THE ORIGINS OF Muhammadan Jurisprudence

JOSEPH SCHACHT

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CHAPTER 9

ANALOGY, SYSTEMATIC REASONING, AND PERSONAL OPINION

THE result of our inquiry so far has been that the real basis of legal doctrine in the ancient schools was not a body of traditions handed down from the Prophet or even from his Companions, but the 'living tradition' of the school as expressed in the consensus of the scholars. The opinion of the scholars on what the right decision ought to be precedes systematically, and also historically, its expression in traditions. We shall see[1] that the material on which the ancient lawyers of Islam started to work was the popular and administrative practice as they found it towards the end of the Umaiyad period. At present we are concerned with their systematizing activity itself. It started with the exercise of personal opinion and of individual reasoning on the part of the earliest cadis and lawyers. It would be a gratuitous assumption to consider the arbitrary decision of the magistrate or the specialist as anterior to rudimentary analogy and the striving after coherence. Both elements are found intimately connected in the earliest period which the sources allow us to discern. Nevertheless, all this individual reasoning, whether purely arbitrary and personal or inspired by an effort at consistency, started from vague beginnings, without direction or method; and it moved towards an increasingly strict discipline until Shāfi'ī, consistently and as a matter of principle, rejected all individual arbitrariness and insisted on strict systematic thought.[2]

Individual reasoning in general is called *ra'y*, 'opinion'. When it is directed towards achieving systematic consistency and guided by the parallel of an existing institution or decision it is called *qiyās* 'analogy'. When it reflects the personal choice of the lawyer, guided by his idea of appropriateness, it is called *istiḥsān* or *istiḥbāb* 'preference'. The term *istiḥsān* therefore came

[1] Below, pp. 190 ff.

[2] These remarks show how far the sources now available compel me to place the emphasis differently from Goldziher, *Zâhiriten*, 5 ff. In what follows, I have endeavoured to study the development in detail rather than to duplicate Goldziher's discussion of its outlines for the early period. See also *E.I.* ii. s.v. *Fiḳh*.

to signify a breach of strict analogy for reasons of public interest, convenience, or similar considerations. The use of individual reasoning in general is called *ijtihād*, and *mujtahid* is the qualified lawyer who uses it. These terms are to a great extent synonymous in the ancient period, and remained so even after Shāfi'ī. Individual reasoning, both in its arbitrary and in its systematically disciplined form, is freely used by the ancient schools, often without being called by any of the terms mentioned. It is typical of the lack of differentiation between the two elements that, if any term is used at all, it is mostly the generic term *ra'y*. In this chapter we are concerned only with the function of individual reasoning as a source of law; for the development of technical legal thought as such, see below, pp. 269 ff.

Qiyās is derived from the Jewish exegetical term *hiqqīsh*, *inf. heqqēsh*, from the Aramaic root *nqsh*, meaning 'to beat together'. This is used: (*a*) of the juxtaposition of two subjects in the Bible, showing that they are to be treated in the same manner; (*b*) of the activity of the interpreter who makes the comparison suggested by the text; (*c*) of a conclusion by analogy, based on the occurrence of an essential common feature in the original and in the parallel case.[1] The third meaning, in which Hillel uses the term (Palestinian Talmud, *Pesachim*, 6, *fol.* 33 a 14), is identical with that of *qiyās*. The existence of an original concrete meaning in Aramaic but not in Arabic (where *qiyās* belongs to the root *qys*), makes the foreign provenance of the term certain. Margoliouth has recognized this origin of *qiyās*, and tentatively suggested the further filiation of *hiqqīsh*, in its technical meanings, from *συμβάλλειν*.[2]

Conclusions *a maiore ad minus* (and negatively *a minore ad maius*) which fall under *qiyās* and are familiar to Shāfi'ī and his Iraqian predecessors,[3] form one branch of Hillel's exegetical rules.[4] D. Daube has pointed out that some of these rules occur, almost literally, in earlier Roman legal classics, and has suggested the 'plausible explanation . . . that there were pretty much the same rhetorical schools in Rome and in the provinces'.[5] The same conclusions occur in Shāfi'ī's older Christian contemporary Theodore Abū Qurra (ed. Migne, *Patr. Gr.* xcvii. 1556), and Theodore's whole technique of

[1] See W. Bacher, *Die älteste Terminologie der jüdischen Schriftauslegung* (1899), 44 f.

[2] In *J.R.A.S.*, 1910, 320.

[3] See below, pp. 110, 124 f.

[4] See H. L. Strack, *Introduction to the Talmud and Midrash* (1931), 93 f. Bergsträsser, in *Islam*, xiv. 81, regards this as a case of technical influence of Jewish on Muhammadan jurisprudence.

[5] In *Law Quarterly Review*, lii. 265 f., in *Hebrew Union College Annual*, xxii, 239 ff., and in *Festschrift Hans Lewald*, Basle 1953, 27 ff.

discussion is the same as that of Shāfi'ī. This influence of Graeco-Roman rhetoric might also account for other traces of Greek logic and Roman law in early Muhammadan legal science,[1] including the particular kind of analogical reasoning known as *istiṣḥāb*[2] which we find for the first time in Shāfi'ī,[3] and perhaps even the reasoning called *istiṣlāḥ*.[4]

A. The Umaiyad Period

The information on the early judges of Egypt in Kindī can hardly be considered as authentic throughout as far as the first century is concerned; but it agrees with that relating to the first half of the second century in making the judges rely on their personal opinion to the exclusion of traditions. This ancient feature, therefore, still persisted at the time in which the information on the first century originated, and it certainly existed in the earlier part of the second century.

P. 312, A.H. 65: among the desirable qualifications of a judge are mentioned knowledge of the Koran and knowledge of how to distribute the shares of inheritance; the judge in question did not have either, but 'judged according to what he knew [that is, what he had heard from others], and inquired [that is, consulted others] about what he did not know'; there is no question yet of knowledge of *sunna* or traditions. If it is stated (p. 313) that this judge was illiterate but nevertheless successful because he used to frequent the company of two Companions of the Prophet, the evidence to the contrary from a much later period compels us to regard this as a secondary explanation.

Pp. 314–20, on 'Abdalraḥmān b. Ḥujaira, judge A.H. 69–83: several decisions are ascribed to him, and the context shows that they are regarded as the result of his own discretion. They are so irregular by all later standards that it is possible or even likely that they reflect authentic legal opinions of the first century, even if their ascription to this particular judge is not beyond doubt.[5] His alleged

[1] See Margoliouth, *Early Development*, 97; above, pp. 83, 91, below, p. 125; *Ikh.* 339 (*regressus ad infinitum*). See also my papers in *J. Comparative Legislation*, 1950, Nos. 3–4, pp. 9–16, in *Histoire de la Médecine*, ii, 1952, No. 5, pp. 11–19, and in *XII Convegno 'Volta'*, Rome, 1957, 197–230.

[2] See Goldziher, in *Vienna Oriental Journal*, i. 231 ff. [3] See below, p. 126.

[4] See below, p. 111, n. 1.

[5] This disproves the later idea that the Egyptians in the beginning followed mostly the decisions of the Companion 'Abdallāh b. 'Amr b. 'Āṣ (Maqrīzī, ii. 332).

reference to a tradition from 'Umar (p. 319) is certainly spurious, because this tradition expresses a secondary and 'unsuccessful' Medinese doctrine (*Muw.* iii. 86; *Muw. Shaib.* 271; *Mud.* v. 87; *Tr. III*, 56). The same applies, for similar reasons, to Ibn Musaiyib's protest to Ibn Ḥujaira against an Egyptian practice relating to the contract of sale (p. 316), and to Ibn Ḥujaira's alleged decision on the obligatory gift from husband to wife in the case of divorce (p. 317), the model for which occurs on p. 309.

Pp. 334 ff., A.H. 99: the Caliph 'Umar b. 'Abdal'azīz left it to a judge to decide at his own discretion (*ra'y*) a question of injury on which no precedent was known to the Caliph (*lam yablughnī fī hādhā shai'*). When the same judge submitted a question of pre-emption to the Caliph, 'Umar b. 'Abdal'azīz referred in general terms to 'what he had heard' (*kunnā nasma'*). This expression does not imply the existence of a tradition, but is regularly used in ancient terminology of opinions that commend themselves.[1] In answering two other problems submitted by the same judge, the Caliph did not refer to traditions but gave his own independent decisions.[2]

P. 344, on Tauba b. Nimr, judge A.H. 115–20: he imposed an obligatory gift from husband to wife in every case of divorce, but did not insist in the face of persistent refusal; this shows that this doctrine, based on a sweeping interpretation of Koran ii. 236, 241, was an innovation.

P. 350, on Khair b. Nu'aim, judge A.H. 120–7: he gave the same decision as Tauba, and the context implies beyond doubt that it was the result of his own discretion. Kindī's authority states that no other judge gave this decision, which seems to contradict the former statement. The same doctrine was reported from Khair's Medinese contemporary Zuhrī and projected back to Qāsim b. Muḥammad, one generation earlier (*Muw.* iii. 55). But it did not prevail in the Medinese school, which imposed the obligatory gift only when the divorce originated from the husband and not from the wife (*Tr. III*, 141). Another unsuccessful Medinese opinion, which is based on a

Maqrīzī states (loc. cit.) on the authority of Kindī that Yazīd b. Abī Ḥabīb (d. A.H. 128) was the first to introduce the study of legal traditions into Egypt.

[1] See above, p. 68; below, pp. 208, n. 8; 211; further, *Muw.* iii. 16; *Tr. III*, 38, where Rabī' speaks as a Medinese; and Goldziher, *Ẓāhiriten*, 15. Mālik's formula *aḥsan mā sami't* (or *alladhī sami't*) has regularly the same meaning; see below, pp. 180, 313; also the typical cases, *Muw.* iii. 8, 16, 68, 259 and particularly 37, where one of several examples occurs in a tradition which runs: Mālik—'Abdalraḥmān b. Qāsim—his father Qāsim b. Muḥammad—Marwān b. Ḥakam gave judgment on a question of divorce. 'Abdalraḥmān comments: 'Qāsim liked this decision and considered it the best that he had heard (*wa-yarāh aḥsan mā sami' fī dhālik*).' For another formula with a similar meaning ('it was said', 'they used to say') see ibid. 35 and below, p. 184.

[2] References to 'Umar b. 'Abdal'azīz are generally spurious; see below, p. 192.

more meticulous interpretation of the Koranic verses and also tends to extend the sphere of the obligatory gift, though not quite as far as Khair and Zuhrī do, is expressed in a tradition related by Nāfi' from Ibn 'Umar. This tradition, and one from another Companion in favour of the obligatory gift, were put into circulation between Zuhrī and Mālik, in whose *Muwaṭṭa'* they appear for the first time. Shāfi'ī follows the tradition from Ibn 'Umar and attacks the current Medinese doctrine as systematically inconsistent. All Medinese opinions, starting with the *ra'y* of Tauba and Khair, share the tendency to impose the obligatory gift in a wider range of cases than the Iraqians (*Muw. Shaib.* 262); these last give the Koranic verses a narrow interpretation, which is also the natural one, and their doctrine probably represents the oldest stage.

Pp. 348–52: a considerable number of decisions given by the same Khair b. Nu'aim are reported; it is evident from the context that they are regarded as the result of his own discretion, and no references to traditions are given in this connexion.

It is significant that this kind of information ceases soon afterwards.

The position of *r'ay* in Muhammadan jurisprudence immediately after the end of the Umaiyad period is discussed at length by Ibn Muqaffa' in his *Risāla fil-Ṣaḥāba*, which can be dated about A.H. 140.[1] According to Ibn Muqaffa', the Caliph, whatever the flatterers may say, cannot interfere with the major duties of religion, and a wrongful order coming from him must not be obeyed. But he possesses supreme authority and can give binding orders at his discretion (*ra'y*) on military and civil administration and generally on all matters on which there is no precedent (*athar*), basing himself on Koran and *sunna*.[2] No one but the Caliph has this right (pp. 122 f.). Reason and personal opinion (*'aql* and *ra'y*) have a restricted but necessary function in religion. The final discretionary decision belongs only to the ruler, but he must endorse and carry out the positive commandments and *sunnas* (p. 123). Systematic reasoning (*ra'y*) ruthlessly pursued leads to the drawing of remote conclusions which are based neither on Koran nor on *sunna*, are acceptable to no one except their author, and lead to disagreement (p. 126).

[1] See above, p. 95, n. 3.

[2] Ibn Muqaffa' uses *athar* for an authoritative precedent, practically as a synonym of *sunna* or 'living tradition'; cf. above, p. 95, n. 4. He does not mention formal traditions.

The distinction which Ibn Muqaffa' makes here between those who base themselves on *sunna*[1] and those who use *ra'y* has nothing to do with the distinction between the Hijazis and the Iraqians which he has introduced before, or even with that between the traditionists and the adherents of the ancient schools. It is, as the evidence collected in this and the preceding chapters shows, merely a distinction between two still-connected and complementary tendencies which the shrewd secretary of state, anticipating Shāfi'ī, isolated from each other and saw as destined to clash.

As an observer from outside, Ibn Muqaffa' disparages *ra'y* as it is used in the ancient schools of law, and suggests that the Caliph should supersede and regulate it.[2] He shows that human imperfections are inherent in systematic reasoning although the person who undertakes it applies strict analogy, particularly when this reasoning is pushed to its extreme limits. He gives a common-sense but non-technical description of the proper function and limitations of analogy and the proper use of *ra'y* and *istiḥsān*, by which undesirable consequences of strict systematic reasoning can be avoided (p. 126).

By his very attacks on *ra'y* Ibn Muqaffa' acknowledges its importance in the ancient schools of law. Apart from using the term, as we saw, for the supreme discretionary decision of the ruler, he uses it for a suggestion of his own on taxation (p. 130), and even mentions it repeatedly as an essential part of the activity of the lawyers, who must possess knowledge of *sunna* and precedents (*ahl al-fiqh wal-sunna wal-siyar*). The emphasis which he lays on the *ra'y* of the Caliph, as opposed to that of the lawyers, is caused by his special position as a secretary of state and the particular political situation at the beginning of the 'Abbāsid dynasty.

B. The Iraqians

The Iraqians do not invalidate the decision of a judge who decides according to his discretion (*ra'y*), even if they regard it as unjust (*Ikh.* 54). But whilst they use *ra'y* themselves, they do not consider it as a valid argument on the part of others (ibid. 378). This inconsistency and the resultant

[1] See above, pp. 58 f.

[2] See above, p. 95.

inconclusive character of *ra'y* provide Shāfi'ī with an argument against it.[1]

The earliest documents of Iraqian *ra'y* consist of a number of traditions from Companions, one of which has been quoted above, p. 29. Further examples in *Tr. II* are:

§ 12 (*a*): 'Alī credits himself and 'Umar with *ra'y*. Sha'bī appears in the *isnād*.

§ 12 (*g*): Ibn Mas'ūd expresses his *ra'y*, but in view of the opposition of some Companions of the Prophet he forgoes acting upon it. This is a counter-tradition against the Iraqian doctrine which goes under the name of Ibn Mas'ūd.

§§ 14 (*e*), 18 (*n*): *ra'y* is ascribed to 'Alī.

§ 18 (*w*): *ra'y* is used by Ibn Mas'ūd in a tradition which expresses the oldest Iraqian doctrine. Its *isnād* is *munqaṭi'*, and it is not earlier than the time of Sha'bī, who appears in its *isnād*.

§ 18 (*y*): Ibn Mas'ūd and 'Umar, who approves of Ibn Mas'ūd's decision, express their *ra'y* that the punishment by *ta'zīr*, which is awarded by the judge, is not to exceed half the Koranic *hadd* punishment. This Iraqian principle is an early arbitrary decision, and the tradition endeavours to enlist the authority of 'Umar for the doctrine which is attributed to Ibn Mas'ūd.

The Basrian version of a tradition against the sale of fruit before it is ripe even puts into the mouth of the Prophet an argument with *ara'aita*, which is typical of the discussions based on *ra'y* (*Tr. I*, 19; *Tr. III*, 12).

To a later period belong traditions in the classical collections and other works, such as that which makes Ibn Mas'ūd come out boldly in favour of the use of one's own *ra'y*, after following first the Koran, then the decisions of the Prophet, then the decisions of pious men;[2] or that which declares that the Companions, when confronted with a question on which they had no tradition from the Prophet, used to come together and arrive at a decision in common (*ajma'ū*), and that their opinion was right (*fal-ḥaqq fīmā ra'au*);[3] or 'Umar's alleged instructions to the old judges in Iraq, Shuraiḥ, and Abū Mūsā Ash'arī.[4]

[1] Below, pp. 121 f. We have observed the same kind of inconsistency in the technical criticism of traditions by the ancient schools: above, pp. 38 f.

[2] Nasā'ī, *Kitāb ādāb al-quḍāt, al-ḥukm bi-ttifāq ahl al-'ilm*. This can be dated in the time of A'mash.

[3] Dārimī, *Bāb al-tawarru' 'an al-jawāb*.

[4] Goldziher, *Zāhiriten*, 9; Margoliouth, in *J.R.A.S.*, 1910, 307 ff. On the famous tradition on Mu'ādh and the Prophet, see below, pp. 105 f.

Ra'y *of individual Iraqians*

Ibrāhīm Nakha'ī. The main body of decisions ascribed to Ibrāhīm as the eponym of a certain strand of Iraqian doctrine[1] is to a great extent pure *ra'y*, often expressing systematic thought.

Abū Ḥanīfa. He extends a time limit as a precaution (*Muw. Shaib.* 274); this is typical *ra'y*. He often uses the expressions *ara'aita* and *alā tarā* (*turā*), which are etymologically connected with *ra'y* and mean 'what do you think of...', 'do you not think', in order to introduce systematic reasoning, parallels, extreme and borderline cases, reductions *ad absurdum*, &c. (*Tr. I, passim*). But he hardly ever says directly: 'This is my opinion (*ra'y*)', 'I am of the opinion (*arā*)', &c.

Abū Yūsuf. An example of his explicit use of *ra'y* occurs in *Tr. I*, 169. The same treatise contains numerous examples of *ara'aita* and *alā tarā*, which Abū Yūsuf uses for the same purpose as Abū Ḥanīfa, and also in order to introduce strict analogical reasoning.

Shaibānī. In *Muw. Shaib.* 142, he calls *ra'y* his gratuitous theory of repeal or, alternatively, his arbitrary interpretation of traditions that do not agree with the common doctrine of his school. In *Muw. Shaib.* 153, he maintains as his *ra'y* the systematic reasoning ascribed to Ibrāhīm Nakha'ī (*Āthār A.Y.* 144; *Āthār Shaib.* 27), as against a tradition from 'Umar which points to the contrary. This tradition, and another from 'Alī to the same effect (*Tr. II*, 3 (*m*)), obviously did not yet exist when the Iraqian doctrine was attributed to Ibrāhīm. *Ara'aita* and *alā tarā* serve to introduce systematic reasoning in *Tr. VIII*, 19; *Muw. Shaib.* 289.

The use of *ra'y* is called *ijtihād* in the title of Shaibānī's book, *Kitāb ijtihād al-ra'y*.[2] This term occurs also in the later group of Iraqian traditions referred to above (p. 104). But this meaning of *ijtihād* is secondary, and its original meaning 'discretion, estimate', has been preserved in Medinese usage, and even to some extent in Shāfi'ī.[3]

The main *locus probans* for *ijtihād al-ra'y* is a tradition according to which Mu'ādh b. Jabal was sent by the Prophet as a judge to Yemen, and in answer to the question of the Prophet about the principles which he intended to follow as a judge, replied that he would use his own discretion (*ajtahid ra'yī*) if he found no guidance in the Koran or in the *sunna* of the Prophet, a programme which the Prophet

[1] See above, pp. 33, 86 f. These decisions belong mostly not to the historical Ibrāhīm but only to the time of Ḥammād; see below, pp. 233 ff.

[2] *Fihrist*, 204, l. 18.

[3] See below, pp. 116 and 127. The word *ra'y* itself often shows the same ancient meaning; see, e.g., *Kharāj*, 35 f. and above, p. 102.

approved warmly. Goldziher has given the general reasons which speak for a late origin of this tradition.[1] Shāfi'ī refers to it, without *isnād*, in *Tr. VII*, 273, but not in the other passages, where he speaks of *ijtihād*. It reappears in Ibn Ḥanbal, v. 230, 236, 242, transmitted by, respectively, Muḥammad b. Ja'far Hudhalī, Wakī', and 'Affān b. Muslim—Shu'ba—Abū 'Aun Muḥammad b. 'Ubaidallāh—Ḥārith b. 'Amr—several companions of Mu'ādh—Mu'ādh. This *isnād* is fictitiously Syrian in its upper part, down to Ḥārith b. 'Amr, who is 'unknown', and in its lower part Iraqian; and Iraqian also is the reference to the *sunna* of the Prophet.[2] The *isnād* becomes real beyond doubt only from Shu'ba onwards, from whom three transmitters relate it. This, together with the obviously doubtful character which the tradition still possessed in the time of Shāfi'ī, enables us to conclude that it originated in the generation before him, in the period of Shu'ba.

Iraqian qiyās

The general conclusion which will emerge from what follows is that the ancient Iraqians were familiar with the method, but used the term only exceptionally in their writings.

The oldest examples of Iraqian *qiyās* show a crude and primitive reasoning. Some are typical of a group of 'unsuccessful' traditions from 'Alī,[3] and Shāfi'ī calls the primitive analogy in one of them *ra'y*.

An old *qiyās* which prevailed in the Iraqian doctrine was to demand a fourfold confession of the culprit before he incurred the *ḥadd* punishment for adultery, by analogy with the four witnesses prescribed by Koran xxiv. 4. This was originally pure *qiyās*, and the only Iraqian tradition on this subject of which I am aware is one of the 'unsuccessful' traditions from 'Alī, which makes him turn away an offending woman four times and only punish her after her fifth confession:[4] this presupposes the *qiyās* and exaggerates the underlying tendency. This doctrine spread into Hijaz, and was put there under the aegis of the Prophet, in a group of traditions the final outcome of which in the classical collections is the tradition of Mā'iz, who was turned away three times by the Prophet and punished after his fourth confession. Most versions go so far as to state that the confessions were made on four separate occasions.[5] Although expressed in traditions, the doctrine remained

[1] *Ẓâhiriten*, 10.
[2] See above, pp. 73 f.
[3] *Tr. II*, 4 (*c*), (*d*), (*f*), 18 (*g*); cf. below, p. 241.
[4] See above, pp. 73 f.
[5] This detail was not part of the original Iraqian doctrine. Abū Ḥanīfa, basing

confined to Iraq (*Tr. I*, 104, 105, 200) and did not prevail in the Medinese school. The oldest variant of this group of traditions, a *mursal* ascribed to Ibn Musaiyib and in itself evidently unhistorical (*Muw.* iv. 4), does not yet know the name of Mā'iz and the fourfold confession as such; another version which mentions the fourfold confession without naming the culprit is even a *mursal* of Zuhrī (ibid. 5 f.). It is obvious that the classical tradition of Mā'iz is late, and that its prototype became known in Hijaz, as the justification of an Iraqian *qiyās*, only in the generation preceding Mālik.

This *qiyās* provoked another, to the effect that the *ḥadd* punishment for theft could be applied only after a twofold confession of the culprit, by analogy with the two witnesses demanded in this case. This doctrine is expressed in a tradition from 'Alī (*Tr. II*, 18 (*s*)), but not all Iraqians hold it.[1]

The minimum value of stolen goods, for the *ḥadd* punishment for theft to be applicable, was fixed in Iraq, by a crude analogy with the five fingers, at 5 dirham. This is the doctrine of Ibn Abī Lailā (*Tr. I*, 198) and one of the doctrines ascribed to Ibn Mas'ūd (*Tr. II*, 18(*x*)), and the parallel is explicitly drawn in a tradition from 'Uthmān (quoted in Sarakhsī, ix. 137). The generally accepted Iraqian *ra'y*, however, was to fix the minimum value of stolen goods arbitrarily at 10 dirham, and as a justification of this, traditions from Ibn Mas'ūd, 'Alī, and the Prophet were produced (*Tr. I*, 198). We have to consider this as the original doctrine, and the *qiyās* as a refinement which remained unsuccessful.

The minimum value of stolen goods provided the starting-point for fixing, by a crude analogy, the minimum amount of *ṣadāq*, the contractual payment to be made by the bridegroom to the bride which is an essential element of the marriage contract (*donatio propter nuptias*). Here, too, the original Iraqian reasoning was arbitrary *ra'y*, such as Shāfi'ī ascribes to 'some followers of Abū Ḥanīfa' who say: 'We think it shocking that intercourse should become lawful for a trifling amount' (*Tr. III*, 54). This stage of doctrine is represented by the opinion ascribed to Ibrāhīm Nakha'ī in a late source ('Iyāḍ, quoted in

himself on the wording of these Medinese versions, tried to introduce it in Iraq but was not successful (see below, p. 300, on *Tr. I*, 104).

[1] *Tr. I*, 196, and below, p. 297 f.; *Kharāj*, 102 f.

Zurqānī, iii. 9): 'Ibrāhīm disapproved of a *ṣadāq* of less than 40, and once he said: of less than 10, dirham.'[1] This arbitrary *ra'y* was later modified, not for the better, by a crude analogy, according to which the use of part of the body of the wife by the husband ought not to be made lawful for an amount less than that legalizing the loss of a limb through the *ḥadd* punishment for theft, and the minimum amount of *ṣadāq* was fixed at 10 dirham (*Muw. Shaib.* 237).[2] This was expressed in a tradition from 'Alī, through Sha'bī (*Tr. III*, 54).[3] The Medinese recognized originally no minimum amount of *ṣadāq*; only Mālik, followed by his personal disciples, adopted the Iraqian analogical reasoning, and starting from his own minimum value of stolen goods for the application of the *ḥadd* punishment, which was ¼ dīnār = 3 dirham, fixed the minimum *ṣadāq* at the same amount (*Muw.* iii. 9). Shāfi'ī states polemically that Mālik diverged from the earlier Medinese opinion under the influence of Abū Ḥanīfa. At the same time, the Iraqians had found this crude *qiyās* unsatisfactory, and fell back on the authority of traditions which had appeared in the meantime in favour of their doctrine (*Tr. III*, 54).

The Iraqians, as opposed to the Medinese (*Muw.* iii. 129), extended the prohibition against re-selling food before taking possession of it to all objects (Abū Ḥanīfa excepted only immovables); this analogical reasoning was put into the mouth of Ibn 'Abbās (he says *aḥsib* 'I think'), in a tradition which Shaibānī adduces as his argument (*Muw. Shaib.* 331).[4] The Iraqians likewise disallowed the sale of animals against animals on credit, bringing this contract under the general rule against uncertainty (*Tr. IX*, 5).

It was the administrative practice that the rider received two shares for his mount in addition to his own share of the booty (ibid., 3). Auzā'ī recognized it as the continuous practice, and found its alleged starting-point in informal traditions on the

[1] The second half of this statement is certainly spurious, as it reflects the second stage of the Iraqian doctrine.

[2] The Iraqian Ibn Shubruma, who put the minimum value of stolen goods for purposes of *ḥadd* punishment at 5 dirham, consistently fixed the minimum *ṣadāq* at the same amount ('Iyāḍ, loc. cit.).

[3] For the *isnād*, see *Comm. Muw. Shaib.* 238, n. 17.

[4] Shāfi'ī (*Ikh.* 328) introduces the word *ra'y* into the text. On the date of this tradition, see below, p. 143.

military expeditions of the Prophet. The ancient Iraqians found it illogical that the share of an animal should be greater than the share of a Muslim, and reduced the portion of the rider to one share for his mount, in addition to his own share. This was still the doctrine and the argument of Abū Ḥanīfa, who also knew a tradition from 'Umar to this effect (*Comm. ed. Cairo*, loc. cit.). Abū Yūsuf, however, returned to the Syrian (and Medinese) doctrine. His ostensible reasons were Syrian and Medinese traditions, which he relates in detail in *Kharāj*, 11 f. But Shaibānī (*Siyar*, ii. 176) gives, besides the reference to traditions, the argument that the older Iraqian doctrine would put the animal and the Muslim on the same footing. In this case, therefore, the refinement of reasoning led to the rejection of a crude *qiyās*.

Shāfi'ī calls the Iraqians 'adherents of *qiyās*' (*ahl al-qiyās*) in *Tr. I*, 137, and in several other passages he represents the *qiyās* as one of their fundamental principles. For example, ibid., 89: 'They do not allow anyone to diverge from *qiyās*.' Or *Tr. IV*, 258: 'If they [the Successors] express opinions on questions on which there is no Koranic text and no *sunna*, you infer that they have arrived at their decision by *qiyās*, and you say: "*Qiyās* is the established knowledge which knowledgeable people agree is right." ' The opponent agrees. Shāfi'ī points out that it is possible that they based their opinions on *ra'y* and not on *qiyās*. The opponent agrees that this is possible, but does not think that they could have expressed opinions except on the basis of *qiyās*. Shāfi'ī replies: 'You . . . imagine that they used *qiyās*, and you make its use obligatory. . . .'[1] These statements are materially correct, but Shāfi'ī formulates them in a pointed manner for purposes of polemics.[2] Shāfi'ī was the first to distinguish on principle between general *ra'y* and strict *qiyās*, and he imposed this distinction on his opponents by a favourite debating device of his.

In the actual reasoning of the Iraqians *qiyās* is simply a more or less clearly defined kind of *ra'y*, and the term *qiyās* is used rarely. In *Ikh.* 116 f., the Iraqian opponent agrees that a certain doctrine of his is based neither on tradition or *sunna* nor on

[1] See also *Tr. I*, 51; *Tr. VIII*, 13 (quoted above, p. 27); *Ris.* 81 (referred to above, p. 48), &c.

[2] The passage in *Tr. IV*, 258, bears also other traces of Shāfi'ī's editing; see above, p. 87.

qiyās, but claims that it is 'reasonable' (*ma'qūl*). In *Tr. III*, 11, the Iraqians look for the element common to both the original and the assimilated case, which justifies the use of analogy, but they do not use *'illa*, which is the later term for it.

The Iraqians base their doctrine on *qiyās* and systematic reasoning[1] rather than on traditions, and they use *qiyās* as an instrument in criticizing traditions.[2] The Iraqian opponent states in *Ikh.* 117 f. that no *qiyās* is valid against a binding tradition (*khabar lāzim*), but the word 'binding' is operative,[3] and how this rule works in practice appears from *Ris.* 75, where the Iraqian opponent follows the opinion of Ibn Mas'ūd, which reflects the Iraqian doctrine, against an analogy drawn from traditions from the Prophet.

Qiyās *of individual Iraqians*

Ibn Abī Lailā. Tr. I, 171 (*a*): Ibn Abī Lailā uses analogical reasoning and expresses it by saying: 'This is the same as . . .' (*hādhā . . . bi-manzilat . . .*), without using the term *qiyās*.

§ 216: he gives general systematic reasoning, based on an analogy, but does not use the term *qiyās*.

Abū Ḥanīfa. Ibid., 107: Abū Ḥanīfa gives a systematically consistent decision, and Shāfi'ī calls it *qiyās*.

§ 200: Abū Ḥanīfa acknowledges the implication of a tradition, and Shāfi'ī, who draws the same conclusion, calls it *qiyās*.

§ 219: a conclusion *a maiore ad minus*.

§ 229: an analogical conclusion from the Koran.

Tr. IX, 15: Shāfi'ī calls Abū Ḥanīfa's reasoning *qiyās*. Abū Ḥanīfa does not use the term *qiyās* in any of these cases.

Abū Yūsuf. Tr. I, 27: Abū Yūsuf draws an analogy but calls it *mithl* ('the same as . . .').

§ 71: he draws a conclusion from the doctrine of Ibn Abī Lailā and calls it *qiyās qaulih* ('a consequence of his doctrine').

Tr. IX, 2: Abū Yūsuf has two arguments *a maiore ad minus*; only Shāfi'ī calls this *qiyās*.

§ 38: Abū Yūsuf gives analogical reasoning, without using the term *qiyās*.

Shaibāni. Tr. VIII, 1: Shāfi'ī calls Shaibānī's wider systematic reasoning *qiyās*.

[1] An example of systematic reasoning which goes much farther than a simple analogy occurs in *Tr. III*, 17.

[2] See above, p. 30. Many of these cases have been obliterated by the subsequent growth of traditions in favour of the Iraqian doctrine.

[3] For its meaning, see below, p. 136, n. 2.

§ 6: Shaibānī uses analogical reasoning and calls it a *qiyās* based on the *sunna*; he also calls it *ma'qūl* 'reasonable', but Shāfi'ī claims that Shaibānī has perverted the *qiyās* and turned it upside down.

§ 7: Shaibānī is able to support the Iraqian doctrine by analogical reasoning starting from a Medinese tradition (*Muw.* iv. 40).

§ 21 and often elsewhere in *Tr. VIII*: conclusions *a maiore ad minus*.

Siyar, iv. 376: a weak analogy against Abū Ḥanīfa's and Abū Yūsuf's consistent doctrine (*Tr. IX*, 24).

Iraqian istiḥsān

According to Shāfi'ī (*Tr. III*, 66), the Iraqians are accustomed to say: 'The *qiyās* would be . . ., but we practise *istiḥsān*.' Ṭabarī (§ 101) says that according to Abū Ḥanīfa and his companions a certain act 'is considered valid by *istiḥsān*, although it is against the *qiyās*'; this decision is taken for purely practical reasons; the terms are of Ṭabarī's choosing and do not occur in the parallel passage, *Tr. IX*, 15.

Some old cases of *istiḥsān* are expressed in, and therefore obliterated by, traditions. For example, strict analogy justifies the application of the *lex talionis* to only one culprit for one victim, and this is indeed the Iraqian doctrine in the case of wounds; but as regards capital crimes, the Iraqians have several culprits executed for the murder of one. *Comm. Muw. Shaib.* 292, n. 3, states that this doctrine is held in deference to a [Medinese] tradition from 'Umar in which the consideration of the public interest is expressed clearly (*Muw.* iv. 48; *Muw. Shaib.* 291). In other words, the ancient Iraqians diverged from the *qiyās* for reasons of public policy, a decision which in Medina was embodied in the tradition from 'Umar. But Shāfi'ī takes the tradition from 'Umar as his starting-point, builds on it another *qiyās* to the effect that the *lex talionis* for wounds is also applicable to several culprits for one victim, and then blames the Iraqians for their inconsistency (*Tr. II*, 18 (*h*)). Properly speaking, this goes against Shāfi'ī's own rule that no *qiyās* is to be based on an exception, but for him the tradition is the basis of his doctrine.[1]

A practical concession to the *mukātab*, the slave whose

[1] This aspect of *istiḥsān*—the consideration of the public interest—was later called *istiṣlāḥ* by the Mālikīs; see Goldziher, in *Vienna Oriental Journal*, i. 229.

master has allowed him to purchase his liberty by instalments, is expressed in a tradition from 'Alī (*Tr. II*, 17 (*c*)), and acknowledged by Ibn Abī Lailā (*Tr. I*, 139); Sarakhsī, vii. 207, calls it *istiḥsān*. Abū Ḥanīfa is systematically consistent, but still makes a very slight concession (at the end of ibid., 140). Abū Yūsuf followed Abū Ḥanīfa at first; in his later opinion he made a concession to the *mukātab*, though not so wide and so formal a one as did Ibn Abī Lailā, leaving the matter rather to the discretion of the judge. Shāfi'ī, who rejects *istiḥsān* on principle, becomes thoroughly consistent.

Goldziher, judging from the sources at his disposal, concluded that Abū Ḥanīfa himself established the principle of *istiḥsān*.[1] We now find that it already existed, as part of the actual reasoning of the Iraqians, before him, although the technical term for it appears, as far as I know, for the first time in Abū Yūsuf. This is confirmed by the following examples.

Ibn Abī Lailā. Tr. I, 92, 93, 94: he shows regard for the practice and gives a common-sense decision which is later called *istiḥsān* (see below, p. 273).

§ 153: he makes an inconsistent exception on account of *vis maior*, out of regard for material justice.

Abū Ḥanīfa. Ibid., 131: Sarakhsī, xxviii. 34, clearly shows the *istiḥsān* in Abū Ḥanīfa's reasoning.

§ 178: Abū Ḥanīfa disapproved of the old custom of *ish'ār* (making incisions in the flesh of sacrificial animals) because it was cruelty; Ibn Abī Lailā and Abū Yūsuf, however, approved of the custom, and authority for it was found in several traditions; Ṭaḥāwī (quoted in Sarakhsī, iv. 138) calls Abū Ḥanīfa's opinion *ra'y*, and the reasons which he gives for this opinion show it to be *istiḥsān*.

Tr. IX, 2: a consideration of Abū Ḥanīfa is based on common sense.

§ 15: neither here nor elsewhere does Abū Ḥanīfa use the term *istiḥsān*.

Abū Yūsuf. Tr. I, 2: he makes a concession in a case of *vis maior*; Sarakhsī, xv. 103, calls it *istiḥsān*.

Goldziher[2] has collected from *Kharāj* and from Shaibānī's *Jāmi' al-Ṣaghīr* several examples where Abū Yūsuf and Shaibānī respectively use the term *istiḥsān* and oppose it to *qiyās*.

Shaibānī. Muw. Shaib. 197, 226: Shaibānī gives an arbitrary opinion and chooses his traditions accordingly; he calls this *ra'y*.

[1] Loc. cit. 228.

[2] Ibid., and in *E.I.*, s.v. *Fiḳh*.

C. The Medinese

Shāfi'ī charges the Medinese with arbitrary *ra'y*.[1] He does so polemically and without real justification in cases where they have other, and for them valid, reasons for their doctrine. But everything that is not based on a tradition from the Prophet is in the last resort *ra'y* for Shāfi'ī, and he calls even the opinions of Companions of the Prophet *ra'y*. *Ra'y* is, indeed, the foundation of a great part of the Medinese doctrine, and in *Ikh.* 197 Shāfi'ī calls the Medinese with whom he disputes 'some scholars learned in traditions and *ra'y*'.

In the argument which Shāfi'ī puts into their mouth in *Tr. III*, 41, they give to the *sunna* higher authority than to *ra'y*; this becomes obvious if we take *sunna* in the old sense of 'living tradition' of the school,[2] which superseded individual opinion. But the doctrine of the school is itself based on the opinion of the recognized scholars, and we find reference being made to what the scholars hold (*ahl al-'ilm yaraun*) as a decisive argument.[3] In this particular case, the opinion in question is a primitive analogical reasoning by which pregnancy is assimilated to illness. This old *ra'y*, which was originally to a great extent anonymous, as the consensus of Medina of which it formed a part was anonymous,[4] was frequently ascribed to individual ancient authorities. So we find that Shāfi'ī, in the same particular case, singles out Qāsim b. Muḥammad as holding the opinion in question. These ascriptions cannot in general be considered authentic unless they are proved so, as the analysis of two typical examples will show.

Mud. iii. 34: Ibn Wahb—Ibn Lahī'a—Khālid b. Abī 'Imrān—Qāsim b. Muḥammad and Sālim were of the opinion (*ra'y*) that the minor who is taken on a raid or who is born during it receives no share of the booty. This is simply the Medinese doctrine, formulated polemically against the opinion of Auzā'ī (*Tr. IX*, 10), and not a straightforward expression of opinion. It is, indeed, likely that Qāsim and Sālim held this opinion, but then this could also be said of their Medinese contemporaries.

Muw. iv. 40 = *Tr. III*, 77: Mālik—Yaḥyā b. Sa'īd—Ibn Musaiyib

[1] *Tr. III, passim*, e.g. §§ 44, 124 (general criticism of the Medinese reasoning).
[2] See above, pp. 61 f.
[3] *Muw.* ii. 115 = *Tr. III*, 128.
[4] See above, p. 84 f.

—'Umar fixed the compensation for a molar at one camel,[1] Mu'āwiya at five camels;[2] Ibn Musaiyib would personally have preferred to fix it at two camels, and remarks that every *mujtahid* is rewarded. This harmonizing but unsuccessful opinion, which presupposes the two other doctrines, can hardly go back to Ibn Musaiyib. The remark on the reward of the *mujtahid* expresses opposition to the doctrine of the school and, though earlier, is hardly much earlier than the tradition from the Prophet on this matter, a tradition which we can date in the generation before Mālik.[3] The common ancient doctrine which fixed the compensation at five camels can safely be dated in Umaiyad times, and the mention of Mu'āwiya as the authority for it points in the same direction; it was possibly, but not necessarily, an administrative regulation.[4] It was given a higher authority in a tradition in which Marwān b. Ḥakam (whose name is another hall-mark of traditions connected with Umaiyad doctrines) consults Ibn 'Abbās, who replies: five camels, and on another aspect of the problem draws an analogy with the fingers;[5] and in the still later traditions from the Prophet to the same effect, either through Ibn 'Abbās or with a new *isnād* through 'Amr b. Shu'aib—his father—his grandfather.[6] The common ancient doctrine was also projected back to individual early Iraqian authorities: Sha'bī, Ibrāhīm Nakha'ī, Ibrāhīm—Shuraiḥ.[7]

But even if ascriptions of *ra'y* to Medinese authorities of the first century are not as a rule authentic, they show its importance in the doctrine of the Medinese school.[8]

As regards the generation before Mālik, it does not seem likely that Rabī'a b. Abī 'Abdalraḥmān, who later received the nickname *Rabī'at al-Ra'y*, showed an inclination to *ra'y* stronger than his contemporaries. Indeed, this would have been difficult for him in view of the role which *ra'y* played even in Mālik's doctrine; his nickname

[1] This is the opinion of 'some other Medinese' in *Tr. VIII*, 10.

[2] This is the opinion of 'some Medinese', including Mālik, ibid. It is shared by the Iraqians, *Muw. Shaib.* 290.

[3] See above, p. 96 f. *Ra'y* and its reward are mentioned together in an anecdote on 'Umar b. 'Abdal'azīz and the lawyers of Medina: Ṭabarī, *Annales*, ii. 1183 (year 87). This anecdote is later than 'Umar b. 'Abdal'azīz, and therefore later than Ibn Musaiyib. [4] See below, p. 208.

[5] *Muw.* iv. 40; *Muw. Shaib.* 290; *Tr. VIII*, 10. On another tradition in which Ibn 'Abbās expresses his *ra'y*, see above, p. 108, n. 4.

[6] Traced by *Comm. Muw. Shaib.* 290, to some of the classical and other collections.

[7] *Āthār Shaib.* 83, 95; *Tr. VIII*, 10.

[8] The old Meccan authority Mujāhid, a 'rationalist' in the interpretation of the Koran, was reported also in law to have accorded to *ra'y* a very high position (Goldziher, *Richtungen*, 110).

seems to be part of the misleading picture created after Shāfi'ī's time of the character of the Medinese school.[1]

Zuhrī, who belongs to the same generation, is quoted both in favour and in disparagement of *ra'y*. On one side he is related, on the authority of Auzā'ī, to have said: 'What an excellent minister of knowledge is sound opinion';[2] on the other he is alleged to have said: 'The [traditional] scholar (*al-'ālim*) is superior to the *mujtahid* by a hundred degrees.'[3] In view of the importance of *ra'y* in the Medinese school, the second statement can at once be dismissed as spurious; but the first, too, the self-conscious wording of which goes beyond the simple and natural use of *ra'y* by Mālik and Ibn Qāsim, is probably spurious.

Mālik's older contemporary Mājashūn called the final doctrine on a particular problem, at which the reasoning of the Medinese school had arrived, *ra'y*.[4]

Mālik's ra'y

The use of *ra'y* by Mālik is well known,[5] and Shāfi'ī, in a polemical passage, reproaches him for making *ra'y* his final criterion (*Tr. III*, 65). Mālik credits Companions of the Prophet with *ra'y*, which he follows (e.g. *Muw.* ii. 69). He uses his *ra'y* on points on which there are no traditions (e.g. ibid. ii. 307), expresses it in confirming traditions from Companions and later authorities (e.g. ibid. iii. 260), uses it in order to interpret traditions restrictively (e.g. ibid. iii. 129), and in connexion with the practice makes it prevail over traditions (e.g. *Mud.* i. 65). His *ra'y* may be a strict analogy (e.g. *Muw.* ii. 268), or an arbitrary, inconsistent decision which may be called *istiḥsān*.[6] Occasionally it stands for broader systematic reasoning (e.g. Ṭabarī, 61), and Mālik uses *ara'aita* for introducing systematic arguments (e.g. *Muw.* iii. 183).

Ibn Qāsim's ra'y

Ibn Qāsim expresses his *ra'y* in the *Mudauwana*, *passim*, either confirming Mālik's doctrine (e.g. iii. 33), or contradicting it (e.g. i. 42), or discussing points not decided by Mālik (e.g. ii. 229). On one of these last he gives his '*ra'y* and *istiḥsān*' (xvi. 203). But where there are traditions and well-established *sunnas* on the authority of the Prophet, analogy and reasoning (*naẓar*) are out of place (iv. 151).

[1] See above, pp. 8, n. 2, 27, 76. On Rabī'a, see below, p. 247 f.
[2] Dārimī, *Bāb fi jtināb al-ahwā': ni'm wazīr al-'ilm al-ra'y al-ḥasan.*
[3] Ibid., *Bāb fī faḍl al-'ilm wal-'ālim.*
[4] See below, p. 221.
[5] Goldziher, *Muh. St.* ii. 217.
[6] See below, pp. 118 f.

This is the reply of Ibn Qāsim to a systematic reasoning of Saḥnūn, and shows the influence of Shāfi'ī.

Medinese ijtihād

The ancient Medinese use *ijtihād* not in the general sense of exercising one's own opinion, but in the rather more specialized one of technical estimate, discretion of the expert. There are positive indications that this narrower meaning of *ijtihād* as a technical term is older than the broader one.

In Mālik *ijtihād* often means estimate by experts.[1] Mālik further knows the *ijtihād* of the Caliph or government (*sulṭān*), meaning either their endorsement of the technical estimate of the experts, as in *Muw.* iv. 39,[2] or their fair, discretionary judgment, as ibid. ii. 305 = Ṭabarī, 87; *Mud.* iii. 29, 30.[3] In *Mud.* ii. 194 he enjoins on the arbiter, who is called upon to fix the fine for a transgression of ritual, to follow his own fair judgment (*ijtihād*) and not traditions on the decisions of Companions in similar cases.

Rabī', in *Tr. III*, 61, uses '*ijtihād* of the Caliph' with the same meaning, and in § 77 he says: 'There is no fixed decision (*ḥukm ma'rūf*) here, but a compensation (*ḥukūma*) must be fixed by fair estimate (*ijtihād*).[4]

Ibn Qāsim, in *Mud.* iv. 29, uses *ijtihād ahl al-'ilm* for 'estimate of knowledgeable people, experts'.

Medinese qiyās

In many passages in *Tr. III* Shāfi'ī credits the Medinese with using analogy, and attacks them for using it improperly.[5] According to them, Shāfi'ī says, one must not diverge from traditions except for sound reason and *qiyās* (§ 145 (*a*)). But we find them using the term *qiyās* themselves only in § 36, where Rabī' states that Mālik does not extend the effect of a tradition by analogy, as Shāfi'ī does, although he extends one of the categories mentioned there by subsumption; some of Mālik's followers hold that the specific mention of five categories in that

[1] *Muw.* iv. 34 (*bis*), 37, 38, 39 (*bis*); *Mud.* xvi. 121, and *passim.*

[2] But the words 'the Caliph has to exercise *ijtihād*' seem to have been added by the editor, Yaḥyā, as they are lacking from Mālik's text as quoted by Shaibānī in *Tr. VIII*, 9; see also *Mud.* xvi. 121.

[3] See also above, p. 48.

[4] The Iraqians (*Tr. VIII*, 21 and elsewhere) say 'fair compensation' (*ḥukūmat 'adl*) where the Medinese would, and do, say *ijtihād.*

[5] e.g. §§ 31, 34 (Shāfi'ī calls their reasoning arbitrary *qiyās* and *ra'y*), 143; also *Ris.* 27 and elsewhere.

tradition implies that all others are excluded; at the same time the Medinese, without using the later technical term *'illa*, look for the motive which underlies the mention of those categories in the tradition; but again they fall back on the opinion that this is not a case in which one must look for implications and that the tradition has to be accepted as it stands (*lā bal al-ḥadīth jumla lā li-ma'nā*). This shows that reasoning by analogy, as used by the Medinese, is still an undisciplined part of their general *ra'y*, and the term *qiyās* was no doubt forced on Rabī' by Shāfi'ī.

Mālik, in *Mud.* ii. 268, reasons by analogy on a point of detail, introducing it by 'I am of the opinion' (*arā*). According to *Tr. III*, 97, Mālik bases 'any number of analogies' on a tradition from Ibn 'Abbās, but these are Shāfi'ī's words. *Mud.* ii. 94 uses *shabbah* 'to assimilate', in describing Mālik's analogical reasoning.

The use of analogical reasoning, but not the term *qiyās*, is also ascribed to ancient Medinese authorities such as Sālim (*Muw.* i. 260) and Ibn Musaiyib (ibid. ii. 307). In the first case there is an analogy based on an exception from a general rule, which is an undisciplined form of *qiyās*. Whereas these ascriptions must be regarded with the same suspicion as those discussed above (pp. 113 f.), the following story related by Mālik (ibid. iv. 39) is certainly spurious: Rabī'a b. Abī 'Abdalraḥmān asked Ibn Musaiyib about the compensation for the fingers of a woman; Ibn Musaiyib replied that it was 10 camels for one finger, 20 for two, 30 for three, but 20 for four; when Rabī'a expressed his astonishment, Ibn Musaiyib asked him whether he was an Iraqian, and assured him that it was the *sunna*.[1] The actual Medinese doctrine followed by Mālik was, however, to fix the compensation for the fingers of a woman at 10 camels each, according to analogy.

Among the Companions, analogical reasoning is ascribed to Ibn 'Abbās in a Medinese tradition which makes him fix the same amount of compensation for each tooth, whatever its position in the mouth, with reference to the fact that the compensation for each finger is the same (ibid. iv. 40). This is also the doctrine of the Medinese and of the Iraqians. But as regards the compensation for the lips, the Iraqians, carrying farther the analogy in the tradition from Ibn 'Abbās, hold, indeed, that half the weregeld is due for each lip, whereas the ancient Medinese award one weregeld for both lips,

[1] This opinion follows from the Medinese principle that the compensation for injuries caused to a woman is half of that for injuries caused to a man, if it amounts to one-third of the weregeld or more, but the same as that for injuries caused to a man, if it amounts to less than one-third of the weregeld; see below, p. 217.

but two-thirds of the weregeld for the loss of the lower lip alone; Mālik and his disciples, however, share the doctrine of the Iraqians, presumably under their influence (*Muw.* iv. 40; *Tr. VIII*, 7).[1]

Medinese istiḥsān

According to *Tr. III*, 24 the doctrine of the Medinese on a certain point is *istiḥsān*; Shāfi'ī uses this term as a synonym of *ra'y*. Ibn Qāsim, in the *Mudauwana*, often uses *istiḥsān*.[2] He also ascribes it to Mālik.[3] But in most passages there is nothing to show whether the term *istiḥsān* was used by Mālik himself or only introduced by Ibn Qāsim, and in one at least (xiv. 109) Ibn Qāsim gives as his own opinion (*ra'ait*) that Mālik used *istiḥsān*; the term does not, as far as I know, occur in Mālik's *Muwaṭṭa'* or in other ancient quotations from Mālik; and where Mālik uses reasoning which might, indeed, be termed *istiḥsān* he does not mention the term. We are therefore justified in concluding that Mālik does not use the term, and that in the solitary passage in which Ibn Qāsim gives it as part of Mālik's words he has put it into the mouth of his master.

This passage is xiv. 134, where Ibn Qāsim says: 'I only know that Mālik distinguished [between the two cases in question], and used to say: "This is a point which has not been made, as far as I know, by any scholar before me . . . but it is a decision on which I have used my *istiḥsān* and my *ra'y*, and I am of the opinion (*arā*) that the practice ought to be accordingly. . . ." ' We have seen above, (p. 115) that Ibn Qāsim uses *ra'y* and *istiḥsān* as synonyms. This is one of the four cases in which the later Mālikī school ascribes to its founder *istiḥsān* as opposed to *ra'y*, a systematic distinction which did not exist in the early period.[4] These alleged cases of Mālik's *istiḥsān* do not include the following, which are authentic:

(*a*) *Muw.* iii. 10 and *Mud.* v. 2: Mālik expresses his *ra'y*; his reasoning is typical *istiḥsān*, and Ibn Qāsim (*Mud.* v. 4 f.) calls it so.

(*b*) *Mud.* ix. 138: this is an exception from a strict analogy based on a tradition: a loan with restitution in kind, which is permissible in the case of male slaves, is not allowed in the case of slave-girls.

[1] For another tradition which credits Ibn 'Abbās with analogical reasoning, see above, p. 108.

[2] For references, see Santillana, *Istituzioni*, i. 57, n. 170 (reprint: 73, n. 170).

[3] Sometimes *istiḥsān* has a non-technical meaning, e.g. *Mud.* ii. 130 for Mālik's approval (*istiḥbāb* and *istiḥsān*) of a doctrine; ibid. xvi. 228 for a tentative opinion of Mālik on a point on which there is no certainty, such as is provided by a *sunna*.

[4] See, on these four alleged cases of Mālik's *istiḥsān*, Guidi–Santillana, ii. 451, nn. 44 and 49, and for the later Mālikī doctrine of *istiḥsān*, Santillana, *Istituzioni*, i. 57.

(*c*) *Tr. III*, 36: here we have another exception from strict analogy; this is also projected back to Mujāhid and 'Aṭā' (Zurqānī, ii. 195).[1]

D. The Syrians

Ra'y, under the name of *naẓar*, is acknowledged in a tradition which the *isnād* shows to be Syrian;[2] according to it, the Prophet was asked what one was to do with a problem on which there was nothing in Koran or *sunna*, and he said: 'The pious men among the believers shall consider it' (*yanẓur fīh*).

Another tradition[3] makes Auzā'ī relate that 'Umar b. 'Abdal'azīz wrote in one of his instructions: 'No one has the right to personal *ra'y* on [points settled in] the Koran; the *ra'y* of the Caliphs concerns those points on which there is no revelation in the Koran and no valid *sunna* from the Prophet; no one has the right to personal *ra'y* on [points settled in] a *sunna* enacted by the Prophet.' This shows essentially the same acceptance of *ra'y*, although the emphasis is laid on its limitations. It represents Auzā'ī's attitude correctly, although whether the tradition as such is authentic must remain doubtful, and the reference to 'Umar b. 'Abdal'azīz is in any case spurious.[4]

Auzā'ī uses *ra'y*, with explicit mention of the term, in Ṭabarī, 97 (p. 148) and elsewhere. He draws a conclusion *a minore ad maius* in *Tr. IX*, 12, and other conclusions by analogy, without using the term *qiyās*, in § 41 (which is crudely reasoned) and repeatedly in § 42. More or less rudimentary systematic reasoning occurs in §§ 34–6 and 44 f. On the other hand he quotes in § 50, without *isnād*, an alleged saying of Shuraiḥ: 'The *sunna* came before your *qiyās*; follow it and do not introduce innovations; you cannot go astray as long as you hold fast to traditions (*athar*).'[5] This picture agrees well with Auzā'ī's attitude to traditions and his concept of *sunna*.[6]

The statements which are attributed to Auzā'ī himself in late sources, representing him as directly hostile to *ra'y*, are certainly spurious.

[1] See, further, below, p. 314.

[2] Dārimī, *Bāb al-tawarru' 'an al-jawāb*.

[3] Ibid., *Bāb mā yuttaqā min tafsīr ḥadīth al-nabī*.

[4] See below, p. 192. The mention of Auzā'ī in the *isnād* of a tradition in favour of sound *ra'y* is also not historical; see above, p. 115.

[5] This is one of a group of Iraqian traditions against *ra'y* and *qiyās*, and later than Sha'bi (see below, pp. 130 f.).

[6] See above, pp. 34 f., 70 ff. The passage quoted from Ibn Qutaiba (above, p. 35) summarizes Auzā'ī's attitude correctly.

E. Shāfi'ī

Shāfi'ī and ra'y

In his earliest period Shāfi'ī uses *ra'y* in the same loose way as the ancient schools. Straightforward examples of this will be found in *Tr. I*, *Tr. VIII*, and *Tr. IX*.[1] It so happens that *Tr. II*, which belongs to the same period, does not contain equally telling passages, but only the ascription of *ra'y* to Companions, which is irrelevant in this connexion and occurs, indeed, in early and late contexts. There are further numerous passages from all periods where Shāfi'ī formulates his conclusions cautiously by giving them as his opinion in a non-technical sense.[2] He also uses *ara'aita* and *alā tarā* for introducing systematic arguments.[3]

In *Tr. IV*, 261, which belongs to Shāfi'ī's middle period, he says: 'When there is no explicit text in the Koran and no *sunna*, the *mujtahids* [scholars] may use their *ijtihād* and hold what they think right (*mā ra'auhu ḥaqqan*).' But this has to be interpreted in the light of Shāfi'ī's polemics, in the same treatise, against *istiḥsān* and arbitrary *ijtihād*, and in favour of disciplined *qiyās*. In *Tr. III*, 148 (p. 244), Shāfi'ī still recognizes that one has to make decisions on points of detail on which there is no consensus and no guidance in Koran and *sunna*, but he claims that this occurs only rarely.

From *Tr. VII* onwards Shāfi'ī rejects arbitrary *ra'y* in favour of strict analogy, for which he even claims a consensus of the scholars.[4] Ibid. 273: Shāfi'ī knows of no scholar who would authorize an intelligent and cultured man to give a judgment or a fetwa by his own opinion, if he did not know the bases of *qiyās*, which are Koran, *sunna*, consensus, and reason (*'aql*). *Ris.* 58: Shāfi'ī uses the term *qiyās*, whereas his opponent, a representative of the ancient schools, calls it *ra'y*. *Tr. III*, 77: Shāfi'ī refuses to set his *ra'y* against a tradition from a Companion. *Ikh.* 21: 'No one is authorized to apply reasoning (*li-ma*) or questioning (*kaif*) or anything tainted by personal opinion

[1] *Tr. I*, 182: Shāfi'ī expresses his own *ra'y*. *Tr. VIII*, 5: Shāfi'ī uses the term *ra'y* for 'systematic reasoning', which he later calls *qiyās*. Ibid., 14: 'It is to be decided by the use of one's own opinion (*ijtihād al-ra'y*), and to be judged by *qiyās*.' *Tr. IX*, 42: 'In my opinion it is not . . . (*lam ara*).'

[2] e.g. *Tr. I*, 18; *Tr. III*, 55, 64, 114; *Tr. IV*, 260; *Tr. VIII*, 11; *Ris.* 78, 79; *Ikh.* 229; *Umm.* iv. 170.

[3] *Ara'aita*: *Tr. I*, 132, 133; *Ikh.* 386, 394, 395. *Alā tarā*: *Tr. I*, 27, 47, 49, 72, &c.

[4] As early as *Tr. I*, 127, he opposes analogy to surmise (*ẓann*).

(*ra'y*) to a tradition from the Prophet.' This excludes the use of systematic reasoning as a means of criticizing traditions, a purpose to which it is put by the ancient schools, particularly the Iraqians.[1] Whenever Shāfi'ī disagrees with an opinion he is inclined to call it *ra'y*, even in cases where his Medinese opponents refer to consensus and practice.[2] In most cases, however, his rejection of *ra'y* takes on the more specialized form of rejection of *istiḥsān*.

Shāfi'ī and istiḥsān

Ra'y and *istiḥsān* are the same for Shāfi'ī, and he uses both terms indiscriminately.[3] The whole second part of *Tr. VII* (pp. 270–7) is devoted to the refutation of *istiḥsān*. No one is authorized to give a judgment or a fetwa unless he bases himself on the Koran, the *sunna*, the consensus of the scholars, or a conclusion drawn by analogy from any of these, and so it follows that no one may give a judgment or fetwa based on *istiḥsān*. The Koran (lxxv. 36) declares that man is not left without guidance; but he who uses *istiḥsān* acts as if he were left without guidance and comes to whatever conclusion he pleases. The Koran in many passages makes it a duty to follow Allah's commandments and to give the right decision; no one can do this unless he knows what the right decision is, and he can know it only from Allah as laid down by Him, either explicitly or by implication, in the Koran and in the *sunna* of the Prophet; no one can find himself confronted by a problem for which provision is not made by Allah directly or indirectly. To admit opinions not based on a principle or on analogy with a principle —not based, that is, on Koran, *sunna*, consensus, or reason (*'aql*)— would be equivalent to admitting the opinions of non-specialists. Moreover, the expert on questions of fact is not authorized to give an arbitrary opinion, or to set aside reasoning by analogy for *istiḥsān*. If one were authorized to use *istiḥsān* one would have to acknowledge that others are free to use another *istiḥsān*, so that every judge and mufti in every town might use his own *istiḥsān*, and there would be several right decisions and

[1] See above, pp. 110, 115, and below, p. 123.

[2] *Tr. III*, 117, 121, 122, 124, &c. See also the passages quoted above, pp. 26, 69, 79. Ibn Qutaiba, 62, takes up Shāfi'ī's recurrent reproach against the adherents of *ra'y*.

[3] *Tr. VII*, 273; *Ris.* 69.

fetwas on one and the same problem. In *Tr. IV*, 253, Shāfi'ī states that no decisions by arbitrary *istiḥsān* are allowed, only reasoning by analogy on points on which there is no text in the Koran, no *sunna*, and no consensus—that is, no binding information (*khabar yalzam*);[1] 'we and the people of our time (*ahl zamāninā*) are obliged to observe this.' Shāfi'ī recognizes here that the earlier generations used a freer kind of reasoning, and he is the first to confine it on principle within the limits of strict analogy.[2]

But in *Tr. III*, 14, Shāfi'ī uses what is, in fact, an *istiḥsān*; and in *Umm.* iii. 114, where he discusses the same problem, his reasoning is clearly arbitrary *ra'y*, that is, *istiḥsān*. Mālik (*Mud.* ix. 138) had given the same decision by *istiḥsān*,[3] and Shāfi'ī no doubt retained it from his early Medinese period.[4]

Shāfi'ī and qiyās

The only kind of reasoning which Shāfi'ī admits is conclusion by analogy. He takes *qiyās* for granted in his polemics against the ancient schools. *Qiyās* is obligatory (*Tr. IV*, 258), and is resorted to when there is no relevant text in the Koran, no *sunna*, and no consensus (*Ris.* 65); all are agreed on this (*Tr. IV*, 260). But *qiyās* remains subordinate to, and is weaker than, these sources of law (*Ris.* 82); Shāfi'ī does not reckon it as one of the sources (*uṣūl*), but considers it derivative (*far'*) (*Tr. VII*, 274). It must be based on Koran, *sunna*, or consensus; it cannot supersede them and is in its turn superseded by them (*Tr. III*, 61 and *passim*). *Sunnas*, that is, traditions from the Prophet, are not subject to analogical reasoning, and their wording must not be interpreted away by *qiyās*.[5] Nothing that the Prophet has forbidden can be allowed by *qiyās* (*Tr. I*, 51). But Shāfi'ī uses *qiyās* in support of traditions,[6] and in *Ris.* 76 he says: 'Unquestioning submission to traditions (*ittibā'*) and *qiyās*

[1] On the meaning of this term, see below, p. 136.

[2] For another passage with a similar remark directed against *ra'y*, see above, p. 79.

[3] See above, p. 118.

[4] In *Tr. III*, 135, 146, Shāfi'ī uses the word *istiḥsān* for expressing his approval of an opinion, not in its technical meaning.

[5] Ibid., 11, 17; *Tr. V*, 262; *Ris.* 31. Only human opinions derived from traditions or themselves based on systematic reasoning are subject to it: *Ikh.* 339 (translated above, p. 13); *Tr. VIII*, 5 (translated above, p. 79 f.).

[6] *Tr. III*, 33; *Tr. IX*, 47.

are two separate aspects: the tradition is always followed unquestioningly, whether it agrees with *qiyās* or not; if it does not agree, *ittibā'* becomes the opposite of *qiyās*; there are also cases where one set of circumstances falls under both rules.'

Shāfi'ī gives the following example. The Prophet decided that the buyer can either keep a *muṣarrāt*, that is, an animal which the seller has not milked for some time before the sale so as to make its yield of milk appear greater, or return it together with one *ṣā'* of dates if he has milked it; he also gave the ruling that 'profit follows responsibility' (*al-kharāj bil-ḍamān*).[1] In cases to which this rule applies there is no [ideal] part of the price corresponding to the profit [which accrues after the sale in the possession of the buyer], and this rule is extended by *qiyās* to all parallel cases. In the case of the *muṣarrāt*, the decision of the Prophet is followed and not extended by *qiyās*, the Prophet having fixed the unknown quantity of milk in the animal, which has an [ideal] part of the price corresponding to it. Now if someone buys an animal which turns out to be a *muṣarrāt* and decides to keep it nevertheless, but after a month finds another hidden fault for which he decides to return it, he can do so, and the milk which has accrued to him during the month belongs to him according to the rule of *al-kharāj bil-ḍamān*; but he must also give one *ṣā'* of dates for the milk which was in the *muṣarrāt* [at the time of sale]. This detail is decided according to the tradition, and the ownership of the milk which has accrued during the month by analogy with the general rule.

Qiyās is, however, used as a criterion for choosing between conflicting traditions.[2] Moreover, in *Tr. III*, 23, Shāfi'ī confirms by analogical reasoning his rejection of a tradition, although he does not call his argument *qiyās* but 'the decisive proof in our opinion' (*al-ḥujja al-thābita 'indanā*). These are survivals of the earlier use of systematic reasoning for criticizing traditions.[3]

The consensus of the Muslims decides which *qiyās* is right and which is wrong (*Ris.* 72). The consensus supersedes an analogy based on a tradition from the Prophet (*Tr. III*, 129).[4] But *qiyās* supersedes the 'practice' which may have been introduced only by some Successor (*Tr. VIII*, 14).

Shāfi'ī's most important methodical rule regarding the use of

[1] See below, p. 181.

[2] See above, p. 14, and *Tr. I*, 115; *Ikh.* 96, 98, 220.

[3] See above, p. 121.

[4] This is what Shāfi'ī says; in fact, he goes even farther and follows the implication of the consensus as against the implication of the tradition.

qiyās is that a *qiyās* cannot be based on a special case which constitutes an exception from a general rule; in other words, that exceptions cannot be extended by analogy.[1] This rule is valid within the sphere of the *sunna* of the Prophet, and between Koran and *sunna* (*Ris.* 75). It is also valid as regards consensus: a decision of an exceptional and unsystematic character, sanctioned by consensus, must not be extended by analogy beyond its original field; but within this, *qiyās* may be used (ibid. 81). The necessary corollary is that an exemption from a general rule must be based on incontrovertible proof (*Ikh.* 256). Shāfi'ī formulates the principle underlying his rule as: 'Legal institutions must not be treated by analogy with one another' (*lā tuqās sharī'a 'alā sharī'a*) (*Tr. III*, 34).

Qiyās is used on questions of detail, which are the concern of specialists only (*Ris.* 50). It is the opposite of *istiḥsān* because it is based on indications (*dalā'il*) and parallels (*mithāl*), and it is comparable to the opinions of experts on questions of fact (*Tr. VII*, 272 f.). But being subject to differences of opinion it does not convey certainty (*iḥāṭa*) (*Tr. IV*, 255). Shāfi'ī recognizes its limits, in opposition to the *ahl al-kalām* (*Tr. I*, 122), and no further *qiyās* can be based on the result of a *qiyās* (ibid. 51).

A particular kind of *qiyās* is represented by conclusions *a potiori*[2] and by conclusions *a maiore ad minus* or, conversely, *a minore ad maius*. Shāfi'ī gives the theory in *Ris.* 70 f.: 'The strongest kind of *qiyās* is the deduction, from the prohibition of a small quantity, of the equally strong or stronger prohibition of a great quantity; from the commendation of a small act of piety, of the presumably stronger commendation of a greater act of piety; from the permission of a great quantity, of the presumably even more unqualified permission of a smaller quantity. . . . Some scholars do not call this *qiyās*, but consider it to fall under the original ruling, and likewise when something is equivalent to (*fī ma'nā* . . .) something allowed or forbidden, so that it is also allowed or forbidden; they reserve the term *qiyās* for cases where there is a possible parallel which can be construed in two ways, one of which is chosen to the exclusion

[1] *Tr. I*, 12 (translated below, pp. 326 f.), 215 (at the end of § 216), 253 (Shāfi'ī shows by brilliant systematic reasoning why *qiyās* cannot be used here); *Ris.* 73, 76, &c.

[2] *Tr. I*, 138; *Tr. III*, 36 (*aulā*), 48 (*adkhal fī ma'nā* . . .).

of the other. Others regard everything that goes beyond the explicit text of Koran and *sunna* and is only its equivalent as *qiyās*.' Shāfi'ī considers the conclusion *a maiore ad minus* 'a binding rule of *qiyās*' (*Tr. VIII*, 12), but in most cases where he draws it he does not call it by this name.

The element common to the original and to the parallel case on which a *qiyās* is based Shāfi'ī calls either informally *ma'nā* 'idea',[1] or more technically *aṣl* 'basis';[2] he does not use the later term *'illa*. In the case of organs of the body, this common element is supplied by their common names; for example, the common name 'lip' justifies the award of the same compensation for injuries to the upper and to the lower lip, and Shāfi'ī states explicitly that 'the weregeld is based on names and not on the degree of usefulness'.[3] But in another case he avoids reasoning 'based on the similarity of names', because it would lead him into a dilemma.[4] If a ruling covering two species of a genus is to be extended, by analogy, to another species, it ought to be extended consistently to all species of that genus, or not at all (*Ris.* 27). The substitute (*badal*) must be treated in analogy with its original (*mubaddal 'anhu*) (*Ikh.* 97).

As a general safeguard against arbitrariness Shāfi'ī insists that analogy must start from the outward and obvious meaning (*ẓāhir*) of the passages on which it is based. This consideration, which corresponds to Shāfi'ī's rule of interpreting traditions according to their outward meaning,[5] occurs in numerous passages, and is set forth in detail in the first part of *Tr. VII* (pp. 267–70).[6] The whole of law, Shāfi'ī points out, is concerned with the *forum externum*; he proves this from passages in the Koran and from traditions from the Prophet, and gives examples.[7]

We have noticed cases where Shāfi'ī's *qiyās* falls short of his own

[1] *Ris.* 8, 31, 76. [2] *Ikh.* 320.

[3] *Tr. VIII*, 7, 9, 10. The theory, later ascribed to Shāfi'ī, that the *qiyās* must be based [exclusively] on names (Aghnides, 86 f.), is not borne out by the texts.

[4] *Tr. VIII*, 9 (at the end). [5] See above, p. 56.

[6] *Fihrist*, 210, mentions among Shāfi'ī's writings a *Kitāb al-ḥukm bil-ẓāhir* (l. 28) and a *Kitāb ibṭāl al-istiḥsān* (l. 29). It is likely that these two titles correspond to the two parts of *Tr. VII*, the whole of which is called *Kitāb ibṭāl al-istiḥsān* in the printed edition.

[7] Shāfi'ī's argument is not as inconclusive as it seems, because Muhammadan law does not distinguish on principle between the finding of general rules and the decision of individual cases.

theoretical requirements.[1] Another case, which was, however, eliminated by Shāfi'ī in his later doctrine, occurs in *Tr. I*, 98. There was an ancient common tendency to apply the *ḥadd* punishment for drinking wine only if the culprit was taken *flagrante delicto*, that is, in a state of drunkenness. This was the doctrine of Ibn Abī Lailā. Abū Ḥanīfa, followed by Abū Yūsuf, extended this principle by analogy to all *ḥadd* punishments, which according to him lapse after a short period of prescription. Shāfi'ī did not admit this principle, which conflicted with the system, but he made allowances for the common tendency by letting all *ḥadd* punishments lapse through intervening repentance (*tauba*), by analogy with the Koranic ruling on banditry (Koran v. 34). This is an analogy based on an exceptional case. In his later opinion, however, as related by Rabī', Shāfi'ī ruled that repentance had no effect on the *ḥadd* punishment (excepting, of course, the particular case of Koran v. 34), and found this decision implied in traditions from the Prophet.

Qiyās often means not a strict analogy, but consistent systematic reasoning in a broader sense, as in *Tr. I*, 123, 133, 184, 200, and often.

Shāfi'ī and istiṣḥāb

Istiṣḥāb is the conclusion by which one 'attaches' a later stage to a former—in other words, one does not presume any changes in the legal situation unless they are proved for certain. Shāfi'ī applies this principle in *Umm*, iv. 170 without, however, using the term *istiṣḥāb*; he obviously regards it as part of *qiyās* and 'reason' (*ma'qūl*).

Shāfi'ī and 'aql, ma'qūl

Shāfi'ī often refers to *'aql* 'reason' or *ma'qūl* 'what is reasonable', sometimes as a synonym of *qiyās*, as in *Tr. I*, 160, and in the numerous cases where he speaks of *qiyās* and *'aql* or *qiyās* and *ma'qūl*, sometimes in a broader meaning, implying that a doctrine is consistent and stands to reason.[2] So *ma'qūl* can be opposed to *qiyās* proper (ibid. 121), or be used to show that there is no place for *qiyās* (ibid. 253).[3] *Ijtihād* must be exercised by *'aql* (*Ris.* 5); Allah has endowed mankind with *'aql* and guides them either by an explicit text or by indications on which to base their *ijtihād* (ibid. 69).

[1] See above, pp. 111, 123.

[2] e.g. *Tr. I*, 73; *Tr. III*, 44; *Tr. VII*, 272; *Tr. VIII*, 21; *Tr. IX*, 16; *Ris.* 79; *Ikh.* 113, 222, 234 (*al-ma'rūf fil-ma'qūl*, 'what agrees with the wider systematic implications').

[3] Naubakhti, *Firaq*, 7, opposes *ijtihād al-ra'y* to *'aql*.

Shāfi'ī and ijtihād

'The use of *qiyās* is *ijtihād*' (*Tr. VII*, 272 f.); or even: '*Qiyās* and *ijtihād* are two terms with the same meaning; on all problems which confront the Muslim there is either a binding decision or an indication of the right solution; this must be sought by *ijtihād*, and *ijtihād* is *qiyās*' (*Ris.* 66). *Ijtihād* is the preliminary of *qiyās*, and opposed to arbitrary *istiḥsān* (*Tr. IV*, 253). It implies reasoning, is based on indications, and excludes following one's own whims and preferences (*Tr. VII*, 274 f.). It is obligatory, and in exercising it one obeys Allah's commands (*Ris.* 5). It is obvious that Shāfi'ī opposes his *ijtihād* of *qiyās* to the Iraqian *ijtihād al-ra'y*,[1] and in *Tr. III*, 61, he also rejects the Medinese idea of *ijtihād* or discretion.[2]

Shāfi'ī gives his detailed theory of *ijtihād*, which is in many respects similar to that of *qiyās*, in the two main passages, *Tr. IV*, 253 f., and *Tr. VII*, 272 ff. The decisions on those points on which there exists no text in the Koran, no *sunna*, and no consensus, and on which a conclusion by analogy must be drawn from Koran or *sunna*, are also covered by the general authority of Allah, because *ijtihād* is vouchsafed by Koran and *sunna*. The Koran authorizes *ijtihād* when it prescribes finding the direction of the Ka'ba from the indications given by the stars, &c. (Koran ii. 144, in conjunction with vi. 97; xvi. 16), but not arbitrarily, or verifying the good character of witnesses from outward criteria (Koran ii. 282, in conjunction with lxv. 2), without regard to their hidden character.[3] The *sunna* authorizes *ijtihād* in the traditions on the Prophet and Mu'ādh,[4] and on the single and double reward of the *mujtahid*.[5] No one may give an opinion on law except by *ijtihād*, that is, *qiyās* as opposed to *ra'y* or *istiḥsān*, and he who is not qualified by the knowledge of Koran, traditions, and consensus, on which he must base his *ijtihād*, has no right to an opinion. The parallel of the opinions of experts on questions of fact[6] applies to *ijtihād* as well as to *qiyās*. It is agreed that in the former generations judges gave judgments and muftis decisions on points on which there was

[1] See above, p. 105.
[2] See above, p. 116.
[3] This argument is far-fetched, as the Koranic passages refer to material decisions; but see above, p. 125, n. 7.
[4] See above, pp. 105 f.
[5] See above, pp. 96 f.
[6] See above, p. 121.

no text in the Koran and no *sunna*, and they must have arrived at them by *ijtihād*.

Ijtihād leads to disagreement.[1] Because of the tradition on the single or double reward of the *mujtahid*, every *mujtahid* who has done his best to arrive at the correct solution is considered to be right, in so far as he has discharged his obligation, even if the result of his *ijtihād* is wrong.[2]

F. The Mu'tazila

The *ahl al-kalām*, that is, the Mu'tazila,[3] base their whole doctrine on reasoning (*naẓar*) and *qiyās*, aiming at consistency. They hold that *qiyās* and *naẓar* lead to truth, and consider themselves as particularly adept in their use.[4]

The names by which Shāfi'ī and Ibn Qutaiba call them, *ahl al-kalām* and *ahl al-naẓar* or *ahl al-qiyās*, mean 'adherents of systematic reasoning, rationalists'. Shāfi'ī, in *Tr. I*, 122, reports their analogical reasoning on a question of law and refutes it. They reject traditions on account of *naẓar* and reason, and use *qiyās* as a basis for criticizing traditions.[5]

Naẓẓām sought to discredit the statements hostile to *qiyās* and *ra'y* which were ascribed to some Companions; he also blamed Ibn Mas'ūd for a decision based on an arbitrary assumption (ibid. 24 f.), and believed that the Companions committed mistakes in their fetwas when they followed their personal opinion (*ra'y*) (Khaiyāṭ, 98). The context of Ibn Qutaiba shows that this was meant to discredit the ancient schools of law whose main authorities were Companions, and was not directed against the use of systematic reasoning as such. Only Ibn Qutaiba, who upheld the case of the traditionists and opponents of human reasoning in law, and particularly Khaiyāṭ, who represented a later stage of the Mu'tazilite doctrine,[6] misrepresented Naẓẓām as wishing to exclude *ra'y* and *qiyās*.

G. The Traditionists

The traditionists[7] are hostile to all reasoning and try to rely exclusively on traditions. They do not refer anything in matters

[1] See above, p. 97.

[2] *Tr. IV*, 253; *Tr. VII*, 274 f.

[3] See below, p. 258.

[4] Ibn Qutaiba, 16, 20, 74, 76. Ibid. 17, they are charged with using *istiḥsān*, but this is polemical.

[5] Ibid., 104, 151, 182, and elsewhere.

[6] See below, p. 259.

[7] See below, p. 253.

of religion to *istiḥsān*, *qiyās*, or *naẓar* (Ibn Qutaiba, 103). They are weak in systematic reasoning, and Shāfi'ī charges them with wilful ignorance.[1] The following details on their doctrine are taken from Ibn Qutaiba.

Ibn Qutaiba spurns systematic reasoning (*qiyās* and *ḥujjat al-'aql*) even as an additional argument (p. 234). He concedes that *ra'y* on the details of law, on which there is no explicit enactment, is less important than the neglect of the Koran and of the traditions from the Prophet; but the right way to arrive at general rules, main duties, and *sunnas* is not by *qiyās* and human reasoning (p. 68). How can *qiyās* apply to the details when it does not agree with the principles (p. 70)? Ibn Qutaiba gives examples where *qiyās* does not apply (pp. 71 ff.). On the other hand, Ibn Qutaiba recognizes that the Companions used their discretion (*ẓann*, *ijtihād al-ra'y*) on questions which were not settled by the Koran and by traditions from the Prophet (p. 367), and he justifies this by saying that they were the leaders of the community (p. 30). Finally, he concedes that there are forbidden things which are prohibited neither in the Koran nor in the *sunna*, but for which man is left to his instinct (*fiṭra*) and his nature (p. 342 and elsewhere).

H. Traditions against Human Reasoning in Law

Goldziher has shown that *ra'y* meant originally 'sound opinion', as opposed to an arbitrary and irresponsible decision.[2] But since the activity it denoted was purely human and therefore fallible, it soon acquired, in polemics, the derogatory meaning of 'arbitrary opinion', particularly when it was opposed to the doctrine of the forebears and the *sunna* of the Prophet. We find this derogatory meaning present already in the dogmatic treatise ascribed to Ḥasan Baṣrī.[3] This does not prevent those who reproach their opponents with *ra'y* from using it themselves.

A further step is represented by the objection to *ra'y* and *qiyās* on principle, an objection which, as Goldziher has seen,[4] is secondary and posterior to their general use. The anecdotes

[1] *Ikh.* 323, 367 f. (quoted above, p. 56 f.). [2] *Ẓâhiriten*, 10.

[3] See above, p. 74. Ibn Muqaffa', *Ṣaḥāba*, 120, opposes *ra'y* to [authoritative] information (*khabar*).

[4] *Ẓâhiriten*, 13 ff.

expressing this objection, which have been collected by Goldziher, are clearly apocryphal and occur only in late sources. This attitude is typical of the traditionists, and the traditionists were also responsible for a whole body of traditions from the Prophet, from Companions, and from Successors, disparaging *ra'y* and *qiyās* and often opposing it to the *sunna* of the Prophet. The statements hostile to reasoning which they put into the mouth of old authorities of the ancient schools themselves, are certainly not authentic, and the Iraqian and Medinese *isnāds* affixed to them are spurious.

Traditions with Iraqian isnāds

One of the oldest traditions of this kind is an alleged saying of Shuraiḥ against *qiyās*, quoted above (p. 119). It is already known to Auzā'ī (*Tr. IX*, 50), and appears in Dārimī (*Bāb taghaiyur al-zamān*) with an *isnād* through the Iraqian Sha'bī, who adds a remark of his own against *qiyās*. But the doctrine connected with these statements contradicts the uniform opinion of the Iraqians (*Muw. Shaib.* 289; *Tr. VIII*, 7), and we must conclude that the names of Sha'bī and Shuraiḥ were borrowed by the traditionists.[1]

We saw that the *isnād* of the main tradition in favour of *ijtihād al-ra'y*, containing the instructions of the Prophet to Mu'ādh b. Jabal, is Iraqian, though fictitiously Syrian in its upper part.[2] A counter-tradition, the *isnād* of which is also (pseudo-)Iraqian in its lower and fictitiously Syrian in its upper part, replaces the recommendation of *ijtihād al-ra'y* by the order given to Mu'ādh to report to the Prophet in cases of doubt (Ibn Māja, *Bāb ijtināb al-ra'y wal-qiyās*).

Bukhārī (*Kitāb al-i'tiṣām bil-kitāb wal-sunna, Bāb mā yudhkar min dhamm al-ra'y*) gives a tradition with an Iraqian *isnād*, according to which Sahl b. Ḥunaif warns himself against *ra'y*, reminding himself of his own experience on the day of Ḥudaibiya during the lifetime of the Prophet, and applying it to his present situation on the day of Ṣiffīn. Here *ra'y* is identified with political disloyalty and made responsible for the civil wars in early Islam.

Dārimī (*Bāb al-tawarru' 'an al-jawāb*; *Bāb taghaiyur al-zamān*; *Bāb fī karāhiyat akhdh al-ra'y*) gives a number of traditions against *qiyās*, *ra'y*, and *ijtihād* from old Iraqian authorities, particularly Sha'bī. Others adduced are Ibn Mas'ūd, Masrūq, Ibrāhīm Nakha'ī, Ḥasan

[1] Shuraiḥ is also the recipient of alleged instructions from 'Umar which include *ijtihād al-ra'y* (see above, p. 104, n. 4); this is an authentically Iraqian tradition.

[2] Above, p. 106.

Baṣrī, Ibn Sīrīn, Qatāda. Some of these traditions presuppose the role of Ibn Mas'ūd and Ibrāhīm Nakha'ī as main authorities of the Iraqians; one in particular endeavours to minimize the doctrine which goes under the name of Ibrāhīm, by a self-deprecating statement which it puts into his mouth. The picture of Sha'bī as 'the strongest critic of *ra'y* and *qiyās* among the Iraqians' (Ibn Qutaiba, 69 f.) was created by the traditionists, but we find that Sha'bī occurs in the *isnāds* of traditions which ascribe early Iraqian *ra'y* and *qiyās* to Companions.[1]

A tradition with an Iraqian *isnād* which is extremely doubtful in all its links higher than Ibn 'Uyaina, makes 'Alī point out that reasoning by analogy has no place in a certain question of ritual (*Tr. II*, 2 (*a*)). This is a counter-move against the Iraqian traditions which ascribe *ra'y* and *qiyās* to 'Alī and other Companions.[2]

Traditions with Medinese (Meccan, Syrian) isnāds

See several of the traditions discussed above, pp. 54 f., 117 (on *Muw.* iv. 39), 119 (on 'Umar b. 'Abdal'azīz), and further:

Bukhārī (*Kitāb al-i'tiṣām bil-kitāb wal-sunna, Bāb mā yudhkar min dhamm al-ra'y*): 'Urwa b. Zubair connects *ra'y* with the time of ignoramuses after real scholars have become extinct.

Dārimī (*Bāb al-tawarru' 'an al-jawāb*): 'Urwa b. Zubair warns against *ra'y* and suspects foreign influence in it.

Dārimī (ibid.): a tradition the *isnād* of which in its lower, historical, part is typical of the traditionists (all men from the town of Raiy), ascribes to the Meccan scholar 'Aṭā' the saying: 'I should be ashamed before Allah if my *ra'y* were taken as a norm on earth.' This is not genuine because we find 'Aṭā' use both *qiyās* (*Tr. I*, 124) and *istiḥsān* (Ibn 'Abdalbarr, quoted in Zurqānī, i. 108).[3]

Dārimī (*Bāb mā yuttaqā min tafsīr ḥadīth al-nabī*): 'Umar b. 'Abdal-'azīz said in a sermon: 'There is no Prophet after ours, and no holy book after ours; what Allah has allowed or forbidden through our Prophet, remains so forever; I am not one who decides (*qāḍī*) but only one who carries out (*munfidh*), no innovator but a follower.' This tradition in the *isnād* of which occurs Mu'tamir b. Sulaimān, who was responsible for several traditions with a traditionist bias,[4] is directed

[1] See above, p. 104, on *Tr. II*, 12 (*a*), 18 (*w*); p. 108, on *Tr. III*, 54. On Sha'bī in general, see below, p. 230 f.

[2] See above, pp. 104, 106.

[3] This *istiḥsān* is a genuine old opinion, though not necessarily authentic for the scholars to whom it is ascribed. On 'Aṭā' in general, see below, p. 250 f.

[4] See above, p. 56.

against the old idea of *ijtihād*. The doctrine expressed here, with all its implications, became part of the classical theory of Muhammadan law, but only after the time of Shāfi'ī. Bukhārī separated *ijtihād* from its old connexion with *ra'y* and *qiyās*,[1] and Ibn Qutaiba, 19, 30, restricted the term *mujtahid* to the great scholars of the past who cannot be equalled, denying *ijtihād* to the contemporaries.

[1] *Kitāb al-i'tiṣām bil-kitāb wal-sunna, Bāb mā jā' fi-jtihād al-qaḍā' bimā anzal Allāh.*