranic verse IV. 59 in connection with a question of the distribution of booty (Kharaj, pp. 198 f.). Cf. Tr. IX, 25; and Ṭabarî, Ikhtilâf al-Fuqahâ', ed. J. Schacht, (Leiden, 1933 A.D.), 64. For another case, see Tr. IX, 21 and the citation of a Quranic verse (LXVIII. 25) which Abû Yûsuf rejects as irrelevant. See also Hujaj, p. 343, regarding a question of divorce, and often.

15. See above pp. 78 ff.

16. See Kharâj, pp. 23 f. and p. 35. This incident itself confirms what we have said above. The process was not that the legal implication of the Quranic verse quoted by ʿUmar had been elaborated in advance.

Its relevance was perceived when an actual problem arose. See also ibid., p. 140.

17. Origins, p. 224. Cf. Qur'ân II. 240.

18. Origins, p. 227. In fact Schacht seems to think that this attention was so perfunctory that even as late as in the late Umayyad times, in explicit violation of the Quranic verse LXV. 1, the practice for the divorced woman and widow was to vacate the house of her husband immediately after death or divorce, without waiting for the end of 'iddah. (Ibid., pp. 197 f.).

19. For the process, as we have just pointed out, often was not of consciously working out the legal implications of the Qur'ân, but trying to find what relevant guidance was found in the Qur'ân relating to these questions. See also n. 14 above and n. 20 below.

20. See above n. 18. To appreciate and examine Schacht's views, see ibid., pp. 70 f., 73; 101 f., 181 f., 188, 193 f., 197 f., 204 f., 212, 218, 226 f., 266 f., 279 f., and 288. A carefull study of these evidences put forth by Schacht in support of his conclusions shows that his conclusion is exaggerated and inaccurate. Some of the

instances cited by him are, in fact, examples of alteration of, or disagreements about, particular interpretations of Quranic verses, rather than instances of introducing a Quranic norm at a secondary stage. In the case of the obligatory gift from the husband to his divorced wife (Origins, pp. 101 f.), for instance the evidence cited by Schacht proves, at the most, that during the early period this gift was not regarded as judicially enforceable, and that at a later stage a certain judge made a departure from the tradition of his predecessors by declaring it to be judicially enforceable. In fact even that statement is disputable because of the report that Ibn Hujayrah (a judge of Egypt 69-83) used to instruct ṣâḥib al-dîwân to deduct three dînârs from the stipends of those who had divorced their wives (Kindî, op. cit., p. 317). What seems to have happened was that even though this gift was considered a religious imperative, there was no general agreement for a considerable period of time that it was judicially enforceable. Let us take another instance cited by Schacht: the question of divorce before consummation of marriage (Origins, pp. 193 f.). The divergence of doctrines, in this case,

does not point to a lack of knowledge of the relevant passage in the Qur'ân, or its neglect during the earlier stage. It only points to disagreement as to the import of "masîs" mentioned in the Qur'ân verse II. 273: whether it could be presumed by privacy (irkhâ' al-sutûr), or was it constituted by nothing short of actual physical masîs. To consider another example cited by Schacht (Origins, pp. 215 f.), what is proved by the relevant citations of Schacht is interpretative disagreement on the question of the oath of abstinence. To consider still another example: the question was as to where the divorced wife or widow should stay during the term of her waiting ('iddah) (ibid., pp. 197 f.), a question which also seems to be connected with the problem of the rights of a divorced woman (see ibid., p. 225). Schacht's inference that "it must have been the practice for the divorced wife or widow to vacate the house of her husband immediately, without waiting for the end of her 'iddah" (ibid., p. 197) is hardly supported by the evidence which he adduces.

On the whole, the inferences drawn by Schacht from the examples that he has cited show arbitrari-

ness of interpretation, apart from the fact that they are the results of employing a method of dating doctrines and traditions, etc., which is of doubtful validity. (For his method of dating traditions, see Origins, pp. 163 ff.) He seems to be correct, however, in inferring on the basis of the instances which he has cited on pp. 73, 210 f., 218, 227, 297 f., that the introduction of Quranic norms (or, perhaps in some cases, the introduction of explicit reference to relevant Quranic verses?) took place at a secondary stage. The over-all picture, therefore, seems to cohere with our conclusion that the Qur'ân continually remained the basis of legal speculation which led to the gradual unfolding of the implications of its legally relevant verses — a process which corresponds to the rise of legal problems in the early Islamic society.

21. One of the early instances is found in the letter of Ḥasan al-Baṣri, albeit in connection with dogmatic questions: "Every opinion which is not supported by the Book of Allâh is misguidance." "Treatise of Baṣrî".

22. Tr. IX, 23. See also ibid., 5, where he mentions the Qur'ân alongwith the sunnah as a

criterion for the acceptance or rejection of traditions. (See Tr. IX, 5).

The statement of Abû Yûsuf that categorical Quranic verses alone are to be referred to in connection with the determination of what is halâl and what is harâm should not be taken at its face value. It seems to be the expression of a scruple rather than a strict formulation either of the Kufian position or even of Abû Yûsuf's own position. For in Tr. IX, 24, Abû Yûsuf states that the question of halâl and harâm instead of being decided with reference to 'practice', ought to be decided on the basis of "sunnah from the Prophet and forbears: his Companions, and the fuqahâ'." This inaccuracy of expression is one of the numerous indications of the vastly superior exposition of the usûl of Fiqh by Shâfi'î, in his works, particularly in Risâlah.

23. Hujaj, p. 258.
24. Ibid., p. 212.
25. See, for instance, ibid., p. 366.
26. For naskh, see Qur'ân II. 106.
27. Âthâr A.Y., 651 f. and 666; Âthâr Sh., 456. For more instances, see Âthâr A.Y., 763 and 779. See also Siyar Kabîr, p. 93.

28. See Muw. Sh., p. 263; Âthâr A.Y., 592, 608, 726 and 727.

29. Ibid., 608.

30. Loc. cit.

31. Tr. III, 10; Muw., pp. 244 f.; Muw. Sh., p. 169.

32. Loc. cit.

33. Tr. III, 10.

34. Commentary Muw. Sh., p. 169. This reflects, inter alia, the increasing confidence in formal traditions.

35. Tr. IX, 28 f.; and Siyar Kabîr, pp. 41 ff., especially p. 52; Kharâj, pp. 194 ff. See also Mabsût, vol. X, p. 31.

36. Ṭabarî, Ikhtilâf, ed. Schacht, 81.

37. Tr. IX, 29.

38. Loc. cit.

39. See above pp. 187 f., and immediately below.

40. See Kharâj, pp. 162 ff.; Tr. II, 18(a); Muw., pp. 819 ff., and Muw Sh., pp. 304 ff.

41. See, for instance, Siyar Kabîr, pp. 212 f. The doctrine concerned was rejected because it was deemed to be opposed to the Quranic verse V. 103. This was reinforced by two arguments: (1) that the Sha'bî, the transmitter of the tradition does

not follow that tradition; and (2) that the traditionsis shâdhdh, and shâdhdh traditions are not followed.

42. See Ikh., pp. 345 ff.; Muw., p. 724.

43. Ibid., p. 721.

44. Ikh., p. 349.

45. See Muw. Sh., p. 361. Shaybânî cites two traditions, one from 'Aṭâ' and the other from Zuhrî, both of which claim that the Medinese doctrine represents an Umayyad innovation, rather than the original practice (i.e., from the time of the Prophet or the first four Calips).

46. See above pp. 190 f.

47. See Ibn Qutaybah, Ta'wîl Mukhtalif al-Hadîth, op. cit., pp. 53, 112, 256.

48. Umm., vol. VI, p. 115 f.

49. Tr. IX, 5. For the translation of the early part of the passage the writer is indebted to Fazlur Rahman, op. cit., p. 35, even though this writer considers that the translation of the latter part of the passage by this writer (viz., "follow the hadîth which is followed by the community..." has a slightly different shade of meaning, as will be evident from a comparison between this writer's translation with that of Fazlur Rhman. Cf. also the transla—

tion of the same portion by Schacht, Origins, p. 28. As for the translation of Schacht, it is inaccurate in this writer's opinion.

50. Tr. IX, 5.

51. For instance, Tr. I, 115 discusses the question whether the testimony of minors was admissible against one another. Abû Ḥanîfah was opposed to its admissibility, while Ibn Abî Laylá favoured it. In this discussion reference has not been made to Quranic verse II. 282 which can be interpreted in such a manner as to exclude the acceptance of the testimony of minors against one another. Shaybânî, however, refers to this verse (Âthâr Sh., 634). This does not necessarily mean that Abû Ḥanîfah was not aware of this Quranic verse, or of its relevance to the subject. Cf. Akhbâr al-Quḍâh, vol. II, pp. 308 and 313. On the question whether one may read the Qur'ân after having urinated and without having performed wudû', Âthâr A.Y., 327 mentions a tradition from Ibn Mas'ûd. The said tradition makes no explicit mention of and nothing else seems to explain, the question satisfactorily except that the question had arisen from the Quranic verse LVI. 79, and that the tradition merely signifies that the "pure" referred to in the verse does not refer to, or at least

does not obligate one's being in the state of wudû', at the time of reading of the Qur'ân (see Muw. Sh., p. 263). To consider another case: several traditions revolve around the question whether a divorced woman or widow could move out from her husband's house before the expiry of her 'iddah. These traditions do not refer to any Quranic verse, though the verses II. 234 and LXV. 4 are certainly relevant to the questions discussed. Cf. Muw., pp. 59 f., where there are four traditions on the question of the duration of the 'iddah of pregnant widows. None of these refers to any Quranic verse, though the question had obviously arisen from the seemingly contradictory implications of two Quranic verses, viz., II. 234 and LXVI. 4. Shaybânî, al-Jâmi' al-Saghîr, pp. 84 f. The question under consideration is that of highway robbery with and without homicide. The question presupposes the Quranic verse V. 33, but there is no explicit mention of the Quranic source of the doctrines, 9 (cf. Kharâj, p. 177). This only shows that the failure to refer to the source or argument in support of a doctrine at a certain period of time, does not prove its non-existence. Again, the reference to that source or argument in connection with the doctrine in question

by some later authority, does not automatically warrant the conclusion that it was necessarily a later fabrication. (Cf. Origins, pp. 140 ff.).

52. It must be emphasised that even though it has generally meant "sunnah of the Prophet", this has not been the unanimous view. The Ḥanafî school, for instance, has formally retained a wider connotation of the term "sunnah". See n. 77 below.

53. See Origins, p. 77 and n. 5.

54. Muh. St., II, passim; also "The Principles of Law in Islam", in Historian's History, vol. VIII, see p. 302: "Judged by a scientific criterion, only a very small part, if any, of the contents of these canonical compilations can be confidently referred to the early period from which they profess to date."

55. "One of the main conclusions to be drawn from Part I of this book is that, generally speaking, the living tradition of the ancient schools of law, based to a great extent on individual reasoning came first, that in the second stage it was put under the aegis of Companions, that traditions from the Prophet himself, put into circulation by traditionalists towards the middle of the second century A.H. disturbed and influenced this living tradition,

and that only Shâfi'î secured to the traditions from the Prophet supreme authority." (Origins, p. 138). To cite another revealing passage from Schacht: "In the course of polemical discussions, doctrines are frequently projected back to higher authorities; traditions from Successors become traditions from Companions, and traditions from Companions become traditions from the Prophet." (Ibid., p. 156).

56. For Lammens, see Fazlur Rahman, op. cit., pp. 4 f.

57. See Margoliouth, Early Development, pp. 65 ff, especially p. 98. He is of the view, however, that these "inventions" were not later than the first century (Loc. cit.).

58. For H.C. Hurgronje, see his Selected Works, tr. and ed. J. Schacht and G.H. Bousquet, (Leiden, 1957 A.D.), p. 51.

59. See J. Wensinck, op. cit., passim, especially pp. 108 f, 158, 162.

60. A. Guillaume, Traditions of Islam, (Oxford, 1924 A.D.), passim.

61. Goldziher's view, however, was significantly different. See Fazlur Rahman, op. cit., p. 4.

62. Introduction, p. 18. This trend of thought was developed by Margoliouth. See Early Development,

pp. 68 ff., particularly pp. 69 f. and 75 f.

63. Origins, p. 149; Introduction, p. 34, and Law in the Middle East, p. 46.

64. See above pp. 27 ff., pp. 52 ff., pp. 67 ff., pp. 99 ff., and pp. 125 ff. Cf. Fazlur Rahman, op. cit., pp. 6 ff.

65. See above pp. 125 ff.

66. See above pp. 67 ff.

67. See above pp. 149 f. See also immediately below. In fact it had even a broader and more generic connotation, but that was rare and was on the decline corresponding to the development of technical legal terminology. See above p. 149.

68. Tr. IX, 18.

69. Ibid., 10.

70. Ibid., 16.

71. Ibid., 24.

72. Ibid., 25.

73. Âthâr A.Y., 482; Âthâr Sh., 315.

74. Kharâj, p. 164.

75. Hujaj, p. 210. See also ibid., pp. 201 ff., 219 f., 225, and often.

76. Ibid., p. 210.

77. Ibid., p. 55. See also Tr. I, 89 and 183. Schacht aptly remarks: "The doctrine of the decisive charac-

ter of traditions from Companions persisted in the school of Abû Ḥanîfa." (Origins, p. 29, n. 4). This is corroborated by the later Ḥanafî works on Usûl al-Fiqh. See, for example, Sarakhsî, Usûl al-Sarakhsî, vol. I, pp. 113 f., vol. II, pp. 105 ff., Nasafî, op. cit., vol. II, p. 2. (Cf. ibid., pp. 99 f.).

78. Tr. VIII, 9.

79. For instance, Ibrâhîm's statement: "I prefer the doctrine of 'Alî to the doctrine of 'Umar." (Âthâr A.Y., 591). See also ibid., 594, 597, 606 and often. See also Âthâr Sh., 453, 521 f., 563, 598, and often.

80. For this, see Coulson, op. cit., pp. 42 f. and 68.

81. See above p. 195 and n. 64.

82. Âthâr A.Y., 607.

83. Tr. I, 9. See also ibid., 116.

84. Kharâj, p. 58.

85. Ibid., p. 26.

86. Ibid., p. 68.

87. Âthâr A.Y., 277. Cf. Hujaj, p. 88.

88. Âthâr A.Y., 390.

89. Ibid., 478.

90. Tr. IX, 24.

91. Shaybânî, K. al-Makhârij fî al-Ḥiyal, ed. Schacht,

(Leipzig, 1930 A.D.), p. 3. Cited hereafter as Hiyal.

92. Tr. IX, 10.

93. Ibid., 11. See also ibid., 12 and 16.

94. Hujaj, p. 213. See also ibid., pp. 210, 225, and often.

95. Muw. Sh., p. 190.

96. Ibid., pp. 257 f.

97. Âthâr A.Y., 120.

98. Ibid., 181. Whether the reference to 'Alqamah is true or false does not concern us here. What is relevant is that this statement represents the doctrine to which Abû Yûsuf subscribed.

99. Ibid., 70.

100. Ibid., 4.

101. Ibid., 62.

102. Ibid., 65 f.

103. Kharâj, p. 54.

104. Âthâr A.Y., 124.

105. Ibid., 830.

106. Muw. Sh., pp. 87 ff.

107. Ibid., p. 120.

108. Ibid., p. 195.

109. Âthâr Sh., 322. See also ibid., 314.

110. Ibid., 445. Cf. ibid., 722.

111. Ibid., 206 f.

112. Ibid., 575.

113. Tr. I, 234.

114. Ibid., 51; and Kharâj, pp. 88 ff.

115. Tr. I, 234; and Kharâj, pp. 108 f. Abû Yûsuf mentions two traditions from the Prophet (see Kharâj, p. 89), which had been cited by Abû Ḥanîfah in support of his doctrine, but which have not been mentioned in Tr. I, 234.

116. Tr. IX, 3. Cf. Kharâj, pp. 18 f. Incidentally Abû Yûsuf mentions a tradition from 'Umar cited by Abû Ḥanîfah in favour of his doctrine (see ibid., p. 19), which is not mentioned in Tr. IX, 3.

117. Kharâj, p. 77.

118. Âthâr Sh., 296.

119. Hujaj, pp. 92 f.

120. Ibid., p. 126; Âthâr Sh., 302; Muw. Sh., 169. Cf. Kharâj, pp. 52 ff. and 55 and Tr. I, 169. Incidentally Âthâr Sh., 302 merely mentions the doctrine of Shaybânî, while Abû Yûsuf mentions traditions from the Prophet (See Kharâj, pp. 52 ff.), on both the questions, and Shaybânî himself bases his doctrine on traditions from the Prophet (see Hujaj, p. 126), though he does not cite the ones mentioned by Abû Yûsuf in Kharâj.

121. Hujaj, pp. 32 ff.

122. Ibid., pp. 77 ff.

123. Muw. Sh., pp. 326 f.

124. For some of these examples see below pp. 221 ff.

125. See above pp.146f.and pp. 195 ff.

126. See, for instance, the attitude of Awzâ'î supra, pp.188f. Shâfi'î also subscribes to this view. (See Umm, VII, p. 20).

127. See, for instance, the statement of Shaybânî on the question of option in sale that 'Umar's interpretation was authoritative because he was most knowledgable in matters relating to the Prophet (Hujaj, p. 238).

128. For references to these arguments, see Tr. III, 39, 83, 119; Ikh., p. 325, and often.

129. For this, see below pp. 221 ff. When the "ancient schools" preferred a tradition from some Companion to that from the Prophet, the reason generally was that they doubted the authenticity of that particular tradition from the Prophet. This is evident, for instance, from the following statement of Shâfi'î: "It is not permissible for a scholar to abandon the doctrine of the Prophet in favour of that of one someone else. And if you say that it is possible that there might be error

in what has been reported from the Prophet...." (Tr. III, 148, p. 241 and often). (Emphasis is our own). See also Risâlah, pp. 543 f., where Shâfi'î mentions that in a discussion he adduced a tradition from the Prophet and his opponent adduced a ruling of Ibn Mas'ûd which was opposed to it, and based his doctrine on the latter. Shâfi'î inquired if any one had any authority as against the Prophet?" "No, if it is established to be from the Prophet", said the opponent. See also below n. 203

130. See above p. 146 and n. 87.

131. Cf. Margoliouth, cited above, Chapter II, n. 75.

132. See the fragment of Qâḍî 'Iyâḍ, Madârik, in Andalus, vol. XV, p. 415. That this was the view of the Medinese is an established fact, even if there might be some dispute about the authenticity of this particular tradition. See Muwaṭṭa', passim, and the statement: "Our doctrine is to authenticate only those traditions that are agreed upon by the people of Medina, to the exclusion of other places". (Tr. III, 148, p. 242).

133. See the letter of Mâlik in Madârik, op. cit.,

pp. 416 ff. The authenticity of this letter is confirmed by the reply of Layth to this letter. See I'lâm al-Muwaqqi'în, vol. III, pp. 94 ff. as well as by the internal evidences of the two letters. Mâlik's concept of practice is also illustrated by another example. With regard to the question of i'tikâf Mâlik observes that one should follow the sunnah that has come from the past; that one is not entitled to follow anything new in that matter besides the practice of the Muslims coming down from the past (ghayr mâ madá 'alayhi al-muslimûn). So far Mâlik might appear to be advocating the sanctification of the current practices of the Muslim society. Such an impression is refuted, however, by his concluding observation: "The Prophet performed i'tikâf and the Muslims came to know thereby the sunnah of i'tikâf" (Muw. p. 314). To consider another case, Mâlik cites a tradition which shows that the Prophet decided on the basis of the testimony of one witness and the oath of the plaintiff. He reinforces this by traditions from 'Umar b. 'Abd al-'Azîz, and Sulaymân b. Yasâr, and then says: "Madat al-sunnah fî al-qadâ'" (Muw., pp. 721 ff). For

the concept of practice among the Syrians, see above pp. 135 ff. and below p. 234, n. 211.

134. See above pp. 102 f., p. 146, and pp. 195 ff.

135. This is proved, for instance, by Ibn al-Muqaffa's statement ("Risâlah fî al-Sahâbah", op. cit., p. 126). It is also corroborated by the remarks of Abû Yûsuf e.g., his blaming the Medinese and the Syrians for claiming the sanctity of sunnah for their practices, even for those which might have been introduced by some market-inspector or some provincial governor (Tr. IX, 1. See also ibid., 3 and 24).

136. Cf. Schacht's conclusions about the Medinese concept of consensus: "But the 'practice' of the Medinese does not simply reflect the actual custom, it contains a theoretical or ideal element".

In Mud., I, 65, Mâlik opposes the 'practice' to a tradition from Abû Bakr (Muw., p. 149). But he thinks of the practice as it ought to be, and therefore says: "The practice, in my opinion is...." In Mud., III, 12, Mâlik says: 'This is how it is (huwa l-sha'n).' But the picture he gives is not one of the actual custom. It is, rather, an ideal, fictitious

picture of the practice at the beginning of Islâm, as is shown by Tr. IX, 1. In Muw. III, 39 Mâlik states: "This is our practice." But it was not yet so in the time of Zuhrî, shortly before Mâlik. So Mâlik's recurrent expression al-amr ʿindanâ, literally 'the practice with us', may mean here and in other places only "the [right] practice in our opinion...." (Origins, p. 68).

For a more detailed view of Schacht on 'practice', see ibid., pp. 64 f., 67, 70 f., 75, 147, 192 ff., 219 ff., 277, 285 f., 288 f., 292, 294, 312, 314 and 318.

137. See n. 135 above.

138. See, for instance, pp. 209 f. above.

139. The Kufian attitude to 'practice' is reflected, both negatively and positively, in the following statement of Abû Yûsuf: "One does not decide a question of allowed and forbidden by simply asserting that people always did it. Most of people always did is not allowed and ought not to be done. There are cases which I could mention,...when the great mass (ʿâmmah) acts against a prohibition of the Prophet. In these questions one has to follow the sunnah which has

come down from the Prophet and the forbears, his companions and fuqahâ'." (Tr. IX, 24). For Abû Yûsuf's denial of the authority of the so-called uninterrupted custom and his demand for formal traditions with isnâd instead, see ibid., 1, 3 and 9. Cf. ibid., 5. Inspite of all this, the heritage of the informal attitude lingered on among the Kufians, including Abû Yûsuf. Among other things, 'practice' or its continuity was considered to confirm the belief that the principle concerned had originated in the time of the Prophet or of the first Caliphs and was, therefore, binding. For Shaybânî, see, for instance, his statement that: "A well-known hadîth which is doubtlessly from the Prophet, and which has been followed till this day by the Muslims in the administration of their affairs all over that a person has option if he has not seen it [i.e., the merchandise]". (Hujaj, p. 236). For another example of 'practice', see Muw. Sh., p. 361.

140. On this point the Kufians seem to consider (and perhaps rightly so), the Syrians and the Medinese (or Hijazis, as they often called them),

to possess a considerable amount of identity of approach. This is evident from Tr. IX, 1 (p. 11) and 3 (p. 21).

141. For statistics, see Origins, p. 33. It is interesting to note that among traditions cited by Mâlik in his Muwattâ', the number of traditions from the Successors is considerably less than traditions from the Prophet as well as traditions from the Companions. For statistics, see ibid., p. 22.

142. See ibid., p. 33.

143. Tr. VIII, 13.

144. Ibid., 6.

145. Ibid., 15. This further confirms that the doctrines of the Successors were not considered to be binding as such.

146. Origins, p. 32.

147. The position of the ancient schools of law appears to be much less inconsistent if we were to bear in mind the reasonable distinction between "what may be followed" and "what must be followed". This also applies, to a great extent, to the questions we shall discuss below pp. 227 ff.

148. See Shâfi'î's reference to the Medinese claim about the famous successor Ibn al-Musayyib, Tr.,

III, 77.

149. Tr. IV, p. 258.

150. See the Medinese view that Ibn 'Umar, his Companions and the Successors were "more advanced in knowledge and closer in point of time to the Prophet..." Tr. III, 145(a). Or Shaybânî's statement about the early generations: "what is knowledge except the knowledge of the ancients..." (Hujaj, p. 81).

151. See the works of Abû Yûsuf and Shaybânî, passim, and especially Âthâr Sh.

152. Abû Yûsuf, for instance, considers acceptance by the fuqahâ' to be one of the criteria for the authenticity of traditions. Tr. IX, 2 and 5. See also Kharâj, reference to 'âmmatu fuqahâ'inâ in Muw. Sh. and Hujaj, passim.

153. Tr. IX, 2 and often. It is implied in the statements made both by Abû Yûsuf and Shaybânî that certain doctrine enjoyed the support of the fuqahâ' in general, or of the bulk of the fuqahâ' of their school, etc. See n. 152 above.

154. See Tr. IX, 24: "In these questions one follows the sunnah from the Prophet and the forbears, his Companions and the fuqahâ'." For the significance of this statement, see above pp. 151 f.

155. The Kufian doctrine was that a tradition from a Companion being part of "binding information" should prevail over qiyâs. See Ikh., pp. 117 f. As for the Successors, we have seen that their precepts and practices were not considered to be authoritative in the sense of being binding. See above pp. 212 ff.

156. See above pp. 199 ff.

157. See Tr. VIII, I, Tr. IX, 6, 11, 29, and often.

158. Tr. III, 148 (p. 246).

159. Tr. III, 16, 76 f., 83 f.

160. Tr. III, 57, 148 (p. 248).

161. Umm, vol. VII, p. 20.

162. See Origins, p. 77, n. 5.

163. Tr. III, 10.

164. This partially explains his extremely harsh criticism of the Medinese in Tr. III, (passim) despite his profession that he belonged to that school (Origins, pp. 9 f.).

165. See below pp. 227 ff.

166. Tr. IX, 5.

167. Tr. III, 119.

168. Ibid., 87. See also ibid., 39

169. Ibid., 77.

170. One of its evidences is the considerably less

frequent reference to 'practice' made by the Kufians. See n. 210 below. Cf. Origins, p. 76. For a few references to 'practice' by the Kufians, see Kharâj, p. 59: "dhâlika al-amr wa 'alayhi al-'amal"; p. 129: "wa huwa al-ladhî 'alayhi al-jamâ'ah wa al-'amal"; p. 134: "wa 'alá hâdhâ al-'amal 'indanâ". The context makes it evident that the reference was to 'normative practice'. For reference to the practice of prominent Companions as against Awzâ'î's reference to a tradition from the Prophet, see Tr. IX, 31. See also Hujaj, p. 236 where a well-known tradition from the Prophet is supported by the claim that: "the Muslims have continued to administer their affairs accordingly till to-day".

171. Tr. IV, p. 258.

172. Muw. Sh., p. 361. It is claimed here by implication that it was during the early Umayyad period that the 'original practice' suffered a change. There can be no doubt that what Shaybânî is trying to show is that the practice prevalent in the time of the Prophet and/ or the a'immat al-hudá (to use his expression for the first four Caliphs, vide. Hujaj, p. 33), was different from the one embodied in the tradition cited by Mâlik. Nevertheless,

Mâlik could claim to have the support of a formally well-authenticated tradition going back to the Prophet, while Shaybânî's traditions were not of that high order from a formal point of view.

173. Tr. III, 10.

174. Loc. cit.; Muw., pp. 244 f.; Muw. Sh., p. 169; Tr. I, 169.

175. See Tr. III, 10.

176. Loc. cit. Abû Yûsuf and Shaybânî, however, disagreed with their master on this question. See Com. Muw. Sh., p. 169; and Hujaj, p. 126.

177. See also above pp. 208 f. and below p. 230 ff.

178. We are referring here to the well-known fact that the growth of Ḥanafî, Mâlikî and other schools, etc., was preceded by the formation of regional schools such as the schools of Iraq and Hijaz, etc. Cf. Origins, pp. 7 f.; and ʿAlî Ḥasan ʿAbd al-Qâdir, op. cit., pp. 131 ff.

179. See also immediately below and pp. 226 f.

180. For instance, even the moderate Khawârij charged ʿUthmân and ʿAlî with having introduced innovations. See the letter of ʿAbd Allâh b. Ibâḍ to ʿAbd al-Malik in Barrâdî, K. al-Jawâhir, cited above pp. 130 f. and n. 33.

181. See for instance, Ibn al-Muqaffa', cited above p. 132 and n. 39.

182. See Tr. IX, 1 and 3. See also Shâfi'î, Tr. VIII, 14 where he accuses some of the ancient practices of the Medinese in the manner Ibn al-Muqaffa' and Abû Yûsuf had done before him, that they had possibly been introduced by the governors.

183. In fact, such criteria seem to have been at a not very advanced stage of development around the year 100. The quest for objective criteria (such as isnâd, etc.) which had already begun in the second half of the first century was, at least partly, a manifestation of dissatisfaction with the "tradition of trust", a mild dissatisfaction in the beginning, but eventually destined to become very forceful and consequential.

184. For some of these examples, see above pp. 203 ff.

185. See Tr. IX, I, 2.

186. Ibid., 1 and 3. See also Origins, p. 191, n. 6.

187. Ibid., 5 and 9. Cf. Shaybânî, Siyar Kabîr, in Sarakhsî, Sharh al-Siyar al-Kabîr, ed. Ṣalâḥ al-Dîn al-Munajjad, 3 vols., (Cairo, 1957-60 A.D.), p. 213, (Cited hereafter as Siyar Kabîr). See also

Muw. Sh., p. 148. For the attitude of the Medinese to isolated traditions, see Tr. III, 148; and Risâlah, p. 534.

188. See his works and the works of Shaybânî, passim.

189. For an explanation of this apparent inconsistency see above p. 214 and n. 146.

190. Ikh., pp. 360, 375, 390.

191. Muw. Sh., p. 113. See also Tr. II, 11 (b).

192. For some instances, see Origins, p. 38.

193. See Tr. VIII, 1 and 13; Ikh., pp. 195, 360 etc.

194. For identification of sunnah with formal tradition from the Prophet, see Tr. III, 148, (p. 249); Tr. I, 9 and 138; Ikh., pp. 27, 51, 57, 357; Umm, IV, 172, and often.

195. See Ikh., 58.

196. Risâlah; Tr. III; and Ikh., passim. See especially Ikh., p. 138.

197. See also above pp. 208 f., 221 ff., and below pp. 231 f.

198. See above pp. 228 f.

199. This is evident from the use of technical terms of the science of tradition which we find in the writings of the contemporaries as well as predecessors of Shâfi'î. For some of these terms,

see Origins, p. 36. The same is the case with the Kufians who used a number of terms which belong to the science of tradition. The word, isnâd and musnad, for instance, were used often. (See e.g., Tr. IX, 1, 2 and Kharâj, p. 39). Such statements about traditions as hadîth mashhûr (Hujaj, p. 15) and hadîth mustafîd ma'rûf (ibid., p. 2), were also often used.

200. Origins, p. 36.

201. See n. 129 above.

202. For isolated traditions see above p. 227, n. 187, and below pp. 249 f. That this was the main point of disagreement between the ancient schools is proved by the works of Shâfi'î, particularly by Ikh., passim. See also Risâlah, pp. 401-70.

203. See above nn. 129 and 177. This was common to the Kufians as well as the Medinese. For evidence of the point we have made see Ikh., 139 which implies that the action of some Companion, if it is opposed to a tradition of the Prophet, makes the authenticity of that tradition from the Prophet doubtful. Tr. III, 119 and 145(a), suggest that Ibn 'Umar could not have been ignorant of the doctrine of the Prophet which, in plain words, means that the tradition which embodies that doctrine is

not trustworthy; ibid., 39 and 87 show that the Medinese rejected a tradition from the Prophet on the plea that 'Umar would be better informed about the Prophet than Sa'd, the transmitter of the tradition concerned from the Prophet which again implies the inauthenticity of that tradition.

204. Ikh., 325.

205. Risâlah, pp. 433 ff.

206. Tr. III, 39, 87, 119.

207. Ibid., 148, (p. 243).

208. Ibid., 2, Ikh., pp. 138 ff.

209. For a more severe criticism of the Medinese by Shâfi'î see Tr. III in comparison with Tr. I, Tr. VIII, and Tr. IX, passim, where Shâfi'î criticises the Kufians.

210. Ikh., p. 336. See also Tr. IX, 10 where Awzâ'î refers to a practice from the Prophet without isnâd, which is rejected by Abû Yûsuf who points out: "We have not heard that from the Prophet or any of his Companions. It is unknown to scholars. Had it been in the maghâzî, it would not have been unknown to us". Then Abû Yûsuf cites a tradition from Ibn 'Abbâs in support of the doctrine of his school. See also ibid., 31: Abû Yûsuf rejects

Awzâ'î's undocumented reference to a tradition from the Prophet, supported by a tradition from 'Umar, and further reinforced by reference to the consensus of scholars. He counters Awzâ'î's argument by claiming that prominent Companions and Successors had practised what Awzâ'î claimed to be forbidden [attempting to prove, thereby, that the tradition invoked by Awzâ'î was not trustworthy]. See also Tr. I, 254: Ibn Abî Laylá supports his doctrine (on the question whether an un-married person who is convicted for fornication should be externed, in addition to being lashed), by referring to a tradition from the Prophet and traditions from Abû Bakr and 'Alî. Abû Yûsuf, on the contrary, has only one tradition, that from 'Alî, to support the divergent doctrine of his master. For an example of the same kind, see Hujaj, pp. 98 f. Here Shaybânî interprets a tradition from the Prophet in a manner quite different from the Medinese and reinforces the doctrine of his school by adducing traditions from the Companions.

211. See n. 210 above and n. 231 below.

212. See above p. 195 and n. 63.

213. Coulson is of the view that Schacht's thesis "is irrefutable in its broad essentials and that the vast

majority of the legal dicta attributed to the Prophet are apocryphal and the result of the process of "back-projection" of legal doctrines..." (Coulson, op. cit., p. 64). Some of the contemporary Muslim scholars hold substantially the same view, the most notable among whom is Fazlur Rahman. See his Islamic Methodology, op. cit., pp. 5 f.

214. Origins, pp. 140 f. In his actual use of this argument Schacht has not been mindful even of the stipulation which he himself mentions, viz., the non-use of a tradition "as a legal argument in a discussion which would have made reference to it imperative." (Emphasis is our own). For an example cited by Schacht himself which seems to contradict one of the assumptions on which his argument is based, see ibid., p. 142.

It would also be interesting to note that Schacht himself has often used later sources for the doctrines of the first and the second centuries in flagrant violation of the principles he enunciates (ibid., pp. 140 ff.). He cites an argument of Shaybânî in favour of a doctrine of his school, for instance, on the basis of a late fifth century book viz., Sarakhsî, Mabsût, and observes that

Shaybânî "developes the argument in a masterly way and introduces a judicious distinction; this seems to be the argument, that Shaibânî did really use". (Origins, p. 271). Again, an alleged doctrine of the early second century is referred to on the basis of 'Iyâḍ quoted in Zurqânî's Commentary of Muwatta' (ibid., pp. 107 f.). For other instances, see pp. 273 and 303, and often.

215. See ibid., pp. 140 ff., and passim.

216. According to Schacht, the literary period in Islamia legal history begins around the year A.H. 150. (Law in the Middle East, p. 50). Margoliouth's view seems to be substantially the same. (See Early Development, pp. 39 f.) In our own view while the composition of books began earlier, hardly any of those books is extant. Moreover, the earlier works would naturally have had numerous imperfections owing to the fact that the Arabs had hardly any tradition of prose-writing before Islâm. As better works came into existence the earlier ones became somewhat superfluous and hence gradually disappeared.

217. See above pp. 62 ff., 218 ff. and 225 f.

218. See above p. 192 and n. 51.

219. See also Âthâr A.Y., 1048 and compare it with

Âthâr Sh., 878 which shows that a certain doctrine which was recorded by Abû Yûsuf as a tradition from the Prophet and transmitted by Ibrâhîm, was recorded by Shaybânî in his Âthâr as the doctrine of Ibrâhîm. In the same way in Tr. I, 116 Abû Ḥanîfah's disciple Abû Yûsuf mentions a certain tradition from the Prophet while Âthâr A.Y., 738 mentions it only as a doctrine of Abû Ḥanîfah. Kharâj, p. 51 reproduces a tradition from the Prophet with isnâd on the question of muzâra'ah cited by Ibn Abî Laylá, but Tr. I, 51 which records the doctrine of Ibn Abî Laylá (a doctrine with which Abû Yûsuf agrees), mentions the traditions without isnâd.

220. It is interesting to note that Ḥujaj (pp. 1 f.) where Shaybânî cites several traditions in support of the doctrine of his school, the tradition of Muw. referred to above has been mentioned.

221. The non-citation of these tradition does not prove being unaware of that tradition. Shaybânî refers to this tradition in Ḥujaj, p. 289 with exactly the same isnâd as found in Muw. and bases his doctrine on this very tradition. And this precisely is our point: that it is unwarranted to assume that one always cited the tradition that

one knew, or its corollary that the non-citation of a tradition necessarily meant its non-existence.

222. Shaybânî as we know was younger than Abû Yûsuf who was also his teacher. Moreover, Shaybânî edited the works of Abû Yûsuf and himself composed works which were either based on or parallel to those of Abû Yûsuf. Hence, if a considerable number of traditions which are mentioned by Abû Yûsuf are not found in the parallel works of Shaybânî this fact undermines the validity of those assumptions (mentioned above pp. 235 f.) which alone can sustain the e silentio method adopted by Schacht.

223. See also nn. 115, 116 and 120 above.

224. For explicit mention of foregetting traditions, or their isnâd, or of loss of books containing these traditions, and of not citing all the traditions that one knew, see Kharâj, p. 57; Risâlah, p. 431. Shâfi'î's passage is all the more instructive. He mentions the following: (1) There are several traditions which he has cited in his work as interrupted even though he had heard them as muttasil and mashhûr. He preferred, however, to mention them as interrupted traditions because of his lack of full memory. (2) He lost several of

his works and so he had to get the traditions which he [still] remembered verified by scholars. (3) He omitted several traditions for fear of increasing the bulk of his work. He put forth what was enough, says Shâfi'î, without attempting to record all that he knew. See also Umm, vol. IV, p. 177; vol. VI, pp. 3 and 172; vol. VII, p. 41.

225. Among the present-day Western scholars, Coulson has initiated, in a tentative manner, the process of questioning the assumptions behind Schacht's method. (See Coulson, History, pp. 64 ff.). Coulson cites, by way of illustration, Schacht's conclusions on the tradition regarding "six slaves" (cited in Origins, pp. 201 f.), which restricts the power of testamentary disposition to one-third of the deceased's assets, to be a tradition of Umayyad origin (back-projected to the Prophet). Schacht considers this to be "explicity stated" in Mâlik's Muw. where it is recorded that, when a man on his death-bed manumitted the six slaves who were his property, Abân b. 'Uthmân (d. 105), the governor of Medina drew lots between them and set free only the winning two. Moreover, Schacht is of the opinion that the tradition with its full isnâd going back to the Prophet dates "only from

the second century, because Shâfi'î states that it is the only argument which can be adduced against the doctrine of Ṭâwûs on another problem of legacies; whether the alleged doctrine of Ṭâwûs is authentic or not, the tradition cannot have existed in the time of historical Ṭâwûs who died in A.H. 101" (Origins, p. 202). For a refutation of the assumptions underlying Schacht's line of argument, see Coulson, op. cit., pp. 66 ff. Regarding the second part of the argument, Coulson is alive to possibilities other than the one which alone appears to Schacht as plausible and thus comes close to our own position stated above pp. 60 ff. To cite Coulson: "Schacht's second argument, then, that the Tradition did not exist in Ṭâwûs's time because, if it had, he could not have maintained the view he did, is only valid if we assume (a) that Ṭâwûs would necessarily be aware of an existing Tradition, (b) that he would interpret it in exactly the same way as ash-Shâfi'î did, and (c) that he would consider himself bound by it. Each of these suppositions is open to serious objection" (ibid., p. 67). For his criticism of these suppositions, see ibid., pp. 67 f.

226. See above Chapter I, nn. 87 and 91.

227. Montgomery Watt was confronted with a similar, if not identical problem while undertaking the task of writing the biography of the Prophet. It is significant that he adopted a considerably different attitude towards the early sources on sîrah. (See Muhammad at Mecca, Oxford, 1953 A.D., pp. xi ff.; Muhammad at Medina, Oxford, 1956 A.D., pp. 336 ff.; and Muhammad : Prophet and Statesman, Oxford, 1961 A.D., pp. 244 f.).

The present writer considers a full-scale discussion as to the extent to which the traditions from the Prophet (e.g., those recorded in the six canonical collections of hadîth) are authentic to be beyond the scope of the present study. Nor does he consider himself, at the present stage of his knowledge of Hadîth and its auxiliary sciences (e.g., Asmâ' al-Rijâl, etc.), to be competent to deal with the subject. It suffices for the purpose of this study to record that many of the conclusions of the present-day Western scholarship on the subject are invalid and exaggerated, and thus to affirm the possibility of the authenticity of a considerably greater number of traditions than has generally been recognized by current Western scholarship.

228. See above p. 233 and n. 209. It is significant that Abû Yûsuf seems to believe that the Medinese and the Syrians had an identical attitude towards 'practice'. (See Tr. IX, 1 and 3).

229. See nn. 209 and 210 above. See also nn. 230 ff. below.

230. Tr. IX, 1, and often.

231. Ibid., 1, 3 and 9. Shâfi'î held a similar view.

The advance made by the Kufians over the Syrians who are, in the view of Abû Yûsuf, akin to the Medinese (see above n. 228), is amply illustrated by Tr. IX, which shows a shift from 'practice' to traditions from the Prophet and Companions. For Abû Yûsuf's reference to traditions from the Prophet (which are not, however, uniformly of a high order from a formal point of view), see ibid., 1 (pp. 2 ff., 8 f., 9, 10, 11 and 12), 2 (interprets the tradition cited by Awzâ'î differently), 3 (agrees with Awzâ'î and diverges from the doctrine of Abû Hanîfah on account of traditions from the Prophet, 4 (points out that the import of the tradition cited by Awzâ'î is different from what he thinks), 5 (pp. 23 f., 24, 31, 32), 6, 7, 8, 9, 10 (a negative argument from traditions: the claim that on the question concerned no tradition has come down

from the Prophet or the Companions; Cf. 18), 14, 15 (a tradition from 'Umar followed by Abû Hanîfah's statement: "Something to this effect has reached us from the Prophet"), 16, 17, 18 (the same argument as in 10), 20 (interprets the tradition cited by Awzâ'î differently), 21, 22, 24, 26, 28, 29, 30, 34, 36. For traditions from the Companions independent of any reference to the Prophet, see 4 (reference to dîwân as an institution in existence since the time of 'Umar), 10, 15 (a tradition from Ibn 'Umar as against Awzâ'î's reference to the doctrine of the scholars of the past), 27, 31, 40, 41. For traditions from the Companions as supplementary arguments, see ibid., passim. The discussion of legal problems in the works of Shaybânî (e.g., Hujaj), which is a debate between Shaybânî and the Medinese on controversial legal doctrines, revolves around traditions from the Prophet and the Companions, besides systematic arguments. See ibid., passim.

232. For Shâfi'î's uncompromising attitude to practice, see Ikh., p. 284. See also Origins, pp. 58 f. and 77 ff.

233. Cf. ibid., pp. 27 and 33 f.

234. See above pp. 227 f.

235. Tr. IX, 1, 2, 5 and 9 and elsewhere.

236. See above pp. 204 ff.

237. One of these considerations was the idea that the Prophet had certain privileges which were shared by none and that in matters involving these privileges, it was wrong to derive any norm from the conduct of the Prophet. (See Tr. IX, 5, pp. 24 and 34; Hujaj, pp. 34 and 231; Muw. Sh., 166 f and often). This particular consideration continued to influence the Kufian doctrines. For other such considerations which led to restrictive interpretation of traditions, see Origins, pp. 47 ff. This also reflects the corresponding decrease of the use of ra'y.

238. Kharâj, pp. 64 ff.

239. Muw. Sh., p. 331. The Medinese too used to interpret traditions from the Prophet restrictively. See, e.g., Tr. III, 61 which mentions the Medinese doctrine that the application of the ruling of the Prophet that the killer of the enemy-soldier was entitled to his spoils, rested on the discretion of the army commander: the killer would be entitled to the spoils only if the army commander had so announced, and not automatically. Shâfi'î disagreed with this and formulated a principle for such

occasions: "The decision of the Prophet to grant something has a general import until there is any evidence from him that his statement should have a restricted application...." (loc. cit.).

240. For relevant instances in regard to the Medinese, see pp. 220 f. See also Origins, pp. 23 f. See also n. 241 below.

241. This conclusion is based on a broad survey of the examples of the supercession of traditions from the Prophet by traditions from the Companions, especially those mentioned by Shâfi'î in Umm and Ikh.

242. See above pp. 231 f.

243. For the traditionists and their legal theory, see Origins, pp. 253 ff.

244. See above p. 217.

245. See above p. 218.

246. See Origins, pp. 23 f. and p. 29; Muw. Sh., p. 133; Hujaj, pp. 237 ff. For Shâfi'î's opinion, see Tr. I, 51.

247. Ikh, 117 f. For Shâfi'î's views, see Origins, p. 19, n. 2.

248. See above pp. 187 ff., 208 f., 222 and 232.

249. Ikh., pp. 138 ff.

250. See n. 248 above.

251. For the attitude of Kufians schools to isolated

traditions, see Tr. IX, 5, 9 and 38; Muw. Sh., p. 148. Cf. also Tr. IV, 256. See also above n. 202.

252. Tr. IV, p. 255.

253. For the Medinese attitude to isolated traditions, see Tr. III, 148 (p. 242). This is besides the fact that one of the main points of disagreement between Shâfi'î and ancient schools was this very question.

254. Ikh., 328 ff.

255. See Risâlah, pp. 591 ff.

For similar opinions of the ancient schools which seem to arise, at least partly, from deficient confidence in formal traditions particularly isolated traditions. Cf. Origins, pp. 47 ff.

256. See Tr. IX, 5, etc. See also above pp. 186 ff. For Shâfi'î's attitude, see Tr. IX, 5; Risâlah, pp. 228 ff.

257. Tr. III, 13. Schacht has mistranslated it as merely 'sunnah'. (See Origins, p. 30, and for his further interpretation of the Kufian concept of sunnah, see ibid., pp. 73 ff.). This misinterpretation is owing to a serious error in reading the text which has the word: "his sunnah" (sunnatihi) rather than merely sunnah. (See Tr. III, 13, p. 182, line 9). To whom this 'his' refers becomes obvious by the fact that the Prophet has been

mentioned in the previous line).

258. Tr. IX, 5 (p. 32). Cf. ibid., 7, 8, 14.

259. Tr. IX, 5 (pp. 24) 31 f., and often.

260. Ibid., 2 (pp. 15 f.), 5 (p. 31), and often.

261. Ibid., 1, 2, 4, and often.

262. See above pp. 152 ff.

263. Âthâr A.Y., 98 and 278. Schacht is of the opinion that the statement attributed to Ibrâhîm in these traditions seems to be genuine. (See Origins, p. 142).

264. See ibid., pp. 42 f., based on Tr. IV, pp. 254 ff. The Mu'tazilah also believed in consensus. (See ibid., pp. 41 and 88).

265. See above pp. 186 ff.

266. For Shâfi'î's ideas on consensus, see Origins, pp. 43 and 88 ff. See also Tr. IV, pp. 256 ff.; Tr. III, 129 and 148 (p. 244).

267. For 'practice', see above pp. 143 ff., and pp. 209 ff.

268. See Tr. IX, 1 (a practice of the Prophet followed without interruption by the Muslims), 3 (a rule regarding the distribution of booty adopted by the Prophet and maintained by the Muslims "till this day"), 5 (a practice regarding the distribution of booty adopted by the Prophet regarding which

a'immat al-hudá were agreed), 7 (a principle of distributing booty introduced by the Prophet and followed by the Muslims subsequently), 8 (a practice of the Prophet, followed by Muslim rulers), 10 (the same as above), 13 (a sunnah has come down from the Prophet which has been practised by the rulers till to-day), 31 (a principle laid down by the Prophet, which is corroborated by a tradition from Ibn 'Umar and regarding which the scholars are agreed).

269. Ibid., 16.

270. Ibid., 28.

271. Ibid., 5 and 31.

272. Ibid., 6 (a certain practice which was denounced neither by any ruler, nor any scholar), 9 (a doctrine accepted by scholars and practised by the rulers), 14 (the same as 6 above), and 32 (a doctrine continually followed and approved by rulers and scholars). It is perhaps significant that in case a practice is not mentioned as having originated with the Prophet, Awzâ'î's reference to the practice of rulers is consistently followed by reference to the approval of scholars. The former seems to represent the actual aspect of 'practice', while the latter ensures its being religiously

approved (i.e., its normative aspect). (Cf. Origins, pp. 70 ff.).

It is also significant that in Tr. IX, Abû Yûsuf refers to consensus much less frequently than Awzâ'î does. Instead of referring to undocumented practice sanctified by anonymous ijmâ' (of the community, or of scholars), Abû Yûsuf generally refers to traditions from the Prophet and Companions. A significant example in this connection is Tr. IX, 9, where Awzâ'î supports a doctrine by claiming that it has been the approved doctrine of scholars and has been practised by the rulers, more or less in the same manner as in ibid., 6 and 14. (Cf. also ibid., 11). Abû Yûsuf counters this by pointing out that on the question concerned only one tradition had come down, and that solitary tradition was irregular. Significant also are the passages wherein Abû Yûsuf disapproves of undocumented reference to practice, and calls for formal and well-attested traditions (ibid., 1 and 9).

273. This was the doctrine of Rabî'. (Tr. III, 148, p. 242).

274. See Origins, pp. 83 ff.

275. See Mâlik's letter to Layth b. Sa'd, cited above pp. 209 f.

276. Tr. III, 77.

277. See above nn. 231 and 272.

278. See Hujaj, passim. This is evident from Shaybânî's repeated claim that on the question under discussion there was a number of traditions and by his repeated demand that the Medinese should produce, if they have, traditions from the Prophet and the Companions (besides systematic arguments), to establish their doctrines and by the small number of questions on which he invokes the sanction of consensus. (See Hujaj, passim).

279. For isolated traditions, see above p. 249, n. 251.

280. That is mâ naqalathu al-'âmmah 'an al-'âmmah (Tr. IV, p. 255). See also Tr. IX, 5 and also nn. 258 ff. above.

281. Tr. IV, pp. 255 ff. It may be noted that consensus denoted the general opinion of the majority, rather than complete uniformity of opinion of all Muslims, of all scholars (see Origins, pp. 82 and 85).

282. Ibid., p. 255.

283. Muw. Sh., pp. 138 ff.

284. Ibid., p. 140.

285. Tr. IV, 255.

286. Kharâj, p. 129. For another instance, see Hujaj, p. 104.

287. See above p. 252, n. 263.

288. Tr.I, 183. See also ibid., 89 where Shâfi'î mentions the Kufians as those who profess not to oppose the doctrine of any Companion.

289. Tr. VIII, 9.

290. Cf. Schacht's observation that the consensus of the Companions took, in the nature of things, the form of a silent approval (ijmâ' sukûtî) in later terminology. (Origins, p. 82).

291. For this kind of assumption on the part of the Medinese, see Tr. III, 69 where Shâfi'î addresses the Medinese as following: "A decision given by 'Umar, according to you, is public and well-known and can only have proceeded from a consultation with the Companions of the Prophet, therefore, his decision, according to you, is equivalent to their opinion, or the opinion of the majority of them.... and you say that his decision in Medina is the same as their general consensus."

292. Origins, p. 44 (based on Tr. IV, pp. 258 ff.). Cf. the view of the Basrian opponent of Shâfi'î in Tr. III, 148 (p. 244).

293. See, for instance, Kharâj, p. 174, on the question of stealing 'Umar consulted people, says Abû Yûsuf,

and they concurred that...."

For reference to the consensus of Companions, see further Kharâj, pp. 55 and 59; and Hujaj, pp. 13 and 15.

294. See some of its evidences in Origins, p. 85. In addition to the evidences cited by Schacht see also Hujaj, pp. 125, 161, 175, 176, etc. In the first and the third of these examples there is explicit reference to the consensus of the Medinese and the Kufians.

295. Tr. IV, p. 256.

296. Hujaj, pp. 161 and 176.

297. Ibid., pp. 125 and 175. See also Tr. VIII, 1.

298. Hujaj, p. 161. (Emphasis is our own).

299. Ibid., p. 176. (Emphasis is our own). Cf. Tr. IV, 255 ff. For other evidences of the same, see the views of a Basrian jurist mentioned by Shâfi'î in Tr. III, 148 (pp. 244 and 245). For the Medinese view which was the same, see Origins, p. 84.

300. For this expression, see above p. 178.

301. See Tr. III, 148 (p. 244).

302. Tr. IV, 256. (Cited in Origins, p. 91). This sentence also shows that in Shâfi'î's opinion consensus too was something which was transmitted much in the same manner as traditions were trans-

mitted. This is partly a consequence of Shâfi'î's formalism.

303. For some examples of the reference to this kind of consensus, (see above pp. 157 ff.). The following are a few more examples: "I found our fuqahâ' follow that doctrine and that is [a doctrine] regarding which, there is consensus among us" (Kharâj, p. 76). "Abu Ḥanîfah and the majority of our fuqahâ' were of the view that...." (Ibid., p. 21). See also ibid., pp. 165 and 167; and Tr. IX, 42. It is this, perhaps, which is meant by Shaybânî's constant reference to "The opinion of Abû Ḥanîfah and the generality of our fuqahâ'" in Muw. Sh., passim.

304. See above p. 210, n. 133.

305. See above pp. 212 ff.

306. See above pp. 260 f..

307. This is the present writer's interpretation for frequent reference by Abû Yûsuf and Shaybânî to the doctrine of "Abû Ḥanîfah and our fuqahâ' in general" (see especially Kharâj; Muw. Sh.; and Hujaj, passim. Cf. Schacht's conclusion in Origins, p. 85). This kind of consensus was at times mentioned to record the particular interpretation of the texts: e.g., regarding the question whether

the testimony of qâdhif is valid, which is based on a difference of interpretation regarding the legal implications of a Quranic verse (Kharâj, p. 166. For a similar example, see ibid., p. 167). It was also mentioned to record which out of the authoritative precedents or traditions was considered to be the basis of the accepted doctrine of the school (ibid., pp. 21 and 165).

308. The reason seems to lie in the implicit distinction between "what may legitimately be followed" and "what must be followed". In the light of the above, this writer takes an altogether different view from the one expressed by Schacht: "We must therefore, conclude that Abû Hanîfa, Abû Yûsuf, Shaibânî and their companions found the consensus, as their group understood it, represented by the body of doctrines associated with the name of Ibrâhîm". (Origins, pp. 86 f.).

309. See above pp. 252 f.

310 See above loc. cit.

311. See p. 256 and n. 281 above. This is owing to the fact that traditions, specially isolated traditions, as yet had less prestige that what they enjoyed a little later.

312. Tr. IX, 5.

313. Hujaj, pp. 93 f. See also ibid., p. 15; Muw. Sh., p. 148, and often.

314. Tr. IV, p. 256.

315. This doctrine is implicitly stated in Tr. IV, p. 255. For some examples, of the application of this principle see above pp. 187 ff.

316. Tr. III, 71, cited in Origins, p. 84.

317. Ibid., p. 83.

318. See above pp. 258 ff.

319. Tr. III, 148, (p. 244) cited in Origins, p. 83.

320. Tr. IV, 256.

321. See ibid.,pp. 256 f. and elsewhere.

322. Origins, p. 87.

323. It is significant that the classical Islamic doctrine of consensus represents, on the whole, a return to its pre-Shâfi'î concept. In the words of Schacht, Shâfi'î's "rejection in principle of the consensus of the scholars and his restriction of consensus to the unanimous doctrine of the community at large, were unsuccessful". (Origins, p. 85). Since the Kufian attitude to consensus during the second century was rooted in the ancient concept of sunnah, the later Ḥanafî doctrine of consensus remained essentially the same. Consensus was invoked, however, less often as an authoritative

argument in the settlement of concrete legal issues than in the early period. This was owing to the gradually arrived "consensus" of the Muslims at large to consider the body of traditions recorded in the authoritative collections of Hadîth to be authentic. Thus consensus actually became the sanction behind these collections of traditions. Moreover, as Snouck Hungronje has pointed out, consensus became "the ultimate mainstay of legal theory and of positive law in their final form: the guarantee of the authenticity and correct interpretation of the Qur'ân, the faithful transmission of the sunnah of the Prophet, the legitimate use of analogy and its results. Thus it covered every detail of the law, including the recognised differences of the several schools" (cited in ibid., p. 2).

CHAPTER V

INFERENCE, ELABORATION AND SYSTEMATISATION

1. See above pp. 94 ff., and 111 f.
2. For this, see above p. 178, n. 1.
3. Ta'wîl Mukhtalif al-Hadîth, op. cit., p. 63.
4. See Origins, pp. 98 f., and 100 ff.
5. Ibid., p. 98.
6. For an example of the use of ra'y in interpreting the Qur'ân, see Tr. IX, 21. For its use in interpreting traditions, see below pp. 271 ff.
7. This was besides the practice of opposing ra'y to athar and sunnah. The distinction between ra'y in the bad sense, in the sense of arbitrary opinion as distinguished from qiyâs occurs fairly frequently in the second century Kufian works, such as the works of Shaybânî. See especially Hujaj, passim.
8. For these, see below pp. 302 ff.
9. Âthâr A.Y., 277.
10. Hujaj, p. 68.
11. VIII. 41.
12. Kharâj, pp. 19 f.
13. Ibid., p. 81.
14. Ibid., p. 62.

15. Ibid., pp. 63 f. Abû Yûsuf disagreed with this stipulation in favour of interpreting the traditions from the Prophet according to its apparent meaning and without binding it with administrative measures. For a similar case, see the Medinese doctrines cited above, p. 245, n. 239.

16. Cited above p. 245. Abû Yûsuf and Shaybânî, however did not accept this exception (loc. cit.).

17. Muw., pp. 618 f.

18. Tr. I, 19; Muw. Sh., pp. 327 ff.; Hujaj, pp. 205 ff., Tr. III, 12. The Kufians also argued that none of the first Caliphs ever made a legal judgment or expressed verbally in favour of the doctrine of the Medinese (loc. cit.)

19. Tr. IX, 13; Siyar Kabîr, p. 716. For another instance of binding the application of an authoritative doctrine with administrative procedures, see above p. 245, n. 238.

20. Kharâj, p. 97.

21. Tr. IX, 33; and Tr. I, 201.

22. Tr. I, 27. Cf. ibid., 34. This reflects the importance of the consideration of the broad interests of Islâm. For other instances, see Kharâj, pp. 26, 27, 37, 60, 60 f., 62, 63, 66, 69, 94, 95, 97, 98 f., 105, 110, 184, 187 and 200; Tr. IX, 2, 14, 19, 20, 21, 27,

28 and 29. See also the sections relating to istihsân, above pp. 167 ff. and below pp. 302 ff.

23. Muw. Sh., pp. 274 f.

24. See above pp. 233 and 243.

25. For explicit reference to linguistic usage in legal judgments, see Siyar Kabîr, p. 170: "Al-thâbit bi al-'urf ka al-thâbit bi al-nass". See also ibid., pp. 312 and 333. See also Jâmi' Kabîr, passim, especially the questions relating to aymân.

26. Futûh al-Buldân, p. 629 (read Abû Yûsuf instead of Abû Sayf). It is interesting to note that Mâlik and Shâfi'î were of the opinions that all inequitable customs ought to be put an end to, let alone those introduced by unbelievers (loc. cit.).

27. The custom was deemed to be of considerable importance by the early judges. (See Introduction, pp. 25 f. and Origins, 100 ff.). For some other instances illustrating the importance of established customs and practices in the view of the Kufians, see Tr. IX, 2, 11, 12, 21, 29 and Muw. Sh., p. 356. See also other works of Abû Yûsuf and Shaybânî, passim. See also below pp. 302 ff.

28. See above p. 245, n. 237.

29. This did not necessarily mean that all ra'y was necessarily wrong, as we shall see. What it meant

was that ra'y, unless it was exercised according to the required method, was liable to lead to wrong conclusions. Ra'y was considered to be definitely wrong when it was opposed to sunnah and athar, and quite often when it was not used according to the proper method.

30. See Hujaj, passim, especially pp. 46, 88, 146, 170, 207, 207 f., 210, 212, 214. This accusation generally took the form of challenging the Medinese to produce if they have, any sunnah or athar either from the Prophet or any of his Companions on which their doctrine is based, to which was sometimes added the positive statement that their inability to adduce relevant traditions proves that the Medinese do not have any such traditions. (See for instance, ibid., pp. 146, 169 f. and 202. See also ibid., pp. 224, 234 and 251 where Shaybânî uses the term tahakkum.)

31. See ibid., pp. 6, 9, 153, 158, 212, 230 f., and 233.

32. Ibid., pp. 207 f., 209 f., 212, 213 f., 215 f., where Shaybânî contends that the Medinese doctrine is based on excessive precaution and is thus arbitrary; p. 218, where he expresses the opinion that Medinese doctrine is based on conjectures and misgivings.

33. That ra'y (or even qiyâs) being invalid if it was in opposition to ijmâ', was quite obvious. (See above pp. 256 f., and Tr. IV, p. 255, which clearly postulates a very high degree of authority for consensus.).

34. Shâfi'î arrived at this position only gradually. For Shâfi'î's views on ra'y, see Origins, pp. 120 ff. Shâfi'î considered ra'y to be equivalent to istihsân (Tr. VII, 273; Risâlah, p. 503); and to istihsân, as we know well, Shâfi'î was uncompromisingly opposed. See Tr. VII, pp. 270 ff.; and Risâlah, pp. 503-59.

35. See Ibn Qutaybah, op. cit., passim.

36. See ibid., p. 63. See also Zahiriten, pp. 5 ff. For the use of ra'y and istihsân by the Medinese, see Origins, pp. 113 ff., and 118 f. Shâfi'î also frequently charges the Medinese of using arbitrary ra'y (Tr. III, passim.). For the Syrians, see Origins, p. 119.

37. In this writer's view, one of the reasons for the characterisation of the Kufians as the adherents of ra'y was presumably their well-recognized method of trying to find answers to hypothetical questions in law, a practice which seems to have been considered objectionable by several contemporary scholars. See

the remark of Ḥafṣ b. Ghiyâth about Abû Ḥanîfah that he was "most knowledgeable about things which have not taken place, and most ignorant about things which have taken place". See also the report about Masrûq that whenever he was asked about a legal question, he inquired: "Has this already taken place." If the answer was in the negative, he used to say: "Excuse me till it does actually take place." (For these along with a few other opinions of contemporary authorities on the same question, see Zahiriten, pp. 17 f.). Although the authenticity of these statements is not beyond doubt, they represent at least second century reactions to the attitude of the Kufian jurists. See also above, pp. 111 ff.

38. A survival of this original connotation of the term is to be found even as late as in the writings of Shâfi'î. (See Tr. III, 135 and 145).

39. According to Schacht, when ra'y "is directed towards achieving systematic consistency and guided by the parallel of an existing institution or decision" it is called qiyâs (Origins, p. 98). Shaybânî defined the principle in a fairly cogent manner: "On whichever question there is no athar, one should resort to analogy from a parallel case

regarding which there is an athar"(Hujaj, p. 6. See also pp. 9, 174 and 235). Shaybânî cites 'Umar as having instructed that all matters about which there is nothing in the Qur'ân and Sunnah one should look up to parallel cases (al-ashbâh wa al-naẓa'ir) and make qiyâs accordingly" (ibid., p. 212).

40. For some examples, see above pp. 105 f.

41. Tr. IV, p. 258.

42. Loc. cit.

43. See notes 44, 45, and 46 below, which imply this. See also Risâlah, pp. 478 f.

44. See Hujaj, pp. 46, 66, 153, 158, 162, 174 and 212.

45. See Tr. VIII, 3 and Ikh., pp. 117 f.

46. See for instance, Hujaj, p. 46 (for athar being more authoritative than qiyâs), and Ikh., 117 f. (for khabar lâzim being more authoritative than qiyâs).

47. Ikh., pp. 117 f.; Risâlah, pp. 543 ff.

48. See below pp. 302 ff.

49. For the use of qiyâs by the Medinese, see Origins, pp. 116 ff. For the use of qiyâs by Awzâ'î see Tr., IX, passim.

50. See above p. 269, n. 3.

51. Tr. I, 137.

52. Ibid., 89, (Shâfi'î also credits the Medinese with using qiyâs, ibid., p. 116 and n. 5).

53. They threw aside (nabadhû) the Book of God and the sunnahs of his Apostle and bound themselves by qiyâs" (Ta'wil Mukhtalif al-Hadîth, p. 165. See also ibid., pp. 16 and 20, where Ibn Qutaybah refers to the claim of the ahl al-Kâlam, whose outlook he presumably considered to be close to that of the Kufians to be proficient in qiyâs).

54. Origins, p. 106.

55. For their characteristic attitude, see above, pp. 82 ff. Cf. Origins, pp. 100 ff.

56. Tr. I, 40.

57. Ibid., 13.

58. Ibid., 155.

59. Ibid., 171(a).

60. Ibid., 63.

61. Tr. IX, 37. See also ibid., 36, where Abû Hanîfah states the principle which underlies this analogy.

62. Ibid., 19. For the doctrine that the sale of arms to the enemy is prohibited, see Kharâj, p. 190.

63. Tr. I, 130.

64. Kharâj, p. 160.

65. Apart from these, quite a good number of the examples of the use of qiyâs which go under the names of Abû Yûsuf and Shaybânî (for some of these, see below, pp. 287 ff.) go back to Abû Ḥanîfah. In regard to quite a few of these questions, Abû Yûsuf and Shaybânî seem to have reproduced or explicated the qiyâs implied in the doctrines, while in respect of others they presumably advanced arguments of their own. That the two disciples of Abû Ḥanîfah did not always care to mention a doctrine to be that of his master even on occasions when such was case is well-established by contemporary evidence. See, for instance, Jâmi' Ṣaghîr, p. 107., a doctrine which is not ascribed to Abû Ḥanîfah or to Abû Yûsuf, although it was beyond doubt the doctrine to which they subscribed (see Tr. I, 3).

66. Kharâj, p. 121.

67. Tr. IX, 38.

68. Kharâj, p. 36.

69. Ibid., p. 70.

70. Ibid., p. 77.

71. Ibid., pp. 21 ff.

72. Kharâj, p. 66.

73. Tr. I, 51; Kharâj, pp. 88 ff.

74. Ibid., pp. 75 and 91 f. Cf. ibid., p. 93.

75. "There can be no qiyâs where there is any athar. On such occasions nothing else is proper but to submit to the athar" (Hujaj, p. 46. See also ibid., p. 88).

76. See Tr. VIII, 3; Ikh., pp. 117 f.; and Risâlah, pp. 543 ff.

77. Based on Tr. VIII, 3; Ikh., 117 f. and on the highly authoritative character of consensus. (For this, see Tr. IV, passim).

78. Hujaj, p. 212.

79. Ibid., p. 6. The same rule is repeated almost in the same words on p. 9. On another occasion he urges: "Qiyâs ought to be resorted to according to what the Prophet did" (ibid., p. 153). Things are subjected to analogical deduction (yuqâs) on the basis of the things which are similar to them (ibid., p. 174). See also ibid., pp. 224, 230 f., 233, 234 f., and often.

80. Ibid., p. 235.

81. Tr. VIII, 1. Shâfi'î, however, brings forward a counter-analogy, which is quite impressive (loc. cit.) Cf. Ibn Abî Laylá's analogy on a similar question (Tr. I, 171).

82. See Tr. I, 20. Cf. Âthar A.Y., 829.

83. Hujaj, pp. 199 f. See also Muw. pp. 691 f.

84. Ḥujaj, p. 188.

85. Ibid., pp. 134 f. For another example of qiyâs, see ibid., pp. 178 f., 179, and 184.

86. Ibid., p. 257.

87. Ibid., pp. 11 f.

88. Ibid., pp. 41 f.

89, Ibid., pp. 116 f.

90. Ibid., pp. 157 f. Cf. Muw. Sh., p. 208

91. Ibid., p. 235.

92. Loc. cit.

93. See ibid., pp. 230 f. and 234 f. and also Muw. Sh., pp. 331 ff.

94. Ibid., pp. 199 f.

95. Muw. Sh., p. 337. For muzâbanah and muḥâqalah, see Muw., pp. 624 ff. and Muw. Sh. 336 f.

96. Muw. Sh., 332 f.; Ḥujaj, pp. 219 f.

97. In connection with this section, see above, pp. 219 ff.

98. See above, pp. 111 f. and 163 ff. and 277 f.

99. It may be pointed out, however, that in the interpretation of âthâr, a particular attitude gradually developed. For this, see above, pp. 245 f.

100. Ḥujaj, p. 77. See also ibid., p. 59 where Shaybânî accuses the Medinese of deviating from athar on the basis of istihsân without the support

of sunnah and athar. On the contrary, there are instances of the use of the term istihsân to describe the supercession of qiyâs by âthâr itself. See, for example, Kharâj, p. 178, where Abû Yûsuf rejects qiyâs in deference to the traditions from Abû Bakr and 'Umar, which he characterises as istihsân. See also ibid., p. 189.

101. Apart from Shâfi'î who devotes a whole treatise to refute istihsân (i.e., Tr. VII) and a fairly long chapter in his Risâlah (pp. 503-59), Ibn Qutaybah also refers to the use of Istihsân by the Iraqians as an evidence of their fickle-mindedness. See Ta'wîl Mukhtalif al-Hadîth, pp. 62 ff.

102. Jâmi' Kabîr, p. 85.

103. Ibid., p. 98.

104. Ibid., p. 45. Here, perhaps, the two doctrines are different because of disagreement in regard to linguistic usage.

105. Ibid., p. 165.

106. Loc. cit.

107 and 108. 'You' in both the instances has been used in the plural.

109. Ibid., p. 287.

110. Siyar Kabîr, pp. 308 f.

111. Ibid., p. 333.

112. Ibid., p. 447.

113. Jâmi' Kabîr, p. 55.

114. Kharâj, pp. 160 f.

115. Ibid., 189.

116. Jâmi' Saghîr, p. 160.

117. Siyar Kabîr, p. 85.

118. Kharâj, p. 182.

119. Ibid., p. 183.

120. Jâmi' Saghîr, p. 107. Cf. Tr., I, 3, with the difference that it specifically mentions slave-girls. Abû Ḥanîfah was of the view that it was not permissible, because "he sold what he did not own," and "manumitted what he did not own." This example of the preference by Abû Yûsuf and Shaybânî to the systematically consistent doctrine of Abû Ḥanîfah, and their disregard of the material consideration in favour of liberty which was the basis of doctrine and its replacement by systematic consideration is one among the many examples which shows the trend of development. See also below pp. 325 ff.

121. Ibid., p. 83.

122. Ibid., p. 69.

123. See above pp. 71 ff.

124. For this, see above pp. 228 f.

125. See above pp. 92 f. Cf. the dating of these doctrines by Schacht in Origins, pp. 234 ff.

126. For Ibrâhîm, see above pp. 106 ff.

127. See n. 35 above. See also Zahriten, pp. 14 f.

128. See above pp. 108 f. This is evident, for instance, from the opinion attributed to Ḥafṣ b. Ghiyâth (d. 177), cited in Zahriten, p. 16. Cf. Muḥammad Abû Zahrah, Abû Ḥanîfah, (Cairo, n.d.), pp. 229 ff.; Ḥajawî, cited in loc. cit. See also Baghdâdî, op. cit., vol. XIII, p. 348 which mentions the reason underlying the adoption of this method by Abu Ḥanîfah.

129. Âthâr A.Y., 432, 434; Âthâr Sh., 291.

130. Âthâr A.Y., 433; Âthâr Sh., 290.

131. Âthâr Sh., 239.

132. See Tr. I, 167.

133. Ibid., 166.

134. Jâmi‘ Saghîr, p. 23.

135. Jâmi‘ Kabîr, pp. 19 f.

136. Ibid., p. 20.

137. Ibid., p. 21.

138. Jâmi‘ Saghîr, p. 23.

139. Jâmi‘ Kabîr, pp. 23 f. Cf. Tr. I, 171 and 172; Âthâr A.Y., 434 f.; Âthâr Sh., 289 ff.

140. Âthâr A.Y., 766 f.; Âthâr Sh., 748 and 750. Cf. Tr. I, 50.

141. Âthâr Sh., 750.
142. Tr. I, 44.
143. Ibid., 45.
144. Ibid., 46.
145. Ibid., 47.
146. Ibid., 48.
147. Ibid., 49.
148. Ibid., 50.
149. Jâmi' Saghîr, pp. 107 f.
150. Ibid., 108.
151. Loc. cit.
152. Loc. cit.
153. See Jâmi' Kabîr, pp. 307-15.
154. Âthâr A.Y., 731; Âthâr Sh., 751.
155. Âthâr A.Y., 732; Âthâr Sh., 752.
156. Ibid., 756.
157. Tr. I, 40.
158. Ibid., 41.
159. Âthâr A.Y., 492.
160. Ibid., 770; Âthâr Sh., 694 f.
161. Ibid., 693.
162. Ibid., 696.
163. Âthâr A.Y., 693.
164. Âthâr Sh., 697 ff.
165. Âthâr A.Y., 769.

166. Origins, p. 269.

167. Ibid., p. 287.

168. See below pp. 341 ff., and n. 128. Cf. Origins, pp. 276 ff., pp. 311 ff.

169. For this last, see above pp. 311 ff.

170. Origins, p. 234.

171. On Ibrâhîm, see above pp. 108 f.

172. Cf. Schacht's position (Origins, p. 234, n. 5), which is hardly justifiable. He is of the view that the doctrines attributed to Ibrâhîm "date in fact only from the time of Ḥammâd" (Origins, p. 234, n. 5). (Cf. above p. 92, n. 88 for the view of this writer on this question). This gratuitous assumption leads him to consider the technical questions embodied in Tr. I to belong to the short period between Ḥammâd (d. 120) on the one hand and Abû Ḥanîfah (d. 150) and Ibn Abî Laylá (d. 148) on the other (loc. cit.). If Ḥammâd was, on the whole, not concerned with the technical legal questions embodied in Tr. I (as Schacht thinks), and was concerned exclusively with the kinds of questions which are ascribed, in his opinion spuriously, to Ibrâhîm in Âthâr A.Y. and Âthâr Sh., then the years 120 to 150 would be credited with an amount of legal development which can be ruled out as incon-

ceivable on à priori grounds. Such a view amounts to assuming not a gradual natural development — even though its pace might be somewhat accelerated — but a big leap.

173. Cf. Origins, pp. 187, n. 5, and pp. 236 ff.

174. For biographical information about Ibn Abî Laylá, see Ibn Sa'd, vol. VI, p. 358; Wakî', op. cit., vol. III, pp. 129 ff. As for his legal thought, it has very ably analysed by Schacht to which little can be added. See Origins, pp. 270 ff., 284 f, 290 ff.

175. Origins, p. 290. For its illustration, see ibid., pp. 290 f.

176. Ibid., p. 291. See for its illustration, ibid., pp. 291 f.

177. See ibid., p. 292 and nn. 2 and 3.

178. Ibid., p. 292. For illustration, see loc. cit.

179. Origins, p. 292. For its illustration, see loc. cit., n. 4.

180. See Tr. I, 123, 125, 133, 151, 152, 206, and often.

181. Tr. I, 16, 39, 75, 83, 129, 148, etc.

182. Origins, p. 294.

183. For Awzâ'î's reasoning, see Tr. IX. See also Origins, pp. 285 ff., 288 f.

184. See ibid., p. 294.

185. See ibid., p. 295.

186. Loc. cit.

187. The following are merely for the sake of typical illustration. For detailed evidence, see Origins, pp. 296 ff.

188. Tr. I, 3. Cf. Jâmi' Saghîr, p. 107.

188a. Tr. I, 13.

189. See Âthâr Sh., 481; Tr. I, 54, and often.

190. Tr. I, 17. Cf. ibid., 53.

191. Ibid., 130.

192. Ibid., 107, 110.

193. Mabsût, vol. XIV, pp. 116 f.

194. Tr. I, 45.

195. Ibid., 21 f. Abû Hanîfah was so strict on this point that he considered the donation of undivided property to be void (ibid., 60 f.).

196. Ibid., 32.

197. Tr. I, 134. See further ibid., 55, 60, 66, 72, 82, 83, 92, 93, 94, 96, 106, 108, 126, 141 f., 150.

198. See immediately below. This is the view of Schacht as well (Origins, p. 296). For Awzâ'î's legal thought, see Origins, pp. 285 ff., 288 f., 298.

199. For a comparison of the legal thought of Abû Hanîfah and Mâlik, see Muw.; Muw. Sh.; and Hujaj,

passim. See also below, pp. 341 ff.

200. Tr. IX, 14; Ṭabarî, Ikhtilâf al-Fuqahâ', ed. Schacht, 76.

201. Tr. IX, 25; Cf. Ikhtilâf al-Fuqahâ', op. cit., 64. See further Tr. IX, 16, 20; Cf. Ikhtilâf al-Fuqahâ', op. cit., 34; Tr. IX, 27, and 33, 34; Cf. Ikhtilâf al-Fuqahâ', op. cit., 46; Tr. I, 201 where Abû Ḥanîfah consistently raises the question of competence of jurisdiction. See also Tr. IX, 41 (where Abû Ḥanîfah's doctrine followed by Abû Yûsuf, takes consideration of a relevant technical distinction).

202. Origins, p. 294.

203. Loc. cit.

204. Loc. cit.

205. See, e.g., Tr. I, 32, and often. In Abû Ḥanîfah too we find attempts at the fusion of these two different elements. This is evident from Abû Ḥanîfah's occasional use of istiḥsân, and consideration of the political interests of the Muslims which underlies a number of his doctrines mentioned in Tr. I, 19; Ḥujaj, pp. 157 f., 208, 215 f., etc. On the whole, however, in Abû Ḥanîfah the balance was tieted towards formal legal considerations.

206. This can presumably be explained by the fact that Abû Yûsuf was a judge.

207. See above p. 332.

208. See Tr. I, 80 f., 99, 135; Tr. IX, 2, 19, 40, 42. See also Origins, pp. 303 f.

209. Ibid., p. 304. For evidence, see ibid., pp. 304 f.

210. See Tr. I, passim, and elsewhere.

211. For examples of istihsân, see above pp. 302 ff.

212. See instances in Origins, p. 307.

213. Cf. Origins, p. 310. For its evidence, see ibid., pp. 307 ff.

214. See Tr. I, 103; Mabsût, vol. XVI, pp. 129 f; Tr. I, 107, 110; and Mabsût, vol. XI, p. 24, and often.

215. For this, see below pp. 342 ff.

216. For this, see Tr. VIII, passim.

217. See, e.g., Muw. Sh., pp. 244, 330, 331, 357; and Tr. III, 58; Tr. IX, 28; Tr. VIII, 4, 6, 11, 12, 14, 16.

218. Muw. Sh., pp. 202, 236; Tr. I, 44; and Mabsût, vol. V, p. 78.

219. See above pp. 335 f. See also Tr. IX (passim) with parallel passages in Ṭabarî, Ikhtilâf al-Fuqahâ'.

220. See Hujaj, passim. This will be evident from the examples cited immediately below.

221. Hujaj, pp. 117 f. Cf. a similar case ibid., p. 119 (the question of zakâh on merchandise which had lain idle for several years).

222. Ibid., pp. 130 f.

223. Ibid., pp. 9 ff.

224. Ibid., pp. 11 f. He also brilliantly supports this by adducing two analogical arguments, see above p. 285.

225. Ibid., pp. 157 f.

226. Ibid., pp. 173 ff.

227. For this Shaybânî uses the term "tahakkum".

228. Ibid., pp. 198 f.

229. Ibid., pp. 207 ff. Cf. Muw., p. 621, a tradition from 'Umar b. 'Abd al-'Azîz supporting the doctrine.

230. Cf. ibid., pp. 207 ff., and often.

231. Ibid., pp. 209 f.

232. Ibid., pp. 213 f.

233. Ibid., pp. 222 f.

234. Ibid., p. 225.

235. Cf. a parallel case ibid., pp. 213 f. The Kufian reasoning in both the cases is the same.

236. Ibid., pp. 235 f. For another example indicating the same attitude, see ibid., pp. 251 f.

237. Muw., p. 671; Hujaj, p. 238.

238. Muw., loc. cit.

239. For the Kufian interpretation of the word tafarruq occuring in the tradition concerned, see Hujaj, p. 237 ff.

240. Ibid., pp. 237 ff.

241. Ibid., pp. 214 ff. For Shaybânî's reasoning in refutation of the Medinese doctrine, who argued that the Medinese judgment was based on excessive precaution, see ibid., p. 215. For the same indictment, see also ibid., p. 218, and elsewhere.

242. Such a transactions seems to have been necessitated by foreign trade which led to the use of several currencies. This seems to be evident from the tradition from Mujâhid cited in ibid., p. 216.

243. Ibid., pp. 215 f. This allegation is made frequently, see ibid., pp. 216, 218, 221, 222, 225, 251 and often, specially in regard to the questions of sale and exchange.

244. Ibid., pp. 216 f.

245. For these scales, see Introduction, pp. 120 ff.

246. Hujaj, pp. 173 ff.

247. Ibid., pp. 134 f. For another example, see ibid., pp. 188 f., and often.

248. For our remarks about the similarity between the

legal theory of the Kufians and that of Shâfi'î, see above Chapter IV (passim), especially pp. 250 and 267.

CONCLUSION

1. Here the term legal has been used in its broader sense, and hence refers to the body of rules by which one is bound.

2. That is, if there is positive semantic evidence about the existence of a concept, we can confidently make an affirmative statement. But if, on the contrary, the semantic evidence of a concept is lacking, this does not necessarily mean the absence of that concept.

APPENDICES

APPENDIX I

The following is the text of the letter written by this writer to Prof. Schacht, seeking his classification on certain questions.

12/18 Bunder Road,
Karachi.

January 26, 1966.

Dear Prof. Schacht,

Hope this letter finds you in enjoyment of good health and happiness.

Many thanks for your previous letter dated the 11th September, 1965, answering my queries. My thesis has proved quite sticky. I hope the next month and early March will see its completion.

There are quite a few points on which I am urgently in need of your clarifications and guidance. I am sure you will not mind the trouble that I am giving you for which I thank you in advance. (All references are to Origins).

1. On p. 23 you write: "Traditions from the Prophet are often superseded by traditions from Companions, or disregarded even without any apparent reason." The last part of the statement has not been

supported by any evidence.

2. On p. 48 you remark: "Another easy method of disposing of traditions from the Prophet was to represent them as particular commands, applicable only to the occasions when they were given.... The examples adduced here are Medinese, but the Iraqians also used this argument." You have not cited any examples with regard to the Iraqians.

3. On p. 29 you write with regard to the Iraqians that: "traditions from Companions supersede traditions from the Prophet...." I found scarcely any evidence for this during my reading, nor is there any example of it to be found in Origins, except the one you cite on p. 75 (ref. Kharâj, p. 99).

   On p. 21 you refer to Ikh., pp. 34 ff., to Shâfi'î's argument against the Iraqians. I checked these pages hoping to find something in support of the above contention but found no examples of the supercession of traditions from the Prophet by those from Companions. Will you be so kind as to point out, even if very briefly, some of the glaring examples that you might have come across?

4. On p. 30 you mention the occasions when the Iraqians

reject traditions from the Prophet and one of them is: "or simply for systematic reasons: because the tradition in question would make the doctrine inconsistent." I found no evidence in Origins concretely supporting this conclusion. On p. 21 you refer to Ikh., 30 ff. as an evidence of Shâfi'î's allegation against both the Medinese and the Iraqians that they neglect traditions in favour of systematic conclusions. On which page does Shâfi'î refer to the Iraqians?

5. On p. 29, n. 2., you refer to "Tr. IX, 40 and elsewhere" in support of your view that the Iraqians claimed that the Companions would not have been unaware of the practice and decisions of the Prophet. Tr. IX, 40, however, does not refer to the subject you have mentioned.

6. On p. 30 you write: "Shafi'î is justified in charging the Iraqians with accepting traditions more easily from Companions than from the Prophet. (Ikh., 345 f.)". I looked up to Ikh., 345 f., but found no charge of that kind levelled against the Iraqians.

I wonder if there is any error in page-reference.

The main purpose of my writing to you for the moment is to find out what concrete evidences you have

for the statement that the Iraqians allowed traditions from Companions to supersede traditions from the Prophet.

Needless to say I will feel deeply obliged to you for your clarifications.

Yours sincerely,

(Zafar Ishaq Ansari)

Prof. J. Schacht,
348 Ivy Lane,
Englewood, N. J.,
U. S. A.

On the following page is photostat copy of Prof. Schacht's reply to the letter in which he gives further evidences in support of some of his conclusions.

Columbia University in the City of New York | New York, N.Y. 10027

DEPARTMENT OF MIDDLE EAST LANGUAGES AND CULTURES

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February 11, 1966

Dear Mr. Ansari,

It is quite impossible for me continually to look up my notes of long ago for additional evidence for the conclusions I drew in my "Origins" (with ample evidence in the notes), as I have now done for you several times. If you are not convinced by what I have said and by the evidence which I have adduced, you have only got to say so. I also think that several of your queries show that you have not read the texts to which I referred, with full understanding, e.g. Shāfi'ī's comments on Tr.IX.5 and Tr.IX.40, or Ikh.34 ff., or the important passage Ikh.345 ff. (read "ff." in place of "f.", but I should not have expected you to stop your reading with the second page, and not take in Shāfi'ī's comments on p. 352 ff.). The Iraqian for whom you looked in vain in Ikh.30 ff., is the non-Medinese interlocutor of Shāfi'ī (e.g. p.33, bottom).

For your benefit, I will mention a few additional references to the sources.

(1) Ikh.323; Tr.III.25

(2) Ikh.73 f.; Zurq. III.245

(3) Tr.II.18(e); Ris.75; Muw.Shayb.87

(4) Muw.Shayb.166; Tr.II.16(b).18(s); Tr.III.11.12.51; Tr.IX.34

(6) Ṭaḥāwī i.182.158; Muw.Shayb.79

I am afraid I cannot continue this correspondence in future.

Yours sincerely,

J. Schacht

APPENDIX II

USAGES OF SUNNAH IN PRE-ISLAMIC AND EARLY ISLAMIC ARABIC POETRY

ديوان حسان بن ثابت الانصاري
تحقيق و شرح ـ عبد الرحمن بن البرقوقي
(القاهرة ـ ١٩٢٩ م)

اذ قتلتم ما جدا ذا مرة ـ واضح السنة معروف النسب
(ص ـ ٢٤ ـ س ـ ٣)

ان الذوائب من فهر و اخوتهم ـ قد بينوا سنة للناس تتبع
(ص ـ ٢٤٨ ـ س ـ ١)

لا ترفع العبد فوق سنتـــه ـ ما دام منا ببطنها شرف
(ص ـ ٢٧٩ ـ س ١١)

ابو الفرج الاصبهاني
كتاب الاغانـــــي
(بيروت ـ ١٩٥٥م)

ان الذوائب من فهر و اخوتهم ـ قد بينوا سنة للناس تتبع
(ج ـ ٤ ـ ص ـ ١٦ ـ س ـ ٣)

اشبه منك سنة وجـــــدا ـ و شيما مرضية و مجـــدا
(ج ـ ٥ ـ ص ـ ١٤٨ ـ س ـ ٣)

وقولوا أتاكم اشبه الناس سنة ـ بوالده فاستبشروا وتوقعوا

(ج ـ ٦ ـ ص ـ ٢٢٧ ـ س ـ ٥)

فلا تجزعن من سنة أنت سرتها ـ فأول راض سنة من يسيرها

(ج ـ ٦ ـ ص ـ ١٢٨ ـ س ٨)

لو انهم عما وجدا ووالدا ـ تاسوا فسنوا سنة المتعطل

(ج ٨ ـ ص ـ ١٧٩ ـ س ـ ٢)

سنة العشاق واحدة ـ فاذا أحببت فاستكن

(ج ـ ٩ ـ ص ـ ١٣٩ ـ س ـ ٢)

اغر كأن البدر سنة وجهه ـ له كفل واف وفرع ومبسم

(ج ـ ١٠ ـ ص ـ ٢٤١ ـ س ـ ٢)

فما مضت سنة حتى رايتكم ـ تمشون في القز والقوهي واللين

(ج ـ ١٢ ـ ص ـ ٣٧٩ ـ س ـ ٤)

فلا تجزعن من سنة قد سننتها ـ فما للدماء الدهر تهرق من حقن

(ج ـ ١٣ ـ ص ـ ٧٣ ـ س ـ ١٣)

الجاحظ ـ كتاب الحيوان

بتحقيق ـ عبد السلام محمد هـارون

(مصـر ـ ١٣٦٢)

وما ارتقاصنا خلف الموالي ـ كسنتنا على عهد الرسول

(ج ـ ٧ ـ ص ـ ٨٤ ـ س ـ ٢)

قوم كأن ضياء الشمس سنتـه ـ لو ناطق الشمس القت نحوه الكلما

(ج ـ ٧ ـ ص ـ ١٨٠ ـ س ـ ٣)

الزبيـــــــــــدي

شرح القاموس المسمى بتاج العروس من جواهر القاموس

(مصـــــر ـ ١٣٠٦)

لم يبق من سنة الفاروق نعرفـه ـ الا الذنيبي والا الدرة الخلق

(ج ـ ١ ـ ص ـ ٢٥٦ ـ س ـ ١٤)

فدى للاكرمين بني هـــلال ـ على علاتهم أهلـي ومالـــي

هم سنوا الجوائز في معـــد ـ فصارت سنة اخرى الليالـــي

(ج ـ ٤ ـ ص ـ ٢٠ ـ س ـ ٢)

اذا ما قريش خلا ملكهـــا ـ فان الخلافة في باهلـــه

لرب الحرون أبي صالـــح ـ وما ذاك بالسنة العادلـــه

(ج ـ ٩ ـ ص ـ ١٧٣ ـ س ـ ١٨)

فلا تجزعن من سيرة أنت سرتها ـ فاول راض سنة من يسيرهـــا

(ج ـ ٩ ـ ص ـ ٢٤٣ ـ س ـ ٢٨)

تريك سنة وجه غير مقرفـــة ـ ملساء ليس بها خال ولا ندب

(ج ـ ٩ ـ ص ـ ٢٤٤ ـ س ـ ٨،٧)

بيضاء في المرآة سنتهـــا ـ في البيت تحت مواضع اللمـــس

(ج ـ ٩ ـ ص ـ ٢٤٤ ـ س ـ ٨)

ابن منظـــــور

لسان العـــــرب

(القاهـــــرة ١٣٠٠ ـ ١٣٠١)

لم يبق من سنة الفاروق نعرفه ـــ الا الذنيبي والا الدرة الخلق

(ج ـ ١ ـ ص ـ ٣٧٧ ـ س ـ ١٢)

كأن احور من غزلان ذى بقـر ـــ اهدى لنا سنة العينين والجيدا

(ج ـ ٤ ـ ص ـ ٣١٣ ـ س ـ ١٨)

فدى للاكرمين بني هـــلال ـــ على علاتهم أهلـي ومالـــي

هم سنوا الجوائز في معـــد ـــ فصارت سنة اخرى الليالـــي

(ج ٧ ـ ص ـ ١٩٣ ـ س ـ ٤)

ولكل قوم سنة وامامهـــا ـــ

(ج ـ ١٤ ـ ص ـ ٢٩١ ـ س ٢٠)

اذا ما قريش خلا ملكهـــا ـــ فان الخلافة في باهلـــه

لرب الحرون أبي صالـــح ـــ وما ذاك بالسنـــة العادلـــه

(ج ـ ١٦ ـ ص ـ ٢٦٥ ـ س ـ ٤)

تريك سنة وجه غير مقرفـــة ـــ ملساء ليس بها خال ولا نـــدب

(ج ـ ١٧ ـ ص ـ ٨٨ ـ س ـ ٩)

بيضاء في المرآة سنتهـــا ـــ في البيت تحت مواضع اللمـــس

(ج ـ ١٧ ـ ص ـ ٨٨ ـ س ـ ١١)

فلا تجزعن من سيرة أنت سرتهـــا ـــ فأول راض سنة من يسيرهـــا

(ج ـــ ١٧ـــ ص ـــ ٨٩ ـــ س ـــ ١١)

المفضليـــات

بتحقيق الاستاذ شارلس ليال

(أكسفـورد ـــ ١٩٢١م)

تريك سنة وجه غير مقرفـــة ـــ ملساء ليس بها خال ولا ندب

(ص ـــ ١٨٥ ـــ س ـــ ١٥)

تريك سنة وجه غير مقرفـــة ـــ ملساء ليس بها خال ولا ندب

(ص ٥٤٢ ـــ س ـــ ١٢)

تريك سنة وجه غير مقرفـــة ـــ غراء مارنها بالمسك مرثـــوم

(ص ـــ ٧٩١ ـــ س ـــ ١)

وبداتم للناس سنتهـــا ـــ وقعدتم للربح في رجـــع

(ص ـــ ٨٣٠ ـــ س ـــ ١)

شرح ديوان الفرزدق

عبدالله اسماعيل الصاوي

(مصـــر ـــ ١٣٥٤)

فاصبحتما فينا كداؤد وابنـــه ـــ على سنة يهدى بها من يسيرهـــا

(ص ـ ٢٠٨ ـ س ـ ٣)

كم حل عنا عدل سنتـــــه ـ من مغرم ثقل و من اصـــر

(ص ـ ٢٢٨ ـ س ـ ١)

حتى استقام لوجه سنتـــه ـ ودرى ولم يك قبلها يدرى

(ص ـ ٢٢٩ ـ س ـ ٤)

ديوان شعر ذى الرمة

بتحقيق كارلائل هنـــرى

(كمبـردج ـ ١٣٣٧)

لها سنة كالشمس في يوم طلقـــة ـ بدت من سحاب وهي جانحة العصر

(ص ـ ٢٦٦ ـ س ـ ٤)

تريك سنة وجه غير مقرفـــــة ـ ملساء ليس بها خال و لا نـــدب

(ص ـ ٤ ـ س ـ ١١)

شرح ديوان عمر بن ابي ربيعة المخزومي

بتحقيق محمد محي الدين عبد الحميد

(القاهـــرة ـ ١٣٧١)

لها من الريم عيناه وسنتـــــه ـ وغرة السابق المختال اذ صهـــلا

(ص ـ ٢٥ ـ س ـ ١٤)

لها من الريم عيناه وسنتـــــه ـ وغرة السابق المختال اذ صهـــلا
(ص ـ ٧١ ـ س ـ ٧)

لاسيلة الخدين واضحـــــة ـ يعشي بسنة وجهها البـــــدر
(ص ـ ١٢٢ ـ س ـ ٧)

وجلت بشيرة سنة مشهـــــورة ـ دون الاراك وراهن الحـــوذان
(ص ـ ١٦٤ ـ س ـ ١)

لها من الريم عيناه وسنتـــــه ـ وغرة السابق المختال اذ صهـــلا
(ص ـ ٢٤٢ ـ س ـ ٤)

شعـــر الاخطـــل

بتحقيق الاب انطون صالحاني اليسوعي

(بيروت ـ ١٨٩١م)

وجهت عيني الى حلو شمائلـــــة ـ كأن سنته في المسجد القمـــر
(ص ـ ٢٧٨ ـ س ـ ٦)

البحتـــري

كتاب الحماسـة

(بيروت ـ ١٩١٠)

أرونا سنة لا عيب فيهـــــا ـ يسوى بيننا فيها الســـواء

(ص ـ ٢٣ ـ س ـ ١٠)

ديوان النابغة الذبياني

بتحقيق كرم البستاني

(بيروت ـ ١٩٥٣م)

يا عام . لم اعرفك تنكر سنة ـ بعد الذين تتابعوا بالمرصد

(ص ٦٢ ـ س ـ ١)

كميت بن زيد الاسدي

هاشميات الكميت

بتحقيق الاستاذ هورفيتز

(ليدن ـ ١٩٠٤م)

بأى كتاب أم بأية سنة ـ ترى حبهم عارا علي وتحسب

(ص ـ ٣١ ـ س ـ ٤)

شرح ديوان كثير بن عبد الرحمن الخزاعي (المشهور بكثير)

(الجزائر ـ ١٩٣٠م)

ولكن مضى ذو مرة متثبت ـ لسنة حق واضح يستبينها

(ص ـ ٣٥ ـ س ـ ٣)

ديوان عبيد الله بن قيس ـ الرقيات

بتحقيق محمد يوسف نجم

(بيروت ـ ١٣٧٨)

خليفة يقتدى بسنتـــــه ـ في ارث مجد الثراء والكرم

(ص ـ ٩ ـ س ـ ١٢)

وترى في البيت سنتهـــا ـ مثل ما في البيعة السرج

(ص ـ ١٦٣ ـ س ـ ٦)

الشيخ احمد بن الامين الشنقيطي

المعلقات العشر

(القاهرة ـ ١٣٥٣)

من معشر سنت لهم آباؤهم ـ ولكل قوم سنة وامامهـــا

(ص ـ ١٠٥ ـ س ـ ٦)

ابو علي اسماعيل بن القالي

سمط اللآلـــي

نسخة وصححه ، عبد العزيز الميمني

(القاهرة ـ ١٣٥٤)

ولكن مضى ذو مرة مثبت ـ بسنة حق واضح يستبينهـا
(ص ـ ٦١ ـ س ـ ٩)
هاد ضياء منير فاصل فلج ـ قضاه سنة وقوله مثـــل
(ص ـ ٣٩٧ ـ س ـ ١٨)

البـــلاذرى
فتوح البلـــــدان
بتحقيق الاستاذ م ج د جاج

وما ارتقاصنا حول الموالـي ـ بسنتنا على عهد الرسـول
(ص ـ ٣٥٤ ـ س ـ ١٢)

ديوان عبيد الابرص السعدى الاسدى
بتحقيق الاستاذ شارلس ليال
(ليـــدن ـ ١٩١٣م)

كأن سنتها في كل داجية ـ حين الظلام بهيم ضوء مصباح
(ص ـ ٦٧ ـ س ـ ١٣)

نقائض بين جرير و فـــــرزدق
بتحقيق الاستاذ انتونى بيـــران
(ليـــــدن ـ ١٩٠٨م)

فجاء بسنة العمرين فيهـــــا ـ شفاء للصدور من السقـــام
(ص ـ ١٠١٥ ـ س ـ ١٥)

APPENDIX III

TRANSLITERATION TABLE

Consonants. From Arabic -

ء	initial: unexpressed medial and final: '	د	d	ض	ḍ	ك	k
ب	b	ذ	dh	ط	ṭ	ل	l
ت	t	ر	r	ظ	ẓ	م	m
ث	th	ز	z	ع	'	ن	n
ج	j	س	s	غ	gh	ه	h
ح	ḥ	ش	sh	ف	f	و	w
خ	kh	ص	ṣ	ق	q	ي	y

From Urdū - as from Persian except as follows:

ٹ	ṭ	ڈ	ḍ	غ	gh	ں	ṇ
خ	kh	ڑ	ṛ	و	in words from Arabic — w Persian — w Sanskrit — v		

From Turkish - according to the Latin spelling current in Turkey.

Vowels, diphthongs, etc.

short: ـَ a; ـِ i; ـُ u.

long: ا ā; و ū, and in Persian and Urdū also rendered by ō;
ي ī, and in Persian and Urdū also rendered by ē; ـے (in Urdū) ē.

alif maqṣūrah: ى á.

long with tashdīd: ـِّـي īya; ـُّـو ūwa.

diphthongs: ـَي ay; ـَو aw.

tā' marbūṭah: ة ah; but in iḍāfah: at.

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ADDENDA

We have considered at some length the question of the occasional supercession of traditions from the Prophet by traditions from the Companions. We have also cited a few examples of that and have tried to explain them by placing them in their historical context (see above, pp. 207 ff.). In his Origins Schacht has also referred to the same phenomenon and has stressed that both the Medinese and the Kufians practised this consistently. Schacht expresses his views on the question in a manner which suggests that it was a well-established principle of the Medinese and the Iraqians to have traditions from the Companions supersede traditions from the Prophet (see Origins, pp. 23 and 29 f.). With regard to the Iraqians, for instance, Schacht writes: "Shâfi'î is justified in charging the Iraqians with accepting traditions more easily from Companions than from the Prophet. . ." (ibid., p. 30). While it is true, as we have seen, that this supercession did occasionally take place, it would be wrong to think that this was a full-fledged principle. Such an inference would have been plausible only if the Companions were deemed to be invested with an authority higher than, or at least equal to, that of the Prophet. This obviously was not the case — a fact which is proved

by the reasons adduced by the ancient schools in self-justification whenever they disregarded a tradition from the Prophet in favour of one from some Companions or of a 'practice' (see above, pp. 231 ff.). In addition to what Schacht has written on this question in Origins, he has adduced further evidences in support of his conclusion in his letter addressed to this writer (see above, appendix I). A brief scrutiny of his evidences on this question in respect of the Iraqians is being essayed in the following pages:

Schacht refers to the following passages: Tr. II, 18(e); Ris., p. 75 (Umm edition); and Muw. Sh., p. 87, in support of his conclusion.

(1) So far as Tr. II, 18(e) is concerned, Schacht has taken the statement of Shâfi'î at its face value despite the polemical context in which it was made. The question concerns the enforcement of certain punishments in which connection Shâfi'î cites a tradition from the Prophet which was transmitted by 'Alî, but was not accepted by the Kufians. Instead, adds Shâfi'î, ". . . hum yukhâlifûn hâdha ilá ghayr fi'l aḥad 'alimtuh min aṣḥâb al-nabî." It is evident that in this instance Shâfi'î is not even accusing the Iraqians of having traditions from the Companions supersede traditions from the Prophet.

(2) The second instance is a passage which occurs in

Ris., p. 75 (Umm edition). Strangely enough, Schacht himself has referred to this passage in Origins (p. 110) in these words: "The Iraqian opponent states in Ikh., 117 f. that no qiyâs is valid against a binding tradition (khabar lâzim), but the word 'binding' is operative, and how this rule works in practice appears from Ris., 75, where the Iraqian opponent follows the opinion of Ibn Mas'ûd, which reflects the Iraqian doctrine, against an analogy drawn from traditions from the Prophet." (See also ibid., p. 27). This interpretation of the passage concerned is quite accurate. Strangely enough, now the same passage has been adduced as an example of the Iraqians' supercession of traditions from the Prophet by those from the Companions.

It also seems significant, that in the passage concerned, in reply to Shâfi'î's pointed question whether anyone had any authority against that of the Prophet (cf. its translation in Khadduri's translation of Risâlah, Baltimore, 1961 A.D., p. 323), the Iraqian interlocutor of Shâfi'î replied: "No, if it [i.e., the tradition] is established to be from the Prophet" (cf. loc. cit.).

(3) The third instance adduced by Schacht is a passage in Muw. Sh., p. 87 (actually 87 ff.). The question concerns raising of hands while pronouncing takbîr during the ritual prayer. Ibrâhîm mentions a traditions from

a Companion, Wâ'il, that he saw that the Prophet raised his hands while pronouncing takbîr during the prayer. Ibrâhîm does not follow this tradition and his reasons are the following: "Perhaps he saw the Prophet only on that day so that he remembered this (practice) from the Prophet while Ibn Mas'ûd and his Companions did not remember it, for I have heard this from none of them". (See also Âthâr A.Y., 105; Ikh., pp. 214 ff.). What is actually involved in this case is that raising hands only in the beginning of the prayer but not during it is the established religious practice of Kufa, where practices were supposed to be based on the precepts and practices of Ibn Mas'ûd and 'Alî.

Thus, the basis on which the Kufians rejected the tradition transmitted by Wâ'il was that those two illustrious Companions of the Prophet could not have prayed in a manner different from that of the Prophet. It will be noticed that in the statement made by Ibrâhîm the paramountcy of the practice of the Prophet is clearly postulated.

In addition to these instances, we have ourselves briefly referred to above (see pp. 233 f.), an important instance from Kharâj (pp. 164 f.), where Abû Yûsuf mentions that the punishment for drinking wine used to be 40 stripes during the time of the Prophet and Abû Bakr;

that 'Umar increased it to eighty; that while each of these constituted sunnah, the Kufian school was agreed in favour of eighty stripes.

A study of the traditions on this subject shows that during the time of the Prophet the quantum of the punishment had not been definitively fixed. The Qur'ân had, however, condemned drinking in very strong terms, denouncing it as a work of the Satan (V. 90. See also II. 219 and V. 91). No wonder, then, that the Prophet should have tried to punish those who violated the Quranic prohibition. Traditions mention that whenever such an offender was brought before the Prophet, he used to ask those who happened to be present on the occasion, to beat him. The result was that people beat him with their hands, with pieces of cloth, with sandals, with plam-leaves. Even the number of blows does not seem to have been precisely fixed at forty. Instead of a definite round figure, the traditions in Muslim, Abû Dawûd and Tirmidhî mention "around forty" blows. The alleged act of 'Umar seems to have been, therefore, in the nature of making fixed and definite what was before him fluid and somewhat uncertain, a measure which seems to be in keeping with his attitude to administrative matters as a whole. (See, for a similar instance, pp. 257 f. above). Moreover, while it is true that the earlier generations of

Muslims considered themselves to be bound by the sunnah of the Prophet, they were freer in the use of their ra'y in applying it, as we have already noted (see above, pp. 270 ff.). This fact seems to be corroborated by the traditions which assert that in the time of 'Umar the habit of drinking, according to Bukhârî and Aḥmad b. Ḥanbel, had begun to spread, that this was brought to 'Umar's notice whereupon he consulted the Companions and increased the quantum of punishment to eighty stripes. (For these traditions, see Shawkânî, Nayl al-Awṭâr, vol. VII, pp. 49 ff.).