

THE ORIGINS OF  
Muhammadan  
Jurisprudence

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OXFORD  
AT THE CLARENDON PRESS

## CHAPTER 8

# CONSENSUS AND DISAGREEMENT

### A. THE OLD IDEA OF CONSENSUS

WE have seen that the legal theory of the ancient schools of law is dominated by the idea of consensus; that they distinguish between the consensus of all Muslims, both the scholars and the people, on essentials, and the consensus of the scholars on points of detail; that they consider the consensus in both forms as the final argument on all problems, and not subject to error; and that it represents the common denominator of doctrine achieved in each generation, as opposed to individual opinions (*ra'y*) which make for disagreement.<sup>1</sup>

The follower of the ancient schools with whom Shāfi'i discusses consensus (*Tr. IV*, 256), defines the scholars whose opinions are authoritative and to be taken into account as those whom the people of every region recognize as their leading lawyers (*man naṣabah ahl balad min al-buldān faqīhan*), whose opinion they accept and to whose decision they submit.<sup>2</sup> Small minorities of muftis, he says, must not be taken into account, but only the majority (*lā anṣur ilā qalīl al-muftīn wa-anṣur ilal-akthar*).

This concept of consensus is common to the Iraqians and the Medinese.<sup>3</sup> Both these ancient schools claim the sanction of a consensus of the Companions for the doctrine ascribed to their particular authority among the Companions of the Prophet, thereby projecting the final criterion of their doctrine back to its alleged origins. This consensus of the Companions takes, in the nature of things, the form of a silent approval (*ijmā' sukūṭī* in later terminology).

In *Tr. III*, 69, Shāfi'i addresses the Medinese: 'A decision given by 'Umar, according to you, is public and notorious (*mashhūr zāhir*), 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 to the opinion of the majority of them,

<sup>1</sup> See above, p. 42 f.

<sup>2</sup> For a list of these local authorities, see above, p. 7 f.

<sup>3</sup> See above, p. 41, n. 5, and *Tr. III*, 148 (p. 243).

... and you say that his decision given in Medina is the same as their general consensus.'

For the Iraqians, see above, p. 44, and Shāfi'i's discussion with a Basrian opponent, couched in Medinese terms, in *Tr. III*, 148 (p. 244). Shāfi'i: 'There were in Medina some 30,000 Companions of the Prophet, if not more. Yet you are not able to relate the same opinion from perhaps as few as six, nay, you relate opinions from only one or two or three or four, who may disagree or agree, but they mostly disagree: 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.' Shāfi'i: '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 agree.' But he concedes that of the rest of the 30,000 nothing is known. Shāfi'i: 'Do you think, then, that anyone can validly claim consensus on points of detail? And the same applies to the Successors and the generation following the Successors.'

The idea of the general consensus of the community is so natural that the question of foreign influence does not arise. But things are different for the highly organized concept of the 'consensus of the scholars', which consists in the considered opinion of their majority and expresses the 'living tradition' of their school. This concept corresponds to the *opinio prudentium* of Roman law, the authority of which was stated by the Emperor Severus in the following terms: 'In ambiguitatibus quae ex legibus proficiscuntur, consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legis obtinere debere.'<sup>2</sup> Goldziher has suggested an influence of Roman on Muhammadan law in this case.<sup>3</sup> This concept may well have been transmitted to the Arabs by the schools of rhetoric.<sup>4</sup>

## B. THE MEDINESE AND CONSENSUS

One feature in which the Medinese idea of consensus differs from the Iraqi is that the Medinese restrict themselves to a local consensus, that is, count only the authorities in Medina. We have come across several passages which show this provin-

<sup>1</sup> Shāfi'i implies, of course, that nothing is known of the opinions of the majority.

<sup>2</sup> *Digest* i. 3, 38.

<sup>3</sup> In *Proceedings of the Hungarian Academy, Class of Linguistics and Moral Sciences*, xi, no. 9 (1884), pp. 11, 18 (in Hungarian).

<sup>4</sup> See below, p. 99f.

cialism,<sup>1</sup> and in *Tr. III*, 22, Shāfi'ī states that he has confined himself in his argument to the premisses of the Medinese, and spoken of the consensus only as the consensus of Medina. In his reply to the Medinese Rabi' in *Tr. III*, 148 (p. 242) Shāfi'ī points out that men in other countries do not acknowledge the local consensus of Medina as a real one. This Medinese provincialism certainly does not imply any pretension on their part that their city was the true home of the *sunna*,<sup>2</sup> although it may have become one of the starting-points for this later claim. It is, more likely, just a crude remnant of the original geographical character of the ancient schools of law,<sup>3</sup> a provincialism which had been superseded, in the case of the Iraqians, by a wider outlook and—not an isolated case—a more highly developed theory. Furthermore, some Medinese share the Iraqi idea of consensus.<sup>4</sup>

Rabi', speaking for the Medinese, declares in *Tr. III*, 22, that 'there is consensus only when there is no disagreement', but points out at the same time that this test is not applied indiscriminately, but only to 'approved scholars'. Even so, only the agreement of the majority is demanded (*Tr. III*, 148, p. 248). Mālik, in *Muw.* iii. 183, makes the far-reaching claim that 'no one anywhere disagrees' with a certain doctrine,<sup>5</sup> but Ibn 'Abdalbarr (quoted in Zurqānī, *ad loc.*) points out that this claim is not quite correct. More moderately, Mālik says in *Muw.* ii. 83, that he has seen the scholars approve of a doctrine, or, in *Muw.* ii. 171: 'This is what the scholars in our city have always held.'

The Medinese consensus is to a great extent anonymous, and Shāfi'ī attacks it for this reason. In *Tr. III*, 71, he says: 'I wish I knew who they are whose opinions constitute consensus, of whom one hears nothing and whom we do not know, Allah help us! Allah has obliged no man to take his religion from [private] persons whom he knows.<sup>6</sup> Even if Allah had done so, how would this justify taking one's religion from persons unknown?'<sup>7</sup> The alleged Medinese consensus resolves itself for Shāfi'ī into the claim of 'hereditary transmission of knowledge in Medina'.<sup>8</sup>

<sup>1</sup> See above, pp. 23, 64 f., 69; also *Ris.* 73.

<sup>2</sup> See above, p. 8.

<sup>3</sup> See above, p. 7.

<sup>4</sup> *Tr. II*, 257; and see below, p. 95 f.

<sup>5</sup> This shows further that the Medinese do not, on principle, reject a broader consensus.

<sup>6</sup> Delete *lā* in the printed text.

<sup>7</sup> Similarly, *Tr. III*, 22, 88, 102; *Ris.* 73, &c.

<sup>8</sup> See above, p. 69.

In ascertaining consensus, the Medinese take no account of the (generally spurious) information on the alleged opinions of their authorities which had been put into circulation by the time of Mālik and Shāfi'ī.<sup>1</sup> But the particular followers of Mālik amongst the Medinese regard their master's doctrine, as expressed in the *Muwatta'*, as the only authoritative statement of the consensus in Medina.<sup>2</sup>

The systematic collection of alleged ancient authorities in favour of the common Medinese doctrine starts only with Ibn Wahb. Typical examples are the lists found in *Mud.* v. 87, 90; viii. 78 f., and elsewhere. We are not justified in considering them more authentic than the lists of fictitious old Medinese authorities to which Shāfi'ī appeals from the actual Medinese doctrine. We shall discuss the old Medinese authorities in detail below, pp. 243 ff.

The consensus in Medina supersedes, of course, 'isolated' traditions from the Prophet and from Companions.

### C. THE IRAQIANS AND CONSENSUS

In contrast to the Medinese concept, the Iraqi idea of consensus is not provincial, but extends in theory to all countries. *Ris.* 73 opposes it to that of the Medinese, and Shāfi'ī's Iraqi opponents argue with the 'consensus of [all] people' (*Ikh.* 71), and the 'consensus of the scholars in all countries' (*Tr.* IV, 256). Abū Yūsuf admits an exception from a rule established by systematic reasoning 'because the Muslims have allowed it' (*Tr.* IX, 5), and Shaibānī refers to 'all Muslims without a contradicting voice, that is, all Hijazis and Iraqians' (*Tr.* VIII, 1).

This is the Iraqi theory. But in practice the consensus of the Iraqians shows the same local character as that of the Medinese. This is implied by Shāfi'ī in *Tr.* III, 148 (p. 246, at the beginning) and in *Ris.* 73; and it underlies Abū Yūsuf's reference to 'the consensus of all our scholars' (*Tr.* IX, 42), and Shaibānī's standing reference to 'the opinion of Abū Ḥanīfa and of our scholars in general' in *Muw. Shaib.* This last expression means the same as Mālik's repeated references to 'our agreed practice' in *Muw.*

The words of Shāfi'ī's Basrian opponent in *Tr.* III, 148 (p. 245), show the conclusions which were drawn from the

<sup>1</sup> See above, pp. 65, 69, 78 f., and below, pp. 195, 206, n. 5.

<sup>2</sup> See above, p. 6 f.

natural assumption that the consensus was not subject to error: 'Whenever I find a generation of scholars at a seat of knowledge, in their majority, holding the same opinion, I call this "consensus", whether their predecessors agreed or disagreed with it, because the majority would not agree on anything in ignorance of the doctrine of their predecessors, and would abandon the previous doctrine only on account of a repeal or because they knew of some better argument, even if they did not mention it.' Shāfi'ī calls this an unfounded assumption (*tawah-hum*) and points out that their successors would then also be free to diverge from them without mentioning their argument. This means, he says, leaving the decision always to the last generation: a point his opponents must concede if they are not to set themselves up as the only standard of knowledge. But this they could hardly do without making the same concession to scholars elsewhere. This is a fair, though polemical, summing-up of the attitude of the Iraqians.

The first external justification of the principle of consensus occurs in *Muw. Shaib.* 140, where Shaibānī says with regard to a particular decision: 'The Muslims are agreed on this and approve of it, and it is related on the authority of the Prophet that everything of which the Muslims approve or disapprove, is good or bad in the sight of Allah.' This informal tradition, still without an *isnād*, was no doubt relatively recent in the time of Shaibānī.<sup>1</sup>

The consensus of the Iraqians is originally just as anonymous as that of the Medinese (*Ris.* 73); it represents the average opinion, and the Iraqians take as little account of the views of minorities as the Medinese do (*Ikh.* 119). Now Shaibānī, who in *Muw. Shaib.* constantly refers to 'the opinion of Abū Ḥanīfa and of our scholars in general', gives in *Āthār Shaib.* a collection of decisions given and traditions transmitted by Ibrāhīm Nakha'ī, together with the opinions of Abū Ḥanīfa. *Āthār A. Y.* is a largely coextensive collection of Ibrāhīm's alleged opinions and traditions, made by Abū Yūsuf. We must therefore conclude that Abū Ḥanīfa, Abū Yūsuf, Shaibānī, and their companions found the consensus, as their group understood it, represented by the body of doctrine associated with the name

<sup>1</sup> See *Comm. Muw. Shaib., ad loc.*, on its doubtful authenticity, even by the standards of the Muhammadan scholars.

of Ibrāhīm Nakha'ī.<sup>1</sup> This did not prevent them from differing occasionally from Ibrāhīm and from one another.

On the whole we find that although there is not much difference between the Iraqians and the Medinese in the way their consensus works in practice, the Iraqians 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.

In *Tr. IV*, 258, Shāfi'ī addresses an Iraqi opponent: 'Your idea of consensus is the consensus of the Companions or the Successors or the following generation and finally the contemporaries. . . . For example you take Ibn Musaiyib the scholar of Medina, 'Aṭā' the scholar of Mecca, Ḥasan the scholar of Basra, and Sha'bī the scholar of Kufa among the Successors, and regard as consensus that on which they agree. You state that they have never met as far as you know, and you infer their consensus from what is related from them. . . . But no one amongst them, as far as we know, has ever used the word consensus, although it would cover most legal knowledge if it were as you claim. Is it not sufficient to discredit your idea of consensus, that no one since the time of the Prophet is related to have claimed it, apart from cases in which nobody holds a diverging opinion, except your contemporaries?'

This agrees well with the idea of Iraqi consensus which we have gained so far, except for the hard-and-fast rule of establishing a consensus, which Shāfi'ī attributes in the course of his polemics to the Iraqians and which is not confirmed by the other indications on how their consensus is ascertained. Ḥasan and Sha'bī do not play the important role in the Iraqi tradition which Shāfi'ī assigns to them, and he neglects Ibrāhīm Nakha'ī, who in their doctrine takes a place even more important than that of Ibn Musaiyib for the Medinese. Moreover, the subservience of Iraqi consensus to the doctrine of other 'geographical' schools which Shāfi'ī implies, is not borne out by the facts; the broader, non-provincial character of the Iraqi idea of consensus is confined to their theory and does not extend to their practice. We must therefore consider this hard-and-fast rule not genuinely Iraqi, but rather a logical consequence which Shāfi'ī forced on his opponents. There are other traces of Shāfi'ī's editing in this passage.<sup>2</sup>

For the predominance of consensus, in the doctrine of the Iraqians, over 'isolated' traditions from the Prophet and from Companions, see above, p. 28.

<sup>1</sup> On this body of doctrine see below, pp. 233 ff.

<sup>2</sup> See below, p. 109, n. 2.

## D. THE MU'TAZILA AND CONSENSUS

The Mu'tazila, or *ahl al-kalām* as Shāfi'ī calls them, acknowledge consensus and share the Iraqi concept of it as the general agreement of the people of all countries.<sup>1</sup>

They apply this idea of consensus to traditions: if the whole community transmits a certain tradition from the Prophet, it cannot be mistaken.<sup>2</sup> This constitutes an extreme case of the 'wide spread' (*tawātur*) of traditions demanded by them.<sup>3</sup>

As regards the consensus of the community on questions left to personal opinion and systematic reasoning (*ra'y* and *qiyās*), the prominent Mu'tazilite Nazzām considered it fallible.<sup>4</sup> This seems to have been a personal doctrine of Nazzām, notwithstanding the statement which Ibn Qutaiba, 241, quotes from a Mu'tazilite source, to the effect that legal rules which are unanimously accepted are nevertheless often refuted by the Koran. This statement is directed against the technical consensus of the scholars as accepted by the ancient schools. Of the numerous examples which Ibn Qutaiba adds, one at least (p. 256) is obviously an argument *ad hominem*, and others seem to be of the same kind.

## E. SHĀFI'Ī AND CONSENSUS

Shāfi'ī's doctrine of consensus shows a continuous development throughout his writings.<sup>5</sup> We have seen that the followers of the ancient schools distinguish between the consensus of all Muslims on essentials and the consensus of the scholars on points of detail.<sup>6</sup> What follows tends to confirm the suggestion that it was Shāfi'ī who, using a favourite debating device of his, imposed this clear-cut distinction on a less sharply defined, two-sided idea of his opponents. Whether this is so or not, we have seen both Iraqians and Medinese making extensive use of the consensus of the scholars or even of the 'approved' scholars. Shāfi'ī started by recognizing and using this old concept of the

<sup>1</sup> See above, p. 41; *Tr. III*, 148 (p. 242).

<sup>2</sup> *Tr. III*, loc. cit.: *Khayāt*, 94 f.

<sup>3</sup> See above, p. 51 f.

<sup>4</sup> *Khayāt*, 51, and, relating to questions of dogma, Ibn Qutaiba, 21.

<sup>5</sup> See the chronology of Shāfi'ī's writings in Appendix I, below, p. 330. The chronology is independent of this development of Shāfi'ī's doctrine, except for the exact place of *Tr. VIII* within Shāfi'ī's earlier period.

<sup>6</sup> See above, p. 42.



consensus of the scholars without misgivings. Later he came more and more to qualify it. Finally he reached the stage of refusing it any authority and even denying its existence. But so deeply ingrained was the habit of referring to it that he did not completely abandon it, but went on using it, mostly as a subsidiary argument and as an argument *ad hominem*.

In the first group of treatises Shāfi'i's use of the argument of consensus is indistinguishable from that of the ancient schools.

*Tr. I*, 127: an analogy with a doctrine based on the consensus, 'which no one can be allowed to neglect'; Shāfi'i states explicitly farther on that this is the consensus of the scholars (although he calls it *madhhab al-'amma*), and not the consensus of the community on essentials. § 182: Shāfi'i refers to the scholars in general.

*Tr. II*, 16 (e): 'Neither we nor anyone we know holds this. The general opinion is (*yaqūl al-nās*). . . .' § 17 (c): 'This is the opinion of the muftis in general (*muftu l-nās*), and we know of no disagreement in this respect.' § 19 (p): 'Neither we nor any mufti we know [except the Iraqians] holds this. . . . I am not aware that they [the Iraqians] relate this from anyone in the past (*mimman maḍā*) whose word carries authority (*qauluh hujja*).' § 19 (r): 'Our opinion—and Allah knows best—comes nearest to what is recognized by the scholars.' § 21 (g): 'They [the Iraqians] . . . do not follow the opinion of any predecessor (*aḥad min al-salaf*), as far as I know . . . . [The opinion which we hold] is the opinion of our scholars in general [that is, the Medinese].'

*Tr. VIII*, 6: 'This is also the opinion of Ibn Musaiyib, Ḥasan, Ibrāhīm Nakha'i, and the majority of the muftis among the Hijazis and the traditionists of whom we have heard.' § 7: 'The argument is the *sunna* [or, rather, an analogy based on traditions from the Prophet] and the lack of disagreement among the scholars, to the best of my knowledge.' § 11: '[Who holds this], puts himself outside the several possible opinions (*kharaj min qaul al-muttafiqin wal-mukhtalifin*).' § 14: 'The doctrine of the mass of the scholars in all countries (*qaul 'awāmm ahl al-buldān min al-ṣuqahā*).'

*Tr. IX*, 10: 'It is established by tradition and by fetwas [opinions given by scholars].' § 25: 'The authorities of the Muslims are agreed (*ajma'at a'immat al-Muslimin*).'

In the following two treatises, Shāfi'i still holds essentially the old idea of consensus, but qualifies it; the consensus of the Muslims gains prominence.

*Tr. VII*, 271 ff.: Nobody is authorized to give a judgment or a fetwa 'unless he bases himself on . . . what the scholars agree in

saying'.—'He disagrees with the general doctrine of the body of learned men whose decisions have been transmitted.'—*Q.*: What is the proof for the authority of that on which men are agreed? *A.*: When the Prophet ordered men to hold fast to the community of Muslims, this could only mean that they were to accept the doctrine of the community; it is reasonable, too, to assume that the community cannot [p. 272] as a whole be ignorant of a ruling given by Allah and the Prophet. Such ignorance is possible only in individuals, whereas something on which all [Muslims] are agreed cannot be wrong and whosoever accepts such a doctrine does so in conformity with the *sunna* of the Prophet.<sup>1</sup>—'This is neither reasonable nor in keeping with the decisions of those who have given decisions from the first time of Islam onwards.'—P. 275: It is not permissible to disagree with an unambiguous text of the Koran, nor an established *sunna*, 'nor, I think, with the community at large (*jamā'at al-nās*), even when there is no Koran or *sunna*'.

*Ris.*: the consensus of the scholars or of their majority appears explicitly on pp. 19, 21, 21 f., 24, 25, 32, 40, 46, 48 ult., 72 (at the end), 73 (at the beginning), 82 (at the beginning). The consensus of the Muslims at large occurs on pp. 46, 58, 72. Shāfi'ī contrasts both kinds of consensus and obviously ascribes higher authority to the consensus of the Muslims at large on p. 63. There he claims that one might almost say that the Muslims in both early and later times are agreed on a point of theory, but he will go only so far as to say that he has not heard that the Muslim scholars were divided on the issue.

In the main passage on consensus, on p. 65, Shāfi'ī discusses only the consensus of the community at large and severs its historical connexion with the old idea of *sunna* or 'living tradition'. *Q.*: What is your argument for following the consensus of the public (*ma jama' al-nās 'alaih*) on a question where there is no explicit command of Allah [in the Koran] and where no decision of the Prophet is related: do you, as others do, hold that the consensus of the public is always based on an established *sunna*<sup>2</sup> even if it is not related? *A.*: That on which the public are agreed and which, they state, is related from the Prophet, that is so, I trust. But as to that which the public do not [explicitly] relate [from the Prophet], which they may or may not assert on the basis of a tradition from the Prophet, so that we cannot consider it as [certainly] transmitted on the authority of the Prophet

<sup>1</sup> This is, after Shaibānī's tradition from the Prophet (above, p. 86), the second external justification of the principle of consensus. See below, p. 91, on the traditions in which Shāfi'ī finds this *sunna* expressed.

<sup>2</sup> In the opinion of the ancient schools, this means their 'living tradition', but Shāfi'ī takes it in the sense of a formal tradition from the Prophet. See also above, p. 43, n. 1.

—because one may transmit only what one has heard—in cases where the transmission [on the authority of the Prophet] is only an assumption which may or may not be true: [as to that,] we accept the decision of the public because we follow their authority, knowing that, wherever there are *sunnas* of the Prophet, their whole body cannot be ignorant of them, although it is possible that some are, and knowing that their whole body cannot agree on something contrary to the *sunna* of the Prophet and on an error, I trust.'

In confirmation, Shāfi'i quotes two traditions which state that the Prophet ordered men to hold fast to the community, and which he explains as referring to the consensus. 'The error comes from separation, but in the community as a whole there is no error with regard to the meaning of the Koran, the *sunna*, and analogy, I trust.'

Contrary to the old idea of consensus and also to the later system, Shāfi'i here restricts its function to the interpretation of Koran and *sunna* and to drawing conclusions from them. He has not succeeded in clarifying his idea of consensus of the community at large, and it remains in an uneasy relationship with the new dominating element, the traditions from the Prophet. Shāfi'i does not know yet the *locus classicus* in favour of consensus: 'My community will never agree on an error.' As a tradition from the Prophet, it appears only in the time of the classical collections,<sup>1</sup> and its wording is directly derived from statements such as that of Shāfi'i.

*Tr. VI* contains only one reference to the consensus of the community at large, on p. 265: 'We know that the Muslims as a body cannot be ignorant of a *sunna*, whereas it is possible that some, individually, are.'

From *Tr. IV* onwards, Shāfi'i rejects the consensus of the scholars explicitly, at least in theory, and even denies its existence.

*Tr. IV*, 256: Shāfi'i twice uses the argument of the *sorites* against the consensus of the majority of scholars.<sup>2</sup> He considers the alleged consensus of the majority only as a pretext for accepting or rejecting doctrines at pleasure. The consensus of the scholars can never be realized as they are never found together,<sup>3</sup> nor can common information (*naql al-'amma*) be had about them. On p. 257, the opponent asks whether in Shāfi'i's view a real consensus exists at all. Shāfi'i replies: 'Certainly, there is much in the essential duties on which no one who knows anything will pretend that there is no consensus, and this applies also to certain general principles'; but he defies him to find a consensus when he comes to controversial questions of detail

<sup>1</sup> Also in Ibn Qutaiba, 24, and in Ibn Rawandi, quoted in Khaiyāt, 97.

<sup>2</sup> In another connexion, the *sorites* occurs in *Ikh.* 324.

<sup>3</sup> This contradicts Shāfi'i's own reasoning, with regard to the community, in *Ris.* 65.

in his own and in the preceding generation. Shāfi'ī denies its existence on questions of detail, which are the concern of specialists, in Medina, and still more in the community at large. The consensus of the majority of those scholars on whom one happens to possess information cannot be used as an argument, and no inference may be drawn regarding the opinion of those scholars of whom nothing is known.<sup>1</sup>

In *Tr. III*, 129, Shāfi'ī maintains the authority of the consensus of the community at large: 'It is impossible that the community should agree on something contrary to the words of the Prophet.' In § 148 (p. 244), he gives his theory in detail. No consensus, whether of the Companions or of the Successors or of the generation after them, can be validly claimed on questions of detail. 'Q.: How can you validly claim consensus at all? A.: It can be validly claimed with regard to duties that no one may neglect, such as prayers, *zakāt* tax, and the prohibition of what is forbidden. But as regards questions concerning specialists, the ignorance of which does not harm the great public and the knowledge of which is to be found with specialists . . . , we can only say one of two things: if we are not aware that they have disagreed, we say so, and if they have disagreed we say that they have done so. . . . We follow whichever of their opinions is more in keeping with Koran and *sunna*. If there is no such indication—and this is rarely the case—then . . . [we follow] the one which is considered better in all its implications by the scholars. If they disagree as described, it is correct to say: [opinions on] this problem are related from a number of persons who disagree, and we follow the opinion of three against that of two, or of four against that of three; but we do not claim that this is a consensus, because to claim a consensus is to make a statement about those who have not expressed an opinion. . . .<sup>2</sup> The consensus comprises the greatest possible number of different groups of people.' Shāfi'ī insists on strict unanimity (*ibid.*, p. 248): 'If the contrary opinion were related only from one or two or three, one could not say that men are agreed, because they are divided. . . . I do not claim consensus unless no one denies that it exists.'

In numerous passages, however, Shāfi'ī uses the old concept of the consensus of the majority of scholars as a subsidiary argument or an argument *ad hominem* against the Medinese. But he explicitly rejects

<sup>1</sup> Shāfi'ī's insistence on positive unanimity has been prepared already in *Ris.*

<sup>2</sup> Shāfi'ī declares repeatedly that one must not claim the consensus 'unless the scholars confirm it explicitly or at least state that they know of no scholar who contradicts it' (§ 22), or without the existence of traditions from the Companions or the Successors sufficient to establish their unanimous agreement (§ 88), or without positive information (*khabar*) to this effect (§ 120).

the Iraqi concept of consensus of scholars in each generation.<sup>1</sup> Basing himself on the traditions expressing 'unsuccessful' Medinese opinions and on recent (mostly spurious) information regarding old Medinese authorities, he denies the existence of real consensus in Medina and charges the contemporary Medinese with diverging from the consensus of their old authorities.<sup>2</sup> He tends to replace the old concept of consensus, on which the Medinese rely, by his idea of *sunna* (§ 71). Against the provincialism of the Medinese in their concept of consensus, he points out that the Medinese are only a minority and claims that, if a consensus exists in Medina, it exists also in the other countries, and if there is disagreement in Medina, the other countries also disagree.<sup>3</sup>

*Ikhtilāf al-Ḥadīth*, itself the latest of the treatises, contains early passages, and we find both the old concept of consensus and Shāfi'ī's new one. Some typical examples of the former (which are, however, not all necessarily early) occur on pp. 5, 37, 73, 170, 176, 207, 246, 262. For the latter see, for instance, pp. 141 ff., which is directed against the assumption of a silent consensus of the Companions, and of a consensus of Companions in general: 'the alleged consensus [of Companions and later authorities] on many points of detail cannot be properly claimed'; Shāfi'ī considers the opinion of his opponents to the contrary as ill-advised, ignorant, and pretentious. 'The forebears never, if I am right,<sup>4</sup> held that all details of law are based on consensus in the same way in which there is consensus on the Koran, the *sunna*, and the essentials.' Apart from the essential duties which the public at large are obliged to observe, no consensus has been claimed by any of the Companions or of the Successors or of the following generation or of those after them, or by any scholar on earth whom Shāfi'ī has known, or by anyone who was regarded as a scholar by the public, except occasionally when someone claimed it after a fashion approved by no scholar Shāfi'ī can think of, and to his personal knowledge rejected by many.<sup>5</sup>

But Shāfi'ī was unable to dispense completely with the idea of consensus of the scholars; he tried to reconcile it with his concept of the consensus of the community at large by opposing the opinion of the generality of scholars ('*awāmm ahl ahl-'ilm*) to that of the specialists (*khāṣṣa*) among them (pp. 56 f.).<sup>6</sup> The unanimous opinion of the

<sup>1</sup> § 148 (p. 245), quoted above, p. 85 f.

<sup>2</sup> §§ 121, 148 (p. 247), and often.

<sup>3</sup> §§ 22, 77, 134, 148 (p. 248, at the end).

<sup>4</sup> This shows that Shāfi'ī's doctrine is something new.

<sup>5</sup> This exaggeration is refuted by Shāfi'ī's own statement on the doctrine of the ancient schools, above, pp. 42 f.

<sup>6</sup> See also below, p. 136.

scholars merges into the consensus of the Muslims at large and serves to eliminate stray opinions by showing them to be below the general scholarly standard. Shāfi'i says on pp. 309 f.: 'If someone were to take a *sunna* of the Prophet or a doctrine unanimously acknowledged by the scholars in general, would he be justified in adducing his own disagreement as proof [that the point is contested] or would he be simply an ignoramus who has still to learn? If the first were the case, everyone might invalidate any rule without reference to a *sunna* or to a disagreement among the scholars.' Shāfi'i gives as an example the paternity of a child: whosoever does not consider it cancelled by the procedure of *li'ān* diverges from the *sunna* of the Prophet, and Shāfi'i knows of no disagreement among the Muslims about it. These passages, which presuppose Shāfi'i's final concept of the consensus of the community at large, seem to be late.<sup>1</sup>

*Umm* is composite, containing passages of various dates and partly revised. Both the old and the new idea of consensus are expressed in it.

#### F. THE LATER DOCTRINE OF CONSENSUS

The classical theory of consensus falls outside the scope of this inquiry.<sup>2</sup> From what has been said, it is clear that the classical theory represents essentially a return to the old concept; in other words, Shāfi'i'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.<sup>3</sup> But the later doctrine does not simply continue the old concept, it accepts Shāfi'i's identification of *sunna* with the contents of traditions from the Prophet and covers it with the authority of the consensus of the scholars. So the main result of Shāfi'i's break with the principle of 'living tradition' became itself part of the 'living tradition' at a later stage. The price that had to be paid for this recognition was that the extent to which traditions from the Prophet were in fact accepted as a foundation of law was in future to be determined by consensus; and Shāfi'i's

<sup>1</sup> The context of the second passage expresses hostility towards the use made of consensus by the ancient schools.

<sup>2</sup> See above, p. 2, and Goldziher, in *Nachr. Ges. Wiss. Gött.*, 1916, 81 ff.

<sup>3</sup> Graf, *Wortelen*, 65, sums up the differences between Shāfi'i's doctrine in *Ris.* and the later theory. The later idea of consensus is already fully developed in Ṭabarī; see Kern, in *Z.D.M.G.* lv. 72. Ibn Qutaiba, 326, regards the consensus, although it be not based on the Koran or on a tradition, as a valid argument; it is difficult to say which stage of doctrine this statement represents.

endeavour to erect the traditions from the Prophet, instead of the 'living tradition' and the consensus, into the highest authority in law was short-lived.

### G. DISAGREEMENT

Shāfi'ī states repeatedly that the ancient schools of law are hostile to disagreement.<sup>1</sup> So are, according to Ibn Qutaiba, 7, the *ahl al-kalām*. The followers of the ancient schools refer to Koranic passages, such as sura iii. 105; xcvi. 4, where Allah blames disagreement in matters of religion; they refuse to concede any kind of disagreement and say that had the old authorities met, they would have come to an agreement by convincing one another (*Tr. IV*, 261). There is also a tradition which makes Ibn Mas'ūd conform to a practice which does not correspond to his doctrine, and when this is pointed out to him say: 'Disagreement is bad.'<sup>2</sup>

Hostility to disagreement, on the ground of administrative convenience, was voiced by Ibn Muqaffa', a secretary of state.<sup>3</sup> He pointed out the wide divergencies in jurisprudence and in administration of justice existing between the several great cities and between the schools of law such as the Iraqians and the Hijazis. These divergencies, he said, either perpetuated different local precedents<sup>4</sup> or came from systematic reasoning, which was sometimes faulty or pushed too far. The Caliph should review the different doctrines with their reasons and codify and enact his own decisions in the interest of uniformity. This code ought to be revised by successive Caliphs. These considerations of Ibn Muqaffa' lie quite outside the compass of the ancient lawyers and traditionists; they are obviously influenced by Persian administrative tradition.

On the other hand, we find Medinese traditions in favour of disagreement and against uniformity. One of these traditions expresses the reaction of the Medinese to an extreme proposal such as that of Ibn Muqaffa', projected back into the Umayyad

<sup>1</sup> *Tr. IV*, 255, 258, 275.

<sup>2</sup> *Tr. II*, 19 (*aa*); *Tr. III*, 117; *Ikh.* 74. A tradition from 'Alī with the same tendency, in Bukhārī, is discussed by Goldziher, *Zāhiriten*, 98.

<sup>3</sup> *Ṣahāba*, 126 f. As this treatise was addressed to the Caliph Maṣū'ir (A.H. 136-58) and Ibn Muqaffa' was killed between 139 and 142, it can be dated about A.H. 140.

<sup>4</sup> *Shai' ma'thūr 'an al-salaf ghair mujma' 'alaih yudabbiruh qaum 'alā wajh wa-yudabbiruh ākharūn 'alā wajh ākhar.*

period. It relates that it was suggested to 'Umar b. 'Abdal'azīz to bring about uniformity of doctrine; but he said: 'I should not like it if they had not disagreed,' and sent letters to the several provinces ordering that each region should decide according to the consensus of its scholars.<sup>1</sup> On the side of the Iraqians, the *Fiqh Akbar* expresses the doctrine that disagreements in the community are a concession from Allah.<sup>2</sup>

These two groups of evidence are not necessarily contradictory, and both tendencies expressed by them are complementary to the concept of consensus in the ancient schools of law. On one side, they accept the geographical differences of doctrine as natural; on the other, they uphold their consensus, disparage irregular opinions which are apt to break it,<sup>3</sup> and state unambiguously what they consider to be right. The rising tide of traditions from the Prophet in particular threatened the continuity and uniformity of doctrine; so Shāfi'ī rightly connected the rejection of 'isolated traditions' by the ancient schools with their aversion to disagreement (*Tr. IV*, 258). The adherents of the ancient schools logically insisted that a qualified lawyer (*mujtahid*)<sup>4</sup> might be wrong in his conclusions (*ibid.* 274). Against the underlying attitude to error and disagreement is directed a tradition to which Shāfi'ī refers in his reply and which makes the Prophet say: 'If a *mujtahid* is right he receives two rewards, and if he is mistaken he receives one reward.'

The *isnād* of this tradition (*Tr. IV*, 275 and *Ris.* 67, where further details of this discussion are recorded) runs: Shāfi'ī—'Abdal'azīz b. Muḥammad—Yazīd b. 'Abdallāh b. Hād—Muḥammad b. Ibrāhīm Taimī—Busr b. Sa'id—Abū Qais—'Amr b. 'Aṣ—Prophet, and after giving the text, Yazīd claims that he mentioned this tradition to Abū Bakr b. Muḥammad b. 'Amr b. Ḥazm, who confirmed it on the authority of Abū Salama b. 'Abdalraḥmān—Abū Huraira. This kind of artificial confirmation is typical of the first appearance

<sup>1</sup> This and two other traditions of similar tendency in Dāriṭnī, *Bāb ikhtilāf al-fuqahā'*. See also the anecdote on Mālik and an early 'Abbāsīd Caliph, discussed in *E.I.*, s.v. *Mālik b. Anas*.

<sup>2</sup> Wensinck, *Creed*, 104, 112 f. This maxim became, much later, a saying of the Prophet, but neither Abū Ḥanīfa, nor Shāfi'ī, nor the classical collections of traditions knew it as such.

<sup>3</sup> The term *ikhtilāf* 'disagreement' means occasionally 'inconsistency, self-contradiction'; see, e.g., *Tr. IX*, 12, 14 (quotations from Abū Yūsuf), and the title of Shāfi'ī's *Ikhtilāf al-Ḥadīth*.

<sup>4</sup> See below, p. 99.



of traditions which had to overcome opposition, and we can safely conclude that this tradition originated in the time of Yazīd, that is, in the generation before Mālik. It found its way into the classical collections.<sup>1</sup> A later form, not yet known to Shāfi'ī, which gives spurious circumstantial detail and mentions ten rewards as against one, is quoted by Ibn Qutaiba, 182.<sup>2</sup>

Shāfi'ī acknowledges disagreement as the necessary result of systematic reasoning (*ijtihād*); it existed already in the time of the Companions, and it is to be resolved by reference to Koran and *sunna*; referring to the tradition on one and two rewards, he denies the existence of a fundamental disagreement even when there are contradictory opinions, because every *mujtahid* fulfils his duty by drawing the conclusion which he considers right.<sup>3</sup>

All this is meant to justify Shāfi'ī's break with the doctrine of the ancient schools and his insistence on the supreme authority of the traditions from the Prophet, beside which the results of systematic reasoning become irrelevant. He says in *Tr. IV*, 261: 'On points on which there exists an explicit decision of Allah or a *sunna* of the Prophet or a consensus of the Muslims, no disagreement is allowed; on the other points, scholars must exert their own judgment in search of an indication (*shubha*) in one of these three sources; he who is qualified for this research is entitled to hold the opinion which he finds implied in Koran, *sunna*, or consensus; if a problem is capable of two solutions, either opinion may be held as the result of systematic reasoning, but this occurs only rarely.'

To sum up: Shāfi'ī advances a fresh and independent study of traditions from the Prophet as against the established doctrine of the ancient schools.

<sup>1</sup> e.g. Bukhārī, *Kitāb al-i'tisām bil-kitāb wal-sunna, Bāb ajr al-hākim idha jtahad*.

<sup>2</sup> An earlier statement of the same thesis, to the effect that every *mujtahid* is rewarded, is ascribed to Ibn Musaiyib, but is hardly authentic; see below, p. 114.

<sup>3</sup> *Tr. III*, 148 (p. 244); *Tr. IV*, 262; *Tr. VII*, 275; *Ris.* 68; *Ikh.* 149.