

CONTRIBUTION OF ASH-SHAFI' TO THE SCIENCE OF LAW

Law, in the sense of "Rule of Conduct", is as old in the human society as this society itself. To be binding on others, on a group, law must emanate from someone who is recognised as a superior authority, head of a family, chief of a tribe, ruler of a country or even a leader in a spiritual or religious sense. Man-made laws are improved by trial and error, by experience. But sometimes the law-giving man affirms that the law has been inspired to him by God our Creator and Master.

Whatever the practical consequences of this difference – with regard to observance, capacity of modification etc. – it is an undeniable fact that even the most exhaustive codes of laws would yet be limited and problems in a living and growing society are unlimited, in the sense that in the course of time with changed circumstances new questions are bound to arise.

That is why a law, which desires to survive, must provide for its growth and progress.

Muslim law was no exception to this axiom. The Prophet of Islam, as the message-bearer of God gave to his community certain directions:

- a) Of the customs and practices of his countrymen, he selected a few to declare that they should be abandoned and replaced by others laid down by him; from a few others he discouraged without formally prohibiting them. He kept silent from all the rest of the existing practices, legal, moral and all else.
- b) He initiated some new rules, both orders and injunctions, for the conduct of daily life.

History shows that in his very life time, even the wording of the verses of the Quran left unanswered some questions and new revelations had to come down to fill the lacunae. Further, it was a daily occurrence that his disciples differed in the interpretation and understanding of even the apparently precise rules; these persons had the advantage of being able to refer the differences to the arbitration of the Prophet, which the Faithful of the later periods could not have. So the Prophet could not – and as a matter of fact, did not – leave his legislation deprived of means of coping with this all too evident necessity.

Through Mu'adh ibn Jahal, he fully approved that in case of the silence of the Quran and the Sunnah, one should make an effort of reasoning with good conscience, including consultation.¹ And through 'Amr ibn al-'As he

¹This *Hadith* is reported by a large number of sources, including the *sunan* of

encouraged honest differences of opinion, when he said: "The *muftabid* (one who makes an effort of reason to find out rule of law) attains sometimes the target, commits error at others; if he attains the target, he has right to double reward, if not, even then, to a single reward."² It was a great principle for the healthy growth of law.

The Prophet left things there. Then came the lightning expansion: only fifteen years had passed on his death when the armies of his successors and disciples controlled a contiguous territory in three continents, extending from Spain to Transoxian China, passing through North Africa. Fifteen more years passed and the community was divided in three main groups (Sunni, Shi'ah and Khariji) never to reunite since the last fourteen centuries.

Observers like Bousquet and others are stupified that in spite of these bloody divisions, the codes of law produced by all the three schools are practically identical; if there are differences, they are not greater than those found inside the same school among its members. To Bousquet, it is a mystery, how could Muslims reach a completion of their law in the course of only thirty years, so that when the community fell victim to divisions and schisms they found in the pre-division heritage enough material for all practical needs, and did not find it necessary to modify legal rules in spite of schisms and civil wars.³

To me at least there is nothing astonishing in the phenomenon. Compare the contemporary example of USA's development of the nuclear energy and how such "backward" countries like Russia, China and India have burnt the intermediary stages, and this in spite of most jealously guarding the secret. The mere idea that the atom, if exploded, produces energy was sufficient for others to reach to the same results. May be the late comers have even added new improvements to the knowledge.

At-Tirmidhi and *Al-Umm* of Ash-Shafi'i. Its text runs: The Prophet asked the governor designate Mu'adh: "How would you decide?" - "According to the Book of God!" - "If you do not find precision therein? - Then according to the *sunna* of the Messenger of God!" - "If you do not find precision there too?" - "Then I shall make an effort of my opinion and shall leave no stone unturned!" - "Praise be to God Who has enabled the messenger of the Messenger of God to a thing which pleases the Messenger of God", exclaimed the Prophet at the end.

² Collections of *Hadith* by many, including al-Bukhari. The text says: The Prophet charged 'Amr ibn al-'As to hear and decide a certain litigation. On what basis? asked 'Amr. The Prophet said: If you attain (the real truth) you will have the double reward (from God), if not, you will still receive (His) single reward.

³ Prof. Bousquet's French article "*Le Mystere De La Formation Du Droit Musulman*", whose Arabic translation is included in my book "*Hal Ta'atibbar al-Fiqh al-Islami bi'l-Qanun ar-Rumi*".

So, the mere knowledge that the Romans, the Persians, the Hindus, the Chinese had detailed laws sufficed for Muslims, without knowing the contents of their laws, to produce their own law, with even innovations undreamt of by their predecessors of other civilizations, other communities. Necessity is the mother of invention. The Bedouin, when he became master of an organic entity which is a state, required law, and he too produced it according to his human capacities.

The Quran is not like the *Torah* (Leviticus), all laws. The task of the Muslim jurist was very arduous, to glean and extract law from it. Further, in the silence of the Quran he had to have recourse to the *Sunnab-Hadith*, which was not even codified, and with the exception of a handful of the companions who had taken down day to day some notes, it was in the memory of the innumerable Muslim men and women, who were not only dying each day one after the other as all mortals, but also dispersing all over the world in the wake of the rapidly expanding territory of the Muslim state. Where there is a will there is a way. They set to work and individual collections of hundreds of researchers could save an astonishingly rich harvest of *Hadith*. That took no doubt time, so that the individual collections should be amalgamated into general and larger collections and made available to all scholars. This with the inevitable consequence that this gradually accumulating knowledge remained in the beginning a speciality (of the Muhaddith) and — what is more important — in the meanwhile needs of the judges and juriconsults had somehow to be fulfilled. These latter had recourse to reasoning and personal opinion based on analogical deduction, whenever the Quran was silent. So, law was partly in the *Sunnab* which was in the course of collection, and partly in the precedents and *fatwas* daily increasing in variety and even in differences on account of the equal freedom of all the innumerable judges and juris-consults. Two practically water-tight compartments came into existence. Further, the records of the *Sunnab* were to be classified for easy research, and a science was to be created and developed to guide the jurist in his law-making activity.

The enormity of the task was further greatly enhanced by the fact that the first Muslims choose to make legislation a private affair of the savants and as free of the Executive as the Judiciary. The government had no say in the opinions of the jurists and in the decisions of the judges. And each member of both these categories of men was equally independent of every other. The natural result was what Ibn al-Muqaffa' (d.139H/756 A.D.) has described in his celebrated letter to the Caliph al-Mansur:⁴

⁴Ibn al-Muqaffa', *Risalah as-Sahabab*, included in Kurd 'Ali's *Rasa'il al-Hulagba*.

"§12. . . Among the things which the Commander of the Faithful will observe regarding the affairs of these two towns (Kufah and Hirah) — as of towns and places other than these two — is the divergence of the conflicting judgments, a divergence which has culminated to a very high pitch in matters (shedding) Blood, (legality of intercourse etc with) Women, and Property. So if a blood or a woman is considered licit in Hirah, the same is declared illicit in Kufah (the new town of Hirah). Such a divergence could be found even inside Kufah itself: it may be considered licit in one part of the city, and illicit in another part. Yet in spite of the multiplicity of its colours, this divergence continues to be applied to Muslims as far as their blood and honour (life, women and property) are concerned, being judgements of judges whose orders and commands are valid. This, notwithstanding the fact that there is not a single group of the people (jurists) of Iraq and of the Hijaz who sees into it and is not overtaken by the false pride regarding what it (i.e. the group or school of law) itself possesses and does not treat with slight all the rest. And this pride makes them plunge into matters which are abhorred by all those thinking people who come to hear of them.

"§13. . . If the Commander of the Faithful could order regarding these conflicting judgments that they should be sent up to him in writing, together with the arguments of each group (school) based on the Prophetic conduct (*Sunnah*) or the analogical deduction, and thereafter the Commander of the Faithful should go through the file and execute in each case the opinion with which God might inspire him; and he should make this opinion incumbent upon all to follow (as binding), forbidding any decision contrary to it, and should issue a comprehensive and obligatory prescription therefor, then could we hope that God would make these divergent judgements—which are a mixture of right and wrong—one single correct order, and we could hope that the unification of the conduct would be a thing which might procure proximity (*Qurbaa*, pleasure) of God, and this thanks to the concurrence of the opinion and the tongue (i.e. order) of the Commander of the Faithful. And similarly would do other (succeeding) Caliphs, till the end of time, if so pleases God."

Ash-Shafi'i (born 150 H) is not the first of the jurists — hundreds had preceded him — rather he is the last of the "giants". The work of synthetization and codification had begun long before him. Of the words that have come down to us, already *al-Majmu' fi al-Fiqh*⁵ of Zaid ibn 'Ali (d. 120 or 122 H.) is a complete Code dealing with all topics of Muslim law. The four thousand odd pages of the *al-Asl* of Muhammad ash-Shaibani concern a teacher of ash-Shafi'i. And all these books of Muslim law were

⁵ Arabic text edited by Griffini, at Milano in 1919, on the basis of a Ms. in the Ambrosiana Library.

based on the twofold source: on the one hand the Quran-Hadith, and on the other hand the Reasoning, particular to each juristic writer.

Jurists knew what a non-jurist like Ibn al-Muqaffa' was criticizing. Abu Hanifah in particular established a "private" law academy, with forty members, all good jurists, to codify and produce a Muslim law which should avoid "some say this, some say that", but selecting out of the conflicting opinions such a one which the academy should consider as more reasonable. To complete their code, the academy did not hesitate to put fictitious questions and replies. As much as half a million rules are said to have been systematized in this way, before the birth of ash-Shafi'i.

Was there anything left yet for a late-comer as ash-Shafi'i? Yes, there was still much to do.

Muslim law is not the work of "rulers in council" as the Roman and Greek laws for instance were. It is also not the work of private savants relying on their personal and technical reasoning. Muslim law is essentially based on what they believe to be "the word of God and of His message-bearer." The word of God, the Quran was at once codified and was available to everybody (not like Hindu and Jewish books which were in the monopolous possession of the priestly caste). The word of the Message-bearer, the *Hadith* took time to be collected and made later available to the general reader. In the meanwhile legal decisions had to be made some how, and people could not wait.

At the time when Ash-Shafi'i was a young student, most of the law was based on the Quran plus juristic reason. Jurists knew little of the Hadith, and the Muhaddiths were not jurists. Owing to translations from Sanskrit and Greek, there was a full-scale invasion of philosophy, logic and scholasticism which were *a la mode* to the horror of the very pious traditionalists. The unity of Islam was at the verge of collapsing and disintegration.

There was crying need of somebody knowing all these things and at the same time a pious and practising Muslim, able to win the confidence of the theologians by his orthodoxy and the confidence of the "enlightened" by his convincing and rational arguments. Ash-Shafi'i was destined to be such a man.

He studied Arabic philology, *Tafsir*, *Hadith*, *Fiqh*, logic, scholasticism, medicine (which he recommends greatly in *al-Umm*) and all the general knowledge found at that golden age in Arabic. There is even a report by his chief biographer, ar-Razi that he knew Greek. Although the chain of its narrators has been found defective, yet that is not impossible. There is a celebrated saying attributed to Ash-Shafi'i: "Whoever studies law, has to depend on Abu Hanifah; for the study of the biography of the Prophet, on Ibn Ishaq; for the study of Hadith, on Malik; for the study of Tafsir, on Muqatil b. Sulaiman",⁶ This implies that he studied history also, parti-

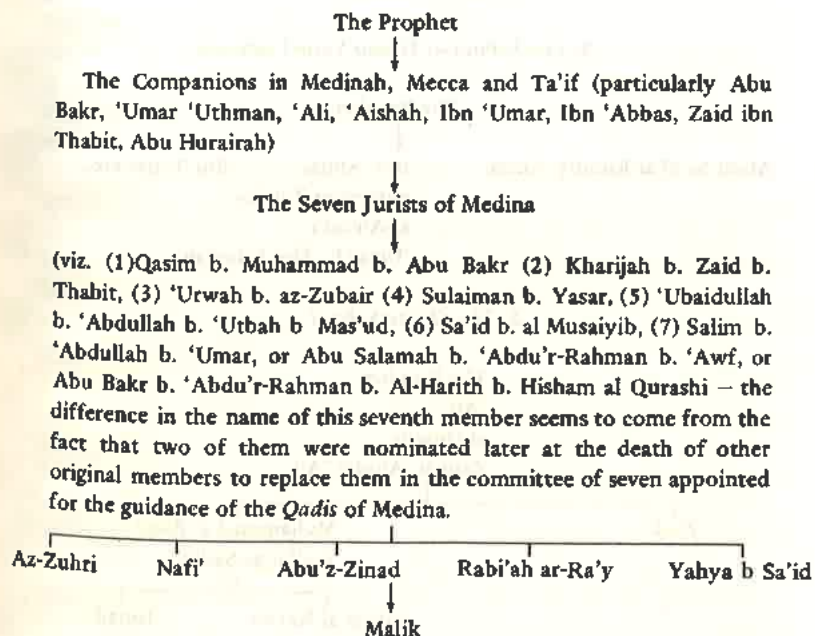
⁶ Ibn Kathir, *al-Bidaya wa'n-Nibaya*.

cularly the life of the Prophet, as something indispensable for a well-educated scholar.

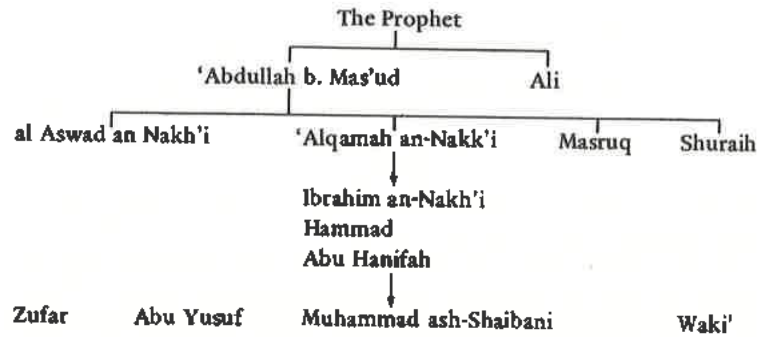
Muqatil, whose commentary of the Quran is recommended by him was a *Zaidite*. It was the epoch of public conflict between tradition and reason (*naql* and *'aql*). It was necessary to rationalize and philosophize the traditional lore of the Quran and the *Hadith* — the *Mu'tazilites* were doing that with all the pitfalls that are inevitable for the pioneers — and to educate people to support the difference of opinion. As many individuals as many reasons. One should not worship one's little brain. Formulate your opinions but remain open to correction by other people's better opinion. Shafi'i would set an example in this particular field also; frequently two, and sometimes even three opinions are attributed to him on one and the same question, which shows that he unhesitatingly changed his opinion when he was convinced of the superiority of the arguments of others.

Ash-Shafi'i's early formation was Meccano-Medinite and in between also Yemenite. Later he went to Iraq and studied there. Lastly he settled in Egypt and came into contact with the savants of that land. This is reflected in the following tables:

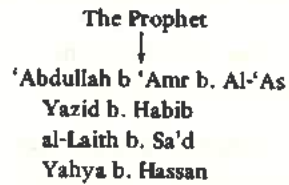
1. The School of the Hijaz



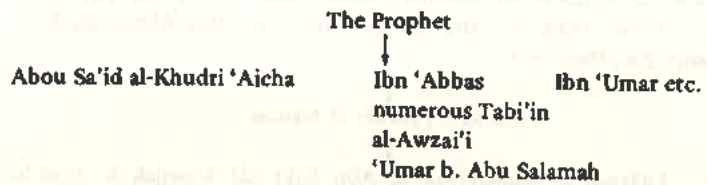
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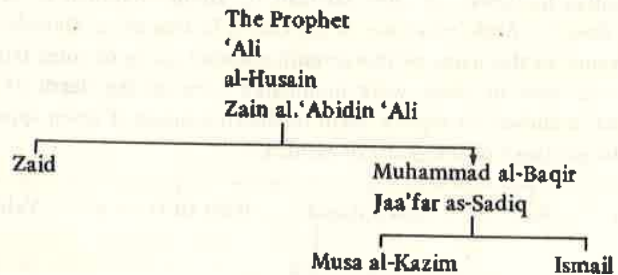
3. The School of Egypt



4. The School of Hijazo-Syro-Yemenite



5. The Shi'ite School



Among the more important of the numerous teachers of Ash-Shafi'i is the Imam Malik (of Medinah). Others were Muhammad Ash-Shaibani and Waki' (of 'Iraq); Yahya b. Hassan (of Egypt), and 'Umar b. Abu Salamah (of Syro-Yemenite). He esteemed very much the commentary of the Quran by Muqatil who was a *Zaidite-Mu'tazilite*. As far as *Hadith* is concerned he studied it under such eminent scholars as Sufyan b. 'Uyainah, Muslim b. Kathir, Malik etc.

He did not agree with the hair-splitting logomachy of the *Mu'tazilites*, but all the others, the *Mufassirs*, the *Mubadiths* and the *Faqih* esteemed him.

The greatest service of 'Ash-Shafi'i to the *Hadith* was that he convinced people that even the *Khabar al-Wabid* (a report on the saying or doing of the Prophet transmitted by only one but highly trustworthy narrator), is binding and is to have preference over the opinion of the lay jurists. Thus he won the confidence of the *Mubaddiths* (and could easily make them accept the need of putting the *Hadith* material in order, take into consideration the context of each *Hadith* whether it concerns a particular case or contains a general order, how to reconcile or prefer one among the conflicting reports on the Prophet, etc.) and that of the jurists, to the lasting good of Muslim law.

To tell the truth, the jurists, although they knew very little of the *Hadith*, were yet honest and God-fearing people. Further the orders of the Prophet never deviated from common sense and evident reason. The result was that even with pure reasoning the jurists had reached to practically the same results as were ordered by the Prophet. Instead of "I think", when they said: "The Prophet has said this and reason confirms it", nobody had to quarrel.

Of course the understanding, be that of the Quran or of the *Hadith*, is individual, human, subject to differences. With his great talents and vast erudition, Ash-Shafi'i tried to revise the man-made part of Muslim law. In his *al-Umm* he explains the *raison d'etre* of his gigantic efforts. He had before him the huge and exhaustive codes of ash-Shaibani and others. So instead of a pioneer work, he had to revise and perfect. But his greatest service lay elsewhere.

The Holy Prophet had enthusiastically approved that, in the silence of the Quran and the *Hadith*, one should have recourse to the effort of reasoning by common sense and good conscience. 'Umar and all succeeding authorities repeated that. But the method of reasoning was not elaborated, and each individual did according to his personal capacities. The great knower of *Hadith*, Abu Hurairah would say: "If one eats a food touched by fire, the ablutions break and have to be renewed, since I saw that once the Prophet, after a meal in a feast, did his ablutions before celebrating the Service of Prayer." The young Ibn 'Abbas asked: "Master, can one use water warmed on fire for ablutions?" Abu Hurairah angrily

replied: "I report the practice of the Prophet and you mock me".⁷ It did not occur to Abu Hurairah to put to himself the question whether the ablutions of the Prophet had taken place because they were already broken or on account of eating the cooked food. Another example: Referring to a verse of the Quran, Abu Dharr al Ghifari used to say that keeping gold and silver in the house entails Hell punishment, and whenever he received his pension, he changed the gold and silver coins into copper ones.⁸

It took a hundred years before pioneer work started to systematize methodology of legislation. In our present state of knowledge, Abu Hanifah (d. 150H.) compiled a *Kitab ar-Ra'y* (legal opinion). A book *Usul al-Fiqh* is attributed to each of his two pupils, Abu Yusuf (d. 182 H.) and Muhammad ash-Shaibani (d. 189 H.). They have not come down to us.

It was left to ash-Shafi'i to make an extraordinary contribution to world law.

Laws were there in human society since all time and in all climes, but the need of an abstract science of law never occurred to anybody before Ash-Shafi'i (d. 204 H.). What is law, why should one obey it, how to understand the exact sense, what are the sources of law, how to make new rules, how to reconcile conflicts in the extant rules, how to modify and abrogate rules, and so on and so forth, a science which could be applied to any and every system of law, past, present and future. His book *ar-Risalah* inaugurated this science; it is now even translated into English.

Naturally philology comes in the first instance. Philosophy of law, jurisprudence, principles of legislation, logic and even historical knowledge of the source material of law must all be combined in this new science which he named "Roots of law" (*usul al-fiqh*). He was inspired by the verse of the Quran which makes "a good word (order) resemble a good tree whose root is solidly fixed in the earth and whose branches soar high in the sky!" The laws are branches (*furu'*) that shoot from the roots (*usul*). Happy terms which have survived in spite of diverging rival schools and succeeding ages.⁹ I must acknowledge that, in my student life I myself came to realize its importance first by the lecture of the French professor Count Ostorog, delivered in the centenary celebration of the University of London, entitled "Roots of Law" and included in his book "The Angora Reform". He had worked long in Istanbul, where his brother, a Muslim, still lives.

⁷The report of Abu Hurairah is included in *Sahih Bukhari* and *Sahih Muslim*.

⁸Ibn al-Athir, *al-Kamil*.

⁹Books of *Fiqh* have the generic name *Furu'*, whereas books of jurisprudence bear the title *usul al-Fiqh*.

The notion of *Good* and *Evil* (The Quranic *Ma'ruf* and *Munkar*) is accepted since long, but the Greek philosophers applied it only to morals. Ash-Shafi'i and his contemporary Mu'tazilite jurists applied it to Muslim law (the theory of what is now called of *Husn* and *Qubb*) which marvelously philosophizes all orders, injunctions and permissions of Muslim law in the celebrated fivefold division:

1. If a thing is good, it must be practised obligatorily (*wajib*).
2. If it is evil, it must be shunned as obligatorily (*Haram*).
3. If the good is preponderant, it will be recommended (*Mustabab*).
4. If the evil is preponderant, it will be discouraged from (*Makrub*).
5. If both are equal, or if there is neither of them, it will be left to individual choice (*Mubah*).

Like the cardinal points of a compass, where between North and East for instance there can be North-East, North-North-East etc., so too between *wajib* and *Mustabab*, there can be *sunnat*, *sunnat Mu'akkadah*; further the *Makrub* may be further subdivided into *Makrub tabrimi* and *Makrub tanzibi*.

Ash-Shafi'i does not elaborate on it in his *ar-Risalah*, but he refers to it in his compendium *al-Umm* from time to time.

Ash-Shafi'i had great respect for his teachers and teachers of teachers, and he had also a great horror of the cult of personality and chauvinism, his ideal being the search of the truth.

As is well-known, the *du'a al-qunut* is a *wajib* (obligatory act) in the dawn prayer, according to ash-Shafi'i whereas it is unknown in the Hanafi method of this prayer. Nevertheless it is reported that when Ash-Shafi'i went to Baghdad (where Abu Hanifah lies buried) he abandoned during his sojourn his practice. On being asked he said: I am still of the same opinion, but I feel ashamed of insisting on my opinion in the presence of this great Imam Abu Hanifah!

His respect for the Imam Malik was not less great. Once he came to know that a cap of Malik as relic had gone to Spain, that in time of drought people used to take it out in procession and invoke God for rain by making intercede this cap. And further, that when a Hadith of the Prophet was cited, the Spanish Muslim jurists retorted: But this is the opinion of Malik!

This shocked Ash-Shafi'i, but he hesitated long to react. He says, he made *Istikharah* (prayers to God for guidance) during a whole year. At last he made up his mind, and wrote his famous monograph "Refutation of the opinions of Malik". He wrote similarly against his *Hanafite* teachers, particularly Muhammad ash-Shaibani: (1) "Refutation of Muhammad b.

Al-Hassan and (2) Refutation of *Istibsān*". But in fact this latter boils down to a rejection of the term, which implies subjective opinions, and not the reasoning in general, since he says: *Istibsān* means that a jurist does not rely on the Quran, the *Hadith*, the consensus and the analogical deduction, but simply and unnecessarily says: "in my opinion, this is better". But *Hanafis* do not say that either.

These were provocative books and in order to show his perfect sincerity, he wrote also such monographs as:

- a) Differences of 'Ali and Ibn Mas'ud (two Companions of the Prophet).
- b) Differences of Abu Hanifah and Ibn Abi Laila.

Ash-Shafi'i tried what he could, but human nature cannot change: some have the temperament for independence, others are credulous and blind imitators. Once when I was paying my respects to Ash-Shafi'i by reciting the *Fatibah* on his grave in Cairo, I saw among the numerous written petitions hung on the ostrich's egg which was suspended on his tomb an open telegram from the governor of one of the provinces of Egypt, asking the venerated Imam Ash-Shafi'i to do what God did not seem to be willing to!

In his voluminous *al-Umm*, we came across innumerable historical and social informations also. As a model of international treaties, for instance, he quotes a real treaty which has not been preserved by historians. He reproduces in extenso the *siyar* of al-Waqidi (which is otherwise lost) and also the *siyar* of al-Awza'i (which in fact reproduces extracts of the *siyar* of Abu Hanifah as criticized by al-Awza'i and as replied to this criticism by Abu Yusuf, followed by the impartial observations of Ash-Shafi'i). He says that the judges kept in the court archives copies of their decisions for cases judged by them. There is no end to such information. If only one could prepare an index to his book!

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