THE ORIGINS OF Muhammadan Jurisprudence

JOSEPH SCHACHT

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CHAPTER 7

SUNNA, 'PRACTICE' AND 'LIVING TRADITION'

THE classical theory of Muhammadan law defines *sunna* as the model behaviour of the Prophet.[1] This is the meaning in which Shāfi'ī uses the word; for him, '*sunna*' and '*sunna* of the Prophet' are synonymous. But *sunna* means, strictly speaking, nothing more than 'precedent', 'way of life'. Goldziher has shown that this originally pagan term was taken over and adapted by Islam,[2] and Margoliouth has concluded that *sunna* as a principle of law meant originally the ideal or normative usage of the community, and only later acquired the restricted meaning of precedents set by the Prophet.[3] The aim of the present chapter is to analyse in detail the meaning in which *sunna* is used by Shāfi'ī and in the ancient schools of law—an analysis which will be found to confirm the conclusion of Margoliouth—and beyond this, to investigate the concepts which in the ancient schools occupied the place filled in the later system by the '*sunna* of the Prophet'. The foremost of these concepts, which on one side are closely connected with the ancient meaning of *sunna*, and on the other merge into consensus, is the customary or 'generally agreed practice' (*'amal, al-amr al-mujtama' 'alaih*). Lacking an indigenous term for this group of concepts, we shall call them the 'living tradition' of the ancient schools, not by way of projecting a category of the later system, under another name, back into the early period, but in recognition of the fact that they are all inter-related and, in fact, interchangeable to such an extent that they cannot be isolated from one another.

A. General

Ibn Muqaffa', a secretary of state in late Umaiyad and early 'Abbāsid times, subjected the old idea of *sunna* to sharp criticism. Anticipating Shāfi'ī he realized that *sunna* as it was understood in his time, was based not on authentic precedents laid down by the Prophet and the first Caliphs, but to a great extent on administrative

[1] See above, p. 1.

[2] *Muh. St.* ii. 11 ff.; a short statement: *Principles*, 294 f.

[3] *Early Development*, 69 f., 75.

regulations of the Umaiyad government. In contrast to Shāfi'ī, however, he did not fall back on traditions from the Prophet but drew the contrary conclusion that the Caliph was free to fix and codify the alleged *sunna*.[1]

The early texts contain numerous traces of the process by which traditions from the Prophet imposed themselves on the old idea of *sunna* and thereby prepared the ground for Shāfi'ī's identification of *sunna* with them. In the time of Shāfi'ī, traditions from the Prophet, particularly 'isolated' ones, were still felt to be something recent which disturbed the 'living tradition' of doctrine in the ancient schools. In *Ikh.* 284, the Iraqian opponent points out that Shāfi'ī's reasoning, which starts from traditions, is new compared with that of Shāfi'ī's companions, the Medinese, who base themselves on practice. Shāfi'ī replies: 'I have told you before that practice means nothing, and we cannot be held responsible for what others say; so stop arguing about it.'

Similarly, in *Tr. III*, 148 (p. 243), Shāfi'ī addresses a Basrian opponent: 'If you answered consistently with your principle, you ought to hold that men are obliged to act, not according to what is related from the Prophet, but according to a corresponding practice or lack of practice after him.' The opponent replies: 'I do not hold that.' But this refers only to the negative consequence which Shāfi'ī forces on him, as appears from his further reply: 'There can be no *sunna* of the Prophet on which the Caliphs have not acted after him.'

In *Ris.* 58, commenting on a tradition which makes 'Umar change his decision when a decision of the Prophet to the contrary became known to him, Shāfi'ī says: 'A tradition from the Prophet must be accepted as soon as it becomes known, even if it is not supported by any corresponding action of a Caliph. If there has been an action on the part of a Caliph and a tradition from the Prophet to the contrary becomes known later, that action must be discarded in favour of the tradition from the Prophet. A tradition from the Prophet derives its authority from itself and not from the action of a later authority. The Muslims [when informed of a tradition from the Prophet] did not make the objection that 'Umar had acted differently in the midst of the Companions.'[2] The opponent acknowledges that if this were correct, it would prove that the *sunna*, in Shāfi'ī's sense, superseded all contrary practice, that one could not pretend that the validity of the *sunna* required confirmation by evidence of its subsequent application, and that nothing contradictory to the *sunna* could affect it in any way.[3] This shows what the actual doctrine of the opponents is.

[1] *Ṣaḥāba*, 126. See further below, pp. 95, 102 f.

[2] This is exactly what the opponents say, as Shāfi'ī implies a few lines farther on.

[3] The text is to be corrected after *ed. Shākir*, p. 425.

We now realize that the arguments, which were adduced by the ancient schools of law against traditions from the Prophet, for instance, the assumption of repeal and the consideration that the Companions would not have been unaware of the Prophet's decisions, were directed against traditions from the Prophet, not as such but only in so far as by their recent growth they tended to disrupt the 'living tradition' of the schools. This explains the apparent inconsistency of sometimes referring to traditions from the Prophet, and sometimes rejecting them in favour of the established doctrine.

Among the earliest authentic illustrations of the ancient attitude to practice are two statements of Ibrāhīm Nakha'ī. Ibrāhīm is aware that the imprecation against political enemies during the ritual prayer is an innovation introduced only under 'Alī and Mu'āwiya some considerable time after the Prophet. He confirms this by pointing out the absence of any information on the matter from the Prophet, Abū Bakr and 'Umar.[1] It follows that the tradition, which claims the Prophet's example for this addition to the ritual and which Shāfi'ī of course accepts,[2] must be later than Ibrāhīm.[3] On another point of ritual, Ibrāhīm refers to the varying practice during the life of the Prophet and under Abū Bakr and 'Umar, and to the Companions' adoption, under 'Umar, of an agreed ruling with reference to the alleged practice of the Prophet on the latest relevant occasion.[4] This story of an agreed ruling is obviously not historical and merely tends to invest the doctrine with the authority of the Companions. But in so far as they relate to Ibrāhīm Nakha'ī, both reports seem to be authentic.

Contrary to the historical development, Shāfi'ī charges the adherents of the old idea of *sunna* as something which takes its highest authority from Companions, with following an innovation (*muḥdath*) of 'Umar,[5] or even flings at them the opprobrious term *bid'a*, that is, a reprehensible innovation.[6] In this connexion (*Ikh.* 36) Shāfi'ī states that the followers of the ancient schools themselves, and the Kufians and Basrians in particular, reproach those who differ from one of

[1] *Āthār A.Y.* 349–52; *Āthār Shaib.* 37; *Tr. I*, 157 (*b*).

[2] *Tr. III*, 119; *Ikh.* 285 ff.

[3] The same applies to the corresponding information on Abū Bakr, 'Umar, and 'Uthmān to which Shāfi'ī refers, as well as to the pointed counter-statements concerning several Companions, particularly Ibn 'Umar, statements which appear from Abū Ḥanīfa onwards (*Tr. I*, 157 (*b*); *Muw.* i. 286; *Muw. Shaib.* 140; *Āthār Shaib.* 37).

[4] *Āthār A.Y.* 390; *Āthār Shaib.* 40.

[5] *Tr. IX*, 4. This is directed against Abū Yūsuf who had taken into account the existence of the state register (*dīwān*), an essential feature of Islamic administration the foundation of which was ascribed to 'Umar.

[6] *Ikh.* 34, explicitly directed against both Iraqians and Medinese.

their own traditions with *bid'a*. This is not borne out by the ancient sources, which show the scholars prepared to accept the fact of local variants in the 'living tradition'.[1] At the very utmost, the insistence of the Medinese on their local practice and consensus[2] might imply a criticism of other local practices. But nothing seems to justify Shāfi'ī's reproach, addressed in the first line to the Iraqians, that they defend their *bid'as* with language so immoderate that he is unwilling to reproduce it (*Ikh.* 34)—unless it were that the followers of the ancient schools had called the recent traditions from the Prophet an innovation, which in fact they were. No doubt this would have seemed immoderate language to Shāfi'ī, and he would be merely returning the attack.

B. The Medinese

Shāfi'ī addresses the Egyptian Medinese: 'You claim to establish the *sunna* in two ways: one is to find that the authorities among the Companions of the Prophet held an opinion that agrees with the doctrine in question, and the other is to find that men did not disagree on it; and you reject it [as not being the *sunna*] if you do not find a corresponding opinion on the part of the authorities or if you find that men disagree' (*Tr. III*, 148, p. 240).

This is borne out by many passages in the ancient Medinese texts, for instance, *Muw.* iii. 173 f., where Mālik quotes a *mursal* tradition on pre-emption, on the authority of the Successors Ibn Musaiyib and Abū Salama b. 'Abdalraḥmān from the Prophet, and adds: 'To the same effect is the *sunna* on which there is no disagreement amongst us.' In order to show this, he mentions that he heard that Ibn Musaiyib and Sulaimān b. Yasār were asked whether there was a *sunna* [that is, a fixed rule] with regard to pre-emption, and both said yes, and gave the legal rule in question.[3]

The wording here and elsewhere implies that *sunna* for Mālik is not identical with the contents of traditions from the Prophet.

[1] See below, pp. 85, 96.

[2] See below, pp. 64 f, 83 f.

[3] When this statement on the *sunna* was made by, or ascribed to, Ibn Musaiyib and Sulaimān b. Yasār, there existed no traditions from the Prophet or from Companions on the problem in question. The *mursal* tradition from the Prophet is therefore later, and the *isnād* containing Ibn Musaiyib and Abū Salama spurious. This *mursal* tradition is also more detailed than the other statement and represents a later stage in the discussion.

In *Muw.* iii. 181 ff., Mālik establishes the *sunna* by a tradition from the Prophet and by references to the opinions of 'Umar b. 'Abdal'azīz, Abū Salama b. 'Abdalraḥmān, and Sulaimān b. Yasār. He adds systematic reasoning because 'one wishes to understand', but he returns to the *sunna* as decisive: 'the *sunna* is proof enough, but one also wants to know the reason, and this is it.' It does not occur to Mālik to fall back on the tradition from the Prophet as such, as the decisive argument, a thing which Shāfi'ī does in *Tr. III*, 148 (p. 249).

In *Muw.* i. 196, Mālik quotes a decision of Zuhrī, ending with the words: 'this is the *sunna*'; and Mālik adds that he has found this to be the doctrine of the scholars of Medina.

In *Muw.* iii. 110, Mālik speaks of the '*sunna* in the past' (*maḍat al-sunna*) on a point of doctrine on which there are no traditions.

Mud. i. 115 establishes the practice of Medina as *sunna* by two traditions transmitted by Ibn Wahb, which Mālik had as yet ignored,[1] and by references to the first four Caliphs and to other old authorities.

In *Mud.* v. 163, Ibn Qāsim says: 'So it is laid down in the traditions (*āthār*) and *sunnas* referring to the Companions of the Prophet.'

The expression '*sunna* of the Prophet' occurs only rarely in the ancient Medinese texts. In *Muw.* iv. 86 f., Mālik says that he has heard it related that the Prophet said: 'I leave you two things after my death; if you hold fast to them you cannot go astray; they are the Book of Allah and the *sunna* of his Prophet.'[2] Mālik gives no *isnād*, and this use of *sunna* is not part of Medinese legal reasoning proper. The same applies to the tradition, related with a full *isnād* through Mālik in *Muw. Shaib.* 389, that 'Umar b. 'Abdal'azīz instructed Abū Bakr b. 'Amr b. Ḥazm to write down all the existing traditions and *sunnas* of the Prophet, traditions of 'Umar and the like, lest they got lost.[3] For a third case, see below, p. 155.

The element of 'practice' in the Medinese 'living tradition' is expressed by terms such as '*amal* 'practice', *al-'amal al-mujtama'* '*alaih* 'generally agreed practice', *al-amr* '*indanā* 'our practice',

[1] See *Muw.* i. 370; *Muw. Shaib.* 146; *Tr. III*, 22.

[2] This is the prototype of the traditions in favour of the *sunna* of the Prophet and of the well-guided Caliphs; see above, p. 25, n. 1.

[3] On the tendency underlying this spurious tradition, see Goldziher, *Muh. St.* ii. 210 f.; Mirza Kazem Beg, in *J.A.*, 4th ser., xv. 168.

al-amr al-mujtama' 'alaih 'indanā 'our generally agreed practice', *al-amr alladhī lā khilāf fīh 'indanā* 'our practice on which there is no disagreement', terms which occur *passim* in the *Muwaṭṭa'* and elsewhere.[1] It is called 'ancient practice' (*al-amr al-qadīm*) in a quotation from Yaḥyā b. Sa'īd in *Tr. VIII*, 14, and this, Shāfi'ī points out, may either be something that one must follow [when it is based on a tradition from the Prophet], or else it may proceed from governors whom one is not obliged to follow. The best the opponent can do, Shāfi'ī says, is to suppose that the case in question belongs to the first kind.

That the 'practice' existed first and traditions from the Prophet and from Companions appeared later, is clearly stated in *Mud.* iv. 28, where Ibn Qāsim gives a theoretical justification of the Medinese point of view. He says: 'This tradition has come down to us, and if it were accompanied by a practice passed to those from whom we have taken it over by their own predecessors, it would be right to follow it. But in fact it is like those other traditions which are not accompanied by practice. [Here Ibn Qāsim gives examples of traditions from the Prophet and from Companions.] But these things could not assert themselves and take root (*lam tashtadd wa-lam taqwa*), the practice was different, and the whole community and the Companions themselves acted on other rules. So the traditions remained neither discredited [in principle] nor adopted in practice (*ghair mukadhdhab bih wa-lā ma'mūl bih*), and actions were ruled by other traditions which were accompanied by practice. These traditions were passed on from the Companions to the Successors, and from these to those after them, without rejecting or casting doubt on others that have come down and have been transmitted.[2] But what was eliminated from practice is left aside and not regarded as authoritative, and only what is corroborated by practice is followed and so regarded. Now the rule which is well established and is accompanied by practice is expressed in the words of the Prophet . . . and the words of Ibn 'Umar to the same effect. . . .'[3]

The Medinese thus oppose 'practice' to traditions. The dead-

[1] For another ancient term see below, p. 245 f.

[2] This lip-service paid to traditions shows the influence they had gained in the time of Ibn Qāsim.

[3] It deserves to be noted that Ibn Qāsim relies on 'practice' although he might have simply referred to the tradition from the Prophet.

lock between the two principles is well illustrated by the following anecdote, related in Ṭabarī (*Annales*, iii. 2505) on the authority of Mālik: Muḥammad b. Abī Bakr b. Muḥammad b. 'Amr b. Ḥazm was judge in Medina, and when he had given judgment contrary to a tradition and come home, his brother, 'Abdallāh b. Abī Bakr, who was a pious man, would say to him: 'My brother, you have given this or that judgment to-day.' Muḥammad would say: 'Yes, my brother.' 'Abdallāh would ask: 'What of the tradition, my brother? The tradition is important enough to have the judgment based on it.' Muḥammad would reply: 'Alas, what of the practice?'—meaning the generally agreed practice in Medina, which they regard as more authoritative than a tradition.

That the Medinese resolved this deadlock by preferring 'practice' to traditions from the Prophet and from Companions, can be seen from the following examples, which are only a few out of many.[1]

Mālik (*Muw.* iii. 134, 136; *Mud.* x. 44) and Rabī' (*Tr. III*, 48) admit the sale of bales by specification from a list, because it is the current practice in the past and present by which no uncertainty (*gharar*) is intended (Mālik), or because men consider it as valid (Rabī'). *Mud.* x. 44 considers Mālik's statement as authoritative (*ḥujja*), particularly because he states the practice, and finds it confirmed by traditions (*āthār*)—not from the Prophet but from authorities such as Yaḥyā b. Sa'īd who establishes the same practice. 'Practice' therefore decides the extent to which the general prohibition of *gharar*, incorporated in a tradition from the Prophet, is to be applied.

Mālik (*Muw.* iii. 136) and Rabī' (*Tr. III*, 47) declare, against a tradition from the Prophet which gives the parties to a sale the right of option as long as they have not separated: 'We have no fixed limit and no established practice for that.' Ibn 'Abdalbarr (quoted in Zurqānī, iii. 137) comments: 'The scholars are agreed that the tradition is well-attested, and most of them follow it. Mālik and Abū Ḥanīfa and their followers reject it, but I know of no one else who does so. Some Mālikīs say that Mālik considered it superseded by the consensus of the Medinese not to act upon it, and this consensus is in Mālik's opinion more authoritative than an 'isolated' tradition. As Abū Bakr b. 'Amr b. Ḥazm says: "If you see the Medi-

[1] See further *Tr. III*, 22 (cf. *Muw.* i. 370), 29 (cf. *Mud.* i. 65), 68 (cf. *Mud.* xiv. 224; xv. 192), 69 (cf. *Muw.* iii. 211), 144 (cf. *Muw.* ii. 333).

nese agree on something, know that it is the truth." But others say that this claim of a Medinese consensus is not substantiated, because the decision[1] to act upon the tradition is related explicitly from Ibn Musaiyib and Zuhrī who are among the most prominent scholars of Medina; further because nothing against acting upon the tradition is explicitly related from the other Medinese, excepting Mālik and Rabī'a b. Abī 'Abdalraḥmān, and not even uniformly from the latter; and finally because Ibn Abī Dhi'b who is a Medinese scholar of the time of Mālik, objected to Mālik's decision not to act upon the tradition, and in his anger used against him hard and unbecoming words.' In other words: by the time of Ibn 'Abdalbarr, spurious information regarding old Medinese authorities had been put into circulation, so as to bring their doctrine into line with the tradition, and we find more of the same kind, regarding the 'seven scholars of Medina' and others, in 'Iyāḍ (quoted in Zurqānī, ibid.). The tradition is certainly later than the ancient doctrine common to the Medinese and Iraqians. Ibn Abī Dhi'b is not a member of the Medinese school of law but a traditionist and disseminator of traditions.[2]

Mālik in *Muw.* iii. 219 ff. prefers the practice, 'what people used to do', as expressed in a statement ascribed to Qāsim b. Muḥammad and a concurring action reported from Ibn 'Umar, to a tradition related from the Prophet. Shāfi'ī comments on this (*Tr. III*, 41): 'Qāsim's statement cannot prevail over a tradition from the Prophet. . . . If it is suggested that Qāsim's reference to the practice of men can refer only to a group of Companions or of scholars who could not possibly be ignorant of the *sunna* of the Prophet, and who did not arrive at their common doctrine because of their personal opinion (*ra'y*) but only on account of the *sunna*, it can be objected that in another case you do not share the opinion of Qāsim and say: "We do not know who the 'people' are to whom Qāsim refers." If Qāsim's statement does not prevail there over your personal opinion, it is surely even less qualified to prevail here over a tradition from the Prophet.' This shows that the 'practice' of the Medinese is not necessarily identical with the authentic or alleged opinions of the old authorities of their school. Shāfi'ī goes on to quote a tradition through Ibn 'Uyaina—'Amr b. Dīnār—Sulaimān b. Yasār, to the effect that Ṭāriq gave judgment in Medina in accordance with[3] the decision related from the Prophet. We must regard this as a spurious statement on an old Medinese, of the same kind as, but older than, those we have met with in the preceding paragraph. As

[1] Delete *tark* from the printed text.

[2] See above, p. 54 f., and below, p. 256, n. 6.

[3] Read *'alā* instead of *'an* which gives no sense.

Qāsim b. Muḥammad and Sulaimān b. Yasār were contemporaries, the responsibility for it can be fixed on either Ibn 'Uyaina or 'Amr b. Dīnār who were both members of the traditionist group.[1]

On the other hand, 'practice' is explicitly identified with those traditions which the Medinese accept, for instance in *Muw.* ii. 368 (= *Muw. Shaib.* 314): Mālik—Zuhrī—Qabīṣa b. Shu'aib—'Umar gave the grandfather the same share in the inheritance which men give him nowadays. In other words: Medinese contemporary 'practice' is projected back into the time of 'Umar. If 'Umar and Ibn 'Umar are the particular authorities of the Medinese,[2] this means only that their names were used in order to justify doctrines which reflected the current 'practice' or which were meant to change it; it does not mean that the traditions going under their names were more or less authentic and formed the basis on which the doctrine was built.[3] (The same applies to Ibn Mas'ūd, 'Alī, and 'Umar as authorities of the Iraqians.)[4] We shall be able to prove the late origin of many of these traditions in detail.[5] We should not, of course, be justified in assuming an absolute identity of legal doctrine and formal traditions for any school at any period.

After the first legitimization of doctrine by reference to Companions of the Prophet had been achieved, the further growth of traditions from Companions and also from the Prophet went partly parallel with the further elaboration of doctrine within the 'living tradition' of the ancient schools, but partly also represented the means by which definite changes in the accepted doctrine of a school were proposed and supported. These efforts were sometimes successful in bringing about a change of doctrine, but often not, and we find whole groups of 'unsuccessful' Medinese and Iraqian doctrines expressed in traditions.[6] I need hardly point out that we must regard the interaction of legal doctrines and traditions as a unitary process, the several aspects and phases of which can be separated only for the sake of analysis. The greatest onslaught on the 'living tradition' of the ancient schools of law was made by the traditionists in the

[1] See below, p. 256, n. 6.
[2] See above, p. 25 f.
[3] See below, p. 156 f.
[4] See above, p. 31 f.
[5] See below, p. 176 ff.
[6] For details on all this, see part II of this book; on 'unsuccessful' doctrines in particular, below, pp. 240 and 248 f.

name of traditions going back to the Prophet.[1] Their attack was well on its way when Shāfi'ī appeared. He accepted their essential thesis and thereby cut himself off from the development of the doctrine in the ancient schools. This view of the development of the function of legal traditions is the only alternative to considering the doctrine of the ancient schools, as Shāfi'ī does, a mass of inconsistencies and contradictions.

We have already encountered cases in which Medinese 'practice' reflects directly the actual custom.[2]

Shāfi'ī discusses another significant example in *Tr. III*, 46. According to him, the Medinese allow for practical reasons the exchange of bullion for a smaller amount of coin of the same metal, so as to cover the minting expenses. This is a serious infringement of the general rules for the exchange of precious metals, and it is little wonder that no parallel exists in *Muw.*, *Muw. Shaib.*, and *Mud.*, although *Mud.* iii. 107, 109, allows some little latitude in similar transactions. But Ibn 'Abdalbarr[3] mentions it as a 'bad and discreditable doctrine' ascribed by a group of Mālikīs to Mālik and Ibn Qāsim who, it is stated, make a concession for this transaction if there is no means of avoiding it. We must regard this decision not as a passing concession on the part of Mālik, but as the original doctrine of the Medinese, and its deliberate obliteration from most of the old sources as an indication of growing strictness in the enforcement of the prohibition of 'usury'. This strictness was advocated in traditions which were collected by Mālik in *Muw.* iii. 111 ff. but prevailed only after him.

As parallel cases, Shāfi'ī mentions (*Tr. III*, 46) concessions of the Medinese to custom with regard to the sale of meat for meat in equal quantities by estimate without weighing, called by Mālik (*Muw.* iii. 127) 'our generally agreed practice', and of bread for bread, eggs for eggs, &c. (cf. *Muw.* iii. 122).

The Medinese in the generation before Mālik, in common with Auzā'ī (*Tr. IX*, 14), allowed soldiers to take food back from enemy country, without dividing it as part of the booty, and to consume it at home. The explicit reason given is that this was the usual custom. Several relevant traditions are to be found in *Mud.* iii. 38 f. Only Mālik (*Muw.* ii. 299), following his own opinion (*ra'y*), restricted the permission to very small amounts.

[1] See below, p. 253 ff. [2] Above, p. 64 f.

[3] *Istidhkār*, MS. Or. 5954 of the British Museum. The question here is whether one may exchange bullion for the same amount in coins and at the same time pay a minting fee; this is legally the same as the problem in the text. For minting fees in the Umaiyad period, see Balādhurī, *Futūḥ*, 468 f.

Shaibānī relates in *Tr. VIII*, 21: 'Mālik declared once: "We did not apply the *lex talionis* to [broken] fingers, until 'Abdal'azīz b. Muṭṭalib, a judge,[1] applied it; since then, we have applied it." But the opinion of the Medinese does not become right because an official (*'āmil*) has acted thus in their country.' This shows the relatively recent origin of parts of the Medinese 'practice' and doctrine.[2]

But the 'practice' of the Medinese does not simply reflect the actual custom, it contains a theoretical or ideal element.

In *Mud.* i. 65, Mālik opposes the 'practice' to a tradition from Abū Bakr (*Muw.* i. 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, Mālik 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 Islam, as is shown by *Tr. IX*, 1.[3] In *Muw.* iii. 39, Mālik states: 'This is our practice.' But it was not yet so in the time of Zuhrī, shortly before Mālik. So Mālik's recurrent expression *al-amr 'indanā*, literally 'the practice with us', may mean here and in other places only 'the [right] practice in our opinion', although Zurqānī as a rule carefully explains it as meaning 'the practice in Medina'.

At this point, we see the 'practice' of the Medinese merge into the common opinion of the recognized scholars, which becomes the final criterion of the 'living tradition' of the school.[4] The continuous doctrine of Medina prevails over the strict and literal interpretation of a tradition (*Muw.* iii. 259). Mālik follows what he has seen the scholars approve, and uses a tradition from Ibn 'Umar only as a subsidiary argument (*Muw.* ii. 83). He counters a tradition from 'Ā'isha, which he does not follow, with the accepted doctrine of the school (*Muw.* ii. 336), and introduces the latter with the words 'the best that I have heard'.[5] He calls a doctrine 'our generally agreed practice, that which I have heard from those of whom I approve, and that on which both early and late authorities are agreed', and again 'a *sunna* on which there

[1] See Ṭabarī, *Annales*, iii. 159, 198, years 144 and 145.

[2] See *Muw.* iv. 51; *Mud.* xvi. 112, 122.

[3] See below, p. 205.

[4] Shāfi'ī himself identifies the two when he says, referring to *Muw.* i. 49: 'If your "practice" (*al-amr 'indakum*) means the consensus of the Medinese . . .' (*Tr. III*, 148, p. 249, and similarly elsewhere).

[5] On the meaning of this formula, see below, p. 101, n. 1.

is no disagreement amongst us, and one to which men's practice has always corresponded (*Muw.* iv. 55 f.)'. This shows the close connexion between the old idea of *sunna*, 'practice', and the common opinion of the recognized scholars, which together constitute the 'living tradition' of the school.

Shāfi'ī attacks this idea of 'living tradition' in *Tr. III*, 147: 'You claim that the judges give judgment only in accordance with the opinion of the scholars, and you claim that the scholars do not disagree. But it is not so. . . . Where is the practice? . . . We do not know what you mean by practice, and you do not know either, as far as we can see. We are forced to conclude that you call your own opinions practice and consensus, and speak of practice and consensus when you mean only your own opinions.'

The 'practice' of the school is not identical with the opinions ascribed to ancient authorities.[1] Shāfi'ī says quite correctly to the Egyptian Medinese: 'You believe in taking knowledge from the lowest source' (*Tr. III*, 148, p. 246), and Rabī' and his Egyptian companions find the doctrine of their school laid down authoritatively in Mālik's *Muwaṭṭa'* (ibid., p. 248). They claim the essential unity of the 'living tradition' of the school, or as Shāfi'ī puts it, they 'contend that knowledge is transmitted in Medina as if by inheritance, and that the authorities do not disagree on it' (*Tr. III*, 77). So Rabī', still speaking as a Medinese, can ask confidently: 'Can you show me a single case in Medina where an opinion held by the great majority (*al-aghlab al-akthar*) of the Successors and rejected only by a minority, has been abandoned by us for the opinion of one of their predecessors, contemporaries, or successors?' (*Tr. III*, 148, p. 246). The growth of 'unsuccessful opinions' ascribed to Companions, Successors, and later authorities, not to mention traditions from the Prophet, enables Shāfi'ī to take up this challenge, but he acknowledges the Medinese principle implicitly when he blames them for following 'the practice of the majority of those from whom opinions are related in Medina' rather than a tradition from the Prophet (ibid., p. 247).[2]

[1] See above, p. 65, and also *Tr. III*, 27, 77, 94, 143, &c.

[2] The theory of the Medinese 'living tradition' is clearly stated by Ibn Qutaiba, 331 ff. and by Ibn 'Abdalbarr, quoted in Zurqānī, iv. 36, l. 1.

C. The Syrians

Auzā'ī knows the concept of '*sunna* of the Prophet' (§ 50),[1] but does not identify it with formal traditions. He considers an informal tradition without *isnād*, concerning the life-story of the Prophet, sufficient to establish a 'valid *sunna*' (§ 37), and an anonymous legal maxim sufficient to show the existence of a 'valid *sunna* going back to the Prophet' (§ 13).[2]

His idea of 'living tradition' is the uninterrupted practice of the Muslims, beginning with the Prophet, maintained by the first Caliphs and by the later rulers, and verified by the scholars. The continuous practice of the Muslims is the decisive element, reference to the Prophet or to the first Caliphs is optional, but not necessary for establishing it. Examples occur in almost every paragraph of *Tr. IX*.

Auzā'ī's 'living tradition' is based partly on actual custom; he says so clearly in § 6, and the same can be inferred from §§ 14,[3] 16, 18, 25, 27 (see the parallel passage in Ṭabarī, 52). At the same time, it has become idealized by being projected back to 'Umar b. 'Abdal'azīz (§ 25), or is being idealized by Auzā'ī himself who lays down fixed rules (§ 27). He exaggerates the unanimity of doctrine (§§ 31, 32); the stage reached by his immediate predecessors becomes for him the continuous and unanimous practice.

Auzā'ī opposes the fictitious 'constant usage of the Prophet and of the Caliphs' to the actual administrative practice (§ 4).[4] He infers the existence of a normative usage of the Muslims or of the Caliphs from informal traditions on the history of the Prophet (§§ 7, 10),[5] or even from a legal maxim (§ 13).

The legal maxim which Auzā'ī in § 13 takes as proof of a 'valid *sunna* going back to the Prophet', says that 'he who kills a foreign enemy [in single combat] has the right to his spoils'. Auzā'ī does not say that this is related on the authority of the Prophet; and Abū Yūsuf, who must certainly have mentioned it if he had known it as a tradition on the authority of the Prophet, is silent. The maxim appears, as part of a tradition concerning the Prophet and Abū Qatāda at the battle of Ḥunain, for the first time in Mālik (*Muw.* ii.

[1] All quotations in this section refer to *Tr. IX*, unless the contrary is stated. Most questions have parallels in Ṭabarī.

[2] See farther down on this page.

[3] See above, p. 67.

[4] See below, p. 205.

[5] See below, p. 261.

301) who interprets it restrictively.[1] He denies knowledge of any other tradition from the Prophet (ibid. 305), but knows a statement on Abū Bakr and 'Umar in favour of the contrary doctrine (Ṭabarī, 87): this statement, being a denial, presupposes the doctrine expressed in the legal maxim, and is the result of a religious scruple at infringing the strict division of booty. The scruple arises from the Koran, and is shared by the Iraqians. The statement may therefore be taken as confirming the authentic character of the practice as alleged by Auzā'ī. Auzā'ī (Ṭabarī, 87) knows the scruple in an earlier form in which it was given the authority of 'Umar. This form subjects the spoils at least to the deduction of one-fifth as the share of the Prophet, a deduction which is also based on the Koran.

The tradition on the announcement of the Prophet at the battle of Bi'r Ma'ūna, again in favour of the legal maxim, appears for the first time in Shāfi'ī (*Tr. IX*, 13), and so does the reference to the action of Sa'd b. Abī Waqqāṣ at Qādisīya, which is intended to rebut the earlier negative statement on Abū Bakr and 'Umar. Later than Shāfi'ī are several traditions mentioned in Zurqānī, ii. 306, and in *Comm. ed. Cairo* on *Tr. IX*, 13; they make the Prophet award the spoils to the killer on a number of other occasions. Some of these have found a place in one or other of the classical collections.[2] The practice was certainly old, it found expression in a legal maxim, Auzā'ī identified it with the '*sunna* going back to the Prophet', a religious scruple regarding it was in part acknowledged by the Iraqians and Mālik, and only Shāfi'ī, under the spell of formal traditions from the Prophet, fell back on the old doctrine.

In § 1 (and in the parallel in Ṭabarī, 89), Auzā'ī refers to actions of the Prophet in general terms without giving *isnāds*, and alleges the uninterrupted practice of the Muslims under 'Umar and 'Uthmān and so on, until the civil war and the killing of the Umaiyad Caliph Walīd b. Yazīd (A.H. 126).[3] In

[1] Shāfi'ī (*Tr. IX*, 13) calls it already 'well-attested, reliable, and not contradicted as far as I know'. It appears in an improved form, providing Abū Qatāda with legal proof of his deed, in Wāqidī.

[2] The tradition on Khālid b. Walīd and the Prophet (in Ibn Ḥanbal, Muslim, and others) favours the restrictive Mālikī and Ḥanafī doctrine. The tradition on Sa'd b. Abī Waqqāṣ at the battle of Uḥud improves the reference to his action at Qādisīya, referred to above, by projecting the incident back into the time of the Prophet.

[3] Ibn Wahb in *Mud.* iii. 12 quotes the same statement of Auzā'ī, but instead of the passage on 'Umar and so on until the killing of Walīd, he says: 'from the Caliphate of 'Umar to the Caliphate of 'Umar b. 'Abdal'azīz'; the name of impious Walīd was changed into that of pious 'Umar b. 'Abdal'azīz in early 'Abbāsid times.

§ 3 (*b*) he refers to the alleged early practice of the Caliphs of the Muslims in the past, until the civil war (in the parallel text in Ṭabarī, 68, he adds: after the death of Walīd b. Yazīd). And in § 24 he says: 'The Muslims always used to . . ., no two men disagreed on this until Walīd was killed.' The parallel passage to § 1 in Ṭabarī, 89, contains an even stronger condemnation of the recent practice. Here Auzā'ī contrasts recent practice with what he alleges to have been the custom since the time of the Prophet, and even accepts a practically undesirable consequence of the old practice.

The civil war which began with the death of Walīd and marked the beginning of the end of the Umaiyad dynasty, was a conventional date for the end of the 'good old time' and not only with regard to the *sunna*.[1]

In view of what we have already seen, we must regard Auzā'ī's 'recent' custom as the real practice (which is indeed admitted and regulated by the Iraqians in the case of § 1), and his alleged 'old' custom as an idealized picture of the 'good old time'.[2] It is relevant to note here that the Syrian Auzā'ī still accepts practically the whole of the Umaiyad period, including even the reign of the 'impious' Walīd, as a normative model on an equal footing with the earliest period of Islam. There is as yet no trace of anti-Umaiyad feeling in him, and several anecdotes, although they cannot be taken as historical, reflect this fact.[3] The real practice as it appears in Auzā'ī's doctrine may be dated towards the end of the Umaiyad period.

Auzā'ī shows a particular kind of dependence on the authority of the Prophet: on the one hand, he is far from Shāfi'ī's insistence on formally well-attested traditions with full *isnāds* going back to the Prophet;[4] on the other, he is inclined to project the whole 'living tradition', the continuous practice of the Muslims, as he finds it, back to the Prophet and to give it the Prophet's

[1] See above, p. 36 f., and the anecdote from Dhahabī, in Fischer, *Biographien von Gewährsmännern*, 71, where Ma'mar relates: 'We were under the impression that we had heard much from Zuhri, until Walid was killed and the scrolls containing Zuhrī's traditions were carried on beasts of burden from his treasury' (falsely amended by the editor).

[2] See below, p. 205.

[3] Dhahabī, *Tadhkira*, s.v. Auzā'ī, i. 168 ff. An anecdote on his having had to hide when the 'Abbāsids entered Syria, is given by Yāqūt, *Mu'jam al-Buldān*, ii. 110 (cf. Barthold, in *Islam*, xviii. 244).

[4] See above, p. 34.

authority, whether he can adduce a precedent established by the Prophet or not. He has this feature in common with the Iraqians.[1]

D. The Iraqians

The Iraqians, in their view of *sunna*, no more think it necessarily based on traditions from the Prophet than do the Medinese.

Thus in *Tr. II*, 4 (*f*), in a tradition from 'Alī, representing an 'unsuccessful' Iraqian doctrine, *sunna* occurs in the sense of 'established religious practice'. And *Tr. III*, 148 (p. 249) makes the Iraqians say: 'We do this on account of the *sunna* [i.e. they give judgment on the defendant's refusal to take the oath when the plaintiff can produce no legal proof, and they do not demand from the plaintiff a confirmatory oath as do the Medinese]. There is no mention of the oath, or of the refusal to take it, in the Koran. This is a *sunna* which is not in the Koran, and it does not come into the category of evidence from witnesses [which is provided for by Koran ii. 282]. We hold that the Koran orders us to give judgment on the evidence of witnesses, either two men or one man and two women, and the refusal to take the oath does not come under this.'

The essential point is that the Iraqians use *sunna* as an argument, even when they can show no relevant tradition. But long before Shāfi'ī, they had coined the term '*sunna* of the Prophet'. It appears in a number of Iraqian traditions.

Tr. II, 9 (*b*): Shāfi'ī—Abū Kāmil and others—Ḥammād b. Salama Baṣrī—Thumāma [of Basra]—his grandfather Anas b. Mālik—his father Mālik gave him the copy of a decree of Abū Bakr on the *ẓakāt* tax and said: 'This is the ordinance of Allah and the *sunna* of the Prophet.' A parallel version in § 9 (*c*) has: 'Abū Bakr gave him the *sunna* in writing.' This tradition can be dated to the time of Ḥammād b. Salama; the connexion between Ḥammād and Thumāma is very weak.[2]

Tr. II, 18 (*a*): Shāfi'ī—a man—Shu'ba—Salama b. Suhail—Sha'bī—'Alī said [referring to an adulteress]: 'I flog her on the basis of the Koran, and lapidate her on the basis of the *sunna* of the Prophet.' The full text of this tradition[3] shows that it depends on the wording of a group of traditions from the Prophet on the punishment

[1] See below, p. 76.
[2] See also below, p. 167.
[3] See below, p. 106.

of an adulterer (Mā'iz); it must therefore be later. The *isnād* shows that it cannot be older than Sha'bī at the best; but the relative chronology of the traditions on this subject makes it impossible to assign it even this date.[1]

Ṭaḥāwī, i. 241, gives several traditions in which Companions refer to the orders, or to the *sunna*, of the Prophet. Ṭaḥāwī remarks correctly that these traditions are Iraqian. They do indeed represent the Iraqian doctrine on the problem in question. The *isnāds* of parallel versions and other indications enable us to date them to the beginning of the second century.

The earliest evidence for the Iraqian term '*sunna* of the Prophet' occurs in a dogmatic treatise which Ḥasan Baṣrī wrote at the command of the Umayyad Caliph 'Abdalmalik, and which therefore cannot be later than the year 86.[2] The author shows himself bound, in a general way, by the example of the forebears (*salaf*) and refers explicitly to the *sunna* of the Prophet. But his actual reasoning is based exclusively on the Koran, and he does not mention any tradition from the Prophet or even from the Companions. It is only his adversaries who refer in general terms to the opinions of the Companions, and these they oppose to the unguided opinion (*ra'y*) of the individual. But the author also charges his opponents with *ra'y*, that is, arbitrary interpretation of the Koran.

We now come to statements of individual Iraqians on *sunna*.

Abū Yūsuf, it is true, declines to accept Auzā'ī's general reference to the uninterrupted custom, questions the reliability of the unidentified persons on whose authority Auzā'ī claims the existence of a *sunna*, and asks for formal *isnāds*.[3] And the Hijazis, Abū Yūsuf says, 'when asked for their authority for their doctrine, reply that it is the *sunna*, whereas it is possibly only the decision of a market-inspector (*'āmil al-sūq*) or some provincial agent (*'āmilum-mā min al-jihāt*)'. But this is only part of the usual polemics between followers of the ancient schools, who do not hesitate to find fault with others for arguments which they use themselves.

Abū Yūsuf's own idea of *sunna* appears from *Tr. IX*, 5, where

[1] In the same way, Koran and *sunna* are opposed to each other in a statement ascribed to Sha'bī and quoted in Ṭaḥāwī, i. 20.

[2] Text, ed. Ritter, in *Islam*, xxi. 67 ff.; summary and commentary by Obermann, in *J.A.O.S.* lv. 138 ff.

[3] *Tr. IX*, 1, 3 (*b*), 9.

he opposes *sunna* to isolated traditions;[1] from §§ 7, 8, where he refers to *sunna* beside traditions; from § 14 where he distinguishes between what he has heard on the authority of the Prophet, the traditions (*āthār*), and the well-known and recognized *sunna* (*al-sunna al-maḥfūẓa al-ma'rūfa*). This last is simply the doctrine of the school, the outcome of religious and systematic objections against the ancient lax practice.

In *Tr. IX*, 18, Abū Yūsuf applies the term '*sunna* of the Prophet' to a case in which nothing to the contrary is known on the authority of the Prophet and of the Companions. In § 21 he refers to 'the *sunna* and the life-history (*sīra*) of the Prophet', quoting several traditions on history without *isnād*, and says: 'The Muslims and the pious forebears, the Companions of the Prophet, have never ceased to do the same, and we have not heard that any of them ever avoided doing so.' In this case, where Auzā'ī's doctrine happens to represent the religious scruple against the rough-and-ready practice, Abū Yūsuf's reasoning is of the same kind as that of Auzā'ī elsewhere.

In *Tr. IX*, 24, Auzā'ī had referred to the unanimous practice 'until Walīd was killed'. Abū Yūsuf retorts: 'One does not decide a question of allowed and forbidden, by simply asserting that people always did it. Most of what people always did is not allowed and ought not to be done. There are cases which I could mention, . . . where the great mass (*'āmma*) acts against a prohibition of the Prophet. In these questions one has to follow the *sunna* which has come down from the Prophet and the forebears, his Companions and the lawyers (*al-sunna 'an rasūl Allāh wa-'an al-salaf min aṣḥābih wa-min qaum fuqahā'*).' This shows that Abū Yūsuf's idea of *sunna*, notwithstanding his polemics, was essentially identical with that of Auzā'ī. There was only a greater degree of technical documentation on the part of the Iraqian scholar.

In *Kharāj*, 99, Abū Yūsuf relates a tradition from 'Alī, according to which the Prophet used to award 40 stripes as a punishment for drinking wine, Abū Bakr 40, and 'Umar 80. He comments: 'All this is *sunna*, and our companions are agreed that the punishment for drinking wine is 80 stripes.'

The degree to which Shaibānī puts the doctrine of the Iraqians under the aegis of the Prophet becomes clear from

[1] Quoted above, p. 28.

Muw. Shaib. 361, where he calls it 'something we have heard on the authority of the Prophet'; but his whole evidence for this consists in statements of Zuhrī and 'Aṭā' on a change of practice in Umaiyad times.

In his long reasoning in *Tr. VIII*, 13, Shaibānī, as it happens, does not use the term *sunna*. But the whole passage, as far as legal arguments are concerned, might have been written by Auzā'ī. Shaibānī refers to the Koran, to traditions from the Prophet (in general terms), to traditions from Companions, and to a later authority (Zuhrī), and claims that the practice changed under Mu'āwiya.

To sum up, the '*sunna* of the Prophet', as understood by the Iraqians, is not identical with, and not necessarily expressed by, traditions from the Prophet; it is simply the 'living tradition' of the school put under the aegis of the Prophet. This concept is shared by Auzā'ī, but not by the Medinese. It cannot be regarded as originally common to all ancient schools of law, and as between the Syrians and the Iraqians, the evidence points definitely to Iraq as its original home. In any case, it was the Iraqians and not the Medinese to whom the concept of '*sunna* of the Prophet' was familiar before the time of Shāfi'ī. The common opinion to the contrary has taken at its face value a later fiction, some other aspects of which we have discussed already.[1]

The Iraqians hardly use the term '*amal*, 'practice', even where their doctrine endorses actual administrative procedure.[2] We have seen Abū Yūsuf inveigh against Auzā'ī's concept of practice, although his own idea of *sunna* comes down to the same. Shāfi'ī's Basrian opponent, when charged with making the 'practice' prevail over traditions from the Prophet, replaces this term in his own answer by *sunna*.[3]

However it be formulated, the Iraqian idea of 'living tradition' is essentially the same as that of the Medinese, and Shāfi'ī can say, addressing the Egyptian Medinese: 'Some of the Easterners have provided you with an argument and hold the same view as you' (*Tr. III*, 148, p. 242). This 'living tradition' is meant when an Iraqian opponent of Shāfi'ī says that there

[1] See above, p. 8, on Medina as the true home of the *sunna*, and p. 27 on the interest of the Medinese in traditions, compared with that of the Iraqians.

[2] See above, p. 60, n. 5.

[3] See above, p. 59.

would be nothing to choose between two doctrines, each of which is represented by a tradition, 'if there were nothing to go by but the two traditions' (*Ikh.* 158 f.). It corresponds to the accepted doctrine of the school, and a scholar from Kufa, presumably Shaibānī himself, can comment on the fact that a well-authenticated tradition from the Prophet is not acted upon because 'all people' have abandoned it, saying: 'By "people" I mean the muftis in our own time or [immediately] before us, not the Successors'; he specifies the people of Hijaz and Iraq; for Iraq, he can only mention Abū Ḥanīfa and his companions, and he is aware that Ibn Abī Lailā holds a different opinion which, however, 'we do not share'; he knows nothing about the muftis in Basra (*Ikh.* 336 f.). The Iraqians, therefore, like the Medinese, take their doctrine 'from the lowest source'. The scholars of Kufa in particular find this doctrine expressed in the opinions ascribed to Ibrāhīm Nakha'ī.[1]

E. Shāfi'ī

For Shāfi'ī, the *sunna* is established only by traditions going back to the Prophet, not by practice or consensus (*Tr. III*, 148, p. 249). Apart from a few traces of the old idea of *sunna* in his earlier writings,[2] Shāfi'ī recognizes the '*sunna* of the Prophet' only in so far as it is expressed in traditions going back to him. This is the idea of *sunna* which we find in the classical theory of Muhammadan law, and Shāfi'ī must be considered as its originator there.[3]

Sunna and traditions are of course not really synonymous.[4] Keeping this in mind, we notice that Shāfi'ī restricts the meaning of *sunna* so much to the contents of traditions from the Prophet, that he is inclined to identify both terms more or less completely.[5]

In the preceding sections we had occasion to refer to Shāfi'ī's attacks against the old ideas of *sunna*, 'practice' and 'living

[1] See above, p. 33.

[2] See below, p. 79 f.

[3] It is also the idea of the traditionists, as explicitly stated in Ibn Qutaiba, 215 f.

[4] See above, p. 3.

[5] The following are some of the most telling passages: *Ris.* 30, 31, 58; *Tr. I*, 9, 138; *Tr. II*, 5 (*c*), 15, 19 (*e*); *Tr. III*, 65, 105, 114, 122, 125, 130; *Tr. VI*, 266; *Tr. VIII*, 6, 7, 8, 12; *Tr. IX*, 39; *Umm.* iv. 170; *Ikh.* 27, 51, 57, 357. Shāfi'ī projects this identification of *sunna* with the contents of traditions from the Prophet back into the time of the Successors: *Ikh.* 24.

tradition'. His main line of argument starts from the traditions from the Prophet (and the Companions) which the Medinese themselves transmitted but did not follow, those traditions which had grown up in Medina beside the 'living tradition' of the school and had not succeeded in modifying it. In *Tr. III*, 68, he addresses the Egyptian Medinese: 'So you relate in this book [the *Muwaṭṭa'*] an authentic, well-attested tradition from the Prophet and two traditions from 'Umar, and then diverge from them all and say that judgment is not given according to them and that the practice is not so, without reporting a statement to the contrary from anyone I know of. Whose practice then have you in mind when you disagree on the strength of it with the *sunna* of the Prophet—which alone, we think, ought to be sufficient to refute that practice—and disagree not only with the *sunna* but with 'Umar also? . . . At the same time, you fall back on practice, but we have not discovered to this very day what you mean by practice. Nor do I think we ever shall.'[1]

The spurious information on the opinions of old Medinese authorities, which by Shāfi'ī's time had grown up beside traditions from the Prophet (and from Companions), provides him with another argument against the Medinese 'living tradition', as expressed in the generally recognized doctrine of the school.[2] So he finds that Mālik and the (Egyptian) Medinese diverge from '*sunna*, practice, and *āthār* [that is, traditions from persons other than the Prophet] in Medina' (*Tr. III*, 54) and that their practice is not uniform as they always claim (ibid. 119). And he considers that their alleged 'ancient practice' is something introduced by governors, an argument which had already appeared in the polemics between the ancient schools.[3]

Logically from his point of view, Shāfi'ī appeals from the actual to an ideal and fictitious doctrine of the Medinese which he reconstructs, just as Auzā'ī had opposed the alleged custom of the 'good old time' to the real and 'recent' practice: 'There is no one in stronger opposition to the [hypothetical] people of Medina than you. . . . You disagree with what you relate from the Prophet . . . and from authorities whose equals cannot be found. One might even say that you are self-confessedly and

[1] Similar passages: *Tr. III*, 29, 47, 67, 89, 148 (p. 249), &c.
[2] See below, p. 85 and n. 1.
[3] See above, pp. 63, 74.

most stubbornly opposed to the [hypothetical] people of Medina, and you could not deny it. You are much more in the wrong than others because you claim to continue their doctrine and to follow them, and then differ from them more than those who do not make this claim.'[1]

As the recognized doctrine of the Medinese school had, by Shāfi'ī's time, acquired a considerable body of *loci probantes* in traditions from the Prophet, his Companions, and later authorities, Shāfi'ī was able to charge them with inconsistency in maintaining their 'living tradition' in the face of other traditions of the same kind. This argument of his merges with his criticism of the attitude of the ancient schools to traditions:[2] 'Mālik sometimes rejects a tradition from the Prophet in favour of the doctrine of a Companion, and then he rejects the Companion's doctrine in favour of his own opinion (*ra'y*); that is to say, everything is at his discretion (*fal-'amal idhan ilaih*)[3] and he can act as he likes. But to do this is not proper for people of our generation (*wa-laisa dhālik li-aḥad min ahl dahrinā*).' This implies that Shāfi'ī's theory is something new.[4]

The earlier writings of Shāfi'ī contain a few traces of the old concept of *sunna*. The following passage deserves to be quoted: 'Ibn Musaiyib states that the weregeld for three fingers of a woman is 30 camels and for four fingers 20, and in answer to the objection of inconsistency he replies that it is the *sunna*; further a tradition to the same effect is related from Zaid b. Thābit. One cannot therefore declare this doctrine erroneous from the systematic point of view (*min jihat al-ra'y*), because this objection can be made only to an opinion which is itself based on systematic reasoning, where one reasoning could be considered sounder than another. But here the only possible objection would be a traditional one (*ittibā'an*), based on something from which one may not diverge; and as Ibn Musaiyib said that it is the *sunna*, it is probable that it comes from the Prophet or from the majority of his Companions. Moreover Zaid [b. Thābit] is not likely to have based his doctrine on systematic reasoning, because it can have no such basis. Should someone quote against this the tradition from 'Alī to the contrary, the answer is that this is well authenticated neither from 'Alī nor from 'Umar; even if it were,

[1] *Tr. III*, 29 (*c*). See further §§ 30, 34, 148 (p. 246 f.).

[2] See above, pp. 21, 26.

[3] This alludes to the Medinese concept of 'practice' ('*amal*), and we might also translate: 'the practice is at his discretion'.

[4] *Tr. III*, 65. See further §§ 69, 85, 128, 145 (*a*).

it is probable that it is the result of the only possible and reasonable systematic consideration; whereas the *sunna*, as quoted by Ibn Musaiyib, disagrees with analogy and reason, and must therefore stand on a traditional basis, as far as we can see.' In a later addition Shāfi'ī says that this was his former opinion, but that he abandoned it because he found no proof that the alleged *sunna* actually went back to the Prophet, and so he now prefers analogy; also, he says, the tradition from Zaid is even less well attested than that from 'Alī.[1]

We find the old idea of the decisive authority of 'practice' surviving even in Abū Dāwūd, the author of one of the classical collections of traditions and in law a follower of Shāfi'ī, who concludes that a tradition from the Prophet has been repealed because the [idealized] practice, which he finds expressed in a tradition from 'Urwa, is different (*Bāb man ra'a l-takhfīf fil-qirā'a fil-maghrib*; cf. the comment of Zurqānī, i. 149).

F. Conclusions

The ancient schools of law shared the old concept of *sunna* or 'living tradition' as the ideal practice of the community, expressed in the accepted doctrine of the school. It was not yet exclusively embodied in traditions from the Prophet, although the Iraqians had been the first to claim for it the authority of the Prophet, by calling it the '*sunna* of the Prophet'. The continous development of doctrine in the ancient schools was outpaced by the development of traditions, particularly those from the Prophet, in the period before Shāfi'ī, and the ancient schools were already on the defensive against the rising tide of traditions when Shāfi'ī appeared. This contrast between doctrine and traditions gave Shāfi'ī his opportunity; he identified the '*sunna* of the Prophet' with the contents of traditions from the Prophet to which he gave, not for the first time,[2] but for the first time consistently, overriding authority, thereby cutting himself off from the continuous development of doctrine before him. If the 'living tradition' diverges constantly from traditions, this shows that the traditions are, generally speaking, later.

The generally accepted doctrine of a school merges in the

[1] *Tr. VIII*, 5. See further *Tr. II*, 21 (*d*); *Tr. IX*, 13, 23, 27; *Tr. VII*, 275 (top); *Ris.* 28; *Ikh.* 184, 409.

[2] See above, p. 28.

consensus.[1] The idea of consensus, as used in the ancient schools, is in fact another aspect of their concept of 'living tradition', and it is only because it has become an independent principle in the classical theory of Muhammadan law, that we shall discuss it in a separate chapter.

[1] See above, pp. 62 f., 64 f., 68, n. 2, 69, 70.