THE ORIGINS OF Muhammadan Jurisprudence

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CHAPTER 6

SHĀFI'Ī'S REASONING

WE have seen in the first part of this book that Shāfi'ī's legal theory, and therefore also his positive legal doctrine, represent a ruthless systematic innovation, based on formal traditions from the Prophet as against the 'living tradition' of the ancient schools of law. Shāfi'ī's legal theory is much more logical and formally consistent than that of his predecessors whom he blames continually for what appears to him as a mass of inconsistencies. Explicit legal reasoning occupies a much more prominent place in Shāfi'ī's doctrine than in that of any of the earlier lawyers, even if we take differences of style and of literary form into account.[1]

The great progress in legal thought achieved by Shāfi'ī over his predecessors and contemporaries has become clear from many passages discussed in the preceding chapters; the following examples are intended to complete the picture, and also to illustrate those relatively few cases in which Shāfi'ī merely reproduces the thought of others, or those, still more exceptional, where he represents a regress in reasoning.

Tr. I, 2: Shāfi'ī shows himself strictly consistent and rejects an allowance for *vis maior* which Abū Yūsuf had made (above, p. 112); one of the two possible consistent opinions leads to a systematic difficulty, Shāfi'ī therefore eliminates it and chooses the other.

Tr. I, 32, 62, 71, 194, 237: Shāfi'ī introduces important distinctions into the discussion for the first time.

Tr. I, 44: An argument which Sarakhsī (v. 78) attributes to Shaibānī is superior to Shāfi'ī's reasoning (above, p. 271).

Tr. I, 75: Shāfi'ī has nothing substantial to add to Ibn Abī Laylā's argument, but deepens the reasoning appreciably.

Tr. I, 78, 124, 147, 152, 212, 215, 222, 226: Shāfi'ī arrives at full systematic consistency for the first time.

Tr. I, 97: Shāfi'ī agrees essentially with Abū Ḥanīfa, but introduces a relevant refinement of procedure.

Tr. I, 107=110: Shāfi'ī gives sound systematic reasoning against Ibn Abī Laylā and agrees himself, by implication, with Abū Ḥanīfa; but his reasoning is more penetrating than that of Abū Ḥanīfa.

[1] Cf. Bergsträsser's remark in *Islam*, xiv. 76.

Tr. I, 123: Shāfi'ī shows judicious appreciation of broader systematic consistency; he returns to the doctrine of Ibn Abī Lailā, but with better reasons, and gives two good parallels.

Tr. II, 11 (*b*): Shāfi'ī reproduces almost literally Shaibānī's argument from *Āthār Shaib.* 69.

Tr. III, 53: Shāfi'ī's doctrine, but not his argument, is anticipated by Shaibānī in *Muw. Shaib.* 244.

Tr. III, 57: Shāfi'ī's reasoning is anticipated in all its details by Shaibānī in *Muw. Shaib.* 357.

Tr. III, 74: See above, p. 306.

Tr. III, 102: Shāfi'ī is anticipated by Shaibānī in *Muw. Shaib.* 330 (above, p. 308).

Tr. VIII, 4: It is evident from Shaibānī's and Shāfi'ī's arguments that both the Kufians and the Medinese hold that the minor and the idiot are incapable of criminal intent (*'amd*), and their voluntary unlawful acts are therefore technically accidental (*khaṭa'*);[1] Mālik (*Mud.* xvi. 199) states in fact that the *'amd* and the *khaṭa'*, the [seemingly] intentional and unintentional acts, of the minor and the idiot are [technically] all *khaṭa'*. Compared with this sound common ancient doctrine, Shāfi'ī's distinction of real *'amd* and *khaṭa'* in the acts of the minor cannot, from the premisses of Muhammadan law, be considered an improvement; that this distinction is in fact arbitrary appears from *Mud.* xvi. 203 where Ibn Qāsim, presumably in order to escape from Shaibānī's systematic arguments, postulates a *khaṭa'* proper in the minor, but calls this doctrine his *ra'y* and *istiḥsān*.

Tr. VIII, 11: Shāfi'ī expresses his thought clumsily; Shaibānī is much clearer.

Tr. VIII, 12: Shāfi'ī's systematic reasoning is more thorough than Shaibānī's, but Shāfi'ī expresses it clumsily.

Tr. VIII, 14, 16: Shāfi'ī adopts and elaborates part of Shaibānī's systematic arguments against the Medinese, although in each case he diverges from both ancient schools.

Tr. VIII, 18: Shāfi'ī has nothing new to add to the Iraqian doctrine as ascribed to Ibrāhīm Nakha'ī and modified by Shaibānī (*Āthār Shaib.* 84), apart from a charge of inconsistency in the use of traditions, directed against Shaibānī.

Tr. VIII, 19: Shāfi'ī gives the same kind of reasoning as Shaibānī, but improves it considerably by good additional arguments; on another issue he reduces Shaibānī, and by implication Mālik, *ad absurdum*.

[1] See above, p. 308 f.

Tr. VIII, 20: Shāfi'ī's systematic reasoning is superior to that of Shaibānī.

Tr. IX, 1: Shāfi'ī points out the inconsistent and unsatisfactory character of Abū Yūsuf's doctrine; his criticisms are not always well-founded, and he too has to wind his way rather arbitrarily through a maze of conflicting traditions; but on the whole his reasoning is sound and superior to that of Abū Yūsuf.

Tr. IX, 18: Shāfi'ī shows disciplined and consistent systematic reasoning, against the solutions of his predecessors which are ruled by expediency and practical considerations. In §§ 16 and 17, too, Shāfi'ī's opinions are systematically more consistent than those of his predecessors.

Tr. IX, 20: Shāfi'ī merely borrows and repeats the reasoning of Abū Ḥanīfa (loc. cit. and Ṭabarī, 34) and Shaibānī (*Siyar*, i. 244).

Tr. IX, 23: Shāfi'ī introduces a broader systematic aspect.

Tr. IX, 26: Shāfi'ī keeps aloof both from Auzā'ī and from Abū Yūsuf, and his legal thought is superior, particularly to that of Auzā'ī.

Tr. IX, 27: Shāfi'ī is systematic and consistent and cuts across the former division of doctrines; he is less technically legal than Abū Ḥanīfa, but combines Islamicizing and systematizing; his reasoning is superior to that of his predecessors, particularly to that of Auzā'ī.

Tr. IX, 28: Shāfi'ī is anticipated partly by Mālik (Ṭabarī, 82) and to a greater extent by Shaibānī (*Siyar*, i. 35); see further below, p. 319.

Tr. IX, 39: Shāfi'ī gives better systematic reasoning than Abū Yūsuf, but exaggerates on a detail. In § 45 Shāfi'ī turns the argument, which Abū Yūsuf uses against Auzā'ī, against Abū Yūsuf himself, but neither reasoning is very convincing.

Tr. IX, 48: Compared with the ancient Iraqians (cf. Sarakhsī, x. 66), Shāfi'ī shows less of technically legal reasoning and more of Islamicizing combined with systematizing.

When Shāfi'ī wrote, the process of Islamicizing the law, of impregnating it with religious and ethical ideas, a process which we have discussed in an earlier chapter,[1] had been essentially completed. We therefore find Shāfi'ī hardly ever influenced in his conscious legal thought by material considerations of a religious and ethical kind, which played an important role in the doctrines of Auzā'ī, Ibn Abī Lailā, Abū Ḥanīfa, and Mālik.[2] We also find him more consistent than his predecessors in

[1] Above, pp. 283 ff.

[2] See above, pp. 288 f., 291 f., 295, 312 f.

separating the moral and the legal aspects, whenever both arise with regard to the same problem.[1] On the other hand, Shāfi'ī's fundamental dependence on formal traditions from the Prophet implies a different formal way of Islamicizing the legal doctrine. We have seen that Shāfi'ī in his legal theory distinguishes sharply between the argument taken from traditions and the result of systematic thought.[2] In his actual reasoning, however, both aspects are closely interwoven, Shāfi'ī shows himself tradition-bound and systematic at the same time, and we may consider this new synthesis typical of his legal thought. We have already noticed cases in which Shāfi'ī's reasoning is Islamicizing, and at the same time systematizing rather than technically legal, and the following examples will give additional evidence of the intimate connexion of the two aspects.

Tr. I, 15: In Shāfi'ī's reasoning traditional and systematic considerations become blended for the first time; he makes an exception from a general rule on account of the *sunna* of the Prophet in favour of the validity of a stipulated manumission, and at the same time establishes systematically the exceptional character of manumission itself.

Tr. I, 133: Shāfi'ī's *qiyās* is better than that of Abū Yūsuf, but essentially Shāfi'ī's doctrine is based on traditions as appears from *Ikh.* 368 ff., particularly 383 ff.

Tr. I, 167: See above, p. 285.

Tr. I, 193: Shāfi'ī combines an argument drawn from a tradition with systematic reasoning.

Tr. III, 48: Shāfi'ī interprets a tradition from the Prophet strictly and consistently, and at the same time gives a general systematic argument and excellent technical reasoning against a Medinese concession to commercial practice.

Tr. VI, 266: Shāfi'ī gives technical legal reasons, besides the argument drawn from consensus, on several problems; see also below, p. 324.

Tr. IX, 19: Shāfi'ī is the first to base his doctrine on traditions; he shows the weak point in Abū Yūsuf's reasoning and introduces a distinction; he creates a consistent theoretical structure for his tradition-bound doctrine, without paying regard to the inconclusive material considerations and to the practice on which Abū Ḥanīfa and Abū Yūsuf on one side, and Auzā'ī on the other, were still dependent.

[1] See above, pp. 125, 178, 284 (on *Tr. I*, 28), 286 (on *Tr. I*, 201).

[2] See above, pp. 122 f., 135 f.

Tr. IX, 21: Shāfi'ī shows the weak point in Abū Yūsuf's argument and combines dependence on traditions with good systematic reasoning, introducing a distinction between two separate legal aspects; he himself takes a moderate, intermediate line between Auzā'ī on one side, and Abū Ḥanīfa and Abū Yūsuf on the other.

Tr. IX, 22: Shāfi'ī applies systematic reasoning to the prima-facie meaning of traditions; his argument is less formal and less technically legal than that of Abū Yūsuf; in the reasoning of Abu Yūsuf the traditional and the systematic elements were still felt to be separate and opposed to each other, but in Shāfi'ī's thought they are intimately combined.

Tr. IX, 28: Although partly anticipated by his predecessors (above, p. 317), Shāfi'ī develops a new, systematic and at the same time tradition-bound doctrine, introducing a legal distinction for the first time; he is more consistent than either the Medinese or the Iraqians, but does not himself achieve full systematic consistency either, because he remains partly influenced by a tradition from Abū Bakr;[1] the many references to the problem in Shāfi'ī's writings (cf. *Tr. III*, 65 and *Umm*, iv. 66, 161 f., 174 ff., 199) show that he must have considered this decision important.

Tr. IX, 33: See above, p. 286.

Ikh. 182 ff.: Common sense, though not very stringent reasoning by which Shāfi'ī, with considerable doubt, tries to reconcile a harmonizing interpretation of traditions with systematic tidiness.

Ikh. 219 f.: Shāfi'ī would prefer one of two contradictory traditions because it agrees with systematic analogy and with the generally held opinion, provided it were well authenticated;[2] as it is not, he is obliged to follow the well-attested tradition to the contrary, and in order to make it more acceptable he gives some systematic reasoning, though vague and unconvincing, in its favour.

Ikh. 331: Shāfi'ī does not succeed in harmonizing and rationalizing the contradictory traditions completely.

Ikh. 364: Shāfi'ī combines deference to the *sunna* of the Prophet with systematic reasoning.

Ris. 76: Shāfi'ī tries to rationalize irrational traditions but has to acknowledge that systematic reasoning sometimes breaks down over systematically irregular traditions; this shows how strong his urge to systematize is.

Umm, iv. 170: Shāfi'ī's systematic reasoning is closely interwoven with his dependence on the *sunna* as expressed in traditions from the Prophet.

[1] See above, p. 19 f., on Shāfi'ī's doctrine regarding conflicts between analogy and traditions from Companions.

[2] Cf. above, p. 14, n. 1.

Shāfi'ī's systematic reasoning has its limitations. We have noticed that it breaks down occasionally over irrational traditions which cannot be systematized and which Shāfi'ī feels himself nevertheless bound to follow. In other cases we find that the very institutions which Shāfi'ī discusses, defy rationalizing.

Tr. I, 88: Shāfi'ī, in an excellently reasoned argument, charges Abū Ḥanīfa and Abū Yūsuf with inconsistency and arbitrariness; but within the framework of Muhammadan law the doctrine of Abū Ḥanīfa and his followers on the acts of a person during his mortal illness is consistent enough, and the argument in its favour given by Sarakhsī, xviii. 26 f., is impressive; the whole idea is inconsistent in itself, and this detracts from Shāfi'ī's argument.

Tr. III, 44: Shāfi'ī shows himself strictly consistent and definitely superior to Ibn Qāsim (*Mud.* iv. 147); he only overlooks the fact that a choice is often given in Muhammadan law in comparable circumstances without the enforcement of the logical alternative which he presses home ruthlessly; his systematic reasoning is too uncompromising for the legal material as he found it.

Tr. VIII, 3: Shāfi'ī is more consistent than the Medinese, but shows himself sophistical and hair-splitting in his argument against Shaibānī; his urge towards systematic consistency breaks down over the irrational character of the traditional doctrine.

Tr. VIII, 6: See below, p. 324.

Ikh. 44: Shāfi'ī draws a specious parallel between the fact that some fornicators are not flogged [but lapidated], and the fact that some thieves do not have their hands cut off [if they steal less than the minimum value which makes the *ḥadd* punishment applicable]; his systematic reasoning breaks down.

Ikh. 356: Shāfi'ī is hard put to it to invalidate a serious systematic objection of his Iraqian opponent; he tries to rationalize the irrational.

Apart from these natural limitations of Shāfi'ī's systematic reasoning by the material to which he was bound, it is rare to find him systematically inconsistent or reasoning loosely. We have seen that he recognized, in the final stage of his doctrine, only analogy and strict systematic reasoning, to the exclusion of *ra'y* and *istiḥsān*, and regarded this even as a religious duty.[1] It is exceptional for a material consideration to interfere with Shāfi'ī's consistent legal thought.[2] It took him time, of course,

[1] See above, pp. 120 ff.

[2] e.g. in *Umm*, iv. 184, containing Shāfi'ī's own decision on the problem dis-

to realize the full implications of his principles[1] and to work out all consequences of his doctrine,[2] and there remain imperfections where he falls short of his own theoretical requirements.[3]

More serious are the faults in Shāfi'ī's reasoning which come from his polemical attitude towards the ancient schools of law, an attitude which in the case of the Medinese is mitigated by his sentimental attachment to them, but in the case of the Iraqians is allowed full scope.[4] Shāfi'ī's eagerness to prove his new legal theory and the new legal doctrine based on it as the only legitimate interpretation of Muhammadan religious law, causes him to make unjustified assumptions, to argue arbitrarily and illogically, and to misrepresent and exaggerate the opinions of his opponents.[5] A relatively harmless manifestation of this tendency is Shāfi'ī's debating device of representing his theoretical innovations as implicitly shared by his opponents, and then blaming them for not applying their own alleged principles.[6] But beyond this, there are numerous cases in which Shāfi'ī's lack of objectivity vitiates his arguments, and of which the following list contains only a few typical examples.

Tr. I, 109: Shāfi'ī's systematic reasoning is consistent and ingenious enough, but he fails to appreciate the point of the argument of the Iraqians.

Tr. II, passim: Shāfi'ī tries artificially to find contradictions between the Iraqian doctrine and the Iraqian traditional authorities 'Alī and Ibn Mas'ūd; he often misrepresents the Iraqian doctrine, for instance in § 9 (*f*), cf. *Āthār Shaib.* 105; in § 11 (*k*), cf. *Muw. Shaib.* 385; in § 19 (*k*), cf. *Āthār Shaib.* 28 ff.; in § 19 (*l*), cf. *Āthār Shaib.* 33.

Tr. III: Shāfi'ī often misrepresents the Medinese doctrine, for instance in § 35, cf. *Muw.* ii. 185; in § 40, cf. *Muw.* ii. 154; in § 52, cf. *Muw.* ii. 68; in § 56, cf. *Muw.* iii. 89; in § 82, cf. *Muw.* iii. 56; in § 86, cf. *Muw.* ii. 212; in § 103, cf. *Muw.* ii. 243; in § 113, cf. *Muw.* i. 75; in § 117, cf. *Mud.* i. 172; in § 118, cf. *Muw.* i. 269; in § 125, cf. *Muw.* i. 126, 197; in § 127, cf. *Mud.* i. 74; in § 131, cf. *Muw.* ii. 230; in § 134, cf. *Muw.* ii. 171.

cussed in *Tr. IX*, 15, where Shāfi'ī makes a concession to the practice in the style of Auzā'ī, though he is sounder than his predecessor.

[1] See above, pp. 20 f., 79 f., 88 ff., 120 ff.

[2] See above, pp. 125 f., 281 f.

[3] See above, pp. 11 f., 15, 18, 38.

[4] See above, p. 9 f.

[5] But Shāfi'ī himself says disarmingly in *Tr. IV*, 256: 'There is no one in the world who judges objectively.'

[6] See above, pp. 11, 52, 87.

Tr. III, 65: Shāfi'ī fails to understand the Medinese method of arguing; both parties talk at cross-purposes.

Tr. III, 98: Shāfi'ī gives strict systematic reasoning but does not meet the point of Mālik's argument; he seems wilfully ignorant of Mālik's reasoning as implied by *Muw.* iii. 37, which is sound and consistent as far as it goes.

Tr. III, 111: Shāfi'ī uses a specious argument which would apply equally to his own doctrine; he seems unwilling to understand the idea of 'recommended' (cf. *Mud.* ii. 159) which, though not expressed in a fixed terminology, was not unknown in his time.[1]

Tr. III, 148 (p. 248): See above, p. 314.

Tr. III, 148 (p. 249): Shāfi'ī, without regard for the context, treats a number of examples given by Mālik (*Muw.* i. 49) as if it were an exhaustive list.

Tr. VIII, 1: Shāfi'ī draws irrelevancies into his otherwise sound argument against Shaibānī.

Tr. VIII, 4: Shāfi'ī succeeds in disposing of most of Shaibānī's systematic arguments,[2] but his own arguments against Shaibānī are mostly sophistical and unconvincing, and some are mutually exclusive; Shāfi'ī's opinion represents a technical regress from the common ancient doctrine.[3]

Tr. VIII, 13: See below, p. 324.

Tr. IX, 2: Shāfi'ī exaggerates in drawing unjustified conclusions from Abū Yūsuf's doctrine.

Tr. IX, 15: Shāfi'ī shows himself prejudiced against Abū Yūsuf, and does not succeed in defending Auzā'ī which he declares to be his object; his own doctrine (*Umm*, iv. 184) agrees in the essentials and in many details with that of Abū Ḥanīfa and Abū Yūsuf; even Shāfi'ī does not arrive at complete consistency.

Tr. IX, 16: Shāfi'ī shows himself prejudiced against the Iraqian doctrine which agrees more naturally than his own with an historical tradition from the Prophet; he has to explain away the resulting difficulty in an artificial manner (*Umm*, iv. 184).

Ikh. 278 ff.: See below, p. 325.

Ikh. 329 f.: Shāfi'ī uses two mutually exclusive arguments as part of the same reasoning against the same Iraqian opponent.

Ikh. 337: Shāfi'ī tries to minimize the correct statement of his Iraqian opponent that a tradition is not followed by the scholars in Iraq and Hijaz, by asking: 'What of the other muftis in the several countries whose opinions you do not know:[4] may I presume, holding the best possible opinion of them, that they agree with the tradition

[1] See above, p. 134 f. [2] See above, p. 308 f. [3] See above, p. 316.
[4] Shāfi'ī does not know them either.

from the Prophet?' It is easy to see how helpless the opponents must have been when faced by Shāfi'ī's insidious arguments and unwarranted assumptions.

Most of the faults in Shāfi'ī's reasoning can be traced to this particular cause, or to the main thesis of his new legal theory, that is to say, to his dependence on traditions from the Prophet. This dependence which makes it impossible for Shāfi'ī to reject straightforwardly any tradition from the Prophet without the authority of another tradition from the Prophet to the contrary, and this only under strict safeguards,[1] is responsible for many bad arguments and arbitrary interpretations. Here again, I can give only a few examples which lend themselves to short comment.

Tr. III, 7: The distinction by which Shāfi'ī seeks to harmonize between two traditions goes directly against their wording; Shāfi'ī finds his distinction confirmed by the relative chronology of the two traditions, and he rules out repeal.

Tr. III, 16: Shāfi'ī draws an unwarranted conclusion from the text of a tradition, and even claims it as its obvious meaning; he has no reply to the arguments of the opponents; his unwarranted conclusion corresponds in fact to the doctrine of traditions from Companions (*Mud.* xiii. 48).

Tr. IX, 44: Shāfi'ī interprets a tradition arbitrarily, so as to make it relevant to his problem.

Ris. 33: Shāfi'ī reasons arbitrarily and unconvincingly in favour of his theory that the *sunna* never contradicts but only explains the Koran.[2]

Ikh.: A treatise of late composition but containing early passages; it has numerous examples of faulty reasoning which can be attributed to the various causes discussed so far. On pp. 166 ff., in an early passage, Shāfi'ī argues in the style of the ancient schools, acts against his own principles, and minimizes traditions that go against his doctrine in a very prejudiced and arbitrary manner; he can adduce no tradition from the Prophet in favour of his own doctrine, and gives only far-fetched conclusions; the context shows that he chose his doctrine because of the systematic difficulties of the opposite opinion, and that his technical legal thought caused him to interpret traditions arbitrarily. On pp. 244 ff., in another early passage in which Shāfi'ī uses the old idea of consensus,[3] his interpretation of traditions is equally arbitrary and unconvincing, and at variance with his own methodical requirements; in this case it is a major

[1] See above, p. 13 ff. [2] See above, p. 15 f.. [3] See above, p. 93.

point of penal law in which Shāfi'ī obviously did not wish to diverge from the majority. On p. 300, where Shāfi'ī criticizes Mālik (above, p. 313), he combines superior systematic reasoning with unwarranted and unnecessary assumptions.

Typical features of Shāfi'ī's thought are sound philological distinctions and linguistic arguments.[1]

The limitations and faults of Shāfi'ī's reasoning cannot detract from the unprecedentedly high quality of his technical legal thought which stands out beyond doubt as the highest individual achievement in Muhammadan jurisprudence. In order to convey an adequate picture of the extent and character of this achievement, I shall give a list, which could easily be extended, of passages in which Shāfi'ī's thought appears particularly brilliant, and illustrate it by the translation in full of a few selected examples.

Tr. I, 129, 138, 150, 184, 195 (cf. Sarakhsī, xxvii. 28), 196, 210, 215 (at the end of 216), 234, 245, 247, 253.

Tr. III, 31, 34, 52, 89, 141, 142, 143.

Tr. VI, 266: A beautiful piece of systematic reasoning on the interplay of religious and legal valuation.

Tr. VII, 273: Two impressive pieces of systematic reasoning in favour of *qiyās* as against *istiḥsān*.[2]

Tr. VIII, 6: Masterly systematic reasoning; already in this early treatise Shāfi'ī claims to be more consistent in his systematic thought (*qiyās*) than Shaibānī; in fact, both try to rationalize a traditional ruling which defies rationalizing.

Tr. VIII, 13: Excellent systematic arguments against the Iraqians, but combined with a cheap debating device at the end; compare the later parallel passage *Ikh.* 389 ff. (see below).

Tr. IX, 5. 25, 40.

Umm, iv. 170 ff.: This section contains at the end sound reasoning on broader systematic issues and parallels.

Umm, vii. 34: Although Shāfi'ī merely follows the Medinese doctrine (*Muw.* iii. 183), his technical legal thought is of a high standard.

Umm, vii. 394 (and, more shortly, ibid. 405): Excellently reasoned

[1] *Tr. III*, 12, 36 (above, p. 144), 91, 141; *Tr. VIII*, 20; *Tr. IX*, 3 (anticipated by Mālik), 25 (better than Abū Yūsuf); *Ikh.* 93 (a linguistic basis for a systematic argument, not necessarily inherent in the problem; Ṭaḥāwī, i. 32 ff., takes over and elaborates the rest of Shāfi'ī's argument, but does not reproduce the linguistic part).—On the other hand, Shāfi'ī in *Tr. III*, 140, ignores a sound philological interpretation given by Mālik.

[2] See above, p. 121.

against a somewhat confused distinction of Mālik (Zurqānī, iii. 256, 265).

Ikh. 73: A clear and vigorous argument, decidedly superior to Ṭaḥāwī's far-fetched counter-argument (i. 241) and to Zurqānī's scholastic reasoning (i. 264).

Ikh. 278 ff.: A masterly discussion with an Iraqian opponent; Shāfi'ī makes the best of a difficult case; he tries, in a rather forced manner, to impose on his opponents unacceptable consequences which they do not really endorse.

Ikh. 292: Excellent systematic reasoning against a Medinese opponent.

Ikh. 327 ff.: Penetrating reasoning; Shāfi'ī discusses the problem of how the contract of *salam*[1] comes to be permitted, a problem not yet envisaged by Mālik in *Muw.* iii. 117.

Ikh. 353 ff.: Shāfi'ī gives excellent systematic reasoning against the Iraqians from his own, new point of view.

Ikh. 389 ff.: Masterly and superior reasoning, more comprehensive and better than the discussion in the earlier parallel passage *Tr. VIII*, 13 (see above).

I shall now leave the last word to Shāfi'ī.

Tr. I, 6: 'If a man buys a slave girl and she has a defect which the seller has concealed from him, the case is the same in law, whether the seller did it wittingly or unwittingly, and the seller commits a sin if he does it wittingly. If, while in the buyer's possession, she acquires another defect and he discovers, too, the existence of the defect originally concealed from him, he is no longer entitled to return her [on account of the concealed defect], even though the defect which she acquired whilst in his possession be the smallest possible defect in a slave. The smallest possible defect, if it existed before the sale and was concealed, would have given him the right to return her to the seller because the existence of such a defect makes the sale binding only if the buyer so wills. So, similarly, the buyer has an equal obligation towards the seller and is not entitled to return her to the seller after the defect which developed whilst she was in his possession, just as the seller was not entitled to hold him bound by the sale of an object which had a defect whilst in the seller's possession. This is the meaning of the *umma* of the Prophet [which is expressed in a tradition] to the effect that he decided

[1] *Salam* is a sale with postponed delivery of the merchandise but immediate payment of the price.

that a slave was to be returned on account of a defect. If a defect develops whilst she is in the possession of the buyer, he has the right of regress [against the seller] for the amount by which the defect which the seller concealed from him diminishes her [value]. This right of regress works as follows. The value of the slave girl, free of the defect, is estimated and amounts to, say, one hundred; then her value, given the defect, is estimated and amounts to, say, ninety; the relevant value is that of the day on which the buyer took delivery of her from the seller, because on that day the sale became completed. Then the buyer has the right of regress against the seller for one-tenth of her price, whatever it amounted to, be it much or little; if he bought her for two hundred, he has the right of regress for twenty, if he bought her for fifty, he has the right of regress for five. Excepting always the case where the seller is prepared to take her back, free of charge, with the defect she developed whilst in the possession of the buyer; then the buyer is given the choice either to return her or to keep her without a right of regress.'

Tr. I, 12: 'If a man buys a slave or any merchandise with the stipulation that the seller, or the buyer, or both shall have the right of option during a term which they fix, the sale is valid provided the term is three days or less; but if it is longer, even by a single moment, the sale must be rescinded.[1] If someone asks: 'How does it come about that the right of option is valid if it is for three days, but not if it is for more', the answer is: Were it not for a tradition from the Prophet, it would be inadmissible for a right of option to exist for a moment after the two parties to a sale have separated, because the Prophet granted them the right of option only until they separated.[2] For it is inadmissible for the buyer to hand his money to the seller and for the seller to hand his slave girl to the buyer, without the seller being free to use the price of his merchandise and the buyer being free to use his slave girl; if we say that [notwithstanding the right of option] both are free to use their property, [this does not obviate the objection because] we hold at the same time that both must return it if one of them chooses

[1] The gist of the following argument is that a stipulated option is systematically irregular, and thus its time-limit cannot be extended beyond the term of three days which the Prophet is reported to have allowed.

[2] See on this *khiyār al-majlis* above, pp. 159 ff.

the return. It is a fundamental part of our doctrine that it is inadmissible to sell a slave girl with the stipulation that the buyer must not re-sell her, because the seller by this stipulation withholds from the buyer part of the full rights of property, whereas it is fitting that, if he transfers the rights of property for a consideration which he receives, he should transfer the full rights of property. Equally, the stipulation of the right of option constitutes a diminution and a denial of the full rights of property. Were it not for a tradition, a sale with the right of option ought to be invalid on principle, and we consider sales invalid for less than this. But as the Prophet laid down an option of three days from the conclusion of the sale in the case of the *muṣarrāt*,[1] and as it is related that he accorded to Ḥabbān b. Munqidh an option of three days with regard to things he bought,[2] we accept the right of option as far as the Prophet laid it down but no farther, because the Prophet himself did not go farther. His recognition of the option is presumably in the nature of setting an extreme limit to it. For the fact that an animal is *muṣarrāt* is sometimes known after it has been milked for the first time within twenty-four hours, and beyond doubt within two days; if the option in this case were accorded so that one could know for certain whether the animal was a *muṣarrāt*—which is a defect—it is more likely that it would have been accorded for as long as it takes to find out, whether it were long or short, just as the option is accorded in the case of any other defect whenever the buyer discovers it without a limitation, whether the time taken to find out be long or short. And if the option had been accorded to Ḥabbān so that he could consult others, he might have consulted them on the spot or shortly afterwards, or he might have postponed the consultation for a long time. Tradition therefore shows that an option of three days is the extreme limit of an option, and we must not exceed it; whoever exceeds it makes a stipulation which in our opinion makes the sale invalid.'[3]

[1] See above, p. 123.

[2] According to this tradition, Ḥabbān b. Munqidh complained that he was being continually cheated, and the Prophet advised him to say every time he bought a thing: 'No deception!' which would secure him an option of three days. See Ibn Ḥajar, *Iṣāba*, s.v. Ḥabbān b. Munqidh.

[3] This is directed against the Medinese who do not lay down a fixed time-limit for the right of option (*Muw.* iii. 137).

Tr. VIII, 14:[1] 'Weregeld is of two kinds, that for *'amd* which is to be paid by the culprit, be it large or small, and that for *khaṭa'* which is to be paid by the *'āqila*, be it large or small, because whoever is responsible for the larger amount is also responsible for the smaller. This is, first of all, a sufficient argument in itself, because if the uncontradicted principle in the case of *'amd* is that the weregeld, large or small, is to be paid by the culprit, and the principle in the case of *khaṭa'* is that the larger amounts are to be paid by the *'āqila*, the same must apply also to the smaller amounts. Further, there is an argument taken from tradition: the Prophet made the *'āqila* responsible for the [whole] weregeld in the case of *khaṭa'*; if this were the only relevant tradition it would follow that the *'āqila* is responsible for all payments in the case of *khaṭa'*, unless one chose on principle to put the financial responsibility for all injuries on the culprit, and to consider the decision of the Prophet on the responsibility of the *'āqila* as [an exception] the limit of which has to be fixed; but if one fixes the limit at one-third, one may as well fix it at nine-tenths or two-thirds or one-half. . . . Abū Ḥanīfa fixes the limit at one-twentieth of the weregeld; the answer to him is the same as to those who fix it at one-third. As to the argument that the smallest amount laid on the *'āqila* by the Prophet is one-twentieth of the weregeld, the only consistent way of treating the responsibility of the *'āqila* as an exception, based on tradition, and of avoiding analogy altogether, would be to lay on the *'āqila* only the full weregeld and one-twentieth of the weregeld, but not the intermediate amounts, leaving them to be paid by the culprit according to the general principle. If analogy is to be used at all, only one of two things is possible: either the lack of a decision by the Prophet on amounts involving less than one-twentieth of the weregeld makes these injuries negligible, without provision for weregeld or retaliation, as strokes and blows are; or these injuries have to be decided by the exercise of systematic reasoning (*ijtihād al-ra'y*) and judged by analogy with those cases on which there is a decision of the Prophet; if this is right, the obligation of the *'āqila* to pay the weregeld for *khaṭa'* must also be extended by analogy.'

[1] This passage is directed against the Medinese and Iraqian doctrines on the lower limit for the payment of weregeld by the *'āqila*; see above, p. 207.