

ABSTRACT

AUTHOR: MUHAMMAD YUSUF GURAYA

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IN THE MUWAṬṬA' OF MĀLIK B. ANAS

DEPARTMENT: INSTITUTE OF ISLAMIC STUDIES
MCGILL UNIVERSITY, MONTREAL
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There are a variety of opinions about the Sunnah whether it is based on the practice of the Muslim community or on the Ḥadīth etc. In the face of these opinions, it seems pertinent to determine what is the concept of Sunnah in the Muwaṭṭa', a earliest comprehensive work on the subject.

Our studies demonstrate that the concept of Sunnah in the Muwaṭṭa' is not necessarily based on the Ḥadīth i.e. "the past," either verbal or practical. Rather "the past" is judged by "the present". It is also not a simple record of the practice of the Muslim community in Madīnah. It is rather a "normative practice of Mālik" (al-Sunnah 'indana). This normative practice of Mālik was based on the recognized

Islamic religious norms and on the accepted standard of conduct derived from the religious and ethical principles introduced by the Prophet. Later this normative practice of Mālik was taken as "the actual practice" of the people of Madinah.

THE CONCEPT OF SUNNAH
IN
THE MUWAṬṬA' OF MĀLIK B. ANAS

GURAYA

THE CONCEPT OF SUNNAH
IN
THE MUWATTA' OF MALIK B. ANAS

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MUHAMMAD YUSUF GURAYA

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INTRODUCTION

The term Sunnah has been vested with prime importance in Muslim jurisprudence from the very beginning. Despite its fundamental importance the origin and meaning of term Sunnah has always been ambiguous and obscure. For example, in the writings of the Muslim jurists who lived during the first 190 years, approximately, after the Hijrah, the term Sunnah was used in a meaning peculiar to this period. From the last decade of the second century onward, however, the term was used in a different meaning and changed its character. Further, in early stages, the content of Sunnah was not specific and determined. The activity of the Muslims (Sunnah al-Muslimin) in general, and the speculative free thought activity of administrators and scholars (Sunnah 'indana) in particular, were genuine, valid and authoritative constituents of Sunnah. Later the term Sunnah was overshadowed by the term Sunnah al-Rasul, and its content became specific and determined (i.e., Hadith). The only genuine and authoritative content was one which was attributed to the Prophet; the activity of the Muslims themselves lost its authority in case of conflict with the content of the Sunnah al-Rasul. Also in recent years, a controversy has arisen

whether or not the concept of Sunnah of the Prophet existed before its content became the exclusive prerogative of the Prophet.

It is in view of this very important evolution in the concept Sunnah that this detailed study has been undertaken. The Muwatta' of Malik b. Anas (d. 179 A.H.), a comprehensive work of the earliest period on the subject, has been chosen for this purpose. The Muwatta' represents the transition from the speculative free thought activity of the earliest jurists to the systematized and well defined science of Hadith in the later period. Malik has compiled vast legal material created by past legal authorities and has also recorded the living practice of his own time. This entire material has been presented in the form of Hadith from the Prophet and his Companions, in the decisions and verdicts of competent authorities and in statements and descriptions of jurists and scholars. Traditionally it has been held that Malik in the Muwatta' is simply a recorder of the practice of his past and present and that he himself contributed very little to the material of the Muwatta'. But the contents of the Muwatta' do not support this view. There is, it seems, a basic concept around which the entire body of this whole material revolves. We shall call this concept "The Concept of Sunnah in the Muwatta' of Malik b. Anas," and shall carry on a detailed investigation in the following chapters to discover what this concept means in respect of the contents

of the Muwatta'.

Our methodology in this study will be to examine certain terms and expressions used by Mālik in the Muwatta'. These terms, in fact, are the pivot of Mālik's thought and are the gist and substance of his opinion. Typical among these expressions are : al-amr 'indana, al-Sunnah 'indana, al-amr al-mujtama' 'alayh 'indana, al-amr alladhī adraktu 'alayh al-nās, al-Sunnah allatī lā ikhtilāf fihā 'indana wa alladhī lam yazal 'alayh 'amal al-nās. We shall follow the use of these expressions systematically throughout the Muwatta', and shall note their usage in their various contexts. On the basis of this intensive and concentrated study we shall try to understand the foundations and determining principles of Mālik's thought. Much time and space will be devoted to the study of the expressions : al-Sunnah 'indana, ahl al-'ilm bibaladinā and al-amr al-mujtama' 'alayh 'indana. Traditionally these expressions have been interpreted in the meaning of the actual practice and consensus of the people and scholars of Madinah. Not satisfied with this interpretation, we shall conduct a detailed investigation to see whether there is another possible interpretation.

To have a full understanding of these expressions and to have a comprehensive view of them it shall be necessary to verify our findings from the Muwatta' by the writings of scholars contemporary with Mālik e.g., Layth

b. Sa'd (d. 175 A.H.), Abū Yūsuf (d. 182 A.H.), al-Shaybānī (d. 189 A.H.), 'Abd al-Rahmān Ibn al-Qāsim (d. 191 A.H.), al-Shāfi'ī (d. 204 A.H.) etc. Among the later authorities in this regard we shall mainly consult al-Zurqānī, the chief commentator of the Muwatta', and Shāh Walī Allāh of Dihlī, another commentator of a selection of the Muwatta'.

In the first chapter detailed background of the concept of Sunnah -- its origin and meaning -- will be given. In this chapter the problem of whether or not the concept of Sunnah of the Prophet existed before the content of the Sunnah became the exclusive prerogative of the Prophet, will be discussed. The second chapter will be devoted to the study of the problem of the Hadīth as basis of Sunnah. The third chapter will describe the main terms and expressions used by Mālik in the Muwatta' and will provide a bridge to the fourth chapter which will discuss in detail the key expressions of Mālik: al-amr 'indana, al-amr al-muj-tama' 'alayh 'indana, ahl al-'ilm bibaladina, etc. The fifth chapter will include a brief summary of the previous discussions in the beginning and will discuss in great detail the concept of Sunnah in the Muwatta'. The conclusions will be given at the end of the fifth chapter.

Our study of the problem has led us to conclude that the concept of Sunnah in the Muwatta' is based on the recognized Islamic religious norms and on the accepted standard of conduct derived from the religious and ethical principles

introduced by the Prophet. That is why the Muwatta' is not a simple record of the practice of the Muslim Community in Madinah. It is rather a "normative practice of Malik" (al-Sunnah 'indana). This concept of Sunnah is different from the orthodox concept of Sunnah; because Hadith is one of the legal arguments with Malik, whereas in the orthodox view of Sunnah Hadith is the only basis of Sunnah.

CHAPTER I

THE CONCEPT OF SUNNAH— A BACKGROUND

I

Sunnah is a model behaviour and an exemplary conduct. Ibn Manẓūr in his Lisān al-'Arab, on the authority of al-Tahzīb¹ defines the term Sunnah as follows:

Al-Sunnah al-Tarīqah al-Mahmūdah al-Mustaḳīmah²
(al-Sunnah is the straightforward commendable way
[of acting]).

This "straightforward, commendable way [of acting]"³ is a model behaviour and an exemplary conduct which is followed only by those who regard it as an exemplary behaviour without any deviation to the right or to the left, i.e., without paying any attention to any other way. It implies that the element of normativeness ab initio is an integral part of the concept of Sunnah. No practice can gain currency unless ab initio it is considered normative and nobody is prepared to regard a behaviour as exemplary unless ab initio he considers it normative. The element of "straightness" (al-mustaḳīmah) in the above definition is a necessary complement of an exemplary conduct. The original meaning of the verb Sanna⁴ is "to introduce," i.e., "to introduce" some

straightforward exemplary way in absence of any agreed upon conduct. It is in this sense that Ibn al-Muqaffa' advised the 'Abbāsid Caliph al-Manṣūr to introduce his own Sunnah⁵ when there was no agreed upon Sunnah of the Prophet. In the same sense Ibn Manẓūr quotes a statement:

Sanantu la-kum sunnatan fa-ittabi'uha⁶ (I have set up an example for you, therefore, follow it).

The inquiries of Dr. Fazlur Rahman has also led him to conclude that the element of "normativeness" is an inseparable part of the meaning of the concept of Sunnah, whereas the element of "straightness" is a necessary complement of the concept of Sunnah.⁷

Sunnah Allāh (Sunnah of God) has been used in the Qur'an and the major lexicographers have also used it for the explanation of the term Sunnah. On such occasions Sunnah means the Moral Law governing the rise and fall of nations of the world. This usage of the Sunnah also supports the above view that Sunnah is a model behaviour and an exemplary conduct; though here it is only the ideality of the action-pattern of one Being, viz. God, that is involved.

That the original and primary meaning of the verb, Sanna is "to introduce" and "to set an example" can be established by many examples. The commonly accepted meaning, "to follow a trodden path," is, in fact, a secondary meaning. Ibn Manẓūr in his Lisan al-'Arab while giving the original meaning of Sunnah quotes Shimr in these words:

Al-Sunnah fī al-aṣl sunnah al-tarīq wa huwa tarīq
sannahu awā'il al-nās fa-ṣāra maslakan li-man ba'd
hum⁸ (al-Sunnah in /its / original meaning is the
 way / of acting /, that is a way / of acting /
 which was introduced by the former people, and
 which consequently, became a trodden path for
 those after them).

In this statement Sunnah and Maslak have very
 nicely been differentiated. Here Sunnah very clearly means
 the example (i.e. exemplary conduct) set in the beginning
 and when that example, in due course of time, has become
 "trodden path," then it is called Maslak. In another state-
 ment Ibn Manzūr says:

Sanantu la-kum sunnatan fa-ittabi'uhā⁹
 (I have set an example for you, therefore,
 follow it).

In this statement the verb used to convey the mean-
 ing "to set an example" is sanantu and the verb conveying
 the meaning "to follow" is ittabi'uhā.

Al-Jawharī and later lexicographers give the origi-
 nal meaning of the verb sannahu, as ṣawwarahu¹⁰ (he shaped
 it or produced it as a model). Ibn Manzūr says sanantu
 means ṣawwartu¹¹ (I shaped it or produced it as a model).
 Ibn al-Muqaffa'¹² and Abū Yūsuf¹³ advised the 'Abbāsīd Caliphs,
 Abū Ja'far al-Manṣūr and Hārūn al-Rashīd, respectively, to
 introduce their own Sunnahs. Ibn Manzūr quotes a verse of
 Khālīd b. 'Atabah al-Hudhalī which says:

Do not be hesitant about an example which you have
 introduced, for the first person to be satisfied
 with a Sunnah is the one who has introduced it (i.e.
 has performed it first of all)¹⁴.

Ibn Manzūr gives another example. He says:

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Sanna fulānun tarīqan min al-khayr; . . . (such a one originated / or introduced / an act of goodness, or piety; / or, a good, or pious way of acting / which his people knew not, and which they afterwards followed).

We have noted above the usage of Sunnah Allāh (the Sunnah of God) in the Qur'ān. Almost all the major lexicographers have used its verb form: sunna Allāh sunnatān (God prescribed / His / Sunnah). Both forms Sunnah or sanna with reference to God, definitely mean "to prescribe" or "to manifest" (as clearly distinguished from "to follow").

It becomes abundantly clear from the above evidence that sannanun originally and primarily means "to introduce" (as distinguished from "to follow").

After having established the original and primary meaning of the verb sanna, now we turn to have a look at its secondary meaning, "to follow." This meaning, it seems, does not come from the base stem sanna; but from its derived stems such as follows:

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Tafa'ala, ifta'ala, istaf'ala e.g. tasannana or istanna or istasanna bisunnatihi i.e. 'amila biha (he acted according to it); istanna bisirati fulan i.e. ittaba'aha (he followed the conduct of someone).

It may be interesting to note that almost all different meanings from the root snn denote some good and useful sense; whether it means "to sharpen a knife; to increase the appetite; to breed camels well; to polish one's speech; to shape, form, mould, produce (as a model); to prescribe, introduce, enact, establish (a law, a custom, a rule, a

way of acting); to grow teeth, to be advanced in years"; or "to clean and polish one's teeth with brush," etc.

There is, however, a Hadīth in the Kitāb al-Kharāj of Abū Yūsuf which states that one can even introduce a bad Sunnah. This solitary example cannot invalidate the essentials of the above view, because the answer given by Ibn Manẓūr is that those who set bad examples wish, nevertheless, to be followed by others and in most cases (perhaps in all cases) they do not think they are setting bad examples.¹⁸

It may be gathered from the foregoing that the view that the primary sense of Sunnah is "the trodden path" does not hold water. Rather our inquiry into the original meaning of the concept of Sunnah has led us to the conclusion that Sunnah ab initio is a normative, model behaviour and an exemplary conduct and that in its primary sense it means "the setting up of an example."

II

The term "Sunnah al-Rasūl" (the Sunnah of the Prophet) as such does not occur in the Qur'ān; and it is also difficult to ascertain with certainty that the Prophet himself used it. The terms used in the Qur'ān are : Uswah ḥasanah¹⁹ (model behaviour or exemplary conduct [of the Prophet]; ittibā'²⁰ al-Rasūl (following of the Prophet); itā'ah al-Rasūl²¹ (obedience to the Prophet); etc. These terms, particularly the first one, Uswah ḥasanah, convey the sense of Sunnah discussed in

the previous section. But the absence of the term Sunnah al-Rasul as such in the Qur'an, and the importance it gained later²² in the Islamic jurisprudence is a notable phenomenon in itself.

To ascertain the exact date of the emergence of the term "Sunnah of the Prophet" in Islamic history is very difficult indeed. Professor Joseph Schacht, writing about its first use, has maintained:

The question whether the administrative acts of the first two Caliphs, Abu Bakr and 'Umar, should be regarded as binding precedents, arose probably at the time when a successor of 'Umar had to be appointed (23/644), and the discontent with the policy of the third Caliph, 'Uthman, which led to his assassination in 35/655, took the form of a charge that he, in his turn, had diverged from the policy of his predecessors and, implicitly, from the Koran. In this connection,²³ there appeared the concept of the Sunna of the Prophet.

According to Dr. Fazlur Rahman the Sunnah as a conscious concept appeared at a time when differences arose in the legal and religious issues. He maintains:

The term Sunnah itself was at first probably not formulated as a conscious concept until differences arose over religious issues. The 'silent' living tradition implies that it was not ab initio described by any term, and that this description and formulation came only where different and indeed opposed interpretations were put forward. Then one was led to oppose the concept Sunnah to innovation.²⁴

The term "Sunnah of the Prophet" appeared thrice in the Muwatta' of Malik b. Anas.²⁵ The term has also appeared in the Sirah al-Nabiyy by Ibn Hisham²⁶ as a statement by the Prophet. In a derivative sense the term has been mentioned in a statement of the first Caliph, Abu Bakr, which he made in his inaugural address after the election, in which he spoke of God and (the example of) His Prophet as deserving obedience and being binding

upon him.²⁷ The term has also been mentioned in a statement attributed to 'Umar I quoted by Abū Yūsuf.²⁸ The earliest authentic evidence for the use of the term, "Sunnah of the Prophet," is two letters, the first addressed by the Kharijī leader, 'Abd Allāh b. Ibad²⁹ (d. 86/705,) and the second by Hasan al-Basri³⁰ (21-110/642-728) to the Umayyad Caliph 'Abd al-Malik b. Marwan (26-86/646-705). In a purely legal sense Professor Schacht maintains: "It [the term, "Sunnah of the Prophet"] was introduced into the theory of Islamic law presumably towards the end of the first century by the scholars of Iraq."³¹ This formulation and description of the term "Sunnah of the Prophet" and its verbal transmission, probably were late as we noted above; but as a non-verbal concept it was valid and operative from the very beginning of Islam. What was formulated and transmitted in a conscious term was only the formal outcome of the inner logic for a process which goes back to the starting point of Islamic history. We shall document this thesis shortly.

III

(a)

The actual struggle which the Prophet waged to implement his ideal was radically different in its moral import and spirit from the usage of the Arabs. The pre-Islamic Sunnah of the Arabs was fundamentally based upon the normative usage of their forefathers. With this established rule

of the Arabs the Prophet's mission differed fundamentally on two points. Firstly, the starting point of his mission was his personality instead of that of the Arabs and their forefathers. Secondly, it condemned the very basis of the Arab's established rule (i.e. the Sunnah based on the tradition of their forefathers) and tried to divert the direction of life towards his mission. The Arabs did their best to establish the fact against the Prophet that whatever had come down to them from their forefathers could be the only valid and genuine basis of their Sunnah. In the Qur'an wherever they challenged the Prophet they invoked the example of their forefathers. In fact the Sunnah based on the tradition of their forefathers was the greatest argument they could bring forth to establish their stand.

Those who are polytheists say: If Allah pleased we would not have set up (aught with Him) nor our forefathers.³² Or (lest) you should say: Only our fathers ascribed partners (to Allah) before (us) and we were their descendants after them.³³ They said: Hast thou come to us that we may serve Allah alone, and give up that which our forefathers used to serve? 34

The advent of the Prophet was a disturbing event for the Arabs. Their tradition which was established over the centuries was being violated under their very noses. For them the right, genuine and valid path was one which had an³⁵ air of antiquity and was established over generations. The challenging call from the Prophet really upset the Arabs. Against the entirely novel announcement of the Prophet:

Follow what Allāh has revealed, they say: "Nay, we follow that wherein we found our forefathers."³⁶ And when it is said to them, come to that which Allāh has revealed and to the Messenger, they say: "Sufficient³⁷ for us is that wherein we found our forefathers."

The Makkans were so sure about the rightness of the way their forefathers were following that they declared: "We found our fathers on a course, and surely we are guided by their footsteps."³⁸

The repeated and recurrent reference to Allāh by the Prophet forced the Makkans to identify the tradition of their forefathers with Allāh: "And when they commit an indecency they say: We found our fathers doing this, and Allāh has enjoined it on us."³⁹

The Qur'ān criticized the basis of the pre-Islamic tradition and declared that their forefathers were ignorant and without sense: "Even though their fathers had no sense at all, nor did they follow the right way". "What ! Even though their fathers knew nothing and had no guidance."⁴⁰⁴¹

There is positive condemnation of their forefathers in the Qur'ān and the way they followed: "They indeed found their fathers astray. So in their footsteps they are hastening on." And most of the ancients surely went astray before them."⁴²

The Prophet by summoning the Arabs to accept him and his mission against the long established tradition of their forefathers, in fact, demolished the principle of reverence for antiquity. By diverting the standard of validity and

genuineness of everything towards his teaching, "Whatever the Messenger gives you, accept it, and whatever he forbids you, abstain (therefrom)," he challenged the sources of their⁴³ tradition and its normativeness. They were surprised by this innovation introduced by the Prophet which created a stir in their old established custom and were astonished by this novelty. In their surprise and bewilderment they exclaimed:⁴⁴ "This is a novel thing."

The Arabs were not inclined to approve of "the guidance," "the way," "the Sunnah," introduced by the Prophet, despite all the rational and logical arguments brought forth in the Qur'an. They angrily and bitterly characterised the way introduced by the Prophet as a forged lie and as a form of sorcery.

And when our clear messages are recited to them, they say: This is naught but a man who desires to turn you away from that which your fathers worshipped. And ~~they~~ they say: This is naught but a forged lie. And those who disbelieve say of the Truth when it comes to them: This is but clear sorcery.⁴⁵

The Arabs incessantly invoked the element of antiquity and rejected whatever was new and was not found in the former times and declared it as forgery: "We never heard of this in the former faith: This is nothing but a forgery."⁴⁶ As the Prophet himself was the innovator of this new Sunnah, therefore, he was also not spared. Where the Makkans condemned his message as forgery, the Prophet was called a liar and an enchanter: "And they wonder that a warner from among themselves has come to⁴⁷ them, and the disbelievers say: This is an enchanter, a liar."

The above evidence points to the fact that the main cause of the Arabs' fury and their violence was that the Prophet, as a single person was taking the place of their forefathers. By so doing he, as a single person challenged the basis of their Sunnah and its normativeness and introduced sweeping innovations. Against this old established Sunnah of the Arabs, the Prophet placed himself and introduced a new Sunnah which basically revolved around the teaching of the Prophet himself ⁴⁸ — a single individual.

The Sunnah prevalent among the Arabs and the Sunnah introduced by the Prophet were different as far as the moral import and spirit were concerned. As far as the concept of Sunnah is concerned, these two Sunnahs were not different even though their formal appearance might suggest that they were. There were two main objections of the Arabs against the Sunnah introduced by the Prophet. First, the Sunnah should have an air of antiquity. Second, its authorship should be collective, i.e., authorship should have its origin in the "forefathers" collectively. Both the conditions, they realized, were lacking in the Sunnah advocated by the Prophet. The prophet, on the other hand, rejected both of them, considering them as later accretions to the real concept of Sunnah. Setting aside the "cumulative tradition" he brought to surface what was lying buried under the later accretive material. In the pre-Islamic Arabia each and every tribe had its own Sunnah distinct from the other and which in turn was given to them by their

respective, individual leaders. Labid b. Rabī'ah, for instance, is very emphatic on this. Praising his tribe he says: ([He comes] from a tribe for whom their ancestors have established a normative behaviour; every community has its Sunnah and its originator. ⁴⁹ Hassān b. Thābit has also ⁵⁰ referred to the same fact. It means whatever Sunnah the pre-Islamic Arabs had was at the time of its origin the creation of single individuals, and it was later, after time had left the agents behind, their names forgotten, that an air of antiquity began to be associated with their actions and an idea of collective authorship ("forefathers") began to be attached to them. It is in this perspective that the meaning of the Sunnah becomes clear: "The Sunnah in [its] original meaning is the way [of acting], that is a way [of acting] which was introduced by the former people, and which consequent- ⁵¹ ly, became a trodden path for those after them." Sunnah is what is established by the initiator in the beginning. When it has become a thoroughfare, it is called Maslak. In this context of the meaning of Sunnah, the Prophet, in fact, was not an "innovator" as he was called by his adversaries. Rather he brought into focus what was already latent in the concept of Sunnah. By vigorous argument he made the concept operative and effective again and restored it to vigour and activity. It was a renewal of validity and a sort of reminder. He vividly and actively discriminated between "ideality" and "practice" and clarified what was confused in the idea of Sunnah.

(b)

The vigorous and effective persuasion of the Arabs by the Prophet bore fruit. The Arabs, who accepted Islam, began to pattern their life according to the point of view of an individual (the Prophet) instead of the collective group ("forefathers"). The Prophet as "Good Exemplar" set examples and tried to divert the direction of life ~~484a~~ towards his own teachings and his exemplary conduct. This ideal Sunnah began to replace those undesirable elements in the Sunnah prevalent before Islam and accepted those which fulfilled the normative pattern set by the Prophet. According to Goldziher, in the words of Dr. Fazlur Rahman: "Immediately after the advent of the Prophet his practice and conduct had come to constitute the Sunnah for the young Muslim Community and the ideality of the pre-Islamic Arab ⁵² Sunnah had come to cease."

Duncan B. Macdonald writing about the change brought about by the Prophet in the customary law of the Arabs says:

The new and dominating element was the personality of Muhammad himself. His contribution was legislation pure and simple, the only legislation that was ever been in Islam. Till his death, ten years later, he ruled his community as an absolute monarch, as a Prophet in his own right.⁵³

Professor Schacht has maintained:

As the Prophet he became the ruler lawgiver of a new society on a religious basis, the community of Muslims, which was meant to, and at once began to, supersede Arabian tribal society...The legislation of the Prophet, too, was an innovation in

the law of Arabia.

And after giving reasons for the Qur'anic legislation, Professor Schacht concludes:

The prohibition of gambling, associated as this was with pagan worship of drinking wine, constitutes, perhaps, the clearest break with ancient Arabian standards of behaviour. ... Besides it had become necessary to deal with new problems...because of the main political aim of the Prophet—the dissolution of the ancient tribal organization and the creation of a community of believers in its stead.54

Professor

^ Majid Khadduri says:

In his compact with the people of Madina (A.D.623) Muhammad defined his Muslim Community as an Umma in distinction from the rest of the people in which all loyalties, tribal or otherwise, were superseded by the Muslim brotherhood.55

Dr. Fazlur Rahman writing on the issue says:

So long as the Prophet was alive, he provided the sole religious and political guide for Muslims both through the Qur'anic revelation and by his extra-Qur'anic words and behaviour.56

And he also says:

Before the Prophet died, he had created the conditions for a universal brotherhood on the basis of faith, a principle which he vigorously substituted for the old blood-ties and tribal loyalties of the Arabs.57

Professor N. J. Coulson has summed up the pre-Islamic usage of the Arabs and the change brought about by the Prophet in the following words:

To the tribe as a whole belonged the power to determine the standards by which its members should live. ... Neither the tribal Shaykh nor any representative assembly had legislative power to interfere with this system. Modifications of the laws, which naturally occurred with the passage of time, may have been initiated by individuals, but their real source lay in the will of the whole community, for they could not form part of the tribal law unless and until they were generally accepted as such.58

With the advent of Islam this pre-Islamic system changed and a sweeping innovation was introduced:

'Obey God and His Prophet'. In this Qur'anic Command lies the supreme innovation introduced by Islam into the social structure of Arabia, the establishment of a novel political authority possessing legislative power.⁵⁹

He further says:

The year 622 saw the establishment of the Muslim community in Medina. The Arab tribes or sub-tribes (with some temporary exceptions) accepted Muhammad as the Prophet or spokesman of God, and regarded themselves and his Meccan followers as constituting a group of a new kind transcended tribal ties. While Muhammad's position gradually developed into one of political and legal sovereignty, the will of God as transmitted to the community by him in the Qur'anic revelations came to supersede tribal custom in various respects.⁶⁰

According to Coulson the most radical reforms of the Arabian customary law effected in the Qur'an were rules on marriage and divorce. In the laws of divorce the supreme innovation of the Qur'an lies in the introduction of the "waiting period" ('iddah). The Qur'anic laws of inheritance, ⁶¹ says Coulson, are the best illustration in this connection. He has explained the pre-Islamic social structure according to which the rules of inheritance were designed to consolidate the strength of the individual tribe as an effective participant in the popular sport of tribal warfare. Accordingly, in order to keep property within the tribe, rights of inheritance belonged solely to the male agnate relatives ('asabah) of the deceased. With the advent of Islam the social structure changed:

As such it reflects the transition effected by Islam from a society based on blood relationship to one based on common religious faith; and in this new society the individual family has replaced the tribe as the basic unit.⁶²

Continuing his argument Coulson says:

The new Quranic scheme of inheritance represented the transition from a tribal society to a society in which the individual family was the unit and in which the rights of relatives other than the male agnate relatives were recognized.⁶³

And he concludes:

A population deeply attached to its traditional values had come to terms with the dictates of its new religious faith.⁶⁴

We have quoted the above authorities as evidence to establish the fact that the Prophet, as a single individual, had successfully replaced the Arabs' forefathers and also the Kāhins and other authoritative Sunnah producing agencies, so far as they were considered the only valid and authoritative/initiators and expounders of their normative Sunnah. In the words of Professor Schacht :

His position as a Prophet, however, backed in the later stages of his career in Medina by a considerable political and military power, gave him a much greater authority than could be claimed by an arbitrator; he became a "Prophet-Lawgiver". But he wielded his almost absolute power not within but without the existing legal system; his authority was not legal but, for the believers, religious and, for the lukewarm, political.⁶⁵

Professor Schacht has further pointed out that the verb qada "refers in the Koran regularly not to the judgement of a judge but to a Sovereign Ordinance, either of

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Allāh or of the Prophet." Majid Khadduri in more emphatic terms has explained the relation between the "Sovereign Ordinance" and its believers. He says: "Hence the term "Islam," which means "surrender" or "submission" to Allah's will, reflects the nature of the relations between Allah as governor and His people, the believers, as governed." 67

According to Khadduri this relation between the "Sovereign Ordinance" and the believers was on the basis of a compact of agreement: "Islam was proposed by Muhammad to each individual and the latter submitted to the divine will for his own welfare in the world and salvation in the next." 68

Once this agreement was completed the believer had no choice of his own but to submit to the "Sovereign Ordinance", pertaining to any problem: religious, social, political, etc. In a particular judgement of the Prophet, when there was bickering among the disputants, the following general ordinance was revealed in the Qur'ān:

But no, by thy Lord ! they believe not until they make thee a judge of what is in dispute between them, then find not any straitness in their hearts as to that which thou decidest and submit with full submission. 69

In another very private domestic problem, when in spite of the active persuasion of the Prophet, Zaynab, supported by her brother, refused to marry Zayd, the following general Ordinance was revealed:

And it behoves not a believing man or a believing woman, when Allāh and His Messenger have decided an affair, to exercise a choice in their matter. And whoever disobeys Allāh and His Messenger, he surely strays off to manifest error." 70

Stating the actual state of affairs of the relation between the Prophet and the believers, the Qur'an says:

The Prophet is closer to the faithful than their own selves, and his wives are (as) their mothers.⁷¹

Here the Qur'an bears testimony to the fact that the Prophet and his wives were actually held by the faithful as their spiritual father and mother. The Prophet wielded the only, absolute authority ever known to the Arabs, because of this circumstance the blood-ties were loosened and loyalties were formed instead on the basis of faith. For example when immigrants arrived in Madinah, a brotherhood based on a common religious faith was established between the immigrants and the helpers, under which they were entitled to a share of inheritance at the death of one another. Later when under this religious enthusiasm the real heirs were deprived of their shares or the economic conditions of the immigrants improved, the Qur'an through an Ordinance had to intervene to re-establish the ties of the actual relatives for the purposes of inheritance:

And the possessors of relationship are closer one to another in the ordinance of Allah than (other) believers and those who fled (their homes), except that you do some good to your friends. This is written in the Book.⁷²

In fact, this state of affairs of the believers was the practical demonstration of such verses of the Qur'an:

Say: If your fathers and your sons and your brethren and your wives and your kinsfolk and the wealth you have acquired and trade whose dullness you fear, and dwellings you love, are dearer to you than Allah and

His Messenger and striving in His way, then wait till Allāh brings His Command to pass. And Allāh guides not the transgressing people 73

The effect of such sovereign Ordinances was that the believers were actually shaken and they became so very careful and cautious that they were hesitant even to perform their daily work unless it was approved by the explicit, divine Command or unless they were fully convinced that their action would conform to the model behaviour or exemplary conduct of the Prophet which they always kept in mind according to an ordinance of God. "Certainly you have in the Messenger of Allāh an excellent exemplar for him who hopes in Allāh and the Latter Day, and remembers Allāh much."74 That is why, if at a certain point they were in doubt about anything, their final resort was not the customary, normative behaviour of their forefathers, but the Prophet himself. The recurrent use of the term yas'alunaka (they ask thee) in the Qur'an is a clear proof of this situation.

The frequent usage of the term yas'alunaka shows that the believers under the impulse of conformity to the "model behaviour" questioned the Prophet casuistically. The Qur'an has preserved some of these dialogues which indicate the anxiety of the believers who under the urge of conformity and adaptability to the standard-pattern-conduct of the Prophet inquired about all spheres of life:

They ask thee: of the new moons⁷⁵; as to what they should spend⁷⁶; about fighting in the sacred month⁷⁷; about the intoxicants and games of chance⁷⁸; concerning the orphans⁷⁹; about menstruation⁸⁰; as to what is allowed them⁸¹; about the Hour, when will it come to pass⁸²; about booties⁸³; about the soul⁸⁴; about Dhul'l-qarnayn⁸⁵; they ask thee about the mountains etc⁸⁶.

The Qur'ān testifies the fact that the impulse and urge of inquiry was so great that it was checked by a special ordinance, so that every thing may not become obligatory and much should be left to the exercise of individual judgement according to the circumstances of the time and place.

O you who believe, ask not about things which if made known to you would give you trouble; and if you ask about them when the Qur'ān is being revealed, they will be made known to you. Allāh pardons this; and Allāh is Forgiving, Forbearing.⁸⁷

What has been said above Duncan B. Macdonald has summed up in the following words :

With the coming of Muhammad and the preaching of Islam, this ancestral Sunna had in great part to yield. But the temper of the Arab mind remained firm, and the Sunna of Muhammad took its place. Pious Muslim did not say, "Such was the usage of fathers and it is mine", but, "I follow the usage of the Prophet of God". Then, just as the old Sunna of the heathen times had expressed itself through the stories of great warriors, of their battles and loves; through anecdotes of wise men, and their keen and eloquent words; so it was with the Sunna of the one man, Muhammad⁸⁸.

IV

We have established above that the Prophet as a single individual had introduced sweeping innovations and

had practically replaced the pre-Islamic Sunnah based on the idea of collective authorship ("forefathers") by his own exemplary conduct; and the believers had practically started to see life from an individual's (i.e. the Prophet's) point of view instead of that of collective group (i.e. forefathers). Now here in this context, it seems reasonable to discuss what was the content and character of the Sunnah of the Prophet? Was it something absolutely specific laying down once and for all the details of rules about all spheres of human life.

Writing on the issue Dr. Fazlur Rahman points out that the Prophet's biography has certainly no tendency to suggest the impression of the Prophet as a pan-Legist neatly regulating the fine details of human life from administration to those of ritual purity.⁸⁹ He continues: "That the Prophetic Sunnah was a general umbrella-concept rather than filled with an absolutely specific content flows directly, at a theoretical level, from the fact that the Sunnah is a behavioral term.⁹⁰ He, therefore, after quoting Hasan al-Basri, concludes that the Prophetic Sunnah is "rather a pointer in a direction than an exactly laid-out series of rules."⁹¹

Professor Joseph Schacht summarizing the ideals of the Prophet says:

His aim as a Prophet was not to create a new system of law; it was to teach men how to act, what to do, and what to avoid in order to pass the reckoning on the Day of Judgement, and to

enter Paradise. This is why Islam in general, and Islamic Law in particular, is a system of duties, comprising ritual, legal, and moral obligations on the same footing, and bringing them all under the authority of the same religious Command."

To apply religious and ethical standards consistently to all aspects of life, according to Professor Schacht, was the original idea of the Prophet. He further maintains that when finally the Prophet had to resort to legislation, the religious and ethical principles were still of his primary concern: "But the Prophet eventually had to resign himself to applying religious and ethical principles to the legal institutions as he found them." After quoting different types of legal statements in the Qur'an he concludes:

[They] are not meant to lay down legal rules regulating the form and effects of these transactions, but to establish moral norms under which certain transactions are allowed or forbidden. . . . They are essentially moral and only incidentally penal 92.

It follows from the above discussion of Professor Schacht that the first and the last aim of the Prophet was to "establish moral norms" and "to apply religious and ethical principles" to all aspects of human behaviour. That is to say to set an example and to introduce an exemplary conduct so that the others follow it. Dr. Fazlur Rahman has put it in this way: "But the real achievements of Muḥammad are to be judged . . . On the basis of what he bequeathed to mankind: both a set of ideals and a concrete way of achieving those ideals." 93 ^{Professor} Majid Khadduri calls these "religious

and ethical principles" a set of divine commands, which constituted "fundamental law" or "Constitution" for the Islamic concept of Umma.⁹⁴ According to, Professor N. J. Coulson, the religious message of the founder-Prophet of Islam (i.e. the religious and ethical principles of Islam) includes the establishing of certain basic standards of behaviour for the Muslim community. He, therefore, concludes that when the religious message of the Prophet was reduced into terms of rights and obligations and when remedies were provided in event of infringement, there already existed an accepted standard of conduct. It follows that "an accepted standard of conduct" was "valid and operative" from the very beginning of Islam. It will be illuminating to quote the whole passage of Prof. Coulson. He writes:

In the evolution of a society the technical process of legislation is a secondary stage. Reducing into terms of rights and obligations an accepted standard of conduct and providing remedies in the event of its infringement, it presupposes the existence of this accepted standard. Naturally enough, therefore, the religious message of the founder-Prophet of Islam, the purpose of which included the establishing of certain basic standard of behaviour for the Muslim community, precedes, both in point of time and emphasis, his role as a political legislator. Accordingly, the so-called legal matter of the Qur'an consists mainly of broad and general propositions as to what the aims and aspirations of Muslim society should be. It is essentially the bare formulation of the Islamic religious ethic⁹⁵.

This "accepted standard of conduct" and "basic standard of behaviour" in the terminology of Prof. Coulson was "the Sunnah of the Prophet" based on the Qur'anic religious and ethical principles. And this is the view of Shāh Walī

Allāh of Dihlī. Discussing the methodology of the early jurists he says that their primary concern was with those fundamental and basic principles (al-qawā'id al-kulliyah) which had been neatly enunciated and refined (naqqahā wa hadhdhabahā). And whenever they were faced by a problem they sought its solution from these fundamental principles. Further, explaining the term al-Sunnah used by Mālik in the Muwattā', Shāh Walī Allāh says: "When Imām Mālik uses the word al-Sunnah in the Muwattā'⁹⁶ he means the established fundamental principles." These "established fundamental principles" were actually the religious and ethical principles bequeathed by the Prophet which were his Sunnah during his lifetime and remained so thereafter.

Dr. Muhammad Iqbāl in his The Reconstruction of Religious Thought in Islam would call these principles "the foundational principles" which constituted the real message of the Prophet. These "foundational principles" says Iqbāl, were the exemplar during the lifetime of the Prophet and they were the "ground work" on which the early doctors of law evolved a number of legal systems. Dr. Iqbāl very clearly has distinguished between the ideals of the Prophet and their application to the habits, ways and peculiarities of the people to whom he was specifically sent.⁹⁷ Therefore, the exemplary conduct and the model behaviour of the Prophet means those universal principles which he applied during his life to the specific, socio-economic conditions prevalent in Arabia of his time and bequeathed

to mankind after his death. Supporting the view of Shah Wali Allāh he sums up his thought in this passage:

The prophet who aims at all-embracing principles, however, can neither reveal different principles for different peoples, nor leaves them to work out their own rules of conduct. His method is to train one particular people, and to use them as a nucleus for the building up of a universal Shari'at. In doing so he accentuates the principles underlying the social life of all mankind, and applies them to concrete cases in the light of the specific habit of the people immediately before him. The Shari'at values (Ahkam) resulting from his application (i.e. rules relating to penalties for crimes) are in a sense specific to that people; and, since their observance is not an end in itself, they cannot be strictly enforced in the case of future generations.⁹⁸

Mawlānā 'Ubayd Allāh Sindhī names these principles as the "fundamental law" (qanūn asāsī) and their application to the socio-economic system of the Prophet's time as the "preliminary laws" (tamhīdī qawānīn) and further explains that the "fundamental law" is unalterable, whereas the "preliminary laws" change with the change in time and place.⁹⁹

Mawlānā Sayyid Abū al-A'la Mawdūdī also holds the view that Sunnah means those moral principles which were applied by the Prophet to all aspects of life. Explaining his view Mawlānā writes:

Sunnah, in fact, is that [model] behaviour for whose teaching and application God sent His Prophet. It excludes those personal habits which the Prophet adopted as a human being or as a person who appeared at a particular period of human history.¹⁰⁰ . . . The basic purpose of the Prophets is to teach good morals to human beings and to impart those [natural] ways which are completely in harmony with "the nature made by God in which He has created men"¹⁰¹. In these good morals and natural ways there is one

thing which occupies the basic and fundamental position and the other is its outward form and manifestation. . . . And the demand of Shari'ah from us is only to adopt the essence of morals and nature. As far the practical form which the Prophet adopted, Shari'ah has given us freedom to adopt it or not.¹⁰²

It follows that according to Mawlana Mawdudi

Sunnah is a model behaviour which is nothing but moral and natural principles; and the basic function of the Prophet was to teach and impart those principles to human being and to apply them to the specific conditions of his time.

In the light of the above evidence there was, therefore, a "normative exemplary behaviour" and an "accepted standard of conduct," introduced by the Prophet for the Muslim community, in contradistinction to the ancient Arabian standards of behaviour. And we already have established that Sunnah primarily means an exemplary conduct. Therefore, whether the normative, exemplary conduct of the Prophet was formulated and described by means of a verbal term such as the "Sunnah of the Prophet" during or just after the time of the Prophet, is immaterial, since the concept as such was valid and operative from the very beginning of Islam. Further, this exemplary conduct of the Prophet constituted the moral and ethical principles and their application to the given historical conditions was not meant to be eternal as the principles themselves.

V

After establishing the fact that there was an accepted standard of conduct and an exemplary behaviour of the Prophet for the Muslim community during his lifetime, it seems reasonable to see whether this accepted standard of behaviour of the Prophet continued after him or not. Professor D. S. Margoliouth says that under the Qur'anic injunction the example of the Prophet was the standard of behaviour for both his Companions and his close associates. The latter group resembled him closely and after his death they carried this conduct wherever they went :

The Koran bids its devotees take as their models those who have been guided, and in practical urges that the Prophet is a pattern of conduct. Naturally, his immediate associates were supposed to have resembled him most closely, and what they did became a norm of conduct far below, indeed, that which was attributed to the Prophet, but at least analogous to it; whose followed their example could not go wrongly.

Professor Margoliouth further says that the conduct of the prophet not only exercised a great influence on his environment but its sphere of influence spread throughout
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the ever-expanding area of Islam.

Professor Joseph Schacht describes the golden rule of the Arabs in this way: "Whatever the forefathers had done deserved to be imitated and every innovation and experiment must be resisted." This idea presented a formidable obstacle to every innovation. Then he says: Islam, the greatest innovation that Arabia saw, had to overcome this obstacle,

and a hard fight it was. But once Islam had prevailed, even among one single group of Arabs, the old conservatism reasserted itself; what had shortly before been an innovation now became the thing to do, a thing hallowed by precedent and tradition, a Sunna. It follows from this passage that the innovation, the Sunnah, introduced by the Prophet in contradistinction to the ancient Arabian Sunnah, had to fight hard to replace the latter, and eventually the former succeeded and prevailed over the latter. Secondly, the innovation, the Sunnah of the Prophet, after having once been accepted by the Arabs, prevailed among them as an accepted standard of conduct in place of the ancient Arabian standard of behaviour. In other words the Sunnah of the Prophet became Maslak for those who followed it after him.

This Sunnah of the Prophet embodied, according to Professor Schacht, the religious and ethical principles, the original idea of the Prophet. These principles were obviously observed in many rules of Islamic law from the beginning. He writes:

It is indeed obvious that many rules of Islamic law, particularly in the law of family and the law of inheritance, not to mention worship and ritual, were based on the Koran from the beginning and occasionally this can be positively proved.¹⁰⁵

This exemplary conduct of the Prophet in the form of the religious and moral principles was the Sunnah during the time of the Prophet and this Sunnah continued without any interruption after his death. This Sunnah was the guide for

the earliest Islamic Qādīs who applied them to the problems presented before them for solution. Professor Schacht says:

The earliest Islamic Kādīs gave judgement according to their own discretion, or 'sound opinion' (ra'y) as it was called . . . and taking the letter and spirit of the Koranic regulations and other recognised Islamic religious norms into account as much as they thought fit.

Speaking historically, Prof. Schacht mentions "specialists" after the earliest Qādīs, and describes their function as follows:

The main concern of these specialists in the intellectual climate of the late Umayyad period, was naturally to know whether the customary law conformed to the Koranic and generally Islamic norms.¹⁰⁶

Professor Schacht describes the function of the Prophet as "to establish moral norms under which certain transactions are allowed or forbidden". After the Prophet these "moral norms" had become "the recognized Islamic religious norms" or the "accepted standard of conduct" for the Muslim community in general and for the Qādīs and the legal specialists in particular. These specialists, in the words of prof. Schacht,

surveyed all fields of contemporary activities, including the field of law; . . . They considered possible objections that could be made to recognized practices from the religious and, in particular, from the ritualistic or the ethical point of view, and as a result endorsed, modified, or rejected them. They impregnated the sphere of law with religious and ethical ideas, subjected it to Islamic norms, and incorporated it into the body of duties incumbent on every Muslim.¹⁰⁷

At the end of this passage he has said that the activity of the Companions and the Successors was on the

pattern of the Prophet. As the Prophet applied these moral and religious principles to the early Islamic community of Madinah, so did his Successors on a much wider scale and in a vastly more detailed manner.

As a conclusion we may say that the Prophet applied the religious and ethical principles introduced by himself to the environment around him, and this activity and behaviour of the Prophet became an accepted standard of conduct for his Companions and their Successors.

Professor Coulson maintains that the Companions of the Prophet carried the example of the Prophet by developing and elaborating the principles to the degree that was required by the practical problems confronting the Muslim

108 community. He calls, the first scholar-jurists the "religious idealists."

These earliest scholar-jurists gave voice to their ideas of standards of conduct which would represent the fulfilment of the true Islamic religious ethic. The starting point was the review of local practice, legal and popular, in the light of the principles of conduct enshrined in the Qur'an. Institutions and activities were individually considered, these approved or rejected according as to whether they measured up to or fell short of those criteria.109

Coulson describing different trends in early jurisprudence says that the early jurists' doctrine represented as having roots stretching back into the past. He very explicitly holds that the activity of the early jurists was linked with the Prophet who was the ultimate starting-point of the Islamic Sunnah. He says:

His (Prophet's) authority lay in the fact that — he was closest, in time and spirit, to the Qur'an and as such was the ultimate starting-point of the Islamic Sunna.¹¹⁰

Therefore, according to Coulson, the "accepted standard of conduct" of the Prophet was carried through after him continuously by the later generations, and the base and ground of the jurists' activities was the Prophet himself who was the ultimate starting-point of the Islamic Sunna."

Now the religious and ethical principles introduced by the Prophet which later became the "recognized Islamic religious norms" in the words of Prof. Schacht; and the "accepted standard of conduct" in the terminology of Professor Coulson, are known as the "basic and fundamental principles" in the terminology of Shah Wali Allah and are called the "foundational principles" by Dr. Iqbal.

Dr. Iqbal tracing the link of these foundational principles to the Prophet concludes that they were the guide of the early jurists: "Our early doctors of law taking their cue mainly from this ground work evolved a number of legal systems."¹¹¹

Dr. Fazlur Rahman has summed up his views on the issue as follows:

The conclusions we have arrived at so far are first that the Sunna and the Hadith were coeval and consubstantial in the earliest phase after Muhammad and that both were directed towards and drew their normativity from him. . . . As the legal situations

and the consciousness of moral and religious issues became more and more complex, controversies arose on most points, and in the theological and moral sphere especially there were foreign influences. But the concept of an ideal Sunna was retained; whatever new material was thought out or assimilated, it was given as an interpretation of the principles of the Quran and the Sunna.¹¹²

It may be gathered from the foregoing that the standard of conduct or the Sunnah of the Prophet set forth and introduced by the Prophet was not only valid and operative during his time for the Muslim community but it continued to remain so after him.

VI

There is, however, another side of the picture too. That is the introduction of the "Sunnah of the Prophet" into the jurisprudential sources of Islam was not the work of the Prophet himself, but, rather it was introduced by later generations. This view has been held by Professor C. Snouck Hurgronje in his work, Mohammedanism, by Professor H. Lammens in his work, Islam, Beliefs and Institutions, and by Professor D. S. Margoliouth in his work, The Early Development of Mohammedanism. They hold that the second source of Islamic law was the customary law of the community approved by the "persons of authority". Professor Margoliouth has summed up this view in these words:

It seems clear that the second source of law was not yet anything quite definite, but merely what was customary and had the approval of persons of authority, all of whom presently merged in the Prophet.¹¹³

In the light of the conclusions drawn by the above

authorities and through his own penetrating and laborious researches Professor Schacht has concluded:

That Shafi'i was the first lawyer to define Sunna as the model behaviour of the Prophet, in contrast with his predecessors for whom it was not necessarily connected with the Prophet, but represented the traditional, albeit ideal, usage of the community.¹¹⁴

And we have established in the previous sections that :

- (1) Sunnah originally and primarily means introducing a model of conduct and setting up of an example (as distinguished from to "follow");
- (2) the Prophet during his life-time had successfully replaced the ancient Arabian standard of behaviour by his exemplary conduct and established an accepted standard of behaviour for the Muslim community in contradistinction to the pre-Islamic tribal society;
- (3) this exemplary behaviour of the Prophet as concept, in contradistinction to the ancient Arabian standard of conduct, was valid and operative from the very beginning of Islam and remained so after him during the time of the Companions and later generations. But the formulation and transmission of the term "Sunnah of the Prophet" as such as conscious concept was probably later.

By juxtaposing the above detailed evidence and our conclusions from it, on the one hand, and the view expressed by Professors Hurgonje, Lammens and Margoliouth, on the other hand, we want to show that there is no real contradiction in them as apparently it seems to be. Because what these people say is that "the second source of law was not yet anything quite definite, but merely what was customary and had the approval of persons of authority". It is, it seems, another way of saying that the second source of

law (i. e. the Sunnah of the Prophet) as a term was not employed initially. Only later did it come into use. The following words in the statement of Professor Margoliouth are very important in this connection: the second source of law was that which "had the approval of persons of authority". Now, "persons of authority" after the Prophet were his senior Companions and then their Successors and so forth. According to the statement the second source of law was that which "had the approval of persons of authority", and we have seen previously that the standard of approval and judgement of these authorities was nothing but what they inherited from the Prophet as his exemplary behaviour - - an accepted standard of conduct, not yet labelled by means of the explicit term, the "Sunnah of the Prophet," because this term appeared later; in the words of Margoliouth: "all of whom presently merged in the Prophet." Without accepting this interpretation it is hard to understand the following statement of Margoliouth in the same book in which he says:

According to all appearances the death of the Prophet made at first little difference in the conduct of affairs, because his successors were his most trusted advisors, the persons most familiar with his ideas and plans.¹¹⁵

 The Koran bids its devotees take as their models those who have been guided, and in practical urges that the Prophet is a pattern of conduct. Naturally, his immediate associates were supposed to have resembled him most closely, and what they did became a norm of conduct far below, indeed, that which was attributed to the Prophet, but at least analogous to it; whoso followed their example could not go wrongly.

. . . We cannot doubt that the mode of life pursued by the Prophet exercised a great influence on his environment, and the process spread through the ever-expanding area of Islam ¹¹⁶.

This should also be the interpretation of Professor Schacht's statement that "Shāfi'i was the first lawyer to define Sunna as the model behaviour of the Prophet". In other words the Sunnah of the Prophet as a non-verbal standard of conduct introduced by the Prophet was present from the beginning but as an explicit legal term was defined by al-Shāfi'i, though he maintains that the term was introduced into the theory of Islamic law, presumably towards the end of the first century, by the scholars of Iraq. Otherwise it would be hard to resolve the contradiction by means of which Professor Schacht maintains on one hand that (1) the basic function of the Prophet was "to establish moral norms" and to introduce "religious and ethical principles" to the Muslim community, (2) these norms and principles replaced the ancient Arabian standard of conduct and represented a radical breakaway from the Arab paganism, and also (3) this activity of the Prophet was followed by the Companions and the "early Kadis" and the "¹¹⁷Specialists," and on the other hand that the Sunnah of the Prophet suddenly appeared in al-Shāfi'i without having any conceptual connection with the Prophet.

VII

By the time of Mālik enough material had been created by the authoritative pronouncements of Caliphs, by the decisions

of judges and by the commands of Civil and Military authorities to make this concept of Sunnah a living reality. In turn this whole material took the place of the pronouncements and decisions of the pre-Islamic Arab authorities, and became the basis of practice and custom of different regions of the Muslim domain. Thus the fluid and liquid concept given by the Prophet began to crystallise in the shape of definite rules and usages of the community. In ~~this~~ way the old idea of Sunnah, i.e., the actual practice established over generations, reasserted itself and the people began to take much interest in the past material and the material creating agencies (the Caliphs, the Companions, judges and commanders). Once this interest in the past and investing it with this supreme value was aroused and set in motion there was no power to check it from its culmination until the time of al-Shāfi'ī who argued with full vigour in favour of the Tradition and the coming generations followed him in this respect.

However, distinction must be made, in this regard, between the attitude of the masses who were naturally inclined towards what had happened in their recent past and between the attitude of the responsible men of opinion. The latter were constantly and vigilantly on watch to see, first, that the "past practices" still conform to the "exemplary conduct of the Prophet" under the rapidly changing circumstances; and secondly, to ensure that there were no religious and

moral objections to the newly emerging transactions and modes
¹¹⁸
of behaviour. Under the Umayyads this function was entrusted
to the Qaḍīs who used to give judgement taking the letter
and the spirit of the Qur'ānic regulations and other recog-
¹¹⁹
nized Islamic religious norms into account. Later this func-
tion was taken over by the legal specialists whose main
concern was to see whether the customary law conformed to
the Qur'ānic and generally Islamic norms.

These pious persons surveyed all fields of
contemporary activities, including the field
of law. . . . They considered possible objections
that could be made to recognized practices from
the religious and, in particular, from the ritualis-
tic or ethical point of view, and as a result
endorsed, modified, or rejected them. They impreg-
nated the sphere of law with religious and ethical
ideas, subjected it to Islamic norms, and incorporat-
ed it into the body of duties incumbent on every
Muslim.¹²⁰"

They provided guidance to the masses how to act
according to the tenets of Islam, on the one hand, and
often criticized, though not by political means, the acts
and regulations of the Umayyad government, on the other
hand.

With the passage of time the groups of the earliest
specialists developed into the "ancient schools of law,"
Though there existed among them a considerable body of common
doctrine based on the religious and moral principles, the
general cha^aracter of these schools was conditioned essentially
by geographical factors, local variations in social conditions,
customary law and practice. An important aspect of the

activity of these early jurists was to depend upon their responsible, personal, free-thought activity — which was called ra'y or "personal considered opinion," for elaborating the religious and moral principles into specific code of human behaviour.

Dr. Fazlur Rahman says:

This rational thinking produced an immense wealth of legal, religious, and moral ideas during the first century and a half approximately. But with all its wealth, the product of this activity became rather chaotic, i.e., the "Sunnah" of different regions — Hijaz, Iraq, Egypt, etc., — became divergent on almost every issue of detail ¹²¹.

Scholars such as al-Awza'i, ¹²²Abū Yūsuf, ¹²³al-Shaybanī ¹²⁴ and al-Shafi'i ¹²⁵ have left details of the legal differences of the period, but the best description, which is very brief but comprehensive, in this regard, has come down to us by an 'Abbasid official dignitary, the secretary of the state, Ibn al-Muqaffa':

Among the issues which Amīr al-Mu'minīn should take into consideration is the matter of these two cities (Kūfah and Basrah) and of the other provinces and regions, concerning the difference of these contradicting legal problems, the diversification of which has become a great issue in connection with the blood, marital relations and properties. The blood and the marital relations which are permitted in Hīrah are prohibited in Kufah. The same kind of legal diversification is happening in the middle of Kufah. A thing is being permitted in one locality but it is being prohibited in the other. In addition to this diverse legal activity, judgements are being given regarding the blood of the Muslims and their honour; these decisions are given by the judges and are enforced (by the Government). In the face of all this, there is not a single group from the people of

Iraq and of Hijāz who perceives this situation; rather they take pride in what they adhere to and pour scorn at what the others possess. This attitude of theirs has thrown them into a situation which perturbs any one who hears it from the intellectuals 126.

It is at this historical juncture that Mālik b. Anas comes into prominence both in official and private capacity. Abū Ja'far al-Manṣūr, the second 'Abbāsīd Caliph, no sooner did he get an opportunity after maintaining peace and order throughout the domain than he took into consideration his secretary's advice and approached one of the most venerated personalities of his time, Mālik b. Anas. He requested him to help him in the crisis. There is enough historical evidence to support the view that the Muwatta' was produced in compliance to al-Manṣūr's request.¹²⁷ The 'Abbāsīds were in desperate need of some middle-path which would put an end to legal divergences and the Muwatta' of Mālik was intended to meet the desire.¹²⁸

Apart from the 'Abbāsīd's request for standardization there was an independent movement for uniformity and standardization launched by the intellectuals themselves. Ibn Hajar al-'Asqalanī¹²⁹ and al-Zurqanī¹³⁰ have mentioned many scholars in different regions who compiled treatises on the legal thought developed in their respective regions. In Madinah proper, it is said, that some scholars compiled works named al-Muwatta', before Mālik.

The pressing need of the time for uniformity accentuated

and brought into a focus by the political revolutions, social upheavals and the legal divergences, compelled the Government as well as the intellectuals to meet the challenge on an "empire-wide" level, as the previous scholars had done on the regional level. It is our contention that Mālik was inspired by both the currents, "regional" as well as the "ultra-regional." The Muwatta', the work he produced in this context, contains the elements of both, and it is a true representation of the movement of the time. It diverges from its predecessors in the sense that it gives importance to the Ḥadīth to the extent that it opens every chapter with a Ḥadīth. Again it is our contention that the introduction of the Ḥadīth in the Muwatta' at this time was due to the popularity of the Ḥadīth. This contention seems reasonable because the Ḥadīth was acquiring the status of a universal element acceptable to all the regions. This is in contra-distinction to the pure Fiqh which developed regionally in geographically closed areas. In al-Muwatta' Mālik introduced this new element to satisfy the universal aspiration but it remained true to the genius of its predecessors to the extent that the overriding authority accepted by him was not the Ḥadīth but the Sunnah.

REFERENCES AND NOTES

1. Full name of al-Tahzīb is Tahzīb al-Lughah. It was compiled by Abū Maṣṣūr Muḥammad b. Aḥmad b. Azhar

al-Harawī, known as Al-Azhari (282-370 A.H.). This information has been taken from Muqaddamah al-Sihāh by Ahmad 'Abd al-Ghafūr 'Attār, (Egypt, 1956/1375), p. 83.

2. Abū al-Fadl Jamāl al-Dīn Muhammad b. Mukarram Ibn Manẓūr al-Afriqī al-Misri, Lisān al-'Arab, (Vols. 15; Beyrūt, 1956/1375), XIII, 226.

3. The term Sunnah means to introduce a straightforward way of acting amidst the conflicting and chaotic circumstances. To this fact the Qur'an has referred: أن هذا صراطي مستقيم
فاتبعوه ولا تتبعوا السبل فتفرق بكم عن سبيله (٦٤ ١٥٤)

Professor S. M. Yūsuf has also pointed to the same: "The root S. N. N; from which the word 'Sunnah' is derived, has the basic sense of clarity, straightness, continuity and extension forward". Art. "The Sunnah — Its Transmission Development And Revision," Islamic Culture, XXXVII, No.4 (Hyder Abad, India, October, 1963), p. 271.

4. Vide all the major dictionaries, S.V; Ibn Manẓūr quotes Nuṣayb:

كأنى سننت الحبيب ، أول عاشق
من الناس ، إذا أحببت من بينهم وحدي

5. 'Abd Allāh Ibn al-Muqaffa', Risālah fī al-Sahābah in Rasā'il al-Bulāgha', ed. Muḥammad Kurd 'Alī (Cairo, 1954/1374), p. 126.

6. Ibn Manẓūr, Lisān al-'Arab, op. cit., p. 225.

7. Fazlur Rahman, Islamic Methodology in History (Karachi, 1965) pp. 1-3.

8. Ibn Manẓūr, Lisān al-'Arab, p. 226.

9. Ibid., 225.

10. Ismā'īl b. Hammād al-Jawharī, al-Ṣiḥāh, ed. Ahmad 'Abd al-Ghafūr 'Attār (Vols. 6; Egypt, 1377 A.H.), V, p. 2139.

11. Ibn Manẓūr, Lisān al-'Arab.

12. Ibn al-Muqaffa', Risālah fī al-Sahābah, op. cit.

13. Abū Yūsuf, Kitāb al-Kharāj (Cairo, 1302 A.H.), p. 3.

14. Ibn Manẓūr, Lisān al-'Arab, op. cit., p. 225.

لاتجز عن من سيرة انت سرتها = فاول راض سنة من يسيرها

15. Ibid.
 16. Ibid.
 17. Vide all the major dictionaries. It is in this sense that J. Milton Cowan in his A Dictionary of Modern Written Arabic (Ithaca, N. Y: Cornell University Press, 1961) p. 433, has used this expression: "Istanna Sunnata Muhammad" (to follow / he followed / the Sunnah of Mohammad)".

18. Ibn Manzūr, Lisān al-'Arab, p. 225.

من سن سنة سيئة يريد من عملها ليقتدى به فيها - وكل من ابتداً امراً عمل به قوم بعده قيل : هو الذي به سنة :

كأنى سنت الحب ، اول عاشق من الناس ، اذا احببت من بينهم وحدي
 19. The Qur'an : 33: 21 : لقد كان لكم فى رسول الله اسوة حسنة :
 (Certainly you have in the Messenger of Allah an excellent exemplar).

20. The Qur'an: 3: 30 و قل ان كنتم تحبون الله فاتبعونى يحببكم الله
 ان هذا صراطى مستقيماً فاتبعوه
 6: 164

21. Ibid. 3: 31

22. If Sunnah means to introduce and to establish something new then every Sunnah is Bid'ah to begin with; for Bid'ah is characterized by lack of previous model and discontinuity with the past. Hassān b. Thābit has expressed this phenomenon in the following verses:

ان الذوائب من فهر و اخوتهم
 يرضى بها كل من كانت سريرته
 قوم اذا حاربوا ضروا عدوهم
 سجية تلك منهم غير محدثه
 قد بينوا للناس سنة تتبـع
 تقوا الاله و بالامر الذى شرعوا
 او حاولوا النفع فى اشيائهم نفـعوا
 ان الخلائق فاعلم شرها البـدع

(The Chiefs of the Fihri tribe and their brethren have established / introduced: Sanna Allāh Sunnatan means bayyana: Lisān al-'Arab, S. V. / Sunnah for the people to be followed. Everyone who has piety and righteousness in his heart conforms to their Sunnah which they have enunciated. They are the people if they wage war damage their enemy; or if they intend to give benefit to their partisans they do it. This is their inborn characteristic which is not new / acquired /. Mind you ! against the natural ways /unnatural / new /acquired / ways are the worst.)
Sharh Diwān Hassan b. Thābit ed. 'Abd al-Rahmān al-Barqūqī (Egypt, 1926/1347), p. 248.

Al-Shatibi (Abu Ishaq Ibrahim) while discussing the Sunnah and the Bid'ah has expressed the same view: Cf. al-I'tisām (Egypt, 1913/1331), I, pp. 21-23. Professor Schacht very explicitly has said: "Islam, the greatest innovation that Arabia saw, had to overcome this obstacle, and a hard fight it was. But once Islam had prevailed, even among one single group of Arabs, the old conservatism reasserted itself; what had shortly before been an innovation now became the thing to do a thing hallowed by precedent and tradition, a Sunnah" (An Introduction

- to Islamic Law (Oxford: Clarendon Press, 1964), p. 17.).
23. Schacht, An Introduction to Islamic Law, p. 17.
 24. Fazlur Rahman, Islam, paperback edition (London, Weidenfeld And Nicolson, 1966), p. 56.
 25. Malik b. Anas, al-Muwatta', with Sharh of al-Zurqanī (4 vols; Cairo, 1310 A.H.), II, p. 370; IV, p. 87, and in section captioned "Māja", fi al-Bay'ah". Cf., Infra; Chap. "Different shades of Sunnah in the light of different terms used in the Muwatta'." Muhammad b. Hasan al-Shaybānī has quoted it in his al-Muwatta' (Deoband, India) p. 317.
 26. Abū Muḥammad 'Abd al-Malik Ibn Hishām, Sīrah al-Nabiyy ed. Muḥammad Muḥayy al-Dīn 'Abd al-Ḥamīd (Vols. 4; Cairo, 1937/1356), IV p. 276.
وقد تركت فيكم ما ان اعتصمتم به فلن تضلوا ابدا امرنا بينا كتاب الله وسنة نبيه
 27. Ibid., p. 341. اطيعوني ما اطعت الله ورسوله فاذا عصيت الله ورسوله فلا طاعة لي لكم
 28. Abū Yūsuf, Kitāb al-Kharāj, (Cairo, 1302 A.H.), pp. 8, 43, 66.
Abū Yūsuf has also quoted it in his work: al-Radd 'alā Siyar al-Awzā'i (Cairo, 1357 A.H.), pp. 57, 67, 131.
 29. Cf. Schacht, An Introduction to Islamic Law, op. cit. p. 18.
 30. Aḥmad b. Yahya Ibn al-Murtadā, Kitāb Tabaqāt al-Mu'tazilah (Beyrūt, 1961) p. 19.
وقد ادركنا السلف الذين قاموا بالمراللة واستنوا بسنة رسول الله صلى الله عليه وسلم
Cf. Der Islam, XXI, 67, pp. (text edited by H. Ritter).
 31. Schacht, Introduction, op. cit. p. 18.
 32. The Qur'an: 6: 147.
 33. Ibid. : 7 : 173.
 34. Ibid. : 7 : 70.
 35. "The Arabs were, and are, bound by tradition and precedent. Whatever was customary was right and proper; whatever the forefathers had done deserved to be imitated. This was the golden rule of the Arabs whose existence on a narrow margin in an unpropitious environment did not leave them much room for experiments and innovations which might upset the precarious balance of their lives. In this idea of precedent or Sunna the whole conservatism of the Arabs found expression." Schacht, Introduction op. cit., p. 17.
 36. The Qur'an: 2: 170.
 37. Ibid.: 5: 104.
 38. Ibid.: 43: 22.
 39. Ibid.: 7: 28.
 40. Ibid.: 2: 170.
 41. Ibid.: 5: 104.

42. Ibid.: 27: 69, 70, 71.
43. Ibid.: 59: 7.
44. Ibid.: 50: 2.
45. Ibid.: 34: 43.
46. Ibid.: 38: 7.
47. Ibid.: 38: 4.
48. "They recognized, of course, that a Sunnah might have been laid down by an individual in the relatively past, but then that individual was considered the spokesman and the representative, the leader (Imam) of the whole group." Schacht, An Introduction, op. cit., p. 17.

N.J. Coulson has expressed the same view: "Modifications of the laws, which naturally occurred with the passage of time, may have been initiated by individuals."

A History of Islamic Law (Edinburgh: at the University Press, 1964), p. 9. من معشر سنتهم أباهم و لكل قوم سنة و امامهم

49. Labīd b. Rabi'ah, al-Mu'allaqāt al-'Ashr, ed. Ahmad b.
50. Amīn al-Shanqīṭī (Egypt, 1353 A.H.), p. 105.
50. Cf. Supra, reference No: 22.

Jāhiz has quoted a statement of an old woman who

received the news of al-Hajjāj's death للهم انك امته فأمت سنته
(Abu 'Uthmān 'Amr b. Bakr al-Jāhiz (150-255 A.H.),

al-Bayān wa al-Tabyiyn, ed. 'Abd al-Salām Muḥammad Ḥarām
(Cairo, 1949), III, p. 271.

51. Ibn Manzūr, Lisān, op. cit., XIII, p. 226.
52. Fazlur Rahman, Islamic Methodology in History, op. cit. 4
53. Duncan B. Macdonald, Development of Muslim Theology, Jurisprudence, and Constitutional Theory, (Lahore, 1960), p. 69.
54. Schacht, An Introduction to Islamic Law, op. cit., pp. 10-14.
55. Majīd Khadduri, War and Peace in the law of Islam, (Johns Hopkins, 1960), p. 4.
56. Fazlur Rahman, Islam, op. cit., p. 43.
57. Ibid., p. 25.
58. N. J. Coulson, A History of Islamic Law op. cit., p. 9.
59. Ibid., p. 4.
60. Ibid., p. 10.
61. Ibid., p. 15.
62. Ibid., p. 16.
63. Ibid., p. 23.
64. Ibid., p. 26.
65. Schacht, An Introduction to Islamic Law, p. 11.
66. Ibid., p. 10.
67. Khadduri, War and Peace, op. cit., p. 8.
68. Ibid.,
69. The Qur'an: 4: 65.
70. Ibid., 33: 36.
71. Ibid., 33: 6.

72. Ibid.
 73. Ibid. : 9 : 25.
 74. Ibid. : 33 : 21.
 75. Ibid. : 2 : 89.
 76. Ibid. : 2 : 215.
 77. Ibid. : 2 : 217.
 78. Ibid. : 2 : 219.
 79. Ibid. : 2 : 220.
 80. Ibid. : 2 : 222.
 81. Ibid. : 5 : 5.
 82. Ibid. : 7 : 186.
 83. Ibid. : 8 : 1.
 84. Ibid. : 17 : 85.
 85. Ibid. : 18 : 84.
 86. Ibid. : 20 : 105.
 87. Ibid. : 5 : 101. In another verse the believers are warned not to behave like the jews who vexed Moses with different questions: 2 : 108.
 88. Duncan B. Macdonald, Development of Muslim Theology, op. cit., p. 74.
 89. Fazlur Rahman, Islamic Methodology in History, op. cit., p. 10.
 90. Ibid., p. 12.
 91. Ibid.
 92. Schacht, An Introduction, op. cit., pp. 11-12.
 93. Fazlur Rahman, Islam, p. 29.
 94. Khadduri, War and Peace, p. 5.
 95. Coulson, A History of Islamic Law, p. 11.
 96. Shah Wali Allāh, al-Musawwa min Ahādith al-Muwatta' (Makkah, 1351 A.H), Introduction, pp. 15-16.
 97. Sir Mohammad Iqbal, The Reconstruction of Religious Thought in Islam, (Lahore, 1962), p. 168.
 98. Ibid., p. 172.
 99. Mawlānā 'Ubayd Allāh Sindhī, Shah Wali awr onka Falsafah, ed. Muhammad Sarwar, (Lahore : Sindh Sagar Academy, 1964), p. 99.
 100. Mawlānā Sayyid Abū al-A'lā Mawdūdī, Rasā'il wa Masā'il (Lahore, 1950), I, p. 311.
 101. The Qur'an : 30 : 30.
 102. Mawdūdī, Rasā'il, p. 311.
- Qādi 'Abd al-Nabiyy b. 'Abd al-Rasul al-Ahmad Nagari has expressed the same view. According to him the Sunnah is of two kinds: Sunan al-Huda (guiding Sunnah i.e. guiding principles) and Sunan al-Zawa'id (Appendix to Sunnah i.e. personal liking and disliking of the originator of the Sunnah). He holds that the Sunan al-Huda is the Sunnah which the Prophet established and only that is obligatory; whereas the Sunan al-Zawa'id is not included in the Sunan al-Huda, therefore, it is not obligatory.

- Cf. Jāmi' al-'ulūm (Dastūr al-'ulamā, (4 volumes; Hyder Abād; Dā'irah al-Ma'ārif, 1329 A.H.), II, p. 185.
103. D. S. Margoliouth, The Early Development of Mohammadanism (London, 1914), p. 54.
104. Schacht, An Introduction, p. 17.
105. Ibid., p. 18 Cf. p. 19.
106. Ibid., p. 26.
107. Ibid., pp. 26-27.
108. Coulson, A History of Islamic Law, p. 26.
109. Ibid., p. 36.
110. Ibid., p. 43.
111. Iqbāl, Reconstruction, op. cit., p. 168.
112. Fazlur Rahman, Islam, op. cit., p. 56.
113. Margoliouth, The Early Development of Mohammadanism, op. cit., p. 70.
114. Joseph Schacht, The Origins of Muhammadan Jurisprudence, (Oxford); Clarendon Press, 1958), p.2.
115. Margoliouth, The Early Development, op. cit., p. 19.
116. Ibid., p. 54.
117. Cf. Schacht, An Introduction, op. cit., p. 17.
118. Ibid., p. 19.
119. Ibid., pp. 25-6.
120. Ibid., pp. 26-7.
121. Fazlur Rahman, Islamic Methodology, op. cit., pp. 14-5.
122. Cf. Al-Radd 'alā Siyar al-Awzā'ī.
123. Cf. Al-Radd; and Kitāb al-Kharāj.
124. Cf. Al-Siyar al-Kabīr and al-Siyar al-Saghīr, al-Muwatta',
Kitāb al-Hujaj
125. Cf. Kitāb al-Umm.
126. Ibn al-Muqaffa', Risalah fi al-Shābah, op. cit., p. 126.
127. i) Ibn Qutaybah (d. 276 A. H.), al-Imamah wa al-Siyāsah, (Egypt, 1348 A. H.), p. 155.
 ii) Muhammad b. 'Umar al-Wāqidi quoted by Ibn Sa'd in the Annales of al-Tabarī, Zayl al-Muzayyal, Vol. XIII, p. 2519.
 iii) Al-Dhahabī (d. 748 A. H.), Tadhkarah al-Huffāz (Hyder Abad Deccan, 1955), Vol. I, p. 209.
 iv) Ibn 'Abd al-Barr (d. 463 A. H.), Intiqā fi Fadā il al-Thalāthah al-a'imah al-Fuqahā', (Egypt, 1340 A.H.), p. 40.
 v) Ibn Farhūn (d. 799 A.H.), al-Dibaj al-Mudhhdhhab (Egypt, 1351 A. H) P. 2-5.

- vi) Ibn 'Asākir (d. 571 A. H.), Kashf al-Mughattā'
fī Fadl al-Muwattā', p.6.
- vii) Al-Suyūṭī, Tanwīr al-Hawālik, introduction (Egypt).
- viii) Al-Zurqānī, Commentary on al-Muwattā' Introduction
(Egypt, 1310 A. H.).
- ix) Ḥajī Khalīfah, Kashf al-Zunūn, p. 1908.
- 128. Joseph Schacht, Encyclopaedia of Islam, article:
"Malik b. Anas".
- 129. Ibn Hajar al-'Asqalānī, Fath al-Bārī, introduction;
- 130. Al-Zurqānī, Sharh, op. cit., introduction, p. 10.

CHAPTER II

HADITH AND SUNNAH

Hadith is considered a very important factor in the formation of Sunnah. The majority of the Muslims hold that Hadith has been the most authoritative basis of Sunnah from the very beginning of Islam. Another group of Muslim jurists maintains that the practice of the Muslim community of a particular region was the chief constituent in shaping the form of Sunnah. We wish now to examine briefly the stands these different groups have taken on the issue of Hadith as basis of Sunnah. Through this brief perusal we hope to realize fully the import of the view adopted by Malik on the issue.

THE ORTHODOX VIEW OF HADITH AND SUNNAH.

In the view accepted by Muslim orthodoxy Sunnah is¹ the second material source of Islamic law. According to this view, Sunnah consists of the sayings and deeds of the Prophet or of things which he approved tacitly. Consequently, all traditional law belonging to the Sunnah is divided into (1) Sunnatal-fi'il, or what the Prophet did; (2) Sunnatal-Qawl, or what the prophet enjoined; (3) Sunnatal-Taqrir, or that which was done or said in the presence of the Prophet, and which

2

was not forbidden by him, and which he thus tacitly approved. Furthermore, Sunnah is established only by Hadīth going back to the Prophet. Al-Shāfi'i is very emphatic on this point and he does not even recognize Sunnah which is based on practice or consensus. According to al-Shāfi'i, who is the prime architect of this theory, Sunna and Sunnah of the Prophet are synonymous. Further, al-Shāfi'i is inclined to identify Hadīth and Sunnah more or less completely. In an answer to a question of al-Rabī' b. Sulaymān asking how a Hadīth from the Prophet is established, al-Shāfi'i says:

Every Hadīth related by a reliable person as going back to the Prophet is authoritative and can be rejected only if another authoritative Hadīth from the Prophet contradicts it; if it is a case of repeal of a former ordinance by a latter, the latter is accepted; if nothing is known about a repeal, the more reliable of the two Hadīths is to be followed; if both are equally reliable, the one more in keeping with the Qur'an and the remaining undisputed parts of the Sunnah of the Prophet is to be chosen; Hadīths from other persons are of no account in face of a Hadīth from the Prophet, whether they confirm or contradict it; if the other persons had been aware of the Hadīths from the Prophet, they would have followed it.⁵

ANCIENT VIEW OF HADĪTH AND SUNNAH:

For the earliest jurists and judges the practice of the community of their respective region had preference over the Hadīth. The typical example of this view is a very interesting case recorded by al-Tabarī:

Muhammad b. 'Abī Bakr b. Muhammad b. 'Amr b. Ḥazm was

judge in Madinah, and when he had given a judgement contrary to a Hadīth and come home, his brother, 'Abd Allāh b. Abi Bakr, who was a pious man, would say to him: "My brother, you have given this or that judgement today." Muhammad would say: "Yes, my brother?" 'Abd Allāh would ask: "What of the Hadīth, my brother? The Hadīth is important enough to have the judgement based on it." Muhammad would reply: "Alas, what of the practice". Malik explains Muhammad's view in these words: "Whatever practice was agreed upon in Madinah and the agreed practice according to them was preferable to the Hadīth" (Ma ajma'a 'alayh min al-'amal bi-al-Madinah wa al-'amal al-mujtama' 'indahum aqwa min al-Hadīth)⁷⁷

The seven lawyers of Madinah were primarily "Fuqahā'" as their epithet suggests, and it was only secondarily that they related Hadīths. They were Sa'īd b. al-Musayyib (d. 93 A. H.), 'Urwah b. al-Zubayr (d. 94 A. H.), Abū Bakr b. 'Ubayd (d. 94 A. H.), al-Qāsim b. Muḥammad (d. 108 A. H.), 'Ubayd Allāh b. 'Abd Allāh (d. 98 A. H.), Sulaymān b. Yasār (d. 100 A. H.) and, Khārījah b. Zayd (d. 100 A. H.). "These were the people who laid down the foundations of the Madinese Fiqh. They were not traditionists, who pre-occupied themselves with the transmission of the Hadīths, rather they were the jurists who engaged themselves with juridical opinions and relied on Hadīths rarely"⁸. In the time of Malik those jurists who compiled Muwattāt did not even think necessary to mention the Hadīths from the Prophet in their compilations. Rather they relied wholly on the generally agreed practice of⁹ Madinah and on the consensus of the scholars of Madinah.

Almost the same was the case with the Syrian jurists. Al-Awza'i[—] their chief representative incessantly and recurrently invoked the practice of the Muslims of his time which, according to him, had its starting point with the Prophet and was followed by the

Caliphs after him and verified by the scholars. Refuting Abū Hanīfah's view on the selling and buying of slaves captured in enemy territory, al-Awzā'ī says: "The Muslims have always been buying and selling war-captives in the Dār al-Harb.¹⁰"

Professor Schacht remarks: "The continuous practice of the Muslims is the decisive element, reference to the Prophet or to the first Caliphs is optional, but not necessary for establishing it."¹¹

The orthodox view of Sunnah was not yet known to the school of Abū Hanīfah. For them Sunnah meant the "established religious practice." Though the concept of Sunnah of the Prophet was known to them, as is clear from Abū Yūsuf's use of this term (al-Sunnah 'an Rasūl Allāh wa 'an al-salaf min aṣḥābih wa-min qawm Fuqahā').¹² Nevertheless, their reliance on the Sunnah in the meaning of recognized practice (al-Sunnah al-Mahfūzah al-Ma'rūfah)¹³ had preference over against any other argument. For example, Abū Hanīfah holds that the property of a non-Muslim who embraces Islam and migrates to Dār al-Islām, will not be given to him, rather it will be treated as booty in case the non-Muslim territory falls to the Muslims. Al-Awzā'ī rejecting this view supports his stand by advancing a Ḥadīth that the Prophet did not treat the properties of the Immigrant-Muslims from Makkah as booty. Abū Yūsuf explains Abū Hanīfah's view against al-Awzā'ī who advanced a Ḥadīth from the Prophet on the issue. Against the Ḥadīth Abū Yūsuf says that the

practice of the Muslims has been on Abū Ḥanīfah's side, and the Prophet's treatment of the Makkans was an exception. Thus he asserts: "So has been the Sunnah and the practice of Islam (although) the Prophet did not do so (in Makkah)¹⁴". This evidence is a clear indication of the fact that the Ḥadīth as such was not identical with the Sunnah in the view of Abū Ḥanīfah and Abū Yūsuf; nor it was necessarily based on the Ḥadīth. After referring to many Ḥadīths from the Prophet Abū Yūsuf concludes that these Ḥadīths contradict the Sunnah, therefore, they are not acceptable. Only the Sunnah based on the spirit and the letter of the teachings of the Prophet is binding and all the Ḥadīths will be accepted or rejected or interpreted in view of this Sunnah. Abū Yūsuf treats all those Ḥadīths which do not conform to the Sunnah as an exception to the Sunnah. For example, he contends that at the battle of Hawāzin the Prophet returned the war captives to Banū Hawāzin, but this practice of the Prophet will not be accepted in face of the Sunnah generally accepted by the Muslims.¹⁵ On the question of giving some fixed share to the women and dhimmis who take part in a battle alongside of the Muslims, Abū Yūsuf refuting al-Awzā'i's view who couches his argument in an ambiguous term: "Asham Rasūl Allāh . . . wa akhadha al-muslimūn biḥalika ba'dahu"¹⁶ . . . "asham Rasūl Allāh . . . wa asham wulat al-muslimīn ba'dahu"¹⁷ says: "I cannot imagine anyone knowing al-Sunnah and al-Sīrah who can be ignorant of it (mā kuntu aḥsabu aḥadan ya'rifu

al-Sunnah wa al-Sīrah yajhalu hādha¹⁸). On the problem of allotting shares from the booty to each of two horses brought by some warrior in a battle, Abū Yūsuf rejects the Hadīth adduced by al-Awza'i and characterizes it as solitary (Shādhidh), i.e., not recognized by practice. It seems, his view of Sunnah which is standard of judgement with him constitutes the religious and moral principles embodied in the Qur'an and in the generally recognized Sunnah (al-Sunnah al-Ma'rūfah)¹⁹.

Muhammad b. Hasan al-Shaybānī, another important figure of the school of Abū Ḥanīfah, shows the same tendency. He, usually documents the Sunnah al-Ma'rūfah,²⁰ by the Hadīth from the Prophet and later authorities; therefore, his view²¹ about Hadīth is almost the same as noted above.

Ibn al-Qāsim, the chief exponent of Mālik, presents his point of view on the problem of Hadīth as the basis of Sunnah as follows: The issue is whether a woman can marry without the permission of her guardian. Ibn al-Qāsim, after giving Mālik's view, i.e., that such a marriage is not valid, interprets a Hadīth from 'Ā'ishah, when she acted as an agent in the marriage of Ḥafṣah bint 'Abd al-Raḥmān with Mundhir b. al-Zubayr²² (without the permission of her guardian). In explanation of this Hadīth, ibn al-Qāsim has disclosed a fundamental principle of Mālik's legal thought about the acceptance of Hadīth as a legal argument. Ibn al-Qāsim says:

This Hadith has come down to us, and if it were accompanied by a practice passed on to those from whom we have taken it by their own predecessors, it would be right to follow it. But in fact it is like those other Hadiths which are not accompanied by practice.

Ibn al-Qasim, to establish his point, quotes some examples.

It is reported from the Prophet that he used perfume during the Ihram [state of ritual consecration during the Hajj]. And the Prophet said "The adulterer does not commit adultery while he is a believer and he does not commit theft while he is a believer". Even though God has revealed the punishment for fornication in the state of belief and amputation of the hands on theft while in the state of belief. Other such Hadiths are reported from his Companions. But these things could not gain actual force and take root. The practice was different, and the whole community and the Companions themselves acted on other rules. So the Hadiths were neither discredited (in principle) nor adopted in practice and the usage continued to follow other Hadiths which were accompanied by practice. These Hadiths were passed on from the Companions to the Successors, and from these to those after them, without rejecting or casting doubt on others and have come down and have been transmitted. But what was neglected in practice is left aside and not regarded as authoritative, and only what is corroborated by practice is followed and so regarded.²³

Another passage quoted by al-Shafi'i in the Kitab al-Umm throws some more light on Malik's view. Al-Shafi'i says:

You claim to establish the Sunnah in two ways: One is to find out that the authorities among the Companions of the Prophet held an opinion that agrees with the doctrine in question, and the other is to find that men did not disagree on it; and you reject it (as not being the Sunnah) if you ~~do not~~ find a corresponding opinion on the part of the authorities, or if you find that men disagree.²⁴

The above evidence very clearly represents two points of view on the issue of Hadith as the basis of Sunnah. According to al-Shafi'i — the chief architect of the orthodox theory the only valid, authentic, authoritative and genuine basis of

basis of the Sunnah is Ḥadīth going back to the Prophet. With the school of Abū Ḥanīfah and Malik, on the other hand, the Ḥadīth as such is not the basis of Sunnah, it must also be borne out by practice. Any Ḥadīth which is not supported by the practice is liable to be rejected or accepted at the discretion of these early jurists.

MĀLIK'S VIEW OF ḤADĪTH AND SUNNAH

Al-Muwattā' represents the transition from the simple Fiqh of the earliest period to the pure science of Ḥadīth in the later period. The Muwattā' is a good gauge for judging the extent of the popularity of which Ḥadīth had gained by the time of Malik b. Anas. It is interesting to note that though the Ḥadīth movement was becoming popular, yet Ḥadīths from the Prophet were greatly outnumbered by the Ḥadīth from the Companions and from the Successors. Abū Bakr al-Abhari has given a list of Ḥadīths from the Prophet, from the Companions and from the Successors contained in the Muwattā'. He says that the total number of Ḥadīths in the Muwattā' from the Prophet, from the Companions and Successors is 1720, out of which 600 Ḥadīths are al-Musnad (i.e., traced back to the Prophet without interruption); 222 Ḥadīths are al-Mursal (i.e., lacking the first transmitter.) 613 are al-Mawqūf (i.e., those which end with Companions); and 285 Ḥadīths are the sayings of the Successors. There are, thus altogether 822

Hadīths from the Prophet as against 898 from others. The Muwatta' compiled by Muḥammad b. Ḥasan al-Shaybānī contains 429 Hadīths from the Prophet as against 750 from others, that is 628 from the Companions, 112 from the Successors²⁷ and 10 from later authorities. These figures are an indication of the fact that Malik was not overly concerned about the Isnad. For him the later technical terms al-Musnad and al-Mursal are equivalent. He used both kinds of Hadīth on equal footing, and al-Mursal has the same force as al-Musnad.

II

In the Muwatta' Malik generally opens every legal chapter with a Hadīth from the Prophet. In the details of the discussions on legal issues in the Muwatta', however, we find that Malik does not consistently adhere to this principle of the priority of Hadīths from the Prophet over Hadīths from the Companions and others. He mentions, no doubt, Hadīths from the Prophet in the beginning of each chapter, but often he finds it necessary to contradict it or to interpret it in the light of the Hadīth from the Companions or others.

Jābir b. 'Abd Allāh reports that the Prophet said:

Anything which is donated to some one belongs to the donee and to his descendants. It (the donation) is for the donee to whom it was donated. It will never return to the donor, because he has donated a thing which will be inherited (by the descendants of the donee).²⁸

Contrary to this clear Hadīth from the Prophet, Mālik holds that the donation is conditional upon the life of the donee. According to his doctrine al-'Umra (life donation) is conditional upon the life of the donee, and with his death the donation will return to the donor in absence of explicit instructions by the donor. Supporting Mālik's view al-Zurqanī has defined the term al-'Umra etymologically as follows:

"Someone says to someone else 'I donate for life to you a house or land or a camel' when [actually he means] I give it to you and say to you that it is yours as long as you live, and when you die it will return to me'²⁹". He has quoted Labīd, the famous poet in his support, "The possessions are only donated trusts; the trusts have to be returned someday inevitably"³⁰. This doctrine of Mālik about al-'Umra runs counter to the Hadīth of the Prophet which though mentioned in the beginning of the discussion does not prevail. Mālik — Nafi' — 'Abd Allāh b. 'Umar reported that the Prophet said "The parties to sale have the right of option as long as they have not separated" Mālik not approving of this Hadīth, declares: "We have no fixed limit about it, nor is³¹ the matter under practice".

Examples of this type could be given almost endlessly but the above evidence on the topic will suffice to prove the fact that Hadīth from the Prophet in the Muwatta' does not have the same meaning and the same legal force as it has in the orthodox point of view. Mālik has disregarded the Hadīths

from the Prophet when they are not in conformity with the view which Mālik prefers. Having established this fact we now turn to the question of authority of the Ḥadīth from the Prophet in relation to Ḥadīths from the Companions and the Successors as well as its relation to the practice of Madinah.

Mālik reports three Ḥadīths from the Prophet approving the practice of Tamattu'³² at the Hajj, and a Ḥadīth from a Companion stating that the practice was forbidden by 'Umar. Mālik prefers the Ḥadīth from the Companions over against the Ḥadīths from the Prophet: Mālik - ibn Shihab - Muḥammad b. 'Abd Allāh b. al-Ḥarith b. Nawfal b. 'Abd al-Muttalib, heard Sa'd b. Abī Waqqāṣ and Dahḥāk b. Qays, in the year Mu'āwiyah b. Abī Sufyān performed the pilgrimage, differing on the practice of the Tamattu' at the pilgrimage. Dahḥāk said, "Nobody will do it except one who is ignorant of the command of God."

Thereupon Sa'd retorted; "You have uttered a very bad thing, O son of my brother !" Dahḥāk replied that 'Umar b. al-Khaṭṭab had prohibited it. Sa'd said that the Prophet³³ had practised it and we practised it with him.

Mālik - Abī al-Aswad Muḥammad b. 'Abd al-Raḥmān - 'Urwah b. al-Zubayr - 'A'ishah said:

We went with the Prophet, on the farewell pilgrimage. There were those among us who dressed for the 'Umrah', and there were those

who dressed only for the pilgrimage, and the Prophet dressed for the pilgrimage. Those who dressed for the 'Umrah, became free (after the performance of its ceremonies), and those who dressed for the pilgrimage or combined the pilgrimage and the 'Umrah did not do so until they sacrificed. 34.

Malik - Muhammad b. 'Abd al-Rahman - Sulayman b. Yasar reported:

The Prophet set out for the Farewell Pilgrimage. Among his Companions were those who dressed for the pilgrimage, and there were those among them who combined the pilgrimage and the 'Umrah, and the others who dressed only for the 'Umrah. So those who dressed for the Hajj or combined the Hajj and the 'Umrah did not put off the Hajj dress, and those who dressed only for the 'Umrah put it off. 35.

Though Malik relates all these Hadiths from the Prophet, but his ultimate reliance in this point is upon the Hadith from the Companion, Dahhak, which reports the prohibition of the Tamattu' at the Hajj by the order of 'Umar. Al-Rabi' has reported Malik's view on the issue very clearly. He says: "Malik said that the Hadith of Dahhak [which reports the prohibition of 'Umar] has preference with me over the Hadith from the Prophet reported by Sa'd". The above evidence proves that Hadith from the Prophet does not have precedence over the Hadith from the Companions. On the contrary, Hadiths from the Companions have superseded Hadiths from the Prophet.

Hadiths from the Prophet not only lack authority for Malik if they are opposed to his doctrine as against the Hadiths from the Companions which accord with his doctrine,

but Hadiths from the Prophet are also not acceptable to Malik if they do not conform to his doctrine which is based on the practice (al-'amal,) of Madinah. Malik has recorded the following Hadiths from the Prophet, saying that anyone can perform the pilgrimage on behalf of others. After mentioning these Hadiths Malik says that their teaching is not practised and that practice does not accord with them. Malik - Ibn Shihab - Sulayman b. Yasar - 'Abd Allah b. 'Abbas said:

While Fadl b. 'Abbas was riding behind the Prophet on the same beast, a woman from the Khath'am came to the Prophet and asked him: "O Prophet of God, the Hajj obligation has become necessary on my father who is very old, and cannot ride on a beast, should I perform the Hajj on his behalf"? The Prophet replied, "Yes". It was on the Farewell pilgrimage. 38.

Malik - Ayub - Ibn Siryin reported:

A person made a vow that when any of his sons reached the age of milking the camel and he milked it and drank it and gave him to drink, he would perform the pilgrimage with his son. One of his sons reached that age and by that time the father had become old. The son came to the Prophet and conveyed to him the vow, saying that his father had become old and he could not go to perform the pilgrimage and asked the Prophet whether he could perform the pilgrimage on his father's behalf? The Prophet replied in the affirmative. 39.

Malik - Ayub - Ibn Sirin - Ibn 'Abbas that a person came to the Prophet and said:

O Prophet of God ! My mother has become very old and she cannot ride on a camel even if we mount her on it. And if I tie her (on the camel) I am afraid she would die. Should I perform the pilgrimage on her behalf? The Prophet said "Yes". 40.

In the face of these Hadiths reported by himself,

Mālik has favoured the current practice saying that the practice does not accord with these ⁴¹Hadīths.

Mālik sometimes ignores Hadīths from the Prophet which are not in harmony with his doctrine and gives his opinion contradicting such Hadīths. Further, he does not offer another Hadīth from any other authority but is content with his personal opinion. Mālik - 'Abd Allāh b. Yazīd - Abū Salamah b. 'Abd al-Rahmān reported :

Abū Hurayrah recited for them (idha al-samā' inshaqqat (a chapter in the Qur'an) and prostrated himself. After the prayer he turned his face to them and told them that the Prophet prostrated himself in this chapter. 42.

Mālik - Nafi' reported:

A person from Egypt told him (Nafi') that 'Umar b. al-Khattāb recited the chapter al-Hajj (in the Qur'an) and he prostrated himself ^{twice} during it, then he said that this chapter was gifted with two prostrations. 43.

Mālik - 'Abd Allāh b. Dīnār said that he had seen 'Abd Allāh b. 'Umar prostrating himself twice during the chapter of al-

⁴⁴Hajj. Mālik - Ibn Shihāb - al-A'raj reported: 'Umar b. al-Khattāb recited the chapter al-Najm and prostrated himself during it, then he stood up and recited another chapter. 45.

Mālik - 'Umar b. 'Abd al-'Azīz ordered Muhammad b. Muslim to order the reciters (of the Qur'an) to prostrate themselves during the chapter, idha al-samā', ⁴⁶inshaqqat.

In the first Hadīth Abū Hurayrah prostrated himself on the recitation of the chapter idha al-samā', inshaqqat and

supported his practice by quoting the authority of the Prophet. Al-Zurqānī in explanation of this Ḥadīth remarked: "This is the practice of the four Caliphs and the practice of the three ⁴⁷ Imams and a group of the learned." The second and third Ḥadīths speak about two prostrations in the chapter al-Hajj, the second on the authority of 'Umar b. al-Khaṭṭāb and the third on the authority of 'Abd Allāh b. 'Umar. The fourth Ḥadīth tells us about the practice of 'Umar b. al-Khaṭṭāb in the chapter al-Naim. The fifth Ḥadīth tells us about a decree of 'Umar b. 'Abd al-'Azīz to all the reciters to prostrate themselves in the chapter idhā al-samā' inshaqqat. Now, despite the fact that the authorities like the Prophet, Abū Hurayrah, 'Umar b. al-Khaṭṭāb, 'Abd Allāh b. 'Umar and 'Umar b. 'Abd al-'Azīz are reported to have practised prostrations in the chapters mentioned above, Malik expresses his opinion in these words: "The matter in our opinion is that there are only eleven prostrations in the Qur'ān and there is nothing in the Mufaṣṣal chapters." ⁴⁸ We can see how Malik has ignored Ḥadīths from such big authorities as mentioned above and has favoured the practice ⁴⁹ which agrees with his opinion. The eleven chapters, which according to him, have prostrations do not include the chapters: al-Naim, idhā al-samā' inshaqqat and one prostration in the chapter al-Hajj. Al-Rabī' has no reservation about the matter, and he clearly states: "We do not prostrate in the Hajj ⁵⁰ except once."

Mālik - Abī Hazm b. Dīnār - Sahl b. Sa'd al-Sā'idī reported:

A woman came to the Prophet and said I give myself to you and stood up in full stature. A man came to the Prophet and said: "O Prophet of God marry her to me if you do not need her". The Prophet asked him: "Do you have anything to give her as dowry". He said: "I have nothing except my trousers." The Prophet said, "If you give this trousers to her you would be sitting without trousers, (better) search out something else." He said "I do not find anything". The Prophet said: "Find out even an iron ring". He searched but found nothing. The Prophet asked him: "Do you know something out of the Qur'an". He said, "I know chapter so and so," he named some chapters of the Qur'an. The Prophet said: "I marry you with her on the amount of the Qur'an you know.⁵¹"

In the face of this Hadīth from the Prophet, Mālik says: "In my opinion a woman should not be married for less than one fourth of a dinar"; thereby he disregards the Hadīth from the Prophet which does not fit within the framework of his doctrine and gives his opinion against it. The Prophet is reported to have said : "A person who slays a person from the enemy and establishes his evidence (for the slaying) deserves his spoils".⁵² Mālik disregards the Hadīth from the Prophet, by saying: "The Prophet's statement that anyone who kills a person is entitled to his spoils was said only on the occasion of Hunayn."⁵³ Mālik, therefore, holds that the person who kills is not ipso facto entitled to the spoils of the slain and that this permission is discretionary at the will of the Imam.⁵⁴ It is in fact, only an excuse to dispose of the Hadīth from the Prophet. Otherwise the battle of Hunayn was the last battle in which actual fighting took place and booty was taken by⁵⁵

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the Muslims. Therefore, it was the final decision of the Prophet, in that regard and should have been binding. The Tabuk expedition, after the battle of Hunayn, was, no doubt, during the lifetime of the Prophet but no fighting took place and no booty was gained. Therefore, the Hunayn battle was the last in that sense. Further, al-Shāfi'ī and al-Zurqānī have pointed out that the Prophet did the same at the battle of Badr, Uhud, Mu'tah etc.

Malik - Abī al-Zubayr - Jābir b. 'Abd Allāh said: We sacrificed animals at Hdaybiyah; one camel by seven participants and one cow by seven participants. Malik - 'Ammarah - Yasarah 'Ata' b. Yasar told that Abū Ayūb said: We used to sacrifice sheep. The head of the house sacrificed (one sheep) on behalf of himself and his housefolks.

After relating these Hadīths Malik prefers the saying of some unknown person and states:

The best that I heard about the sacrifice of the camel, of the cow and of the sheep, is that a person should sacrifice only on behalf of himself and his house folks, a camel, a cow and a sheep, any one of these animals which he possesses associating in the sacrifice only his housefolks with the exclusion of others

The first two Hadīths are very clear on the point that the Prophet and 1400 Companions at Hdaybiyah sacrificed one camel and one cow on behalf of each seven persons, and the continuous practice of the Companions was the same. Malik, not approving these Hadīths declares his own opinion:

"The sacrificial camel or cow will be sacrificed only by one person. A person would sacrifice only on his

own behalf and on behalf of his house-folks. As for the view that a group of people may buy a cow or a sheep and then each one take a share of the meat is not allowed. We have heard that the sacrificial animal will not be shared.⁶²

There is evidence in the Muwatta' that Malik prefers sometimes Hadiths from the successor against the Hadith from the Prophet. We have already seen a Hadith from the Prophet on al-'Umra (life donation) which says:

If any one who donates something for life, the donated thing is for the donee and for his descendants. It is for the person to whom it is donated. It will never return to the donor, because he has donated something which will be inherited.⁶³

As against this clear Hadith from the Prophet, Malik has preferred what al-Qasim b. Muhammad, a Successor, has said ⁶⁴ on this matter. There is an explicit Hadith of the Prophet: "The widow has greater right in herself \angle about her marriage \angle than her guardian \angle i.e., she can marry without the permission of her guardian \angle , and the virgin should be consulted \angle by her guardian about her marriage \angle ". After reporting this Hadith from the Prophet in the Muwatt', Malik supports the practice which says: "Al-Qasim b. Muhammad and Salim b. 'Abd Allah used to marry their virgin daughters and did not consult them". Malik approves the practice of al-Qasim and Salim against the Hadith from the Prophet and says: "The ⁶⁵ matter in our opinion is accordingly".

From what has been said so far we can conclude that in the Muwatta' there is enough evidence to establish the fact

that Malik uses the Hadiths from the Prophet as legal arguments, but they are not conclusive; rather they can be superseded by other arguments. The other arguments which can supersede the Hadiths from the Prophet are the Hadiths from the Companions, the practice of Madinah, the considered personal opinion of Malik coupled with the statements of some ambiguous authorities and the Hadiths from the Successors.

III

Next we must take into account Hadiths from the Companions and their position in the legal thought of Malik. Hadiths from the Companions cited in the Muwatta' are not only almost equal in number to the Hadiths from the Prophet, but they have also the same legal force. But just as the Hadiths from the Prophet are not conclusive in authority, neither are Hadiths from the Companions conclusive. They can supersede Hadiths from the Prophet as we have seen, but in turn they can also be superseded by Hadiths and other legal arguments from the later authorities. Malik - Hisham b. 'Urwah - 'Urwah said: "'Umar b. al-Khattab recited a chapter requiring prostration while he was on the pulpit on Friday. He descended and prostrated himself, and the people followed him in prostration".

'Umar possessed a very high position among the legal authorities according to Malik, nevertheless, he does not approve the practice of 'Umar when it does not agree with his own doctrine. That is why Malik does not approve the act of

'Umar's descending from the pulpit for prostration and takes shelter under the 'amal (the practice) and declares clearly: "This is not the practice that the Imam should descend (from the pulpit) and prostrate himself, when he recites the chapters requiring prostration from the pulpit,".

Malik - Nafi' - 'Abd Allah b. Dinar - 'Abd Allah b. 'Umar said:

A person asked the Prophet about the night prayer. The Prophet replied: "The night prayer should be offered two by two (Rak'at); and when someone is afraid of the dawn he should add one (Rak'ah) at the end of the twos and thus, make the number odd. 68."

Malik - Nafi' said:

I was with 'Abd Allah b. 'Umar in Makkah and the sky was clouded; 'Abd Allah became afraid of the dawn during his night prayer and he added one Rak'ah to his already said Rak'at which were even in number. Then the sky became clear and he realized that it was still night, so he added one Rak'ah to the odd number and evened the Rak'at of his prayer. Then he continued praying two by two, when again he became afraid of the dawn he added one Rak'ah to his even number and made the number of the prayer into odd. 69.

Malik - Ibn Shihab - Sa'd b. Abi Waqqas used to say his night prayer after the 'Isha' prayer and used to make it odd by one.

These three Hadiths, one from the Prophet and others by 'Abd Allah b. 'Umar and Sa'd b. Abi Waqqas very explicitly speak about the practice of the Prophet and of the Companions, but Malik does not approve them. He rather gives his own opinion combined with the practice. He says: "The practice with us is not according to what has been related, but the least number of Witr is three".

Malik - Abī 'Ubayd - 'Ubadah - b. Nusayy - Qays b. al-Harith
 - Abī 'Abd Allāh al-Sunabhi said:

I came to Madinah during the Caliphate of Abū Bakr al-Siddiq, and said al-Maghrib prayer behind him. He recited in the first two Rak'at the Umm al-Qur'an and a chapter from the Qisār chapters of the Qur'an. Then he stood up for the third Rak'ah and I got closer to him and I heard him reciting the Umm al-Qur'an and this verse: Rabbānā lā tuzigh qulūbanā ba'd idh hadaytanā. 72.

Malik - Nafi' - 'Abd Allāh b. 'Umar used to recite in each of the four Rak'at, the Umm al-Qur'an and another chapter 73 from the Qur'an, when he said that prayer alone.

Against the practice of Abū Bakr and 'Abd Allāh b. 'Umar, Malik favours his own practice and says: "We do not like this practice; rather we say our practice is not based on this (practice). Nothing will be recited after the Umm al-Qur'an in the third Rak'ah." 74 Al-Shafi'i pointed out to al-Rabi': "When 'Umar b. 'Abd al-'Aziz heard of the practice of Abū Bakr he adopted it". Then al-Shafi'i asked him: "Do you leave the practice of Abū Bakr, Ibn 'Umar and 'Umar b. 'Abd al-'Aziz for the practice". To which al-Rabi' retorts confidently: "We are opposed to all this and we repeat; nothing will be added after the first two Rak'at to the Umm al-Qur'an." 75

Malik - Ibn Shihab - Irak b. Malik - Sulaymān b. Yasar said:

A person from Banī Sa'd b. Layth was riding on a horse. He trampled the toe of a person from the Juhaynah which bled profusely; consequently he died. 'Umar b. al-Khattab asked the defendants: "Do you swear by God fifty oaths that the deceased did not die of it"? They refused to swear. Then he asked the plaintiffs: "Do you swear"? They also refused. When

refused. Then 'Umar decided to award half of the blood-money to be paid by Banu Sa'ds' 76.

Malik sets aside this decision of 'Umar by saying:

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"The practice is not based on it."

'Abd Allāh b. 'Umar reports that 'Umar was washed, shrouded and prayed over (at his funeral). After reporting this Hadīth Malik remarks: "It has reached me from the learned (ahl al-'ilm) that the martyrs were not washed, nor was prayer said over them. They were buried in the clothes in which they were killed." 78

Not only does Malik dispose of Hadīths from the Companions on the basis of practice; he also subordinates them by means of his own considered opinion combined with practice. Malik - Nafi' - a slave of 'Abd Allāh b. 'Umar, who was a fugitive, was accused of theft. 'Abd Allāh b. 'Umar sent him to Sa'id b. al-'Asi, the Governor of Madinah for the cutting off of his hand, Sa'id refused to cut off his hand and said: "We do not cut off the hand of a fugitive slave when he is accused of theft." 'Abd Allāh b. 'Umar asked Sa'id, "In which verse of the Qur'an do you find this injunction?" Then 'Abd Allāh b. 'Umar ordered the cutting off of his hand, and it was cut off. 79

Against this decision of 'Abd Allāh b. 'Umar, Malik quotes the opinion of al-Qasim b. Muḥammad, Salim b. 'Abd Allāh and 'Urwah b. al-Zubayr that they used to say "When a fugitive slave is accused of theft, the punishment of cutting off hand

will not be inflicted". Malik endorses this opinion by saying:
 "The matter about which there is no disagreement among us is
 that, when a fugitive slave is accused of theft his hand will
 not be cut off."
 80

Malik - Hisham b. 'Urwah - 'Urwah - 'A'ishah used to
 say: "Nonsensical oath (laghw al-Yamin) is the saying of a
 person "la wallah la wallah". Against this interpretation of
 'A'ishah, Malik said; "The best that I heard [in this connec-
 tion] is that the "nonsensical oath" is the swearing of a
 person concerning something about which he is confident that
 it is in accordance with what he thinks, then he discovers
 later on that it was not like that. That is the nonsensical
 81
 oath."

IV

We have seen Malik's treatment of Hadiths from the
 Prophet and also his attitude towards Hadiths from the
 Companions. Hadiths from the Successors are also very import-
 ant for Malik, and we do not find them to have less legal
 force in the Muwatta' than Hadiths from higher authorities i.e.
Hadiths from the Prophet and from the Companions. Malik's treat-
 ment of these Hadiths is no different from his treatment of
Hadiths from higher authorities, so far as their agreement or
 disagreement with Malik's doctrine is concerned. We see many
 examples in the Muwatta' where such Hadiths are discarded when
 there is a clash between the practice or doctrine of Malik and

Hadiths.

Malik - Raziq b. Hakim related that he had caught a fugitive slave who had committed theft. Raziq said that he was in doubt about what to do. So he wrote about it to 'Umar b. 'Abd al-'Aziz asking him about the punishment in such a case; 'Umar b. 'Abd al-'Aziz was Governor those days. Raziq wrote to him informing him: "I have heard that when a fugitive slave is convicted of theft his hand should not be cut off". He said 'Umar b. 'Abd al-'Aziz wrote to him refuting his letter: "You wrote to me that you had heard that a fugitive slave, when he commits a theft, will not have his hand cut off, and God al-Mighty says in his Book: The hands of both male thief and female thief should be cut off...If the theft amounts to one fourth of a dinar his hand must be cut."⁸²

Malik does not approve this Hadith and relates the opinion of those who agree with his doctrine: Malik said: "Al-Qasim b. Muhammad and Salim b. 'Abd Allah and 'Urwah b. al-Zubayr used to say that when a fugitive slave commits a theft the punishment of amputation of hands is not obligatory". Malik endorses this view saying: "That is the matter about which there is^{no} disagreement among us."⁸³

Malik - 'Umar b. 'Abd al-'Aziz commanded Muhammad b. Muslim to order the reciters (of the Qur'an) to prostrate themselves during the chapter idha al-sama' inshaqqat.⁸⁴ Against this general command of a Caliph throughout the Caliphate, Malik said: "The practice with us is that there are in the Qur'an only eleven

prostrations, and there is no prostration in the Mufaṣṣal
⁸⁵
 chapters." This statement of Mālik does not include idhā al-
sama' inshaqqat where prostration was held to be necessary by
 'Umar b. 'Abd al-'Azīz, so much so that 'Umar b. 'Abd al-
 'Azīz took much pains to promulgate prostration in this chap-
 ter by a decree throughout the Caliphate. Ibn al-Musayyib, Ibn
Shihāb and Rabi'ah (three major authorities of Mālik) declared
 that a person can perform al-Hajj on behalf of another.⁸⁶ Mālik
 does not approve the unanimous decision of the three great
 authorities of Madinah and says: "The practice was not accor-
⁸⁷
 ding to their view."

The conclusion of what has been said so far is that
 the Hadīths from the Prophet and from subsequent authorities
 are all legal arguments with Mālik. They are all equal in
 legal force and one does not have preference over other. They
 supersede one another indiscriminately. In this process
 of supersession there is no distinction among Hadīths from
 the Prophet, from the Companions and from the Successors. Dur-
 ing our study of the Hadīths in the Muwattā' we have realized
 that in the process of supersession 'amal (the practice) and
 the personal considered opinion (ra'y) of Mālik himself hold a
 prominent place. It is evident from our study of Mālik's use of
Hadīth that the 'amal and ra'y were always above other argu-
 ments. These two principles often superseded the others but
 were never superseded by them. Thus, we can conclude that so
 far as the legal arguments in the Muwattā' are concerned 'amal
 and ra'y are the highest arguments. Further, it emerges from
 the evidence that Hadīths from the Prophet or from any

subsequent authority, for Malik, are not the final criterion to judge the right Islamic point of view on a certain legal issue; rather they seem to provide evidence to support a view accepted on grounds other than that of the Hadiths themselves. It shows that the Hadiths do not occupy the same position in the Muwatta' as they occupy in the orthodox view. They are, rather one of the arguments much like other legal arguments in the Muwatta', therefore, they cannot be the most authoritative basis of the Sunnah in the Muwatta'. This means that the concept of Sunnah in the Muwatta' is essentially different from the concept of Sunnah essentially based on the Hadiths, where the Hadith possesses an overriding authority and constitutes the final and decisive argument.

REFERENCES AND NOTES

1. Al-Shāfi'i, Kitāb al-Umm. (Cairo, A.H. 1324) Vol.VII p.249.
2. Ibid., p. 177.
3. Ibid., p. 249.
4. Ibid.
5. Ibid., p. 177.
6. Al-Tabarī, Tarīkh al-Umam wa al-mulūk (Egypt: al-Matba'ah al-Husayniyah al-Misriyah), III, p. 2505.
7. Ibid., p. 2506.
8. Abū Zahara, Malik b. Anas, Urdu trans. 'Ubayd Allāh Qudsi (Lahore, 1960). pp. 174-175.
9. Al-Zurqānī, Sharḥ al-Muwatta', (Cairo, 1310 A.H.), Vol.I. p.8.
10. i) Abū Yūsuf Ya'qūb b. Ibrāhīm (d. 182 A.H.) Al-Radd 'alā Siyar al-Awza'i (Hyder Abad, India, 1357 A.H.) p.61.
- ii) Al-Shāfi'i, al-Umm, op. cit., Vol. P. 320.
11. Joseph Schacht, Origins of Muhammadan Jurisprudence, (London 1959) P.70.
12. Al-Shāfi'i, al-Umm, op. cit., Vol. VII, p. 320.
13. Ibid., p. 314.
14. Abū Yūsuf, al-Radd, op.cit., pp. 131-35. For full account

of the subject that according to Abū Yūsuf Sunnah or "Sunnah of the Prophet" was not necessarily based on the Hadith attributed to the Prophet, see pp. 24, 32-3, 108-9, 126-30 of al-Radd. Abu Yusuf is not prepared to accept Hadith at their face value. He will accept whatever is related from any past authority so long as it fits into the view of Sunnah he held; and he will reject or explain away what contradicts his view. About a certain Hadith he retorts to al-Awza'i: "qad balagh-ana 'an Rasūl Allāh ma qal Al-Awza'i, wa li-Hadith Rasūl Allāh ma'an wa Wujuh wa Tafsir lā yafhamuhu wa lā yubshir-uhu illā man a'ānahu Allāh 'alayh (al-Radd, p. 14). At another occasion he distinguishes between Hadith and Sunnah by saying: "On this point Hadith is abundant and Sunnah is well-known." (wa al-Hadith fi hadha kathir wa al-Sunnah fi hadha ma'rufah), (al-Radd, p. 38).

15. Ibid.
16. Ibid., p. 37.
17. Ibid., p. 39.
18. Ibid., pp. 36, 37.
19. Ibid., p. 32.
20. Muhammad b. Hasan al-Shaybānī, Kitāb al-Hujaj (MS), pp. 88, 188. This Manuscript is in the possession of Mawlānā 'Abd al-Rashīd al-Nu'mānī, Reader, in Jami'ah Islāmīa, Bahāwalpur.
21. Al-Shaybānī, al-Muwatta', op. cit., p. 176.
22. Al-Sahnūn b. Sa'id, al-Mudawwanah (Egypt, 1323 A.H.) Vol. IV, p. 28.
23. Ibid.
24. Al-Shafi'i, Kitāb al-Umm, op. cit., Vol. VII, p. 240.
25. Joseph Schacht, Encyclopaedia of Islam, article, "Malik b. Anas," p. 207.
26. Al-Zurqanī, op. cit., Vol. I, p. 8.
27. Schacht, Origins of Muhammedan Jurisprudence, op. cit., p. 22.
28. Malik, al-Muwatta', op. cit., Vol. III, p. 219.
29. Malik, op. cit., p. 219.
30. Ibid.
31. Malik, ibid., Vol. III, p. 136.
32. A kind of pilgrimage where a pilgrim puts off his pilgrimage dress after performing 'Umrah (minor pilgrimage) and puts it on again as the Major Pilgrimage approaches nearer.
33. Malik, al-Muwatta', op. cit., Vol. II, p. 178.
34. Ibid., p. 169.
35. Ibid., pp. 170-171.

36. Al-Shāfi'ī, Kitāb al-Umm, op. cit., Vol. VII, p. 199.
37. Al-Shāfi'ī, op. cit., p. 196.
38. Malik, al-Muwatta', op. cit., Vol. II, p. 198.
39. Al-Shāfi'ī, op. cit., p. 196.
40. Ibid.
41. Ibid.
42. Mālik, al-Muwatta', op. cit., Vol. I, p. 371.
43. Ibid.
44. Ibid.
45. Al-Shāfi'ī, op. cit., p. 187.
46. Ibid.
47. Al-Zurqānī, op. cit., Vol. I, p. 371.
48. Malik, al-Muwatta', op. cit., I, p. 371.
49. Ibid. p. 373 : al-A'raf, al-Ra'd, al-Nahl, Subhān, Maryam,
al-Hajj, al-Furqān, al-Naml, al-Sajdah, Sād, Fuṣṣilat.
50. Al-Shāfi'ī, op. cit. p. 229.
51. Malik, al-Muwatta', op. cit., Vol. III, pp. 5, 6.
52. Ibid., p. 9.
53. Ibid., Vol. II, pp. 301- 2.
54. Ibid., p. 305.
55. Ibid.
56. Ibid. Vol. II.
57. Ibid., p. 306. Al-Shāfi'ī, al-Umm, op. cit. Vol. VII.
58. Malik, al-Muwatta', op. cit., Vol. II, pp. 347, 348.
59. Ibid., p. 348.
60. Ibid.
61. Al-Shāfi'ī, op. cit., 199.
62. Mālik, op. cit. (al-Shirkah fi al-Dahāyā).
63. Mālik, al-Muwatta', op. cit., p. 210.
64. Ibid., p. 220.
65. Mālik, al-Muwatta', op. cit., Vol. III, pp. 4, 5.
66. Ibid., Vol. I, p. 371.
67. Ibid., p. 372.
68. Ibid., pp. 227-229.
69. Ibid., p. 232.
70. Ibid., p. 233.
71. Ibid.
72. Ibid., p. 149, 150.
73. Ibid., p. 150.
74. Al-Shāfi'ī, op. cit., p. 192.
75. Ibid.
76. Mālik, al-Muwatta', op. cit., Vol. IV, p. 33.
77. Ibid.
78. Mālik, al-Muwatta'.
79. Mālik al-Muwatta', op. cit., Vol. IV, p. 19.

- 80. Ibid.
- 81. Ibid.
- 82. Ibid., Vol. IV, p. 19.
- 83. Ibid.
- 84. Al-Shafi'i, op. cit., p. 187.
- 85. Malik, op. cit., Vol. I, p. 373.
- 86. Al-Shafi'i, op. cit., p. 196.
- 87. Ibid.

CHAPTER III

DIFFERENT SHADES OF SUNNAH IN THE LIGHT OF DIFFERENT TERMS USED IN THE MUWAṬṬĀ'

By the time of Malik the ideality of Sunnah or the normative and exemplary conduct set forth by the Prophet, after passing through several phases, had taken certain definite shapes and had begun to emerge in the form of customs, usages and practices, though the Prophetic Sunnah as a general umbrella - concept was present at all times. The Muwaṭṭā' is a good record of all these terms and their different shades. During the Umayyad rule, although the political capital of the state had shifted to Damascus, the intellectual centre of the Umayyads continued to remain in Madinah. Thus the Madinese were able to continue their intellectual Islamic tradition from the very first century of Islam. Malik in his Muwaṭṭā' has codified the Islamic learning of Madinah. Professor Joseph Schacht, writing on the Muwaṭṭā' has remarked: "The object of the Muwaṭṭā' is to give a survey of law and justice, ritual and practice of Religion according to the Idjma' of Islam in Madinah, according to the Sunmausual in Madinah and to create a theoretical standard for matters which were not settled from the point of view of Idjma' and ¹Sunnah."

Dr. Fazlur Rahman has pointed out two meanings of Sunnah in the Muwatta'. After quoting an example from the Muwatta' in which Sunnah is used twice, Dr. Fazlur Rahman remarks:

Whereas in the one case it does mean "the practice" or "established practice in Madinah" it cannot mean this in the second case, for one does not ask in the face of an agreed practice: 'Is there any Sunnah with regard to this'? In the second case then, Sunnah must mean an "authoritative" or "normative" precedent. But whose normative precedent? Obviously in this case the Sunnah is either the Sunnah of the Prophet or of any subsequent authority under the general aegis of the Prophetic Sunnah ².

Dr. Fazlur Rahman's inference from this interpretation of the term Sunnah is that there are two related concepts of Sunnah in the Muwatta'. (1) The practice or the established practice. (2) An authoritative or normative precedent. That is also the conclusion of Professor Schacht: "But the 'practice' of the Madinese does not simply reflect the actual custom, it contains a theoretical or ideal element."³

In the following we shall see what different terms Mālik has used to express his idea of Sunnah in the Muwatta'. Then in the light of these terms we shall attempt to define the concept Sunnah in the Muwatta'. Mālik has used many terms to express the concept of Sunnah, which, in fact, represent different shades of the concept of Sunnah. The terms used for Sunnah in the Muwatta' are as follows:

1. "The practice or opinion of the people of Madinah"
— 4
(al-amr alladhī adraktu 'alayh al-nas).
2. "The agreed practice or opinion among us" (al-amr al-

-mujtama' 'alayh 'indana⁵.

3. "The practice or opinion according to the scholars of Madinah" ('alā dhālika adraktu ahl al-'ilm bibaladina⁶).
4. "The practice or opinion according to us" (al-Sunnah 'indana⁷, al-amr 'indana⁷).
5. "The long established practice" (madat al-Sunnah⁸).
6. "The Sunnah of the Prophet of God" (Sunnah Rasūl Allah⁹).

These terms have other equivalents also. The expression "the practice of the people of Madinah," has the following equivalents:

- 1) "The practice of the Muslims on which there is no disagreement" (Sunnah al-muslimīn allatī lā ikhtilāf¹⁰ fiha¹⁰).
- 2) "That is the practice with us on which there is no disagreement and the people have always been practising it" (tilka al-Sunnah allatī lā ikhtilāf fiha¹¹ 'indana walladhi lam yazal 'alayh 'amal al-nas¹¹).
- 3) "That is the practice which is without doubt and without disagreement" ('alā hādha al-Sunnah allatī lā shakk fiha wa lā ikhtilāf¹²).
- 4) "The custom which is being practised, its knowledge is in the hearts of the people, and that is what the people had been practising in the past" (al-amr al-ma'mul bihi wa ma'rifah dhālika fī ṣudūr al-nas¹²).

wa mā Maḍā min 'amal al-māḍiyīn fih).¹³

The phrase "the practice or opinion according to the scholars of Madinah" has also been expressed in other forms:

- 1) "The practice or opinion I heard the scholars talking about" (al-amr alladhī sami'tu min ahl al-'ilm).¹⁴
- 2) "The scholars have always followed this practice or opinion" (al-amr alladhī lam yazal 'alayh ahl al-'ilm bibaladina).¹⁵
- 3) "The opinion of those who have sound knowledge and insight" (ahl al-ma'rifah al-baṣar).¹⁶
- 4) "The opinion or practice of the people having knowledge and understanding" (ahl al-'ilm wa al-Fih).¹⁷
- 5) "The opinion or practice of those exalted predecessors who have passed away" (ahl al-faḍl alladhīn maḍaw).¹⁸

The term "established practice" has been expressed in the following ways:

- 1) "The established practice has been like this" (maḍat bidhalika al-Sunnah).¹⁹
- 2) "The practice of the predecessors had been according to this" (ma maḍā min 'amal al-māḍiyīn fih).²⁰
- 3) "The established practice among us" (al-Sunnah al-thābitah 'indana).²¹
- 4) "The practice about which there is no disagreement" (al-Sunnah allatī lā ikhtilāf fiha).²²

- 5) "The practice of the Muslims about which there is no disagreement" (Sunnah al-muslimin allati la ikhtilaf fiha)²³
- 6) "The practice according to us" (al-Sunnah 'indana)²⁴
- 7) "The practice according to us about which there is no disagreement" (al-Sunnah 'indana allati la ikhtilaf fiha)²⁵

Another term synonymous with the term "al-Sunnah 'indana" is "al-amr 'indana". And this term "al-amr" has its other equivalents too:

- 1) "The practice or opinion according to us" (al-amr 'indana)²⁶
- 2) "The agreed practice or opinion according to us" (al-amr al-mujtama' 'alayh 'indana)²⁷
- 3) "The practice about which there is no disagreement among us" (al-amr alladhi la ikhtilaf fih 'indana)²⁸
- 4) "The practice or opinion which the scholars of our city have always followed" (al-amr alladhi lam yazal 'alayh ahl al-'ilm bibaladina)²⁹
- 5) "The practice or opinion, well known, trustworthy" (amr ma'mul mawqut)³⁰
- 6) "The practice on which the people have always been (agreed)" (al-amr alladhi lam yazal 'alayh al-nas 'indana)³¹
- 7) "The agreed practice with us on which I found the scholars of our city" (al-amr al-mujtama' 'alayh 'indana wa alladhi adraktu 'alayh ahl al-'ilm bibaladina)³²
- 8) "The agreed opinion or practice about which there is no disagreement, on which I found the scholars of our city"

(al-amr al-mujtama' 'alayh alladhī lā ikhtilāf fih³³
wa alladhī adraktu 'alayh ahl al-'ilm bibaladina).

- 9) "The opinion or practice on which there is no disagreement and none of the scholars of our city is in doubt about it, and the actual practice is also according to it" (al-amr alladhī lā ikhtilāf fih wa lā shakk 'inda³⁴
aḥad min ahl al-'ilm bibaladina wa kadhalik al-'amal).
- 10) "The practice or opinion on which there is a vast majority of scholars in our city (al-amr alladhī kanat³⁵
'alayh al-jama'at bibaladina).
- 11) "The usage which is under practice and its recognition is in the hearts of the people and the practice of the predecessors had been accordingly (al-hukm al-ma'mūl bihi
wa ma'rifah dhalika fī ṣudūr al-nās wa mā maḍā min 'amal³⁶
al-mādiyīn fih).

These are the different terms used by Mālik in the Muwatta' to express the concept of Sunnah. Though Mālik has used these terms in order to refer to the Sunnah, they are not altogether identical in force. They constitute rather different shades of the Sunnah and exhibit gradations. A closer study of the contents of the Muwatta' shows that these terms have historical significance. For example, when Mālik uses al-Sunnah al-thābitah³⁷ or al-amr alladhī lam yazal 'alayh al-nas³⁸ etc., he seems to convey the sense that such a practice has come down to the time of Mālik from his predecessors and people still practise

it. But when Mālik uses the term al-Sunnah 'indana or al-amr 'indana or al-amr al-mujtama' 'alayh 'indana etc. he seems to convey the sense that the people in Madinah follow a practice like this or that some of the scholars or Mālik himself thinks that at present the practice should be according to this.

The terms al-Sunnah or al-amr or al-'amal, meaning actual custom of the people of Madinah, it seems, denote the basic and fundamental ingredients of the concept of the Sunnah in the Muwatta'. Mālik has used three words: practice (al-Sunnah),
 39
 actual custom (al-'amal) and the prevalent practice (al-amr). But all these three terms have also been used to express the practice of those who have passed away. When they are used in this sense, they are meant to provide arguments for supporting the prevalent practice and they are not used to denote a standard of conduct or to judge the validity of the actual practice. Rather the past is judged by the present. That is why actual practice has preference over all other forms of practice described in the Muwatta'. There is a mass of evidence to support this view, but the following is the most glaring example. Describing a certain issue, in the Muwatta', Mālik says: "That is our agreed opinion, that is the opinion I heard from those whom I like, that is the opinion on which the leaders (of opinion) of the past and of the present have agreement and that is the agreed practice and that is the mode which the people have always been practising" (al-amr al-mujtama' 'alah 'indana, wa alladhi sami'tu mimman arda, wa alladhi ijtama'at 'alayh al-'ammah fi al-qadim wa al-Hadith ... Wa tilka al-Sunnah

allatī lā ikhtilāf fīhā 'indana, wa alladhī lam yazal 'alayh
'amal al-nas).⁴⁰

Here three terms have been mentioned. First, the agreed opinion of Malik's group, secondly, the opinion of the scholars of Madinah whom Malik liked and the unanimous opinion of the scholars of the past and present, thirdly, the actual practice. These terms are very significant for the following reasons: The practice of the past and the agreed opinion of the scholars of Madinah are not ipso facto identical with the actual practice of Madinah. Their juxtaposition is meant to show that the practice of the past and the agreed opinion of the scholars of Madinah are similar in the sense that they are used as arguments to provide documentation to establish the validity of the actual practice of Madinah, which means that the practice of the past or the agreement of the scholars of Madinah are not independent criteria to judge the validity or genuineness of the present; rather they are used to support the prevalent practice. In other words, the actual practice (al-'amal) is a basic ingredient in Malik's concept of Sunnah to which other constituents are added as corroborative elements. Nevertheless the element of the idea-⁴¹ lity of Sunnah overrides even the prevalent practice. Thus the most fundamental and basic concept of Sunnah in the Muwatta' is ideal or normative practice. We will revert to the documentation of this point in our chapter on Sunnah.

Next to the "actual practice" comes the term "agreed practice or opinion among us". We have already seen its various expressions. The most important among them are the following:

"That is our agreed opinion, about which there is no⁴² disagreement and I found the scholars of our city on it," or "That is the practice or opinion about which there is no disagreement and none of the scholars of our city has any doubt⁴³ about it and the actual practice is also accordingly." It seems from this paraphrase of the term that it has been applied to cases where the scholars generally agree and the people generally practise it, though differences may exist among the scholars, and the whole Muslim community of Madinah may not necessarily practise it.

The term "That is the opinion or practice of the scholars of our city" ("ahl al-'ilm bibaladina") does not mean that all the scholars of Madinah held that opinion unanimously. The available evidence in the Muwatta' seems to support the view that Malik used this term when some of the scholars of Madinah agreed with his opinion. There are references in the Muwatta' which show that Malik was speaking only of those scholars who shared his opinion. Though Malik has used this term absolutely at many places, here and there he has clearly shown that he⁴⁴ meant only certain scholars and a particular group among them. Sometimes he clearly says: "The scholars whom I like" (ala⁴⁵ hadha adraktu man arda min ahl al-'ilm). At one place he used the term al-amr al-mujtama' 'alayh 'indana (the agreed opinion or practice with us) and at the end Malik adds: "This is the opinion or practice on which there has been (agreement of) a majority (of scholars) of our city" (wa hadha al-amr alladhi

⁴⁶
kānat 'alayh al-jamā'at bibaladina).

In the light of the above discussion we can conclude that the terms "the agreed opinion or practice among us (al-amr al-mujtama' 'alayh 'indana) and "the opinion or practice of the scholars of our city" (wa 'alayh adraktu ahl al-'ilm bibaladina) are not general in sense as apparently they seemed to be; rather they are used to show the agreement of some of the scholars who agree with Mālik. We shall discuss this point in the following chapter in detail.

The term "the practice according to us" (al-Sunnah 'indana or al-amr 'indana) may mean the practice or opinion according to the circle of Mālik or according to Mālik himself. This term certainly does not mean what is meant by the terms "the practice of the people of Madinah" or "the practice or opinion of the scholars of Madinah". The terms al-amr 'indana or al-Sunnah 'indana are limited in scope whereas the former terms are general. For example, Mālik on a given issue says: "The practice according to us (is the same) ⁴⁷ on which I found (agreement among) the scholars of our city". Here Mālik has distinguished between "the practice according to us" and "the practice according to the scholars of Madinah". This shows that there was a circle of scholars or a circle of Mālik's pupils in Madinah headed by Mālik himself where Mālik's opinion dominated, and that circle was clearly distinguished from other scholars of Madinah. When both the groups or all the groups or all the groups of scholars in Madinah agreed with one another or when the opinion of Mālik's group was in

harmony with the opinion of other groups, Mālik used the term, "the practice according to us on which I found the scholars of our city (in agreement) " (al-Sunnah 'indana wa alladhī adraktu 'alayh ahl al-'ilm bibaladinā), On another occasion Mālik used the term, al-amr 'indana (the practice according to us), and then at the end of the issue he added: "I found on this, those scholars whom I like ('alā hādha adraktu man ardā min ahl al-'ilm). Here Mālik has identified his opinion with the opinion of those scholars who are in harmony with him on this issue. Sometimes the term al-Sunnah 'indana is qualified with a clause allatī lā ikhtilāf fiha (the practice according to us about which there is no disagreement). It seems from the contexts of the terms that both the qualifying clauses wa alladhī adraktu ahl al-'ilm bibaladinā and allatī lā ikhtilāf fiha are synonymous in the sense that by the use of both of them Mālik wants to support his contention by referring to some authorities in Madinah. Nevertheless, neither of the two means that it represents the consensus of the people or scholars of Madinah at large. From these examples we can understand that the term al-amr 'indana or al-Sunnah 'indana means the opinion or practice according to Mālik, as the qualifying clauses have shown that the scholars or people of Madinah were not first included in the term but were suffixed or affixed later on. A very clear example of this is the issue dealing with the number of prostrations in the Qur'ān. Mālik says al-amr 'indana (the practice or opinion according to us) is that there are only eleven prostrations in the Qur'ān and there is no prostration

in the Mufaṣṣal chapters. Malik has expressed this opinion after reporting numerous Hadīths in the Muwatta contrary to his own view, from the Prophet, from the companions and from contemporary scholars, even from those scholars who were his very reliable authorities.⁴⁹ This means that the term al-amr 'indana was his personal opinion; even when he opposed all the authorities of Madinah and held a solitary doctrine, he used the term al-amr 'indana.

Malik asked Ibn Shihab al-Zuhri about the pregnant woman in case she sees bleeding. Ibn Shihab said: "Such a woman should keep away from prayers."⁵⁰ After quoting Ibn Shihab on the issue, Malik endorses Ibn Shihab's verdict in these words: "And that is our opinion" (wa kadhalika al-amr 'indana). Here al-amr 'indana is distinguished from the verdict of one of the leading authorities of Malik, and therefore, it is his personal opinion. It is obvious that 'indana here does not include Ibn Shihab as is testified by the expression kadhalika.

On a certain issue Malik said: "The practice according to us is in accordance with the Hadīth of Hishām b. 'Urwah".⁵¹ In this case Malik quotes many statements and reports from different authorities of Madinah and at the end prefers one of them out of many and declares that his opinion was in accordance with the opinion of Hishām b. 'Urwah. He expresses his personal opinion but uses the word 'indana which in fact, is equivalent in force to 'indi (in my opinion).

Malik has reported numerous decisions, judgements and opinions of some of the previous Caliphs, governors and judges

in Madinah and has used this material as an argument to support his particular view. It is possible that the entire body of material created by these agencies is an essential part of the actual practice of Madinah prevalent at the time of Malik. Nevertheless, despite its importance, the material, as a whole, or any of the decisions, opinions, or verdicts attributed to these authorities have not been treated as Sunnah in the Muwatta'. Rather the entire material is treated as an argument to provide evidence to support Malik's particular point of view. It is interesting to note that not only have the decisions, opinions and statements of these authorities not been called Sunnah, but such materials reported even from the Companions have been treated in the same way and are not called Sunnah. Even Abu Bakr and 'Umar are also treated in this manner. On this very point Ibn Hazm criticizes Malik and accuses him of not unfaithfully following the practice of Abu Bakr or 'Umar. Ibn Hazm says that Malik reported only ten decisions of Abu Bakr in the Muwatta' and actually opposed⁵² eight of them.

The most striking point in this regard is the following statement of Malik on a certain issue: "Nothing has been reported from the Prophet nor has any Sunnah been established⁵³ regarding it". In this case Sunnah is clearly distinguished from anything coming (verbally) from the Prophet. This explicitly shows that the term Sunnah in the Muwatta' usually means the actual practice prevalent in Madinah; and the decisions,

statements and opinions of all the previous authorities do not necessarily constitute Sunnah, rather they are arguments to establish its validity. But Malik exercised his discretion in using them as arguments.

The term "Sunnah of the Prophet" has been mentioned in the Muwatta' thrice. First, it occurs at a place when Abu Bakr tells a certain grand-mother that he did not know the ⁵⁴Sunnah of the Prophet of God in regard to a certain matter. Secondly, it appears when Malik reports from the Prophet, "I am leaving among you two things. You will not deviate so long as you cling to them, viz. the Book of God and the Sunnah of the Prophet." ⁵⁵ Thirdly, it occurs when 'Abd Allah b. 'Umar sending his oath of allegiance to 'Abd al-Malik b. Marwan wrote to him: "I assure you about the hearing and obedience which is (based on) the Sunnah of Allah and the Sunnah of his Prophet." ⁵⁶ All the three usages of the term show that their mention in the Muwatta' is for the sake of information and report. Further, in the same report where Abu Bakr is related to have said that he did not know the Sunnah of the Prophet in a certain regard, it is stated that when the case was presented to 'Umar he did not even mention the term "the Sunnah of the Prophet". Rather he said, "No decision in that regard has so far been given." Thus he did not use Abu Bakr's term, "He knew no Sunnah of the Prophet in that regard." The second occurrence of the term "the Sunnah of the Prophet" is only a report which even as a report falls short of histo-

rical standards. It is reported only by Mālik himself direct from the Prophet, and he has mentioned no authority except himself. The third occurrence is again a sort of report conveying what 'Abd Allāh b. 'Umar sent to 'Abd al-Malik b. Marwān.

From what we have said with regard to the usage of the term "the Sunnah of the Prophet" in the Muwatta', it becomes abundantly clear that the verbal transmission of the term, "Sunnah of the Prophet," as such has no connection with the basic concept of the Sunnah in the Muwatta'. Mālik has never used this term in the Muwatta' as a criterion to judge the validity of the Sunnah prevalent in Madinah. It has never been used as a final resort and as a standard of conduct. As a matter of fact the term as such has not been given any importance and has not been treated above the level of a report.

The terms "the best that I heard in this regard" (ah-san mā sami'tu ilayya) and "I think so" (arā) or "I do not think so" (walā arā) are also very significant so far as the concept Sunnah in the Muwatta' is concerned. As we have already said in our discussion of the term al-Sunnah 'indana (the practice according to us) may mean "Sunnah according to me".

These expressions are equivalent as ideas. On a given issue Mālik says al-amr 'indana (our opinion) is according to the report from Hishām b. 'Urwah, and at the end of the report Mālik adds: "That is the best that I heard in this connection." 57 Here in this example al-amr 'indana and huwa aḥabb mā sami'tu ilayya fi dhalik are synonymous. Mālik uses these terms to

express his preference of one opinion over others. This meaning of the term becomes clear from his arbitrary choice of a particular report from among other reports contrary to the one he chose.

Sometimes Mālik leaves matters to the discretion of the ruler, when he does not find any satisfactory practice on the issue in question or feels himself unable to give his own personal opinion. For example, when he was asked about a certain issue he said: "This is a case where the Imam would decide," although a decision and a precedent from a leading authority of Madinah existed.⁵⁸

We have explained above the terms used by Mālik to express the concept Sunnah in the Muwatta' and have also shown that they express different shades of the concept Sunnah in the Muwatta'. The actual practice prevalent at the time of Mālik in Madinah possesses important place in his arguments. He, however, is not always satisfied with the practice as he is not bound to stick to the reports and statements of the previous authorities of Madinah. That is why he gives a verdict contrary to the reports of the previous authorities as well as to the actual custom.

Next we shall deal with a very tricky term, al-amr al-mujtama' 'alayh 'indana' (the agreed opinion or practice with us), in order to see whether it means the consensus of the people of Madinah at large, or the consensus of the scholars of Madinah or something else ! As the term has a

close relation to the concept of Sunnah as the prevalent practice in the Muwatta' we must investigate the matter in some detail.

REFERENCES AND NOTES

1. Joseph Schacht, Encyclopaedia of Islam, article: "Malik b. Anas," p. 206.
2. Dr. Fazlur Rahman, Islamic Methodology in History (Karachi, 1965), p. 13.
3. Joseph Schacht, Origins of Muhammadan Jurisprudence, op. cit., p. 68.
4. Malik, al-Muwatta' with commentary of al-Zurqani (Cairo, 1310 A.H), Vol. I, p. 30.
5. Ibid., Vol. II, p. 45.
6. Ibid., p. 169.
7. Ibid., Vol. I, p. 161, and also pp. 207-8.
8. Ibid., Vol. II, p. 366.
9. Ibid., p. 370.
10. Ibid., Vol. III, p. 269.
11. Ibid., Vol. IV, p. 56.
12. Ibid., Vol. III, p. 52.
13. Ibid., p. 135.
14. Ibid., p. 52.
15. Ibid., Vol. II, p. 172.
16. Ibid., Vol. III, p. 163.
17. Ibid., Vol. II, p. 126.
18. Ibid., p. 130.
19. Ibid., p. 75.
20. Ibid., Vol. III, p. 135.
21. Ibid., p. 236.
22. Ibid., Vol. II, p. 50.
23. Ibid., Vol. III, p. 269.
24. Ibid., Vol. I, p. 161.
25. Ibid., Vol. II, p. 44.
26. Ibid., Vol. I, p. 49.
27. Ibid., Vol. II, p. 44.
28. Ibid., p. 47.
29. Ibid., p. 172.
30. Ibid., p. 306.
31. Ibid., p. 363.
32. Ibid., p. 365.
33. Ibid., p. 370.
34. Ibid., p. 377.
35. Ibid., Vol. III, p. 98.
36. Ibid., p. 135.
37. Ibid., p. 236.
38. Ibid., Vol. II, p. 363.

39. Ibid., p. 377.
40. Ibid., Vol. IV, pp. 55-56.
41. Mālik has directly and indirectly pointed out at many places in the Muwatta', where he did not seem to be satisfied with the prevalent practice of the scholars as well as with the practice of the people of Madinah. At such places he gives his own opinion contradicting with the reports, as well as with the practice and wants to correct the actual custom.
42. Mālik, al-Muwatta', op. cit., II, p. 370.
43. Ibid., p. 377.
44. Ibid., Volume. II, pp. 171, 210, 231, 235, 274.
45. Ibid., Vol. IV, p. 55.
46. Ibid., Vol. III, p. 98.
47. Ibid., Vol. II, p. 63.
48. Ibid., Vol. I, p. 372.
49. See the chapter on the prostrations of the Qur'an in the Muwatta'.
50. Ibid., Vol. I, p. 106.
51. Ibid., p. 113.
52. Ibn Hazm, al-Ihkam fi usul al-Ahkam (Cairo, 1345 A. H.), Vol. I, pp. 99, 100.
53. Mālik, al-Muwatta', op. cit., Vol. IV, p. 34.
54. Ibid., Vol. II, p. 370.
55. Ibid., Vol. IV, p. 87.
56. Ibid., Vol. IV, "Mā Jā' fī al-bay'ah."
57. Ibid., Vol. I, p. 113.
58. Ibid., Vol. II, p. 306.

CHAPTER IV

AL-AMR AL-MUJTAMA' 'ALAYH 'INDANĀ AND THE IDEA OF CONSENSUS

I

AL-AMR AL-MUJTAMA' 'ALAYH 'INDANĀ EXPLAINED

Mālik is the first known jurist to have used very extensively in his writings a term which seems to give the impression of consensus. The term is al-amr al-mujtama' 'alayh 'indana. When we open the Muwatta', we meet this term frequently in the chapters on social dealings and transactions. Despite this fact, however, the idea of general consensus of the whole community is not communicated by this term; rather it seems that the term suggests the local consensus of Madinah. Nevertheless, there is evidence to establish the fact that Mālik was aware of the general consensus of the community. Commenting on the validity of one witness and an oath, Mālik criticises the view of certain jurists from Kūfah, Baṣrah, Makkah and Madinah, and claims: "This is a matter on which all people¹ and all regions have agreement". We, however, do not know precisely what he meant by the term, 'al-amr al-mujtama' 'alayh'. But this much is certain that it did not include the whole Muslim community. In al-Mustaṣfā, al-Ghazālī has held that in

the thought of Mālik this term means the consensus of Madinah only.² Abū Zaharah has inferred from al-Ghazālī's statement that according to Mālik consensus is what is agreed upon only by the jurists of Madinah, and no body else enters into their circle. This matter becomes clear from the fact that whenever Mālik advances the argument of the consensus of the scholars on a certain issue, he says: "That is the agreed practice among us" (huwa al-amr al-mujtama' 'alayh 'indana). Abū Zaharah explains this term in this way: "If you read the Muwatta' you will find in it a word, 'inda', following the phrase, 'al-amr al-mujtama' 'alayh. 'indana', undoubtedly means the place i.e. Madinah".³ Al-Zurqānī, the chief commentator of the Muwatta' says in his commentary while explaining the term, that 'indana'⁴ meant "in Madinah". Professor Joseph Schacht, writing on the consensus of the Madinese has pointed out: "One feature in which the Medinese idea of consensus differs from the Iraqians is that the Medinese restrict themselves to a local consensus, that is, count only the authorities in Medinah".⁵ Al-Shāfi'ī has asserted that Mālik had confined himself to the boundaries of Madinah, and talked of the consensus only as being the consensus of Madinah.⁶ Al-Rabī', the pupil of Mālik and an addressee of al-Shāfi'ī, in his polemics stated positively to al-Shāfi'ī that they (Mālik and his followers) believed only in what the people of Madinah had agreed upon excluding the people of other regions.⁷

Following this line of thought (taking for granted

that wherever the term, al-amr al-mujtama' 'alayh occurs in the Muwatta' it means consensus) the later Mālikī scholars have distinguished between the consensus on the essentials of Islam and that on points of detail. Thus, according to them, the consensus of the whole Muslim community of Madinah was related to issues such as the call for prayer, and the call to follow the Imam (iqamah), and not to begin the prayer with a loud bismilla, and on the instruments of scale and measurement such as the Mudd and the Ṣā' etc. The consensus in the Muwatta' on these essentials would be considered valid and the consensus on points of detail would not be binding. Al-Qadī 'Iyād is of this view.

The majority of cases where Mālik has used this term are related to the consensus of the scholars. Now the point to be determined is whether the word 'indana' means all the scholars of Madinah or a group among them to whom Mālik also belonged. If the latter is the case, the question arises whether one particular group is always referred to or whether the reference is indeterminate. This is a very difficult point to determine. In fact it is so difficult that a person like al-Shafi'i who was a direct pupil of Mālik could not resolve the problem. He says:

I wish I knew who they are whose opinions constitute consensus, of whom one hears nothing (precisely) and whom we do not know, Allāh help us! Allāh has obliged no man to take his religion from private persons whom he knows (not). Even if Allāh had done so, how would this justify taking one's religion from persons unknown" ?

Malik nowhere in the Muwaṭṭa' has specified "these" whose opinions constitute consensus and what he means by the ahl al-'ilm bibaladina (the scholars of our city). Abū Yūsuf also holds that when al-Awza'i and the people of Madinah [especially Malik] use such terms as: bidhalika 'amilat al-a'imma wa 'alayh ahl al-'ilm, it does not mean that they refer to some actual practice of the Caliphs and the agreed opinion of the learned. According to Abū Yūsuf such terms are ambiguous and obscure.¹⁰ Thus the consensus, if this is what is meant by the terms al-amr al-muitama' 'alayh or wa'alayh ahl al-'ilm bibaladina, is to a great extent anonymous.

Nevertheless, there are sporadic references in the Muwaṭṭa' where Malik speaks of certain authorities. On a certain point Malik refers to al-Qāsim b. Muḥammad, Ṣalīm b. 'Abd Allāh b. 'Abd Allāh, Abū Bakr b. 'Abd al-Raḥmān, Sulaymān b. Yasar and Ibn Shihab.¹¹ On another occasion Malik quotes 'Umar b. al-Khaṭṭāb, 'Abd Allāh b. 'Umar, 'Abd Allāh b. Mas'ūd, Ṣalīm b. 'Abd Allāh, al-Qāsim b. Muḥammad, Ibn Shihab and Sulaymān b. Yasar.¹² Malik's pupil Ibn al-Qāsim on a particular issue has referred to the ahl-'ilm of Malik by saying "the ancient scholars, that is Ibn al-Musayyib and others."¹³ But we cannot say with any certainty that these were the only scholars who are referred to in the Muwaṭṭa' and whose opinions constitute the consensus in Malik. In fact, what is more plausible is that wherever Malik uses such terms, he means sometimes one group of scholars of Madinah who agree with him on a particu-

lar doctrine, and on another occasion he means another group of scholars who conform to his view on certain other points. Furthermore, these different groups of scholars do not necessarily form a definite body in Madinah, rather sometimes an individual of a particular group referred to by Malik on a certain issue may be dropped, and on another occasion may be added to some other group. Therefore, the principle is not to refer to a particular body of scholars when they agree; rather the rule is to search out some of the scholars of Madinah who agree with Malik on a given issue. Nevertheless, the possibility of the consensus of all the scholars of Madinah cannot be ruled out since the term used by Malik is ambiguous. In that case the term, al-amr al-mujtama' 'alayh 'indana, would not be sufficient; it has to be qualified by other phrases such as al-amr alladhi la ikhtilaf fih alladhi adraktu 'alayh ahl al-'ilm bibaladina.¹⁴ But according to the available evidence even this kind of situation is not final and conclusive. We will show later on that even with the usage of the qualifying clauses Malik has not always meant the whole community of scholars. Therefore, Malik's reference to the whole body of scholars is rare and an exception, the rule being what we have described earlier. The following example is very clear on the point:

On a particular issue Malik says: "The practice or the opinion which I heard the scholars speaking of . . . That is the best that I heard, and that is the agreed practice or opinion" (al-amr alladhi sami'tu min ahl al-'ilm . . .

fahādḥā aḥabbu mā sami'tu ilayya wa huwa al-amr al-mujtama'
'alayh¹⁵). Here all three terms have been used, apparently, in one and the same sense. At the outset, Malik starts with what he heard of the practice or opinion of certain scholars of Madinah. After explaining the matter he says: "That is the best I heard" and then at the end he adds, "And that is the agreed practice or opinion". His introduction to the issue indicates that Malik heard that particular case from an anonymous group of scholars in Madinah; which implies that it is not the opinions of all the scholars. Our assertion about his arbitrary choice of one group of scholars who were of Malik's opinion is further supported by Malik's statement: "That is the best that I heard". It shows that the opinion which Malik preferred on that particular issue was one out of many other opinions held by other scholars of Madinah which Malik did not like. In other words, Malik's arbitrary choice of one opinion out of many is equivalent to some of the ahl al-'ilm of Madinah out of many scholars. In turn Malik's choice of this particular opinion of scholars becomes equivalent to the "agreed practice" (al-amr al-mujtama' 'alayh), since the latter term is used to corroborate the former. This example gives a positive clue to understanding the meaning of the term al-amr al-mujtama' 'alayh 'indana in the Muwatta'.

The most frequent usage of the term suffixed by the word 'indana (in our opinion or according to us or amongst us)

needs further explanation. We have already touched upon the issue in our discussion on al-amr 'indana and al-Sunnah 'indana. There we said that the word 'indana' may mean 'indi' (according to me). The same meaning may be conveyed by the word 'indana' in the expression al-amr al-mujtama' 'alayh' 'indana. The above case is a clear example of this meaning of the term. In this case Malik has claimed, "And that is the agreed practice or opinion". But this agreed practice or opinion, in fact, was the opinion of some of the scholars of Madinah, which Malik preferred as over against others.

Malik heard the scholars saying that there was no objection in fasting for a life-time (la ba's bi siyam al-dahr) provided one remains without fast on the days forbidden by the Prophet. Malik says: "And that is the best that I heard in this connection"¹⁶. Here Malik identifies his personal choice with the opinion of the group of scholars in Madinah who held the opinion that fasting for a life-time is unobjectionable.

On a specific occasion Malik says: "This is the agreed opinion according to us and the opinion of some of the scholars whom I like" (al-amr 'indana . . . wa 'ala hadha adraktu man arda min ahl al-'ilm)¹⁷. The term "The opinion of some of the scholars whom I like," in fact, is a very clear indicator of the fact that Malik used to exercise his own judgement and discrimination on the available material in the form of Hadiths, statements and opinions and gave his preference to a certain doctrine practised by a group of people and held by some sch-

olars. He then formulated his independent opinion and sought corroborative evidence from any corner — from the general practice of the people or from a group amongst them or from the opinions and doctrines of some of the scholars who agreed with him on a particular issue.

A decisive proof in this regard has been provided by al-Rabī' the defender of Malik against al-Shāfi'i in al-Umm. Al-Rabī' says:

We claim that it is the consensus of the people (ijtima' al-nas) that there are eleven prostrations in the Qur'an and there is no prostration in the Mufaṣṣal 18 (a name given to some chapters in the Qur'an). To this al-Shāfi'i says: "You must not say "it is consensus of the people unless all the scholars are contacted and when informed that there was a consensus of the people on what you claimed, they replied in the affirmative. The least they could say in this regard is 'We are not aware of any of the scholars who disagree with what you claim to be an agreement. So far as your claim: "There is consensus of the people" is concerned (you must know that) the people with you in Madinah prefer to say "there is no agreement of the people as you assume'".

After producing evidence from some of the highest authorities of Malik against Malik's view, such as from 'Umar b. 'Abd al-'Azīz and others, al-Shāfi'i addresses al-Rabī':

Is it not proper for you to say that the people have agreement that there are prostrations in the Mufaṣṣal rather than to say that the people have agreement that there are no prostrations in the Mufaṣṣal. If you say that it is not proper to say so, since we do not know that actually they have agreed. But you claim that they have agreement and you have not reported (any Hadith) from any of the leaders supporting your claim. I don't really know who those people are with you? Are they creatures none of whom is known. We have not advanced any argument against you except

from your own sources i.e. from the people of Madinah, and we have not considered the consensus (in this regard) except the consensus of the people of Madinah. You should correct your thinking. You must know that it is not proper for you to say: "There is consensus of the people in Madinah, until there remains no opponent to the consensus from the Scholars". Rather you should say: "In what they have differed we have given preference to such and such". (Underlining touched).

To this criticism and analysis of al-Shafi'i, al-Rabi' frankly admits that his statement: "The consensus of the people," in fact, meant only the opinion of those scholars who agree with Malik though others differed.¹⁹

The following points emerge out of the above discussion. In this passage, al-Shafi'i, the direct pupil of Malik, has explained the term al-amr al-mujtama' 'alayh 'indana. It seems from the passage that the term ijtama' al-nas (the agreement of the people), and the term al-amr al-mujtama' 'alayh 'indana (the agreed opinion according to us) and the term al-amr 'indana (the opinion according to us) are almost synonymous. In the passage al-Rabi' has used the term ijtama' al-nas which is similar to its corresponding term in the Muwatta' al-amr al-mujtama' 'alayh 'indana. The term which Yahya in his version of the Muwatta' has applied to the doctrine, "There are only eleven prostrations in the Qur'an" is al-amr 'indana and al-Rabi' has used the term ijtama' al-nas for the same doctrine in this passage. This means that according to al-Rabi' the term al-amr 'indana and the term ijtama' al-nas are synonymous. And there is no difference between the term ijtama' al-nas and the term al-amr al-mujtama' 'alayh 'indana, which in turn are equivalent

to the term of the Muwatta' al-amr 'indana.

Though al-Shāfi'ī in principle did not believe in the consensus of Madinah only (for he believed in the consensus of the scholars of the whole community)²⁰, yet for the sake of argument he does accept the claim of consensus of Madinah only but asks for its evidence. He clearly declares that he would be satisfied by the evidence advanced only from the pure Madinese sources and not outside of them, provided that evidence is conclusive.²¹ In this context al-Shāfi'ī asks al-Rabī' ". "So far as your claim, 'There is consensus of the people' is concerned, the people with you in Madinah say, 'There is no consensus of the people as you assume to be the case' ". Here al-Shāfi'ī being a direct pupil of Malik and knowing the detailed conditions of Madinah, its scholars, their agreements and their differences, declares that the claim of Malik was not correct and the scholars of Madinah held different opinions on the issue. This case indicates that when Malik claims consensus of the people of Madinah, it does not mean the consensus of the whole community of Madinah or the consensus of the whole body of the scholars. It shows that Malik sometimes claims consensus even though many of the scholars of Madinah disagree with him.

Another point which emerges out of this passage is that Malik, sometimes claims consensus when actually there is no authority in Madinah whom he could quote in his support; rather whatever evidence he can produce goes against his own claim. For example, he says: "Al-amr 'indana (the opinion

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with us is) that there are only eleven prostrations in the Qur'an and there is nothing in the Mufaṣṣal chapters". 'Al-Rabī' has reported Mālik's term al-amr 'indana as ijtima' al-nas as we have noted above. Now we must examine the evidence which Mālik has produced to support his claim of "consensus" on this issue. In the section on the prostration of the Qur'an in the Muwatta', Mālik has recorded five Hadīths. The first four of these Hadīths go radically against the claim of Mālik about consensus, and the fifth has nothing to do with the number of the prostrations in the Qur'an. After relating these Hadīths Mālik claims consensus on an issue which is against the evidence he has actually produced. The first Hadīth says that Abu Hurayrah prostrated himself during his recitation of a certain chapter, and at the end of the prayer he declared that he had prostrated himself in that chapter because he had seen the Prophet doing so. This evidence goes against Mālik's claim. The second Hadīth relates a practice of 'Umar b. al-Khattāb that he prostrated himself twice in the chapter al-Hajj. In that case the number of the prostrations in the Qur'an should be more than eleven. But Mālik declared a "consensus" that there are only eleven prostrations in the Qur'an. The third Hadīth confirms the second and thus also goes against the claim of consensus by Mālik. The fourth Hadīth tells about another practice of 'Umar b. al-Khattāb that he prostrated himself during the chapter al-Najm, which is again against the claim of consensus. Thus we see that whatever evidence Mālik

can produce in the Muwatta' on the issue of the prostrations in the Qur'an goes directly against his claim of "consensus", and he has not reported a single authority to support his own view. Al-Shafi'i has brought forth some more evidence from Malik against the claim of consensus on the issue. Al-Shafi'i says: "You relate from 'Umar b. 'Abd al-'Aziz that when he (Umar) heard about the prostration of Abu Hurayrah and the practice of the Prophet in that regard he ordered the reciters to prostrate themselves in it. Thus al-Shafi'i has added 'Umar b. 'Abd al-'Aziz to the evidence produced in the Muwatta', which of course is against the claim of "consensus". From the above discussion we can conclude that Malik sometimes claims consensus when there is no authority in Madinah proper whom he could quote in his support. The whole evidence in the Muwatta' on the issue, far from supporting his claim, contradicts it. That is why al-Shafi'i was right in his saying:

"You do not follow what you relate and do not name a single authority against it. And you relate prostrations from the leaders of the people and do not relate anything against them. Is it not proper for you to say that there is consensus of the people that there are prostrations in the Mufassal chapters-27 ?

II

Ahl al-'Ilm Bibaladina

It may be said that Malik had referred to a particular group of scholars in Madinah who agreed with his opinion and claimed consensus on the basis of their agreement. There is

indirect reference to such a group of scholars in a letter which Malik wrote to Layth b. Sa'd. That is also the opinion of al-Rabi' which he expressed when he admitted to al-Shafi'i that when he claimed consensus he did not mean the consensus of the people of Madinah as a whole or the consensus of the whole body of scholars in Madinah. Rather he meant only a group of scholars whom Malik liked.²⁸

Shah Wali Allah has also expressed the same opinion and has said that Malik meant by the consensus only the consensus of some of his teachers.²⁹ But it would not be correct to infer from this that there was always a particular, specific body of his teachers to whom he always referred in such cases. For we see many differences between Malik and the most venerated authorities of his own, including his teachers. For example, Sa'id b. al-Musayyib is one of the most reliable authorities in the Muwatta'; nevertheless, al-Tabari has recorded that Malik differed with Sa'id b. al-Musayyib on ten essential issues of their day.³⁰ Al-Tabari has mentioned ten differences between Malik and Sa'id b. al-Musayyib. Perhaps these ten cases were about the "essentials". So far as their differences on points of detail are concerned, their number may naturally be much greater.

The view that there was no particular body of scholars to whom Malik referred is supported by numerous examples, but the following one is very clear. The issue is whether a case can be decided in favour of a plaintiff on the evidence of one

witness and an oath. There were two groups on the issue among the authorities of Malik. One of them was in favour of the proposition while the other was against it. Abū Salamah³¹ b. 'Abd al-Rahmān and Sulaymān b. Yasar were in favour; Ibn Shihāb,³² 'Urwah, Ibn al-Musayyib, al-Qasim and many others were against. Malik favoured the opinion of the first group (though it consisted of only two cited persons) and declared: "The established practice is that the case will be decided³³ on the evidence of an oath and one witness". Here Malik declared the opinions of Abū Salamah b. 'Abd al-Rahmān and Sulaymān b. Yasar to be the "established practice" and does not pay any attention to the divergence from it by the majority of his authorities, authorities no less than Ibn Shihāb, 'Urwah, Ibn al-Musayyib, al-Qasim and many others. Now this example very clearly tells us that there was no particular group of scholars in Madinah to whom Malik always referred; rather he chose and preferred any opinion on his own accord against another and excluded any scholar whose opinion he did not like and included any scholar whose opinion he liked. Further, he declared "established Sunnah" on a particular issue, which in fact was the opinion of a minority of scholars and which was opposed by the majority of them. Here we find that only two authorities Abū Salamah b. 'Abd al-Rahmān and Sulaymān b. Yasar agree with the opinion of Malik and only on the authority of these two personalities, Malik declared that there was established Sunna on that issue; while the big majority of

great authorities held the opposite opinion and differed with Malik.

In addition to the authorities referred to above who were against the doctrine of Malik, there is very interesting point which is made by al-Shafi'i. Al-Shafi'i discussed in al-Umm, with al-Rabi' the issues in which he disagreed with Malik; nevertheless, he had begun the polemics, firstly on the issues in which there was agreement between Malik and al-Shafi'i but in which others disagreed with them. In all such cases al-Shafi'i addressed their (Malik's and al-Shafi'i's)³⁴ opponents with the phrase ba'd al-nas (some people). Al-Shafi'i has nowhere specified who these anonymous "some people" were. It seems from the evidence that this anonymous group existed in Madinah. No doubt some of the doctrines ascribed to them resembled the doctrines of the Iraqians, but there is enough evidence to support the possibility that such a group did exist in Madinah. Al-Shafi'i has applied two terms. One ba'd al-nas and the other ba'd al-mashriqiyyin (some of the Easterners). The latter term can refer to the Iraqians or the school of Abu Hanifah, but the referent of the first term are the group that existed in Madinah. There are hints in the Umm to support this view on pages 177-183, but the occurrence of this term on page 182 on the discussion of "evidence" provides enough testimony to establish the point. Here al-Shafi'i, after quoting a Hadith from the Prophet that he decided (a case) on the evidence of an oath and one witness, says, "We

and you hold this doctrine". He, then, says, "ba'd al-nās" (some people) disagree with us". The people who disagreed with Mālik and al-Shāfi'ī, quote authorities in their support who were purely from Madinah. They were Ibn Shihāb, 'Urwah, Ibn al-Musayyib, al-Qāsim and many other successors (from Madinah), and none of them was from Iraq. Al-Shāfi'ī has explained that these "many other successors" were actually the companions of al-Zuhri³⁵ (Ibn Shihāb). There is no need to stress the point that al-Zuhri's companions were from Madinah and not from Iraq. That is why we are inclined to conclude that these ba'd al-nās³⁶ were in Madinah. From the evidence under examination it seems that there were a number of Successors in Madinah who held the doctrine of the majority of Successors but were not so influential as Mālik. Therefore history did not preserve their names, and they have remained anonymous in the terminology of al-Shāfi'ī. It was most probably through the personal influence of Mālik that the minority opinion of some Successors — Abū Salamah b. 'Abd al-Rahmān and Sulaymān b. Yasar — acquired the status of the "established Sunnah" of Madinah in the terminology of Mālik and that al-Shāfi'ī took note of it.

Mālik says, "The practice with us, on the issue of al-Mustahādah (a woman who is suffering from continuous menstruation) is on the Hadīth from Hishām b. 'Urwah from his father³⁷ ('Urwah)". Here again Mālik has used the term 'indana' (with us). In support of his view on this issue he has quoted only one

authority from Madinah viz. 'Urwah, and has declared very honestly at the end that that was the best he had heard (on that question). This shows that it was not the unanimous opinion of the scholars of Madinah; rather he chose one personality among the Madinese scholars who agreed with his view and said that that was the practice according to them [him] and that was the best he had heard. It is not a mere conjecture that there was only one personality ('Urwah) whom Malik quoted in his support. The available evidence suggests that, in fact, it was the case. There were many great authorities in Madinah who opposed this view, but Malik did not concur with their opinion and preferred 'Urwah's opinion over the opinion of all of them. Malik himself quoted Sa'id b. al-Musayyib whose views were contrary to the view he supported. Sa'id b. al-Musayyib held that the Mustahadah should take a bath after every bleeding, which was contrary to the opinion of 'Urwah who held that she should bathe only once and then should perform only routine ablutions for every prayer. Malik held the latter opinion and quoting 'Urwah in his support declared that the practice "with us" was accordingly. This example is also an indication of the fact that the claim of consensus in the Muwatta' or the apparent majority opinion in the Muwatta', in most cases, in fact, was the arbitrary choice of Malik among other doctrines prevalent in Madinah.

Al-Rabi' is very explicit and frank in this regard. Wherever he is hard pressed by al-Shafi'i, he admits that

Malik exercised his arbitrary choice and preferred one scholar of Madinah over the others. For example, in this case al-Rabi' says: "We accept the doctrine of 'Urwah and reject the doctrine of Ibn al-Musayyib."⁴⁰

Al-Shafi'i has pointed out that al-amr al-mujtama' 'alayh according to Malik was sometimes based merely on the practice of some of the important authorities of Madinah such as 'Umar b. al-Khattab,⁴¹ or 'Umar b. 'Abd al-'Aziz. We cannot doubt the truth of such statements of al-Shafi'i. We may add to this that Malik was not always bound to stick to 'Umar b. al-Khattab or 'Umar b. 'Abd al-'Aziz. Rather he wanted authority in particular cases, especially from the great authorities of Madinah, but did not regard himself as bound to stick to any of them in case of difference. Nevertheless, it is a very significant statement of al-Shafi'i that the al-amr al-mujtama' 'alayh,⁴³ was not the general consensus of the scholars of Madinah; rather it was the agreement of some of the scholars whose opinion or practice was in accordance with the opinion or practice of Malik or sometimes only the practice of some of the major authorities. Malik held that the performance of pilgrimage on behalf of others was not allowed.⁴⁴ In addition to the fact that all the Hadiths which Malik quoted under the subject in the Muwatta' from the Prophet are against the doctrine he held,⁴⁵ there were many major authorities, quoted by Malik himself, in Madinah who held the contrary opinion. The authorities were 'Ali, Ibn 'Abbas, Ibn al-Musayyib, Ibn Shihab

and Rabi'ah (b. Abi 'Abd al-Rahman)⁴⁶. All these authorities of Malik declare that the performance of pilgrimage on behalf of others was allowed. As Malik did not quote any authority in his own support and opposed all of them, al-Shafi'i said that, in fact, there was none among the companions of the Prophet who held Malik's opinion; all the scholars of jurisprudence from Madinah, Makkah, and from the East and Yaman held that the performance of the pilgrimage on behalf of others was⁴⁷ allowed.

Malik held that the least amount of dowry in marriage for a woman is one fourth of a dinar, and this amount is a⁴⁸ must. The best evidence Malik could produce in this context in the Muwatta' was one Hadith from the Prophet in which the Prophet had given a woman to a person in marriage who could not⁴⁹ produce even an iron ring to offer as dowry. Thus the evidence is against the doctrine of Malik. Further the great authorities of Malik such as 'Umar b. al-Khattab, Sa'id b. al-Musayyib and Rabi'ah b. Abi 'Abd al-Rahman held the opposite opinion⁵⁰ and did not agree with him. There was controversy in Madinah on the issue of whether wiping on the shoes (al-mash' ala al-khuffayn) for ablution in winter or in journey was allowed or not. Malik held that it was not allowed to the resident (al-muqim). Here Malik has opposed the authorities of Madinah such as 'Umar b. al-Khattab, Sa'd b. Abi Waqqas, 'Abd 'Allah b. 'Umar, Anas b. Malik, 'Urwah b. al-Zubayr and Ibn Shihab.⁵¹

AL-AMR AL-MUJTAMA' 'ALAYH 'INDANA
 NOT UNANIMOUS PRACTICE
 OR CONSENSUS

The terms al-Sunnah, al-'amal, al-amr, al-amr al-muj-
tama' 'alayh etc. used by Malik in the Muwatta' were mostly
 based on the Hadiths, practices, customs or opinions reported
 from the authorities quoted above. We have seen during the
 above discussion that Malik has opposed not only the Hadiths,
 reports and opinions but also the authorities from among the
 Companions, the Successors and his contemporaries. The autho-
 rities from among the Companions were the most reliable such
 as 'Umar b. al-Khattab, Sa'd b. Abi Waqqas, 'Abd Allah b. 'Umar
 and Anas b. Malik. They include some of the most venerated
 and respected personalities from Malik's own teachers such
 as, 'Urwah b. al-Zubayr, Ibn Shihab, etc. Disregarding all
 of them, Malik held a contrary opinion. This shows that Malik
 was not bound to follow the practice of the Companions nor the
 the practice of his own authorities nor even the prevalent
 practice in Madinah but followed what he considered the prac-
 tice ought to be. Further, the agreement or disagreement of
 the majority or minority of the scholars of Madinah — past
 or present had actually little to do with the idea of con-
 sensen with Malik. He declared consensus even where, in
 fact, it was his personal opinion. It was on such occasions
 that Shah Wali Allah said that the idea of consensus in the

Muwatta' was not the consensus of all the scholars of Madinah, rather it was the opinion of some of the teachers of Malik or the personal opinion of Malik himself.⁵²

Malik said: "The practice with us, regarding the abandoned child (al-Manbudh) is that it is free and its fealty (wala') is to the Muslims. They will inherit him".⁵³ Yahya, the reporter of the famous version of the Muwatta' has reported in the Muwatta' that Malik used the expression al-amr 'indana (the practice according to us). Al-Rabi' and al-Shafi'i report from Malik that Malik used the term al-amr al-mujtama' 'alayh 'indana.⁵⁴ This means al-amr indana and al-amr al-mujtama' 'alayh 'indana were equivalent terms with Malik as well as with his pupils who reported from him. Our inference is supported by the arguments presented by Yahya, al-Rabi' and al-Shafi'i. Yahya in the Muwatta' records from Malik the decision of 'Umar at the end of which Malik says al-amr 'indana. The same case is reported from Malik by al-Shafi'i in the Umm, and at the end al-Shafi'i says, "Malik said, "al-amr mujtama' 'alayh 'indana" and al-Rabi' confirms Malik's al-amr 'indana reported by al-Shafi'i. The best evidence which Malik produced to support his claim was the decision of 'Umar. But the decision of 'Umar was that the wala' (the fealty) of the abandoned child (al-Munbudh) was to the emancipator, and Malik claimed al-amr al-mujtama' 'alayh 'indana (the agreed practice with us) that the wala' (the fealty) was to the Muslims. This shows that Malik did not have any other evidence to support his

claim except the decision of 'Umar, whom he opposed. This means that Malik was not shy of reporting on the subject whatever had been reported or practised in Madinah whether it supported him or opposed him. Moreover, he considered his personal opinion as "consensus" and declared his opinion as al-amr al-mujtama' 'alayh 'indana. Here 'indana (in our opinion) means "'indi'" (in my opinion) because the reports and practice of Madinah were not in accord with the doctrine of Malik but rather were contrary to it. High authorities like 'Umar and Ibn Shihab held opposite opinion to Malik, and there was none in Madinah who supported Malik. That is also the complaint of al-Shafi'i against Malik who remarked on the issue: "I wish to know who were those who had consensus, who are not heard⁵⁵ and about whom we do not know anything".

Malik held that the blood-money of a molar tooth is⁵⁶ five camels. This opinion of Malik was against the decision of 'Umar b. al-Khattab and Sa'id b. al-Musayyib,⁵⁷ very reliable authorities used by Malik himself.

Malik claimed consensus on a particular form of sale saying: "al-amr al-mujtama' 'alayh 'indana" — that a person while selling dates can keep for himself upto one third of⁵⁸ the dates. Against Malik's claim of consensus in Madinah, al-Qasim b. Muhammad, and 'Amrah bint 'Abd al-Rahman held different opinions, and their practice was contrary to the consensus⁵⁹ claimed by Malik. This example also supports the view that the consensus in the Muwatta' does not mean the agreement

of all the scholars in Madinah, not even the agreement of all the teachers of Malik and his respected authorities. This example indicates that all the authorities who are reported on the issue were against the view held by Malik, and there was none in Madinah whom Malik quoted in his support. These and other similar examples clarify the idea of "consensus" in the Muwatta'. The result of all this evidence is that the "consensus" of Malik definitely does not mean the complete agreement of all the scholars of Madinah. Malik's difference with his authorities depends upon his own discretion. Sometimes he declares al-amr al-mujtama' 'alayh 'indana, but at the same time he reports the contrary opinion of those who differ with him on the same issue. In the process of his agreeing and disagreeing with his authorities he does not spare any of them; rather he expresses his opinion whether it goes against Sa'id ibn al-Musayyib or Ibn Shihab al-Zuhri or 'Urwah or Rabi'ah. Malik asked Ibn Shihab about Olives. He replied that there was a tax of al-'Ushr (one tenth) on them Malik opposed Ibn Shihab saying: "Al-'ushr will not be taken except from their oil."

'Urwah b. al. Zubayr used to say al-Qunut is in the morning prayer in the second Rak'ah before bowing down. Here Malik has opposed 'Urwah and held that the Qunut will be said after the Ruku'. The scholars of Madinah held different opinions about saying prayer before or after the 'Id prayer. Malik reports that Ibn 'Umar and Sa'id b. al-Musayyib did not say prayer before or after the 'Id prayer. Al-Qasim b. Muhammad used

to say four Rak'at prayer before proceeding to the 'Id prayer. 'Urwah b. al-Zubayr used to say prayer in the Mosque before
⁶⁴the 'Id prayer. Al-Zurqani has pointed out in his commentary on the Muwatta' that Malik forbade to say prayers (individually) at the place where 'Id prayer was going to be said. According to Ibn al-Qasim, Malik used to say prayer in the Mosque before and after the 'Id congregation; whereas Ibn Wahb and Ashhab reported that Malik used to say prayer only after the 'Id but
⁶⁵not before it.

We have already noted Malik's view on dowry, that the least amount allowable was one fourth of a dinar, and we have also noted that this opinion of Malik was against the practice of the Prophet and that of 'Umar. It was also against the opinion of Sa'id b. al-Musayyib and Rabi'ah b. Abi 'Abd al-Rahman. The agreement of the Prophet, 'Umar, Sa'id b. al-Musayyib etc. in fact, was tantamount to consensus, as Malik has not reported any difference on the point from any scholar of Madinah, past or present. Despite this fact Malik declared that the least amount of dowry must be one fourth of a dinar. Al-Shafi'i asked al-Drawardi whether there was any scholar in Madinah who held the opinion that the least amount of dowry was one fourth of dinar. He said: "No by God! I do not know any one who said
⁶⁶so before Malik."

Malik claimed consensus saying: "Al-amr 'indana
⁶⁷Muslim will not be killed for a non-Muslim". Against this claim off Malik there are many great authorities of Madinah who do not share Malik's view and there is no agreement on the blood-money

of a non-Muslim. Mālik has reported a decision of 'Umar b. 'Abd al-'Azīz that if a Jew or a Christian is killed, his blood⁶⁸ should be half of the bloodwit of a free Muslim. It is interesting to note that after recording this decision of 'Umar b. 'Abd al-'Azīz, Mālik endorsing a statement of Sulaymān b. Yasar says: "wa huwa al-amr "indana" (and that is our opinion). This statement of Sulaymān b. Yasar is different from the decision of 'Umar b. 'Abd al-'Azīz. According to Muḥammad b. Ḥasan al-Shaybānī, Mālik reported a precedent of the Prophet⁶⁹ that he killed a Muslim for a non-Muslim. Rabi'ah b. 'Abd al-Rahmān, a great scholar of Madinah, held that a Muslim will be⁷⁰ killed for a non-Muslim. 'Umar b. al-Khaṭṭāb decided a case⁷¹ where a Muslim was killed for a Christian of Hirah. That was the practice of 'Alī b. Abī Tālib. One of the greatest personalities and the most respected authorities of Madinah, Ibn Shihāb held that the blood-money of a protected one (dhimmi) during the Caliphates of Abū Bakr and 'Umar and 'Uthmān⁷³ was equivalent to the blood-money of a free Muslim. Malik has expressed divergent opinions from these authorities, yet he declares "consensus".

The letter written by Layṭh b. Sa'd to Mālik b. Anas contains very significant material which supports the idea of the "consensus" we have been discussing. After showing how the Companions of the Prophet spread throughout the Caliphate after the Prophet's death and how differences arose in their opinions, Layṭh reminded Mālik that many differences existed

among the Successors. He says:

The successors like Sa'id b. al-Musayyib and others of his calibre differed widely among themselves. Those who followed them disagreed with one another. I myself had been their pupil and attended them. Nowadays Ibn Shihab and Rabi'ah b. Abi 'Abd al-Rahman are their leaders. As you have attended al-Rabi'ah, you are fully aware of his divergent opinions. I myself have heard what you said against him. I have also heard the different opinions of other scholars of Madinah who were older than he. They were Yahya b. Sa'id, 'Ubayd b. 'Umar, Kathir b. Farqad and many others. So much so that you were forced to leave his group due to the uncompromising attitude of Rabi'ah. 'Abd al-'Aziz b. 'Abd Allah, you and I discussed those issues which we did not like. Both of you agreed with me on the issues on which I was not in agreement with Rabi'ah. When we met Ibn Shihab (we found) that he held many divergent doctrines. It happened often that when he wrote to any of us, he gave three answers to one question, contradicting one another, not knowing what he had said in reply to that particular issue previously. These were the reasons due to which I dared to express my opinion against the opinions of the scholars of Madinah, but you showed your displeasure with it.

Then Layth gives some examples of the controversial issues among the Madinese scholars. One issue is whether at the expiry of four months (essential requisite for Iyla /divor-
ce on mutual condemnation by spouses 74 in the Qur'an) divorce occurs or not? Layth reminds Malik: "you hold that at the expiry of four months divorce does not occur if the husband is not asked to appear before an authority". Against this doctrine of Malik, Layth b. Sa'd points out that 'Uthman b. 'Affan, Zayd b. Thabit, Qabiysah b. Zuwayb and Abu Salamah b. 'Abd al-Rahman b. 'Awf, Sa'id b. al-Musayyib, Abu Bakr b. 'Abd al-Rahman b. Al-Harith b. Hisham and Ibn Shihab held

that the wife would be automatically divorced at the expiry
75
of the four months. Layth b. Sa'd cites another example:

Zayd b. Thabit held that when a husband delegates his right of divorce to his wife and she chooses to remain with him (even then), she would be considered divorced (— even if she does not divorce herself). If she exercises the delegated right of divorce thrice against herself, she would be considered divorced once. 'Abd al-Malik b. Marwan decided in accordance with this, and Rabi'ah b. Abi 'Abd al-Rahman held the same.

After quoting the doctrine of Zayd b. Thabit, 'Abd al-Malik b. Marwan and Rabi'ah b. Abi 'Abd al-Rahman, Layth b. Sa'd points out to Malik that there was consensus of the people (in Madinah) on the point, viz. that if the wife chooses to remain with
76
her husband no divorce would occur. Here Layth b. Sa'd has pointed out to Malik that the consensus in that regard was not according to the claim of Malik; rather the consensus of the people of Madinah was contrary to it. Layth b. Sa'd also reminds Malik:

When Zufar b. 'Asim al-Hilali wanted to say prayer for rain (al-Istisqa') you (Malik) asked him to say the prayer before the address (al-Khutbah)⁷⁷. I protested against it strongly because the prayer for rain and the address is analogous to the Friday prayer⁷⁸. 'Umar b. 'Abd al-'Aziz, Abu Bakr b. Muhammad b. Hazm and all others (in Madinah) used to address before the prayer. That is why all people felt the weakness of Zufar's practice and detested it.⁷⁹

Here Layth has told us that all the people of Madinah had agreement on this issue; the great leaders and scholars like 'Umar b. 'Abd al-'Aziz and Abu Bakr b. Muhammad b. Hazm practised accordingly; but Malik disagreed with all of them

and held a solitary opinion. In other words, Malik did not accept the agreement of the people or scholars of Madinah and opposed it; and he claimed consensus or agreement of the people or the scholars of Madinah when, in fact, this consensus was his own opinion or at the best it was supported by a few of the scholars in Madinah.

Malik held that two partners (in business) had not to pay Zakah unless the share in the commodity of each partner reaches the limit on which Zakah is essential.⁸¹ Against this doctrine of Malik, the authorities of Madinah like 'Umar b. al-Khattab, 'Umar b. 'Abd al-'Aziz held that they had to pay the Zakah. Another great scholar of Madinah Yahya b. Sa'id held the same opinion. Here Malik has opposed 'Umar b. al-Khattab and 'Umar b. 'Abd al-'Aziz the most reliable authorities among the companions and among the successors respectively. He has also opposed Yahya b. Sa'id, one of the most respected authorities among his teachers. At the end of his letter, Layth says: "There are many other issues which are controversial but I leave them for the time being."⁸²

This letter which was written in reply to a letter sent by Malik to Layth b. Sa'd throws much light on the idea of consensus in Malik. Malik in his letter had advised Layth when Layth formulated and expressed his legal opinion, not to oppose the practice of the people with us and the practice of our town. In his reply, Layth has pointed out to Malik that what he had claimed as the agreement or practice of the people of Madinah,

in fact, was his own opinion; and instead of agreement or consensus or the general practice of people on the issues, in reality there existed difference and disagreement. Citing many examples and quoting the leading authorities of Madinah, Layth showed to Mālik that he differed widely with all of them and not infrequently held solitary opinions without any support from the Madinese scholars and authorities. From the names cited by Layth in his letter it appears that Mālik had differences on almost all issues either with one authority or the other. These authorities are not other than 'Umar b. Al-Khattāb, 'Uthmān b. 'Affān, Zayd b. Thābit' among the Companions, and 'Umar b. 'Abd al-'Azīz, Sa'id b. al-Musayyib, Ibn Shihāb, Rabi'ah b. Abī 'Abd al-Rahmān, Qabiṣah b. Zuwayb, Abū Salamah b. 'Abd al-Rahmān b. 'Awf, Abū Bakr. b. 'Abd al-Rahmān b. Hārith b. Hishām, 'Abd al-Mālik b. Marwān, Abū Bakr b. Muḥammad b. Hazm, Yahyā b. Sa'id and many others among the Successors and Successors of Successors.

We can conclude from what has been said so far that the idea of consensus described by Mālik in the Muwattā' does not include the whole Muslim community in Madinah. Further, though apparently, the terminology used by Mālik to express the idea of consensus suggests that all the scholars of Madinah agreed on the points where Mālik has claimed consensus, yet, in fact the consensus of Mālik does not mean the agreement of all the scholars of Madinah. We have also examined the evidence to see whether there was a particular group of

scholars in Madinah, on whose agreement on a particular issue, Mālik declared consensus in Madinah. The evidence has shown that mostly wherever Mālik claims consensus, a difference between the leading scholars in Madinah exists. What the evidence has shown is that Mālik gives preference to some opinion of the Madinese scholars over the others and declares consensus respecting it. Expressions like al-amr al-muitama' 'alayh 'indana do not mean that all the scholars of Madinah or even a particular group of them always agree on the issues where such terms are applied. From the letter of Layth b. Sa'd and from the writings of Abū Yūsuf, al-Shaybānī, al-Shāfi'ī and al-Rabī', we have shown in detail that Mālik differed with his own authorities, agreeing with some of them and disagreeing at the same time with others. We have cited many examples from the Muwatta' to show that Mālik gives the different opinions of the scholars of Madinah and at the end of the issue he declares al-amr al-muitama' 'alayh 'indana. There are some places in the Muwatta' where Mālik has simply mentioned the term and has not given the contrary opinions of the scholars. We have verified some of such places in the writings of his contemporaries i.e. Layth b. Sa'd, al-Shāfi'ī, al-Rabī' etc. and have found that many great scholars of Madinah held a different opinion. Thus with the help of internal and external evidence we conclude that the idea of consensus in the Muwatta', in fact, was the personal choice of opinion of some of the scholars of Madinah.

We have also shown that the term 'indana' is very ambiguous and sometimes it means 'indī', and this meaning of the term may be extended even to the term al-amr al-mujtama' 'alayh 'indana'. On such occasions al-Shāfi'ī has correctly pointed out: "You call your own opinion consensus." Shah Wali Allāh⁸³ says that on occasions in the Muwatta', where Malik has used the word 'indana', actually there was not the consensus of the people of Madinah, rather it was the choice of some of his teachers or even his personal choice.⁸⁴

This attitude of Malik towards consensus is confirmed by later Maliki scholars. Malik has applied the term al-amr al-mujtama' 'alayh ambiguously both to the matters under practice in Madinah and to theoretical issues. Al-Qarafi would not accept this indiscriminate use of the term; rather he would accept the "consensus" reported by Malik on the matters which were under practice, of the whole community of Madinah like the call for prayer etc. He would not accept the consensus of Malik which was based on the opinion of Malik on the points which were not in practice.⁸⁵ Al-Qadi 'Iyad holds the same opinion. He says that what has been reported as being the practice in Madinah, like the call for prayer, and the call to follow the Imam and not to express bismillah in the prayer, the general form of the Prophet's prayer, the number of its Rak'at and prostrations and the like would constitute consensus which would be binding.⁸⁶ Al-Shāfi'ī would also accept the consensus of Malik if it is related to the essen-

tials of Islam, because al-Shāfi'i holds that consensus is
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not possible except on the essentials of Islam."

The result of these discussions of al-Shāfi'i and of the Mālikī scholars is that they have differentiated between the consensus in Mālik on essentials and the consensus on the points of detail, and held that the consensus on the essentials or on the matters which were under common practice would be accepted as genuine and valid legal argument while the consensus on points of detail would not be accepted as such. This differentiation between the consensus on the essentials and on points of detail is not found in the Muwatta'. Mālik has not differentiated between the two and has applied the term al-amr al-mujtama' 'alayh 'indana' mostly on points of detail. It may be very interesting to note that Mālik has used this term most extensively in the chapters on the Mu'amalat (dealings and transactions) and never in the chapters dealing with the 'Ibadat (the matters pertaining to rituals and worship) except twice in the Kitab al-Zakah. Thus, what was a rule with Mālik became an exception with the Mālik's pupils and what was exception with Mālik became rule with his followers. Mālik has recorded the practice on worship prevalent in Madinah as he found with his sporadic comments. But in his chapters concerning social dealings and transactions, Mālik goes on writing on the subject giving his own opinions and his choice of the opinions of others. He quotes the Prophet and other subsequent authorities sporadically. This

change of emphasis from report to opinion and judgement shows that Mālik's main concern was with social dealings. Here he exercises his independent opinion and differs and agrees with his authorities according to his own view of Islam.

If the reports concerning the request of Abū Ja'far al-Manṣūr, to Mālik for the compilation of a Sunnah or normative conduct of affairs are correct, then it becomes quite intelligible that Mālik was not only concerned with the legal divergences of other regions as they were pointed out to him by al-Manṣūr, but he was also conscious of the legal differences existing in Madinah. That is, in order to comply with the wishes of al-Manṣūr, he would call up a consensus of Madinah on certain issues though, in fact, the consensus was only an opinion of some of the scholars of Madinah whom Mālik liked or even sometimes his own personal opinion. From the evidence we have produced from the Muwatta' it becomes abundantly clear that the idea of consensus in the Muwatta' was not actually the agreement of all the scholars of Madinah or a particular group from among them, to whom Mālik always referred on **points** of consensus; **rather** it was a consensus sometimes supported by a few of the scholars of Madinah, and sometimes designated only by Mālik's personal opinion. In this latter case Mālik often did not quote any group of scholars in his support but rather gave contrary opinions of scholars in Madinah. It seems that Mālik had a general spirit of Islam in his mind and declared from his own point of view how the consensus

should be. The Muwatta' was rather an endeavour to bring about a consensus and normative practice than to state and record an already existing one.

There are some references in the Muwatta' where Malik has suffixed certain qualifying phrases to the most extensively used term al-amr al-mujtama' 'alayh 'indana. These phrases are al-amr alladhi la ikhtilaf fih 'indana (the practice about which there is no disagreement) 'alladhi sami'tu ahl al-'ilm yaqulun (which I heard the scholars talking about), or the phrase al-Sunnah allati la ikhtilaf fiha wal-allati adrak-tu 'alayh ahl al-'ilm bibaladina⁸⁹ (the Sunnah about which there is no disagreement and on which I found the scholars of our city). On such occasions the additional and qualifying phrases give more force to the term al-amr al-mujtama' 'alayh 'indana and, further, on such occasions, Malik extends the scope of consensus to the general practice of the people of Madinah and also to the scholars whom he liked. It may be that on such occasions, Malik referred to the general consensus of the whole body of scholars in Madinah. But as we have already said, such cases in the Muwatta' are rare and exceptional, they are also anonymous and ambiguous. But the most important thing which we should keep in mind is the fact that the term al-amr al-mujtama' 'alayh 'indana scarcely means the consensus of the people of Madinah at large or the consensus of the whole body of scholars in Madinah. This meaning of the term would become possible only where the qualifying and additional

descriptions are appended to it. The term when it is used alone generally means the personal opinion of Malik, or at the most, it would include his pupils or those who were under his direct influence. Al-Shaybani has put it in this way, "Qal Malik wa man qal biqawlihi"⁹¹ (this was the opinion of Malik and of those who agreed with him) or "fa-qal Malik b. Anas. wa man akhadha biqawlihi"⁹² (that was the opinion of Malik b. Anas and the opinion of those who agreed with him). Al-Shaybani has clearly distinguished between the scholars of Madinah and Malik and his adherents. He says, "wa qal ahl al-Madinah wa Malik," (this was the opinion of Malik and the opinion of the people of Madinah) or "wa kadhalika qal ahl al-Madinah wa Malik"⁹³ (and that was the opinion of Malik and of ahl al-Madinah). This distinction is very important to make, as traditionally scholars have taken this term in the sense which it apparently suggests. We have spent so much time in the elucidation of this term, firstly, because it is closely related to the basic sense of the concept of Sunnah in the Muwatta', and secondly, because until now it has been used ambiguously. We have shown above that the term, al-amr al-mujtama' 'alayh 'indana, is not equivalent to the general practice of the people or of scholars of Madinah, but signifies the personal opinion of Malik supported sometimes by some of the scholars of Madinah.

REFERENCES AND NOTES.

1. Mālik says: "min al-nās man yaqūl lā takūna al-yamin ma' al-shahid al-wahid". Al-zurqānī explaining the word "al-nās", gives the following names: Ibrāhīm al-Nakha'i, al-Hakam, 'Atā', Ibn Shaburmah, Abū Hanifah, wa al-Kufiyyin, al-Thawri, al-Awza'i, wa al-Zuhri. At the end Mālik says: "Fahadhā mimma lā ikhtilāf fih 'inda aḥad min al-nās wa lā bi-balad min al-buldān". Mālik, al-Muwatta', with commentary of al-Zurqānī (Cairo, 1310 A. H.), Vol.III. pp. 183-4.
2. Al-Ghazālī, al-Mustaṣfa, Vol.I, p. 187.
3. Abū Zaharah, Mālik, (Cairo) p. 328.
4. See al-Zurqānī the relevant places where the term is explained.
5. Joseph Schacht, Origins . . ., op. cit., p. 83.
6. Ibid., p. 84.
7. Al-Shāfi'i, al-Umm, op. cit., Vol. VII, p. 242.
8. Al-Qadī 'Iyād, al-Madārik, p. 41, quoted by Abū Zaharah op.cit., pp. 334, 335.
9. Al-Shāfi'i, Kitāb al-Umm, VII, p. 242.
10. Abū Yūsuf, al-Radd 'alā Siyar al-Awza'i, p. 41.
11. Mālik, al-Muwatta', op. cit., Vol. III, p. 61.
12. Ibid., p. 68.
13. Ibn al-Qasim, al-Mudawwanah, Volume, IV, p. 54.
14. Mālik, al-Muwatta', op. cit., Vol.II. p. 366.
15. Ibid., Vol. II, p. 110.
16. Ibid., Vol. II, pp. 106, 107.
17. Ibid., Vol. II, pp. 63-64.
18. Mālik, al-Muwatta', Chapter on the prostrations of the Qur'an.
19. Ibid., p. 188.
20. Ibid., p. 257.
21. Ibid., p. 188.
22. Mālik, al-Muwatta', op. cit., Vol. II, pp. 370- 71.
23. Ibid.
24. Ibid.
25. Ibid.
26. Al-Shāfi'i, al-Umm., op. cit., Vol. VII.
27. Ibid., p. 188.
28. Ibid.
29. Shāh Walī Allāh, al-Musawwā min aḥādīth al-Muwatta' (Makkah, 1351 A.H.) Vol. I, introduction, p. 43.
30. Abū Ja'far, Muhammad Ibn Jarīr al-Ṭabarī, Kitāb Ikhtilāf al-
31. Mālik, al-Muwatta', III, p. 182. / Fuqahā (Egypt, 1902/1320)
32. Al-Shāfi'i, al-Umm, op. cit., Vol.VII, p. 192.

33. Malik, al-Muwatta', op. cit., Vol. VII, p. 182.
34. Al-Shafi'i, al-Umm, op. cit., Vol. VII, pp. 177-183.
35. Ibid., p. 8.
36. We are aware of the fact that the big debate on the issue of evidence by one witness and an oath, took place between al-Shafi'i and Muhammad b. Hasan al-Shaybani. But what we want to establish here the possibility of the existence of a group in Madinah who adhered to the opinion of great Successors such as Ibn Shihab, 'Urwah, Ibn al-Musayyib, al-Qasim and many other successors. It is interesting to note that the majority opinion of the Successors of Madinah developed and flourished better in 'Iraq than in Madinah.
37. Malik, al-Muwatta', op. cit., Vol. I, p. 113.
38. Malik, al-Muwatta', op. cit., Vol. I, p. 112.
39. Ibid.
40. Al-Shafi'i, al-Umm, op. cit., Vol. VII, p. 194.
41. Ibid p. 196.
42. Ibid p. 188.
43. Ibid p. 196.
44. Ibid.
45. Malik, al-Muwatta', op. cit., Vol. II, pp. 198-99.
46. Al-Shafi'i, al-Umm, op. cit., Vol. VII, p. 196.
47. Ibid.
48. Malik, al-Muwatta', op. cit., Vol. III, p. 9.
49. Ibid. p. 526.
50. Al-Shafi'i, op. cit. p. 207.
51. Malik, al-Muwatta', op. cit., Vol. I, pp. 71-74.
52. Shah Wali Allah, al-Musawwa, op. cit., p. 36.
53. Malik, al-Muwatta', op. cit., Vol. III, p. 196.
54. Al-Shafi'i, al-Umm, op. cit., Vol. VII, p. 215.
55. Ibid p. 216.
56. Ibid p. 218.
57. Malik, al-Muwatta', op. cit., Vol. IV, p. 40.
58. Ibid., Vol. III, p. 104.
59. Ibid.
60. Ibid., Vol. II, p. 63.
61. Al-Shafi'i, al-Umm, op. cit., Vol. VII, p. 231.
62. Malik, al-Muwatta', op. cit., Vol. I, p. 327.
63. Ibid.
64. Ibid.
65. Ibid.
66. Al-Shafi'i, al-Umm, op. cit., Vol. VII, p. 247.
67. Malik, al-Muwatta', op. cit., Vol.

68. Ibid.
69. Al-Shafi'i, op. cit., p. 290.
70. Ibid. p. 291.
71. Ibid.
72. Ibid.
73. Ibid.
74. The Qur'an, ; 2: 226.
75. Ibn al-Qayyim, I'lam al-Mu'aqqi'in, Urdu Tr. Muhammad. Ibrahim, (Dehli, 1353 A.H.), Part V. p. 72.
76. Malik, al-Muwatta', op. cit., Vol. III, p. 37.
77. Ibn al-Qayyim, op. cit., p. 72.
78. Malik, al-Muwatta', op. cit. Vol. I, pp. 341-2.
79. Ibn al-Qayyim, I'lam, op. cit., p. 73.
80. Ibid.
81. Ibid.
82. Ibid.
83. Al-Shafi'i, al-Umm, op. cit., Vol. VII.
84. Shah Wali Allah, al-Musawwa, op. cit., Int. p. 36.
85. Al-Qarafi, Sharh al-Tanqih, p. 245 quoted Abu Zaharah, Malik, Cairo, p. 333.
86. Al-Qadi 'Iyad, al-Madarik p. 41 quoted by Abu Zaharah, Malik, Cairo, pp. 334, 335.
87. Al-Shafi'i, al-Risalah, ed. al-Halabi. p. 534.
88. Cf. Supra. Chap. 1.
89. Malik. al-Muwatta', op. cit. Vol. II, p. 47.
90. Ibid., p. 376.
91. Al-Shaybani, Kitab al-Hujjah, op. cit., p. 237.
92. Ibid., p. 23.
93. Ibid., pp. 6-7.

It will be interesting to observe that it was perhaps, a general practice of the early jurists to use the term ijtima' or mujtama', in a general sense, though, in fact, in many such cases, it was only a practice of a particular region or even of a particular group of people in a certain region. On a particular issue, al-Awza'i has referred to "the unanimous practice until Walid was killed" (Abu Yusuf, al-Radd). Here al-Awza'i uses the phrase, "unanimous practice (of the Muslims at large)", which probably was the practice of a group of people in Damascus.

Similarly, Abū Yūsuf claims that the Companions of the Prophet had not agreed on anything with regard to the prayers so strongly as they did on the point that the morning prayer should be offered until it had become fairly light (Abū Yūsuf, Kitāb al-Athar p. 20). Although Abū Yūsuf has used the words which imply the universal consensus of the Companions of the Prophet, yet the massive evidence against this view in the Muwatta' and in the Umm shows that the Companions did not hold an unanimous opinion. Therefore, it is clear that Abū Yūsuf must be referring to the practice in Irāq or at the most to the Companions who had lived there.

CHAPTER V

CONCEPT OF SUNNAH

PART I

SUNNAH NOT NECESSARILY BASED ON HADITH.

Our study of Hadith as basis of Sunnah has led us to the conclusion that the concept of Sunnah in the Muwatta' is different from the orthodox view of Sunnah. In the orthodox view the Sunnah is established only by Hadiths from the Prophet and even the practice or consensus of the Muslims cannot replace Hadith as basis of Sunnah. According to this theory, the Hadith and the Sunnah are more or less identical.¹ This view of Sunnah was not yet known to Malik. For him the practice of Madinah and the consensus of the scholars of Madinah and especially the normative practice of Malik himself had precedence over Hadith.² We have adduced evidence in great detail in chapter II above to show that Hadith in the Muwatta' does not possess the highest authority and is not the final criterion for judging the validity or genuineness of the actions of the Muslims. Malik has disregarded many Hadiths from the Prophet as well as from subsequent authorities (i.e. the Companions, the Successors and

Successors of Successors). Not only is the Hadīth from the Prophet ignored on the strength of practice or at Malik's own discretion but Hadīths from the Prophet have also been abandoned in favour of Hadīths from the Companions, from the Successors and from the Successors of Successors. On a certain issue Malik very clearly asserts: "The Hadīth of Dahhāk (a Companion) has preference with me over the Hadīth from the Prophet". On another occasion, after reporting many Hadīths from the Prophet, he says: "They are not practised and the practice does not accord with them." Sometimes Malik disregards the Hadīths from the Prophet saying: "The matter in our opinion is that ..."; or "In my opinion ...". On another occasion he disregards the Hadīth by saying: "The best that I heard". At another place, in the face of a Hadīth from the Prophet he says: "This Hadīth has been reported, and I do not know what is its reality". Malik was once asked why he did not relate those Hadīths which he had heard from Ibn Shihāb on a certain point. He replied: "The practice was not according to them, so I abandoned them". Thus we see that Malik does not care much about the Hadīths emanating from any source, whether from the Prophet or from any subsequent authority. He ignores them indiscriminately when they do not conform to the view he holds; and accepts any of them regardless of the source or authority when it is in harmony with his view.

It seems pertinent here to refer to the term "Sunnah"

of the Prophet" in the Muwatta'. The term "Sunnah of the Prophet" no doubt, occurs in the Muwatta' more than once.¹⁰ We have already noted¹¹ that the term as such has not been invested with much importance; it has no connection with the basic concept of Sunnah in the Muwatta'. Further, it has never been applied as a criterion for judging the validity of the Sunnah prevalent in Madinah not to speak of being considered the highest criterion besides the Qur'an.

So much for the internal evidence. As for the external evidence, the following authorities are very important; Abu Yusuf, al-Shaybani, al-Shafi'i, al-Rabi', Ibn al-Qasim, and Shah Wali Allah of Dihli. Al-Shafi'i, the most active and vocal among them, has pointed out repeatedly that Malik had disregarded many Hadiths reported by himself and that he had not accepted the Hadith as the basis of Sunnah. According to al-Shafi'i, the basis of Sunnah in Malik is neither the Hadith nor the practice, rather it is his personal opinion. After pointing out that the scholars of Madinah differed widely among themselves and that the judges did not have an agreed pattern on which to give judgement, al-Shafi'i asks, "where is then the practice?" and says: "Nobody knows what you mean by practice". Then he accuses Malik by saying that he calls his own opinions practice and consensus, and speaks of practice and consensus when he means only his own opinions.¹² Al-Rabi' has admitted before al-Shafi'i on several occasions that Malik actually did not base Sunnah on the Hadith.¹³ He clearly says: "Our doctrine is

not to follow the Hadīth [as conclusive argument] from the Prophet, from the Companions and from the Successors¹⁴. Ibn al-Qasim very clearly has said that Malik did not follow a certain Hadīth because it was not corroborated by practice. Had it been corroborated by practice it would have been right to follow it. Muhammad b. Hasan al-Shaybani¹⁵, anticipating al-Shafi'i, has vehemently criticized Malik on the grounds that Malik ignored Hadīths reported and recorded by himself. He has also pointed out that when Malik set aside Hadīth on a given issue he did not quote another Hadīth on the issue but followed what he liked. Al-Shaybani, to substantiate his view, has cited an example where Malik, contradicting a Hadīth reported by himself, has maintained that the resident (al-muqim) is not allowed to wipe his shoes [for ablution]. On the issue of passing across a person engaged in prayer Malik gives his opinion against many Hadīths reported by himself. After quoting these Hadīths and Malik's opinion, al-Shaybani says, "This is a clear proof of the fact that Malik ignores Hadīths to follow what he likes" and further points out that there are many occasions where Malik demonstrates this practice and, if he wants to elaborate this point, he can quote many Hadīths which Malik has disregarded¹⁶. Shah Wali Allah has pointed out that Sunnah in the Muwatta' was not the outcome of the Hadīth; rather it was based on certain principles deduced by Malik from unknown sources¹⁷.

From the internal and external evidence produced above

it becomes abundantly clear that the concept of Sunnah in the Muwatta' is fundamentally different from the Sunnah in the orthodox view. In the Muwatta' the Hadith is one of the arguments accepted or discarded at the discretion of Malik, whereas in the orthodox view the Hadith possesses the highest authority and is the final argument.

II

THE PRACTICE OF THE PAST - ITS RELATION TO SUNNAH

The practice of the past has been described in the Muwatta' by Hadiths, statements, decisions, verdicts etc. from the Prophet and from later authorities i.e. the Companions, the Caliphs, the judges, the governors and the scholars. Sometimes the practice is represented by general statements of Malik viz. wa alladhi lam yazal 'alayh 'amal al-nas" or "hadha ma adraktu al-nas 'alayh wa huwa al-amr al-qadim alladhi lam yazal al-nas 'alayh"¹⁸, etc. It seems from the contents of the Muwatta' that the practice of the past represented by the above mentioned material, does not constitute an independent legal argument in the thought of Malik. We have already noted Malik's treatment of the Hadiths, which is absolutely at the discretion of Malik. Almost the same is applicable to other forms of the past material. Malik hardly mentions any practice of the past which does not have a practical bearing on the present. Wherever he refers to the past al-madi, first he described the present and then as

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an additional corroborative argument, he mentions the past. Malik gives his opinion in detail on a certain issue and at the end he adds: "And that is the past practice" (wa dhalika al-mādi min al-Sunnah).²⁰ He sometimes refers to the past practice which has become custom at present. Referring to the practice of "retiring during the last ten days of Ramadan" (al-I'tikaf) he says:

The I'tikaf is a (religious) practice like other practices viz. the prayers, the fasting, the pilgrimage and others like them. Any one who engages himself in any of these practices must do according to what has been the practice of the past (Innama ya'malu bimā madā min al-Sunnah, 21).

Usually he describes the continued practice from the past in terms like this: "madat al-Sunnah" (that has been the practice) or "madat al-Sunnah allatī lā ikhtilāf fīhā 'indana" (the continued practice about which there is no disagreement among us)". It is clear from these examples that the past is referred to only when it has some bearing on the present. It is mentioned either in matters which are purely religious and which all the Muslims practise or it is carefully suffixed or prefixed with the present 'indana: qad madat al-Sunnah 'indana or tilka al-Sunnah allatī lā ikhtilāf fīhā 'indana.

But where the past is used as an independent argument and is no more observed in the practice of the people, he discards it outright and gives his opinion against it. A little before Malik, al-A'raj reports a continuous practice of the people to curse the non-believers during the month of Ramadan.²²

Malik does not approve this practice and declares: "This is not being practised nor do I think it should be practised (wa lā arā an yu'mala bihi)²³." Malik reports a practice of 'Umar, b. al-Khaṭṭāb and of the people of his time that on a certain Friday 'Umar, while he was on the pulpit, recited a passage (from the Qur'an). He, then, descended (from the pulpit) and prostrated himself and the people followed him. At the end of the reported practice of 'Umar, Malik declares: "It is not the practice that the Imam should descend from the pulpit when he recites a passage from the Qur'an requiring prostration and prostrate"²⁴. There are numerous examples of this type, but the above evidence is sufficient to prove the fact that the past, when it does not yield a corresponding validity to the present, will not be followed and will remain unimportant in the face of the prevalent practice of Madinah or against the opinion of Malik himself. Further, it becomes clear from the above discussion that the contents of the past practice were not absolutely specific for Malik. It seems that according to him the past practice was of a purely situational character, and he does not take it seriously and does not treat it specifically and strictly. That is why the past as such was not important for him. The past has never been presented in the Muwattā' as an independent argument for judging the validity and genuineness of the present. On the contrary, the past is judged by the present. Hence the Sunnah in the Muwattā' is a living Sunnah. It is forward-looking rather than a backward-looking process.

III

THE PREVALENT PRACTICE (AL-'AMAL) AND SUNNAH

It appears from the contents of the Muwatta' that among the legal arguments Malik's greatest reliance is on the actual practice (al-'amal) of Madinah. But the practice of Madinah is not something absolutely specific and explicit. There are several expressions and phrases in the Muwatta'
25 which convey the sense of the practice. They express different shades of the 'amal' and have their gradations. In the following we discuss these expressions according to their position.

The chief constituent and the highest form of the 'amal' with Malik is the element which is observed in the practice of the people of Madinah in general, and on which Malik and his circle agree with those scholars whom they like. Further, the whole body of the scholars in Madinah also give their consent to it, and according to Malik, even the past scholars as well as the governors and judges held a unanimous opinion concerning it. The typical expression of this is the following example:

On a certain issue Malik says:

The agreed practice among us which I heard from those whom I like, on which the leaders of the past and of the present are in agreement, and that is the Sunnah about which there is no disagreement among us, and according to which has been the practice of the people (al-amr al-mujtama' 'alayh 'indana wa alladhi sami'tu mimman arda' ... wa alladhi ijtama'at 'alayh al-'a'immatu fi al-qadim wa al-Hadith . . . wa tilka al-Sunnah allati la ikhtilaf)

fīhā 'indana wa alladhi lam yazal 'alayh 'amal al-nās)²⁶

Malik has gone so far to establish the practice of the people of Madinah in this case that he has apparently left no body out either past or present. But the striking point in this example is the way he starts his description. He begins the argument with the agreed opinion of his circle ('indana). Then he goes on quoting those whom he liked (mimman arda), then the whole body of scholars of the past and of the present, then the Sunnah which was without disagreement, and at the end the continuous practice of the masses. It seems that the 'amal al-nās as such, is not the highest argument unless it is strengthened by other corroborative arguments. There is plenty of evidence in the Muwatta' to support this view. On a certain occasion Malik says: "The matter about which there is no disagreement and no doubt among any of the scholars of our city, and the practice (al-'amal) is also like that" (al-amr alladhi la ikhtialaf fih wa la shakk 'inda ahad min ahl al-'ilm bibaladina wa kadhālika al-'amal)²⁷

At another place he uses this phrase: "The matter which is under practice, its knowledge is in the hearts of the people, and the practice of the past has been like that" (al-amr al-ma'mul bihi wa ma'rifah dhalika fi sudur al-nās wa mā madā min 'amal al-madiyīn

fih)²⁸. From these examples we can understand that the most effective and forceful argument in the thought of Malik is the practice (al-'amal) of Madinah when it is corroborated by other arguments.

Next to this kind of expression are the phrases which describe the practice of the people along with some of the corroborative

arguments. On a certain issue Mālik says: "This is the practice which I found the people and the scholars of our city following" (hādha al-amr huwa alladhī adraktu 'alayh al-nās wa ahl al-'ilm bibaladina)⁻²⁹. On another occasion Mālik says "The agreed matter among us and the Sunnah about which there is no disagreement and on which I found the scholars of our city" (al-amr al-muitama' 'alayh 'indana wa al-Sunnah allatī lā ikhtilāf fiha, wa alladhī adraktu' 'alayh ahl al-'ilm bibaladina)³⁰. It follows from these examples that where the practice (al-'amal) is supported by one or two arguments, this is secondary in force to the practice which is backed by further arguments.

The third kind of practice is the one which is reported above without being corroborated by any other argument: "This is the practice which I found the people following; that is the past practice, and the people have always followed it" (hādha mā adraktu 'alayh al-nās wa huwa al-amr al-qadīm wa lam yazal al-nās 'alayh)³¹. On another occasion Mālik reports: "The practice of the Muslims about which there is no disagreement" (Sunnah al-Muslimīn allatī lā ikhtilāf fiha)³².

The fourth constituent of the practice is the simple agreement of the scholars of Madinah without any other corroborative argument. On such occasions Mālik says: "That is the matter on which the scholars of our city always have agreed" (dhalika al-amr alladhī lam yazal 'alayh ahl al-'ilm bibaladina)³³. Or sometimes he refers the matter to some anonymous scholars

"the matter I heard the scholars speaking about" (al-amr
³⁴
alladhī sami'tu min ahl - 'ilm).

These are the different phrases which are used to denote the prevalent practice of Madinah. It seems that these expressions represent different shades of the practice, and that they convey different degrees of the 'amal. As we have already noted, all these phrases are not quite equal in force; their force increases proportionately according to the strength of the corroborative arguments.

These were the positive expressions conveying the practice of Madinah. But sometimes Malik discards certain elements alongside the practice in Madinah, and on such occasions he usually adds laysa al-'amal 'alayh (the practice is not according to it) at the end or in the beginning of his statement of the issue. On the issue of performing the pilgrimage on another's behalf Malik says: "The practice is not according to this " (laysa 'alā hadhā al-'amal). On the question whether a person can say one Witr, Malik declares: "This is not the practice according to us" (laysa hadhā al-'amal 'indana).

There is yet another constituent of the 'amal in Madinah, that is, the opinion of Malik himself. We have seen above that the 'amal holds a unique position in the legal thought of Malik, and its force increases with the strength of the corroborative arguments. We have also noted that all arguments other than the 'amal are subject to the authority of the 'amal which is never overruled by any of the previous arguments. But it

remains to be seen whether the 'amal itself is subject to any thing else or it is an absolutely independent argument. It is our opinion that it is ~~subject~~ to the "normative practice" a point to which we shall revert in the next section. But it may be very important here to point out that the practice which Malik upholds was not very old. It becomes clear from the contents of the Muwatta' that the 'amal which Malik upheld and the amr al-qadim expressed in the Muwatta' were, in fact, quite recent. On the issue of the night-prayer (Salat al-Tarawih) during the month of Ramadan, Malik quotes Dawud b. Qays who said, "I found the people, during the rule of Aban b. 'Uthman and 'Umar b. 'Abd al-'Aziz (in Madinah) saying thirty-nine Rak'at including Witr. Malik, endorsing this report adds : "That is the ancient practice according to us" (huwa al-amr al-qadim 'indana)³⁵. Here Malik calls a practice "al-amr al-qadim" which had actually originated only a generation before him. The most telling example on the subject is the following: Al-A'raj ('Abd al-Rahman b. Hurmuz d. 117 A.H.)³⁶ describes an unanimous practice of the people of Madinah on a certain issue: "Ma adraktu al-nas illa wa humm ..." ³⁷ On this unanimous practice of the people of Madinah in the time of al-A'raj (d. 117 A. H.) Malik remarks: "The practice is not according to this (practice)" (laysa ³⁸ 'alayh al-'amal). This means that what was a unanimous practice of the people of Madinah thirty years before had become outdated in the time of Malik, and a new practice had replaced

it. In the first instance the amr al-qadim had its origin only in the time of 'Umar b. 'Abd al-'Aziz (d. 101 A. H.), and here in the second instance the 'amal of Madinah is stated to be against what was the unanimous practice of the people in 117 A. H. Therefore, the 'amal of the people of Madinah was quite recent in the time of Malik; or else the 'amal' spoken of in the Muwatta' was not always "actual" but rather sometimes was intended by Malik to be the "ideal" or "normative" practice. We are inclined to support the second
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view.

From the foregoing discussion it may be concluded that the expressions stated above constitute the 'amal of Madinah. The 'amal of Madinah does not include what was observed in the practice of the people of Madinah a little before Malik, but rather what was prevalent in the time of Malik. Hence the 'amal means the "present practice". This "present practice" was higher than the "past practice" in authority. Therefore, it could supersede all the Hadiths, statements, decisions and verdicts belonging to the past regardless of their distance and their source. The past as such, therefore, does not constitute an independent argument and does not establish its validity as such. The past has to seek its roots in the present and establish its genuineness in the "present practice" if it is to become valid at all. The present possesses the overriding authority and is the standard of judgment; the past follows the present and is judged by its normative standard.

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PART II

AL-SUNNAH 'INDANA

The term Sunnah as we have already noted in chapter I means "to set an example," "to establish a new rule or a custom or an institution etc. to be followed." It also conveys the meaning of an already existing custom. In the Muwatta' the term has been used in both senses. It is very difficult, indeed, to determine with certainty where Malik has used the word Sunnah in the meaning of "actual unanimous custom" and where in the sense of "normative practice." Nevertheless, from the contents of the Muwatta' some guiding principles can be deduced which may enable us to judge in what sense the term is used. For example, it would appear that wherever the following principles are present with regard to a particular issue, Malik will employ the term al-Sunnah in the sense of the actual practice of the people of Madinah:

- i) Malik has not quoted Hadith, or a statement, or verdict or decision etc. of any of the past authorities against the issue;
- ii) the expression used by Malik to describe the issue reflects the general practice of the people of Madinah;
- iii) the scholars of Madinah agree with the issue;
- iv) "Malik with his circle" ('indana) is in agreement with the above.

On a certain issue Malik says: "al-amr al-mujtama'
'alayh 'indana wa al-Sunnah allati la ikhtilaf fiha wa alladhi
adraktu 'alayh ahl al-'ilm bibaladina"⁴⁰ (the agreed opinion

among us and the Sunnah which is without disagreement and which I found the scholars of our city following). Commenting on another issue Mālik says: "Dhālika al-amr alladhī lā ikhtilāf fih wa lā shakk 'inda aḥad min ahl al-'ilm bibaladīnā wa kadhālika al-'amal"⁴¹ (that is the practice about which there is no disagreement, not a single scholar in our city has any doubt about it, and the [general] practice [of the people of Madinah] is accordingly). On an other issue Mālik says: "Wa dhālika al-amr al-ma'mūl bihi wa ma'rifah dhālika fī ṣudūr al-nās wa mā madā min 'amal al-mādiyīn fih"⁴² (that is the custom generally followed [by the people], its recognition is in the hearts of the masses, and the practice of the predecessors had been accordingly).

On these three issues Mālik has not quoted any Ḥadīth, statement, verdict, decision etc. from any previous authority which contradicts his doctrines, and whatever he has recorded from the past is in harmony with the issues stated by him. On the first issue, for instance, Mālik has recorded Ḥadīths and decisions from the Prophet, from 'Alī, from 'Umar b. al-Khaṭṭāb, 'Uthmān b. 'Affān and from Sa'id b. al-Musayyib, which unanimously concur with the doctrine under discussion. Then at the end of the passage Mālik describes the agreed opinion of his circle (al-amr al-mujtama' 'alayh 'indana) and the general practice of the people of Madinah (wa al-Sunnah allatī lā ikhtilāf fiḥā) and then the agreement of other scholars of Madinah (wa alladhī adraktu 'alayh ahl al-'ilm biba-

ladina). In the second example, Malik records nothing from the past, which means that he did not find anything from his predecessors in support of the issue or against it; so he discusses the issue by quoting other arguments, i.e. the agreed opinion (of Malik) ⁴³ (al-amr alladhī lā ikhtilāf fih), the unanimous opinion of the scholars of Madinah and the general practice of the people of Madinah (wa lā shakk 'inda aḥad min ahl al-'ilm bibaladina wa kadhalika al-'amal). On the third issue Malik quotes a Nadith from the Prophet which accords with the point under discussion. Then endorsing the issue he describes the problem in his own way and gives his opinion on it; at the end of the passage he adds that this is the custom which is generally followed (al-amr al-ma'mul bihi), that this is the practice generally recognized by the scholars and by the people of Madinah (wa ma'rifah dhalik fī sudūr al-nās) and that this has been the practice of the predecessors (wa ma madā min 'amal al-madiyīn). These illustrations and many others in the Muwatta' lead us to locate occasions in the Muwatta' where the term al-Sunnah is used in the meaning of actual practice. From these examples we can conclude, first, that either "the past" is in accordance with "the present" or "the past" is not present at all, but there is no contradiction so far as the report of the "past" and the practice of the "present" in Madinah is concerned. Secondly, the expressions give the impression that on such issues there was a general practice of the people of Madinah (al-

Sunnah allatī lā ikhtilāf fiḥā or wa kadḥalika al-'amal etc).

Thirdly, all the scholars of Madinah agree on such issues (wa alladhī adraktu 'alayh ahl al-'ilm bibaladina, or wa lā shakk 'inda aḥad min ahl al-'ilm bibaladina etc.). Fourthly, the opinion of Mālik combined with the opinion of his circle concurs with the issue (al-amr al-mujtama' 'alayh 'indana or al-Sunnah 'indana).

These four elements constitute the Sunnah in the meaning of actual practice of the people of Madinah. We must stress the point that in case there is a failure of any of these constituents in any of the issues, the question of unanimity on that issue becomes doubtful. When, for instance, Mālik quotes some past authority at the beginning of an issue and then at its end states an opinion contradicting the past authority, such an opinion may not be held unanimously, despite the bold phrases such as lā ikhtilāf 'indana (there is no disagreement among us) or al-amr al-mujtama' 'alayh 'indana (the matter is unanimously held among us), etc. For in such cases some of the scholars of Madinah may hold views in accord with the past authority quoted by Mālik or a section of people in Madinah may act according to it. Similarly, if all the scholars are not in harmony on such an issue or the people of Madinah have different practices, the question of unanimity will be doubtful. Last of all, "the agreed opinion of Mālik and his circle" (al-amr 'indana or al-Sunnah 'indana) plays the most essential part in establishing the practice of Madinah. "The agreed opin-

ion of Malik and his circle" is the chief constituent of the practice of Madinah, and no practice of Madinah will be recognised as valid or authentic, despite the agreement of first ~~three~~ constituents, unless it is approved by "the agreed opinion of Malik". Therefore, where all the four constituents are in harmony with one another then the Sunnah in the sense of the actual practice may be established.

It will be interesting to note that this sort of "unanimity" will be found in certain parts of the Muwattā' and missing in other parts. The most extensive occurrence of this phenomenon is in the chapters devoted to the problem dealing with the Mu'amalat (social dealings and transactions). In these chapters "the past" is missing to an alarming extent whereas the "present" is all-pervasive. For an illustration we can take the chapter on inheritance (al-Farā'id). According to a standard edition of the Muwattā' (edited by Muhammad Fuwad 'Abd al-Baqi, Egypt, 1951 A. H.) Malik has devoted twenty pages to this chapter. Here, contrary to his wont, he does not open the chapter by any Hadith from the Prophet or a statement or decision of the Companions or subsequent authorities. Rather this chapter is opened by his own statement: "al-amr al-mujtama' 'alayh 'indana wa alladhi adraktu 'alayh ahl al-'ilm bibaladinā". Up to page 8 (8th inclusive) he goes on stating issues one after the other without referring to any of the past authorities. The issues are substantiated by his statements al-amr al-mujtama' 'alayh 'indana alladhi lā ikhtilaf fih wa alladhi adraktu 'alayh

ahl al-'ilm bibaladina etc. In the next 12 pages the Companions and the Successors are referred to more than twice and the Prophet only twice, and the rest of the issues are supported again by the expressions mentioned above. We have taken the chapter on inheritance (al-Fara'id) as an illustration, but many other chapters are very similar to it; particularly the chapter on selling (al-Buyū'). It may be concluded from the foregoing that the Sunnah in the meaning of actual practice is based on "the present" and "the present" is an independent argument in its relation to "the past". In fact it is so independent that "the past" is dependent on "the present". Now we shall see whether the Sunnah (al-'amal) is an absolute authority in the Muwatta' or whether it is subject to some other normative standard for judging its validity and absoluteness.

II

AL-'AMAL NOT AN ABSOLUTE AUTHORITY

Nowhere in the Muwatta' has Malik claimed that the 'amal' (the actual practice) of Madinah is his highest argument. It is, perhaps, the phraseology which he has used in the Muwatta', which has given this impression. So far as the contents of the Muwatta' are concerned this view is difficult to support. It emerges from the Muwatta' and from his other opinions preserved in the Mudawwanah of al-Sahnun, al-Radd, and Kitab al-Kharaj by Abu Yusuf, Kitab al-Hujjah and al-Muwatta' by al-Shaybani, al-Umm by al-Shafi'i and elsewhere that the 'amal' of Madinah

is not the final argument and the standard of judgement for Malik. In the following we shall produce evidence from Malik to support our contention.

Al-Zurqani quotes al-Qadi Abu Ishaq and Ibn 'Abd al-Barr to show that there was a practice among the people of Madinah in respect to a certain matter from the time of Mughirah b. Shu'bah and Mu'awiyah (b. Abi Sufyan).⁴⁴ On the same issue al-Zurqani quotes another authority, al-'Askari, from al-Waqidi who reports a statement of al-Zuhri (ibn Shihab) that the practice was first initiated by Mu'awiyah in Syria and by Marwan b. al-Hakam in Madinah.⁴⁵ Ibn Sa'd in his Tabaqat reports from Muhammad b. Sa'd al-Quraz the daily practice of 'Umar b. 'Abd al-'Aziz (who was governor of Madinah at that time) and the practice of the people in general and the agreed opinion of the "Fuqaha" (of Madinah) in particular on the same issue.⁴⁶ Al-Waqidi reports that there was a continuous practice of the people of Madinah in that matter from the time of the Prophet and that there was no cessation of this practice even long after Malik's death.⁴⁷ In the Muwatta' itself Malik has confirmed the practice on the matter under discussion and was asked⁴⁸ "Who initiated it" ? From the above evidence it becomes abundantly clear that there was a practice of the people of Madinah on that issue from the time of the Prophet and that after the Prophet the people of Madinah had continued following it. But Malik is not in favour of the general practice of Madinah, therefore, he does not approve it. In this case Malik does not

find anything contrary to the practice, since it was the agreed practice of the scholars as well as of the people of Madinah, and even the past authorities of Madinah had also been in favour of the practice. Therefore, to support his view against the practice he says: "The matter was not practised in the earlier period (⁴⁹fi al-zaman al-awwal). This example is a very clear indicator that neither "the present" as such nor "the past" as such was the standard of judgement for Malik; rather "the past" and "the present" were both at his disposal, and he used them wherever they agreed with his view.

On the issue of fasting for six days after the Fitr Malik does not like the current practice of the people of Madinah. It seems that the 'amal of Madinah was that people should fast during those days. But since the practice does not conform to his view, he does not approve it and calls the practice Bid'ah ⁵⁰ (innovation). In support of his view contrary to the practice he quotes the past authorities, which means that scholars contemporary with him were also in favour of the practice. It is a wont of Malik that when on a certain issue he has to refer to "the contemporary scholars of Madinah" he usually says "ahl al-'ilm bibaladina yaqulun" (scholars of our city say) or "wa 'alayh adraktu ahl al-'ilm bibaladina" (I found the scholars in (agreement) on it). But here in this case Malik uses the past tense "lam yara" and "lam yablughni", which means that the contemporary scholars do not share his view; rather they approve the practice. At the end he uses the present tense

"yakrahun" and "yakhafun",⁵¹ which is a reference to Malik's own group who concur with his view and do not like the practice. Qaḍī 'Iyād, describing many reasons why Mālik opposed fasting during those six days, says that Mālik found fasting to be a common practice in Madinah, but he did not like it.⁵² Further, the later Mālikī scholars have commented on Mālik's statement that he personally did not like the practice of Madinah and called the practice "Bid'ah". Muṭrif, 'Iyād⁵³ and Abū 'Umar (among the Mālikī scholars) are of this view. While commenting on Malik's statement none of them has held that Mālik detested the practice because the scholars of Madinah had also detested it. Rather each of them has taken the rejection of fasting as the personal opinion of Malik which was contrary to the practice.

It was a general practice at the time of Malik that several partners used to purchase an animal for sacrifice (fi al-nusuk wa al-ḍahāya)⁵⁴ and distribute its meat according to their shares in ownership. Apparently this practice was based on the practice of the Companions while they were with the Prophet in the year of Hudaybiyah ('ām al-Hudaybiyah).⁵⁵ Since Mālik does not approve this practice, he says: "This practice is to be detested" (fa inna dhalika yukrahu). Now there was no basis for Mālik to support his view from any contemporary authority of Madinah or even from his immediate past. The Hadith from the Prophet, the practice of the Companions and the actual practice of Madinah were all against him.

Nevertheless, he goes against the practice and quotes a ⁵⁶ Hadīth from a Companion which supports his doctrine.

Malik has recorded Hadīths and practices of the Prophet and of the later authorities to show that they used to wipe only the upper part of their shoes while performing al-mash. Under the heading "al-'amal fī al-mash 'alā al-khuffayn", ayn", in the Muwatta', he records the practice of 'Urwah which was the representative practice of the people of Madinah, i.e., to wipe only the upper part of shoes. Al-Zurqanī ⁵⁷ has recorded consensus on this point. ⁵⁸ Nevertheless, this practice does not accord with the view of Malik. He, therefore, in disregard of everything, including even the practice, chooses the opinion of Ibn Shihāb which says that the upper ⁵⁹ part and the sole both have to be wiped.

Ibn al-Qasim describes a general practice of Madinah saying that the callers for prayer in Madinah did not put their fingers into their ears (al-Mu'adhdhinin bi al-Madinah la yaj'alun asabi'ahum fī adhanihim). ⁶⁰ Malik does not approve of the practice as it stands; rather he suggests an amendment, saying that the practice should not be taken strictly, and the caller (al-Mu'adhdhin) should be free either to put his ⁶¹ fingers in his ears or not.

The above evidence suggests that the 'amal of Madinah was not the highest or overriding argument with Malik nor was it the final criterion of judgement to test the validity and genuineness of the arguments available to Malik. The eviden-

ce produced above and many other examples in the Muwatta' clearly show that the 'amal (the practice as such) is not absolute in its authority and is not a standard of judgement. Conversely the 'amal in the Muwatta' itself is subject to still another higher argument and has to be corroborated by this higher argument to establish its validity and genuineness. The "still higher argument" in the Muwatta' is the "normative practice" (al-'amal 'indi).

Mālik has frequently used the expression "laysa 'ala hadhā al-'amal" or "laysa 'alayh al-'amal" in the Muwatta'. Traditionally, the expression has been taken to mean "the practice of Madinah." We are not satisfied with this interpretation of the expression. We feel on the one hand that it is ambiguous and on the other that it is not always equivalent to the agreed practice of the people of Madinah. The expression may refer to practice of the people of Madinah at some places, but usually it is equivocal on the occasions where it is suffixed by the term 'indana. In those cases it may mean 'indi. On the question of the least number of Witr to be said Mālik records the practice of the Prophet and the practice of the Companions that the least number of the Witr was one. According to al-Zurqanī all the Companions had agreement on this point. Apparently such was also the practice of the scholars like Ibn Shihab who has reported the practice of Sa'd b. Abi Waqqas and of the people. Now Mālik after quoting all this, says: "Wa laysa 'ala hadhā al-'amal 'indana".

It is our contention that "al-'amal 'indana" (the practice according to us) in this expression is not the practice of all the people of Madinah. Firstly, Malik has recorded above the practice of the Prophet and of the later authorities which are contrary to his claim. Therefore, the question of unanimity has already become doubtful. Secondly, whatever evidence he has recorded on the point is also contrary to his claim, and he has not quoted in his support a single report from any authority, past or present, and has not cited the practice of any scholar previous or contemporary. Further, it is his wont that whenever he finds anything in his support he mentions it alongwith his statement which we have already discussed. Here Malik does not report any supporting evidence but simply says "wa laysa 'ala hadha al-'amal 'indana". In the latest edition of the commentary of al-Zurqanī published in 1954 A. D. from Cairo the editors have deleted the word "'ala" from the expression which now reads: "wa laysa hadha al-'amal 'indana",⁶⁵ which clearly means: "This is not the practice according to us", or "We do not accept it as normative practice".

From the foregoing we can conclude that the expression "laysa 'ala hadha al-'amal 'indana" may mean "the practice according to Malik". The crowning example in this regard is the following: On a certain issue Malik records a practice of Abu⁶⁶ Bakr. When al-Shafi'i mentions this reported practice as his argument, al-Rabi' rejects it and says: "laysa 'alayh al-'amal"⁶⁷ (the practice was not according to it). In his turn al-Shafi'i

produces evidence to show to al-Rabī' that there was such a practice. Al-Shāfi'i reports what Malik had reported to him about the practice of Abū Bakr and Ibn 'Umar on the point and further supports his argument by reporting from Sufyān b. 'Uyanah that 'Umar b. 'Abd al-'Azīz also followed the same practice. When al-Shāfi'i showed to al-Rabī' that Malik was not right in his claim of "laysa 'alayh al-'amal" (the practice was not according to it) and proved that the matter was according to practice, al-Rabī' apparently agreeing with al-Shāfi'i, omits from his argument the expression "laysa 'alayh al-'amal" and simply says: "We oppose all this, and we say nothing will be added to the 'Umm al-Qur'an in the last two Rak'at. Here in this example we see that Malik's statement "laysa 'alayh al-'amal" is equivalent to his statement: "Innā nakrahu hādha" (we dislike it) or "inna nukhalifu hādha" (we oppose this). Al-Shāfi'i approaches al-Rabī' and tells him that Malik has opposed what he himself has reported, has reported nothing in his own support, and has also opposed the practice. Then he asks from where comes his claim of following the practice (fa ayn al-'amal).

Perhaps the most conclusive evidence on the point that on the occasions where Malik used the expression "laysa 'alayh al-'amal 'indana" he usually means "the normative practice" in this sense, is his expression reported by Ibn al-Qasim in the Mudawwanah. Commenting on the above issue Ibn al-Qasim quotes Malik: "laysa al-'amal 'indi" (I do not accept it as practice). This use of the term has shed a flood of light in

helping to understand this all-important expression. What has been said ambiguously so far, has become evidently clear here. Al-Rabī' uses the words naqūl laysa 'alayh al-'amal and "inna nakrahu ḥadhā" and "inna nukhālifu ḥadhā" to express the same meaning which Mālik has conveyed by the expression: "laysa al-'amal 'indī". In other words "laysa 'alayh al-'amal 'indana" (which is equivalent to "naqūl" with al-Rabī') and "laysa al-'amal 'indī" are equivalent. We have already noted that the expression "laysa 'alā ḥadhā al-'amal 'indana"⁷² is equivalent to the expression "laysa ḥadhā al-'amal 'indana"⁷³. It is quite obvious that "laysa ḥadhā al-'amal 'indana" is not different from "laysa ḥadhā al-'amal 'indī".

Therefore, the reference in the Muwatta' to the "normative practice" ("al-'amal 'indī" or "indana") is the rule,⁷⁴ and reference to "the actual practice" ('amal al-nās) is an exception. Further, "the actual practice" ('amal al-nās) is one of the legal arguments of Mālik which, like other arguments, is subject to "the normative practice".

III

AL-SUNNAH 'INDANA ∩ 'INDI ∩ ∩ "THE NORMATIVE PRACTICE" ∩

We have established above that the 'amal (the actual practice of Madinah) is one of the legal arguments used by

Malik but that does not possess the highest authority in the Muwatta', though it occupies a special place among other arguments. The chief characteristic of the 'amal (the actual practice), is that it holds supreme authority over other arguments of "the past". It supersedes "the past" but has never been superseded by it. The authority of the 'amal as the standard of judgement of "the past" is established. On the other hand, however, the 'amal is subject to "the 'amal 'indana or 'indi" ("the normative practice"). It is, therefore, "the normative practice" which rules supreme over "the past" as well as "the present". We shall next discuss briefly the constituents of "normative practice".

We have already pointed out that the Muwatta' was an endeavour to bring about a "Sunnah" and an "Ijma'" rather than an attempt to state and record what was already existing in Madinah. Al-Shafi'i was, perhaps, the first person who used the terms "Sunnah", the "'amal" and the "ijma'", in the Muwatta', at their face value and who then accused Malik of not following what he himself had recorded. However, since Malik was endeavouring to bring about an agreement on "normative practice" and was not simply recording the existing state of things, al-Shafi'i's criticism on the grounds advanced was not justified. In any case, due to the change of emphasis on "the normative practice" of Malik to "the actual practice" of al-Shafi'i, two points of view came into being. What emerges from al-Shafi'i's polemics and from the Muwatta' is that the "Sunnah"

and the "'amal" in the meaning of the actual practice of Madinah were not the final resort with Malik; rather his criterion of judgement was the "'amal 'indana" or the "Sunnah 'indana" (the normative practice).

Malik used these expressions for the most part in the "normative" or "ideal" sense, whereas al-Shafi'i used all of them, invariably, in the actual sense. In the "Kitab Ikhtilaf Malik wa al-Shafi'i" in the Umm, al-Shafi'i has shown in great detail that Malik did not follow consistently the "'amal", the "'ijma'" and the "Sunnah" of Madinah. He says on a certain point:

You claim to follow the people of Madinah but at the same time you oppose whatever has been reported from them. Therefore, it becomes abundantly clear that none else but you disregard so strongly all their reports and statements (annah-laysa ahad atraku 'ala ahl al-Madinah lijam'i' aqawilhim minkum)⁷⁶.

On a given issue Malik says: "wa'ala dhalika kan al-nas⁷⁷
fi zaman al-awwal wa 'ala dhalika adraktuhum" (this had been the practice of the people in the early period, and I found the people [of our time] on the same). After reporting the continuous practice of the people of Madinah, Malik, not agreeing with the established practice, suggests how the practice⁷⁸ should be. On a certain point al-Shafi'i portrays the actual practice of Madinah and also quotes many great authorities of the past and of the present and says: "You have opposed the leaders (al-a'imma) and the actual practice (wa al-'amal), and then concludes: "There is no creature who so strongly opposes the people of Madinah as you do." At the end of the

argument he adds, "If someone draws the conclusion from your writings that you are the strongest opponent of the people of Madinah, he will be justified in his conclusions."⁷⁹

On a given issue al-Rabī' has reported from Mālik a consensus of the people of Madinah. Al-Shāfi'ī disputes al-Rabī' and produces detailed evidence from Madinah against the "consensus" of Mālik (wa ahl al-Madinah ma'akumyaqūlun mā ijtama' al-nas). Against this detailed evidence produced by al-Shāfi'ī, al-Rabī' admits frankly that Mālik by "ijtama' al-nas" (the consensus of the people) meant "man radiṭu min ahl al-Madinah wa in kanū mukhtalifin" (those whom Mālik liked among the Madinese even though the other people of Madinah may have held different view).⁸⁰ Here al-Rabī' has told us that the "ijma'" in Mālik, here and elsewhere, was not the actual consensus of the scholars or of the people of Madinah; rather it was the choice or the ideal consensus of Mālik.

Al-Rabī' reports from Mālik that he (Mālik) did not follow a certain doctrine for the "'amal" was not according to it. Al-Shāfi'ī shows in detail that the 'amal' was according to that doctrine. When al-Rabī' found himself helpless and could not defend Mālik, he left aside the argument of the "'amal" as there was no such practice in Madinah and took another line of argument. That is, the doctrine would be troublesome if it were followed (li ann hadha tathqil 'alā al-nas). On this al-Shāfi'ī asks: "fa ayn al-'amal" (then where is the practice ?) Al-Shāfi'ī concludes that there was none in

Madinah who was in favour of Mālik or whom Mālik could quote in his support and that whatever he did cite was against his view. The practice of Madinah was also against it.⁸¹

Al-Shāfi'i has pointed to many issues on which there was agreement in the practice of the people of Madinah but of which Mālik said: "laysa 'alā hādha al-'amal".⁸² On such occasions "laysa 'alā hādha al-'amal" (the practice is not according to this) of Mālik would mean "laysa 'alā hādha al-'amal 'indi" (practice should not be like this according to "me"). For example, Mālik says: "laysa 'alā hādha al-'amal" on a certain matter. Al-Shāfi'i brings forth evidence and quotes the Prophet, 'Alī, al-Hasan, Ibn 'Abbās, Ibn al-Musayyib, Ibn Shībah and Rabi'ah etc. all from Madinah to show that there was such an 'amal in Madinah. The agreement and the practice of the great authorities of Madinah in fact, was tantamount to the actual practice of Madinah. According to al-Shāfi'i the issue was not only agreed upon and practised in Madinah, but there was no difference on the point even in the other regions of the Muslim lands i.e., in Makkah, in the East (Iraq)⁸³ and Yaman. This shows clearly that Mālik was talking of the normative practice, whereas al-Shāfi'i accused him on the grounds of the actual practice. Mālik declares: "al-amr al-mujtama' 'alayh 'indana" on a certain issue. Al-Shāfi'i points out that al-Qāsim (b. Muḥammad) and 'Amrah bint 'Abd al-Raḥmān did not hold the same opinion.⁸⁴ Al-Shāfi'i wants to prove that Mālik's claim of the actual ijma' was not correct.

Al-Shāfi'i, addressing al-Rabī', says that Malik holds there to be consensus on an issue, to which al-Rabī' replies in the affirmative. Al-Shāfi'i reminds al-Rabī' that a great majority of people do not concur with the opinion of Malik. Al-Shāfi'i, taking it for granted that Malik, in fact, held a solitary opinion of which he (Malik) spoke as an "agreed opinion," continues:

Who has forced you to talk of this [agreed opinion] to which no body among human beings has referred. All-ah help us ! Then you corroborate it by saying al-amr 'indana (the practice according to us). If "al-amr 'indakum" is (equivalent to) Ijma' (consensus) of the people of Madinah then [why] have you opposed them. If it is a meaningless expression then why have you taken so much pain over it (fa lima takallaftumuha ?) I am not aware of any one before you who has said it; and whenever I talked to any one of you about it, I did not find him aware of its meaning.⁸⁶

Here al-Shāfi'i, taking the expression of "Ijma'" at its face value, has disclosed very clearly that the Ijma' in Malik was not necessarily "actual"; rather Malik declared "Ijmā'" to exist on many occasions where, in fact, there was difference. Therefore, the "Ijmā'" on such occasions must be the normative or ideal Ijma'. Another very important point emerges from this passage, viz., when Malik uses many corroborative expressions on a given point which give the impression of "complete agreement" in Madinah, on such occasion despite the corroborative expressions, there is in fact, no actual agreement. Because Malik is convinced about its being ideal, therefore, he supports it by confirmatory expressions.

Al-Shāfi'i, juxtaposing the actual practice of the

people of Madinah, the opinion of its scholars and the occasions where Mālik has used the expressions "al-'amal 'indana", "al-amr al-mujtama' 'alayh 'indana", "ijtima' al-nās" etc.

concludes that Mālik has not used these expressions to convey the actual practice of the people of Madinah and the opinions of its scholars; rather they are used to express the practice or consensus "in the mind of Mālik himself" i.e., "the ideal practice and consensus". Professor H.A.R. Gibb, commenting on such issues in his work, Muhammadanism has said: "The Koran and the Tradition are not, as it is often said, the basis of Islamic legal speculation, but only its sources. The real foundation is to be sought in the attitude of mind which deter-
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mined the methods of utilizing these sources." The last sentence of Professor Gibb is very important for the subject we are discussing here. In fact, it is the attitude of mind which determines the methods of utilizing the sources. The attitude of mind of Mālik holds supreme authority in the Muwatta' in determining what should be accepted from the prevalent material in Madinah and what should be modified and to what extent. Mālik evaluates and assesses the sources by that standard and establishes its genuineness and validity. With this attitude of mind a certain methodology is evolved serving the purpose of a set of principles which become the standard of judgement and the final criterion.

Al-Shāfi'ī in his endeavour to find out whether there was actual practice in Madinah in respect to the issues where

Mālik had used the expression 'amal describes the practice of Madinah and the opinions of its scholars and comes to the conclusion that the practice of the people of Madinah was contrary to the 'amal described by Mālik. Therefore, recurrently he asks "fa-ayn al-'amal" (where is the practice?); "hadhā shay' khalaftum fih al-Sunnah, wa al-'amal, wa al-athar bi al-Madinah" ⁸⁸ (on this issue you have opposed the Sunnah and the 'amal and the reports [from the great authorities of Madinah]; "Taqlū ijtama' al-nas wa ahl al-Madinah ma'a-kum yaqlūn ma ijtama' al-nas" ⁸⁹ (You say the people have agreement while the people of Madinah with you are saying that the people do not have agreement). Almost on the same grounds al-Shaybānī has accused Mālik. On a given point he says:

Fa hadhihi ahādith ahl al-Madinah yuhtajju 'alayhim bihā wa hum ya'khuḍhūn bi-khilāfihā wa mimman ya'khuḍhū bikhilāfihā Mālik Ibn Anas wa huwa alladhī rawahā fakayfa yakūnūn Aṣḥab Athar wa hum yada'un 'ayānan mā yarwūn wa law aradnā an nahtajja 'alayhim bi-ahādith kathirah min al-ahādith fī hadhā aw nahwihi la-aḥtajajnā bihā 'alayhim [lakinna ihtajājanā] bi-ahādithi him awjabu fī al-Hujjah 'alayhim wa hadhā mimma yadullu 'alā ghayrihi min aqwalihim innamā tarakū fīhi al-Athar wa akhadhū fih bimā istahsanū bimā lam ya'tu fīhi bi-Athar wa lā Sunnah ⁹⁰ (these are the Hadiths of Ahl al-Madinah which can be advanced as argument against them; [because] they report these Hadiths and practice against them. Mālik Ibn Anas is one of them, who has reported these Hadiths. [In such circumstances] how can they [claim to]

be the followers of Ḥadīth [Athar]. They openly have ignored what they have reported. If we wish to advance argument against them from Ḥadīth we can do so because there are number of Ḥadīths [which can be cited] on the present issue or on other similar cases. [Though our advancing argument against them] from the Ḥadīths reported by themselves is the greater argument to be established against them. This is one of the proofs where they have ignored Athar (Ḥadīths) and have followed what they liked, for which they could neither produce any Athar nor Sunnah.

From this juxtaposition of the actual practice of Madinah and the normative practice of Malik, al-Shāfi'ī draws the conclusion "fa al-'amal idhan ilayh" (the practice is at his discretion), and "sammaytum aqāwīlakum al-'amal wa al-ijma'"⁹² (You call your own opinions the practice and the consensus).

Next to al-Shaybanī and al-Shāfi'ī, who are of the view that the 'amal and the ijma' in Malik were normative, is al-Rabī' b. Sulayman, the addressee of al-Shāfi'ī in his polemics. Al-Rabī' has admitted this phenomenon at many places to al-Shāfi'ī. On a certain issue al-Rabī' reports consensus of the people of Madinah from Malik, and at the end he discloses that by "the consensus of the people" he does not mean the consensus of the people of Madinah in general, but the consensus of those "whom we like", though other people may have differences".⁹³ This means that the consensus was at the discretion of Malik. That the practice or the consensus was at the discretion of Malik is further supported by the expressions used by al-Rabī'.

In his polemics with al-Shāfi'i, al-Rabī' will usually support his position by the use of such phrases as fa-inna nakrahu (we dislike it) or fa-inna nukhalifu hadha (we oppose this). In these phrases, the "we" includes Mālik. When al-Shāfi'i produces much evidence against the view held by Mālik, al-Rabī' usually does not present other reports from Mālik. He either repeats "fa-inna nakrahu" (we dislike it) or "fa-inna nukhalifu" (we oppose it) or explains Mālik's view rationally as, e.g. "li-annah tathqīl" (because it is troublesome).⁹⁴ The most telling example in this regard is a case where Mālik disregards the practice as well as the report. On this occasion al-Shāfi'i addresses al-Rabī' and says "the 'amal and the ijma' are nothing but your own opinions".⁹⁵ Now here was the occasion where al-Rabī' should have defended Mālik, had al-Shāfi'i's statement not been based on truth. But what al-Rabī' said in reply to al-Shāfi'i was that he simply endorsed the opinion of al-Shāfi'i and accepted it completely.⁹⁶

Ibn al-Qasim also holds the same view. He has given certain hints in the Mudawwanah to the effect that Mālik tried to present a normative practice. There are many examples in the Mudawwanah in this regard but his reporting of a statement from Mālik in this connection is very important. On a certain issue he reports from Mālik: "al-'amal 'indi" (the practice according to me), which, in fact, is the most important indication of the fact that Mālik wanted to present a normative practice.

Layth b. Sa'd is another very important figure who has helped us to understand the concept of Sunnah in the Muwatta' of Malik. In his letter addressed to Malik, Layth has disclosed many facts which throw light on the point that Malik did not invariably follow the actual practice and the consensus of the people of Madinah. Rather, in the presence of wide differences in Madinah, Malik's claim of following the practice and the consensus does not hold water. It is implied in the letter of Layth that Malik did not represent the actual practice or consensus of Madinah and that what he presented was his normative practice or consensus. Abu Yusuf says that the phrases such as "bidhalik 'amilat al-'ammah wa 'alayh ahl al-'ilm" both in Malik and in al-Awza'i are vague and ambiguous and do not refer to the actual practice. Al-Shaybani, another important authority on Malik, holds that Malik ignored and disregarded the practice of Madinah when it did not fit into the general principles of Islam, according to Malik, which al-Shaybani terms as istihsan.

Shah Wali Allah of Dihli, though a later authority on Malik, has helped us a lot in explaining the concept of Sunnah in the Muwatta'. Shah Wali Allah quotes a statement of 'Abd al-Rahman b. Mahdi, in the introduction of his work, al-Musaffa, a commentary on a selection of Ahadith from the Muwatta' by Shah Wali Allah himself. The statement reads: "Sufyan al-Thawri is Imam in Hadith and not Imam in Sunnah, while al-Awza'i is Imam in Sunnah and not in Hadith, but Imam Malik is

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 Imām in both of them." Shah Wali Allāh quotes another statement by al-Ḥafīẓ b. Ṣalāḥ explaining the meaning of al-Sunnah in the above statement: "The meaning of the Sunnah is that which is the antonym of al-bid'ah (innovation). It is possible that a person may be a scholar of Ḥadīth but not be a scholar of Sunnah."
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Shah Wali Allāh, not satisfied with the explanation of Ḥafīẓ b. Ṣalāḥ, says that the statement needs further clarification and then he gives his interpretation in these words:

It is no secret that the predecessors were of two categories in determining the meanings and in deducing the legal opinion (fī istinbāṭ al-ma'ānī wa al-fatawā). The occupation of the one category was to take care of the Qur'ān and the Ḥadīth and the statements of the Companions and utilize them for legal purposes (wa tastaṇbitu minhā). That was the methodology of the Muḥaddithīn (Traditionists). The other category used to take into account those fundamental and basic principles (al-qawā'id al-kulliyah) which had been neatly enunciated and refined (naqqahahā wa hadhdhabahā) by a group of jurists without taking into account their sources. Whenever they were faced by a problem, they sought its solution from these fundamental (principles). And that was the methodology of the activity of the Fuqahā' (the jurists). 102

After explaining the meaning of the Sunnah, i.e., "the basic and fundamental principles," Shah Wali Allāh turns to the Sunnah of Malik in his Muwatta' and says: "And when Imām Malik uses the term al-Sunnah in the Muwatta' he means the established fundamental principles."
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Therefore, the concept of Sunnah in the Muwatta' constitutes certain basic and fundamental principles based on

the religious and ethical principles of Islam. This Sunnah was the highest authority with Malik and it superseded every other legal argument prevalent in Madinah. Consequently, the constituents and content of the concept of Sunnah in the Muwatta' are (i) the sound reason and independent considered opinion (ra'y) of Malik; (ii) moral and legal reasoning; and (iii) the basis of this rational and moral free-thought activity of Malik was the recognized Islamic religious norms derived from the religious and ethical principles introduced by the Prophet.

That is why we find two things in the Muwatta':

- (1) The legal material in the shape of pronouncements, decisions and statements from the authorities of the past and the present;
- (2) a standard of judgement for the purpose of evaluating and assessing the material, for establishing its validity and genuineness and for presenting a normative and ideal practice.

The primary intention of Malik, therefore, was to present a normative practice; if this were possible on a given point through the already existing practice Malik accepted it; if not, then he tried to mould the actual practice by diverting attention from it to his own preferred concept of the normative practice. On such occasions Malik usually applied some expressions which are suffixed or prefixed by the term 'indana'. 'Indana' is applied to the practice or opinion or statement or decision even of one-single authority of Madinah. If such a view is practised or held by two or more authorities, then its force is augmented. We have pointed out at various places that very often Malik has applied this term even to his

personal opinion. It is on such occasions that Layth b. Sa'd, Abū Yūsuf, al-Shaybānī and al-Shāfi'ī were much upset to hear the personal opinion of Mālik described as the practice of Madinah when such was not practised even by a minority of the Madinese.

CONCLUSION

Sunnah and Hadīth are not identical in the Muwatta'. Hadīth in general certainly is one of the sources of Sunnah, but not its only source. The acceptance of Hadīth by Mālik as a source of Sunnah does not depend upon the principles enunciated by later specialists on Hadīth. For him all kinds of Hadīth such as: the Musnad, the Mursal, the Mawqūf, the Munqati' etc. are equal as legal arguments. They are accepted or rejected, and also are superseded by one another, indiscriminately and on the basis of principles other than those developed later in the science of Hadīth.

"The past" (al-madī), in whatever form (i.e., statements, verdicts, decisions etc. by the past legal authorities of Madinah), is another source of Sunnah in the Muwatta'. But "the past" as such is not an independent legal argument. Its validity depends upon its bearing on "the present". Acceptance or rejection of the authority of the past will be judged, regardless of the source of information by the extent to which it is useful in present circumstances.

"The present", or "the prevalent practice of the peo-

ple of Madinah" (al-amr alladhī adraktu 'alayh al-nās) is another very important constituent of Sunnah in the Muwattā'. "The present" is not dependent upon "the past" for establishing its validity; rather "the present" is so independent of "the past" that sometimes, the latter is judged by the former. Traditionally it has been held that "the practice of the people of Madinah" (al-'amal) was the highest legal argument and the final standard of judgement with Malik. We have shown that although the 'amal ruled supreme over other legal arguments, it was not the final standard of judgement with Malik. Truly it superseded "the past" and never vice-versa; but the 'amal in turn was superseded by another yet higher argument, i.e., the personal judgement of Malik himself (i.e., 'indana).

Very extensively used expressions in the Muwattā' such as al-amr al-mujtama' 'alayh 'indana, al-amr alladhī lā ikhtilāf fih 'indana, al-amr alladhī adraktu 'alayh ahl al-'ilm bibaladina etc. have traditionally been taken in the sense of the general consensus of the people and of the scholars of Madinah. We have established, on the contrary, that in spite of the use of these bold phrases, Malik did not mean by them the actual general consensus of the people or of the scholars of Madinah. Rather he applied these suggestive expressions in his endeavour to bring about a consensus and to point out a normative practice.

The possibility of an actual general consensus or practice of the people of Madinah in the Muwattā' cannot be ruled

out altogether. Establishment of such a general consensus does not depend, however, upon the use of the foregoing expressions with their corroborative phrases, apparently conveying this sense. To establish the actual consensus or practice on a particular issue the following conditions have to be fulfilled : (i) No Hadīth, statement, verdict or decision etc. of any of the past authority is quoted by Malik against the issue; (ii) the expression employed by Malik to describe the issue reflects the general practice of the people of Madinah; (iii) the scholars of Madinah agree with the issue; and (iv) "Malik with his circle" ('indana) agrees with the above conditions.

Thus, Hadīth, from the Prophet or from some subsequent authority, administrative directives, authoritative legal and juristic statements, verdicts and decisions of past and the present authorities and customs and practices of the people of Madinah — i. e., the prevalent legal material in Madinah — are all legal arguments with Malik to be used to support a particular view of Sunnah. This view of Sunnah rules supreme over these arguments and constitutes the highest and conclusive standard of judgement with Malik for evaluating and assessing the material and presenting a normative practice. We have, therefore, concluded that the Muwatta', instead of being a simple record of the consensus and practice of Madinah is an endeavour to bring about an ideal consensus and a normative practice.

The original meaning of the term Sunnah, as we have seen in Chapter I, is "to set an example" and "to introduce exemplary conduct". In the context of the Muwattā', Sunnah means "to bring about" and "to point out," from the prevalent legal material, the exemplary conduct and the model behaviour introduced by the Prophet. We have also seen in the same Chapter that the exemplary conduct of the Prophet, in the form of religious and ethical principles, became established, and this fluid and liquid concept began to crystallise in the shape of definite rules and usages of the community. It was the function of the early jurists and scholars to find out and to point out this exemplary conduct from the cumulative tradition and from the accretive legal material. It is in this context that the term Sunnah has been employed by Malik in the Muwattā'. This meaning of Sunnah is further strengthened by the corroborative expression, 'indana', suffixed to Sunnah. Contrary to the traditional interpretation, we have shown in great detail that 'indana' means Malik and those who held his opinion. Malik's occasional use of 'indi' in place of 'indana' has made this meaning all the more clear. It is through this combination of al-Sunnah and 'indana', that the concept of Sunnah in the Muwattā' is established.

There are some other expressions also employed by Malik in the Muwattā' to convey this concept. They are:

dhālik ahabbu mā sami'tu illaya fī dhālik, (this is the best of what I have heard in this connection), lā ba's bihi (there is nothing objectionable in it), arā (this is my independent considered opinion), etc. Therefore, the content of al-Sunnah 'indana (the normative practice of Mālik) is not identical with the content of Sunnah as understood by al-Shāfi'i. Rather the content of al-Sunnah 'indana is:

- (i) The religious and ethical principles introduced by the Prophet which in due course of time had acquired the status of recognized Islamic religious norms and the accepted standard of conduct (al-quwā'id al-kulliyah); (ii) sound reason and independent considered opinion (ra'y) and (iii) legal and moral reasoning.

The intellectual activity of the Madinese scholars in the generation preceding Mālik was in the field of Fiqh, pure and simple. Due to their rational and legal free-thought-activity they are known as the Fuqahā'. They had little to do with Hadīth, with all its later technicalities. Mālik was brought up in this intellectual milieu and received his training in this environment. Consequently, he started his intellectual career as a jurist and the contents of the Muwaṭṭa' bear witness to the fact that he continued this career throughout his life. But the period in which he lived was gathering momentum in favour of Hadīth. He shows his awareness of this fact, but is content only to use it as one of his

arguments and not beyond that. He rarely invoked the verbal transmission of Sunnah (i.e. Hadīth) to establish his point. It is true that he utilized the Hadīth material more than his predecessors. But that was due to the fact that the pressing need of the time for uniformity and standardization amidst the chaotic and confused situation created by legal divergences, compelled the scholars to meet the challenge on an "empire-wide "level, as the previous scholars had done on the regional level. Mālik shows his awareness of this "ultra-regional" evolution and used Hadīth in his argumentation which was acquiring the status of a universal element acceptable to all regions. This development was in contra-distinction to the pure Fiqh which developed regionally in geographically and socially closed areas. Despite this evolution in his legal thought, ironically, Mālik is more conservative to the genius of his predecessors than his counter-parts in Iraq, Abū Yūsuf and al-Shaybānī. The overriding authority accepted by Mālik was not the Hadīth but the Sunnah 'indana; whereas the Iraqians, especially al-Shaybānī, had gone half-way to al-Shāfi'ī in the utilization of the Hadīth material in their argumentation.

REFERENCES AND NOTES.

1. Al-Shāfi'ī, al-Umm, (Cairo, 1324 A. H.), Vol. VII p.177.
2. Al-Tabarī, Tārīkh al-Umam wa al-Muluk, op. cit., Vol.III,p.
3. Al-Shāfi'ī, op. cit., p. 199.
4. Ibid., p.196.
5. Mālik, al-Muwatṭa' op. cit., Vol. I, p. 371.

6. Ibid., Vol. III, p. 9.
7. Ibid., Vol. II, p. 348.
8. Al-Sahnūn, al-Mudawwanah, op. cit., Vol. I, p. 5.
9. Abū Nu'aym, Hilyah al-Awliya', Vol. VI, p. 322.
10. See Supra Chap. 111.
11. Ibid. —
12. Al-Shāfi'i, op. cit., p. 240.
13. Ibid., pp. 199, 229.
14. Ibid., p. 240.
15. Al-Sahnūn, op. cit., Vol. IV, p. 28.
16. Muhammad b. Hasan al-Shaybānī, Kitāb al-Hujjah 'alā ahl al-Madinah (Hyderabad, 1965), p. 23., See also pp. 218-222.
17. Shāh Walī Allāh of Dihlī, Intro. to his Commentary on the Muwatta'.
18. Al-Sahnūn, op. cit., Vol. I, p. 222.
19. This tendency to document the "present" by the "past" has reached its fruition in the writings of al-Shaybānī. Usually he mentions the prevalent practice on a certain issue, then supports it by the "past" — the Ḥadīth from the Prophet or subsequent authorities. To give as an example, he states that it is Sunnah to levy Jizyah on the magians, not to marry their women and not to eat their slaughtered animals. At the end he remarks, "So has been reported to us from the Prophet" (Al-Shaybānī, al-Muwatta', op. cit., p. 176). He opens his Kitāb al-Hujaj by a statement of Abu Hanīfah against the view of Mālik; then endorsing the prevalent practice on the issue in these words: "aḥabb ilaynā," he brings the "past" arguments for its further documentation. The whole book is full of this tendency. (Kitāb al-Hujjah 'alā ahl al-Madinah, Hyderabad, 1965, Vol. I).
20. Malik, op. cit., Vol. II, p. 133.
21. Ibid., p. 129.
22. Ibid., Vol. I, p. 216.
23. Al-Sahnūn, op. cit., Vol. I, p. 224.
24. Malik, op. cit., Vol. I, p. 372.
25. See Supra Chap. 111.
26. Mālik, op. cit., Vol. IV, pp. 55-56.
27. Ibid., Vol. II, p. 377.
28. Ibid., Vol. III, p. 135.
29. Ibid., Vol. I, p. 30.

30. Ibid., Vol. II, p. 376.
31. Al-Sahnun, op. cit., Vol. I, p. 222.
32. Malik, op. cit., Vol. III, p. 269.
33. Ibid., Vol. II, p. 172.
34. Ibid., p. 110.
35. Ibid., Vol. I, p. 216.
36. Ibid., p. 30.
37. Ibid., p. 216.
38. Al-Sahnun, op. cit., Vol. I, p. 222.
39. Abu Yusuf in clear terms has expressed that the practice stated in Malik's writings is not actual. He has gone so far in this regard that he was not prepared to accept as actual practice what was expressed in such clear terms as this: "wa bidhalika maḍat al-Sunnah." (Al-Radd, p.41).
40. Malik, op. cit., Vol. II, p. 376.
41. Ibid., p. 377.
42. Ibid., Vol. III, p. 135.
43. "Al-Amr alladhi la ikhtilaf fih" cannot mean the agreed opinion of the people of Madinah in general nor the opinion of the scholars of Madinah in general, because both of them are mentioned in the next phrase.
44. Malik, op. cit., Vol. I, p. 134.
45. Ibid.
46. Ibid.
47. Ibid.
48. Ibid.
49. Ibid.
50. Ibid., Vol. II, p. 126.
51. Ibid.
52. Ibid.
53. Ibid. Later Malikis under the influence of the mounting-tide of the Hadith were forced to leave the opinion of Malik, and interpreted it as his personal opinion i.e. not based on Hadith, therefore, they were not bound to follow Malik on that particular matter.
54. Ibid., Vol. II, p. 348.
55. Ibid., p. 347.
56. Ibid., p. 348.
57. Ibid., Vol. I, p. 74.
58. Ibid.
59. Ibid.
60. Al-Sahnun, op. cit., Vol. I, p. 59.
61. Ibid.
62. Malik, op. cit., Vol. I, pp. 227-233.
63. Ibid., p. 229.
64. Ibid., p. 233.

65. Muwatta', with commentary of al-Zurqānī (Cairo, 1954), V.I, p. 258.
66. Malik, op. cit., ed. 1310 A. H. Vol. I, pp. 149-50.
67. Al-Shāfi'i, op. cit., p. 192.
68. Ibid.
69. Ibid.
70. Ibid., p. 193.
71. Al-Sahnūn, op. cit., Vol. I, p. 65.
72. Malik, op. cit., Vol. I, p. 233.
73. Malik, al-Muwatta', ed. 1954, Vol. I, p. 258. "Laysa 'alā hadhā al-'amal 'Indanā" means "We do not accept it as the practice" i.e., "the normative practice".
74. Abū Yūsuf has pointed out that the term "madat al-Sunnah", in al-Awza'i and in Malik is vague. It does not refer to the actual established practice (al-Radd).
75. Al-Shaybānī had already paved the way on these lines, and he seems to be half-way towards al-Shāfi'i. But the difference between the two is that al-Shaybānī usually criticizes Malik for ignoring Hadīth to follow his own opinion; whereas al-Shāfi'i criticizes Malik for disregarding Hadīth as well as the practice of Madinah.
76. Al-Shāfi'i, op. cit., p. 194.
77. Al-Shaybānī, Kitāb al-Hujjah, op. cit., pp. 98-99.
78. Al-Sahnūn, al-Mudawwanah, op. cit.; I, p. 100 "Qal Malik fi al-Qunūt fi al-subḥ kullu dhālika wasi'un".
79. Ibid., p. 193.
80. Ibid., pp. 187-88.
81. Ibid., pp. 192-193.
82. Ibid., p. 196.
83. Ibid.
84. Ibid., p. 228.
85. Ibid., p. 249, last para "innakum mujammi'un".
86. Ibid.
87. H. A. R. Gibb, Muhammadanism, second galaxy printing (U. S. A. 1963), p. 91.
88. Ibid., p. 207.
89. Ibid., p. 188.
90. Al-Shaybānī, Kitāb al-Hujjah, op. cit.; p. 222.
91. Ibid., p. 213.
92. Ibid., p. 240.
93. Ibid., pp. 187-88.
94. Ibid., p. 192.

- 95; Ibid., p. 240.
96. Ibid.
97. Abū Yūsuf, al-Radd, op. cit., p. 41.
98. Al-Shaybānī, al-Hujjah, p. 222.
99. This statement of 'Abd al-Rahmān b. Mahdī has been reported by Abū Nu'aym al-Isfahānī, Hilyah al-Awliyā' (Cairo, 1936), Volume VI, p. 332.
100. Shāh Wali Allāh, al-Musawwā min Ahādīth al-Muwattā', (Makkah, 1351 A. H.) intro., p. 15.
101. Ibid.
102. Ibid.
103. Ibid., p. 16.

BIBLIOGRAPHY OF WORKS CITED

ARABIC

- Abū Nu'aym (d. 430), Hilyah al-Awliya', (10 Vols., Cairo, (1932 - 8).
- Abū Yūsuf (d. 182), Kitāb al-Athār, with a commentary by the editor Shaykh Abū al-Wafā, (Cairo, 1355 A.H.).
- _____, Kitāb al-Kharāj, (Bulaq, 1302 A.H.).
- _____, Al-Radd 'alā Siyar al-Awza'i (Hyder Abad, India, 1357 A. H.).
- Abū Zaharah, Malik (Egypt, 1922).
- Aḥmad 'Abd al-Ghafūr 'Attār, Muqaddamah al-Siḥah, (Egypt, 1956/1375).
- Al-Azhari, Abū Mansūr Muhammad b. Aḥmad b. Azhar al-Harawī (d. 370), Tahzīb al-Lughah, quoted by Ibn Manẓūr in his Lisān al-'Arab.
- Al-Barqūqī, 'Abd al-Raḥmān, Sharḥ Diwān Ḥassān b. Thābit (Egypt, 1926/1347).
- Al-Dhahabī, (d. 748), Tadhkirah al-Huffāz (4 Vols. Hyder Abad, India, 1955).
- Al-Ghazālī (d. 505), Al-Mustaṣfa (Egypt).
- Hajī Khalīfah (d. 1067), Kash al-Zanūn (1941/1360).
- Ḥassān b. Thābit, Diwān Ḥassān b. Thābit, with commentary ed. 'Abd al-Raḥmān al-Barqūqī (Egypt, 1926/1347).

- Ibn 'Abd al-Barr (d. 463), Intiqā fī Faḍā il al-Thalāthah al-a'imah al-Fuqahā' (Egypt, 1350 A. H.).
- _____, Jāmi' Bayān al-'Ilm (Egypt).
- Ibn 'Asakir (d. 571), Kash al-Mughattā' fī Faḍl al-Muwattā'.
- Ibn Farḥūn (d. 799), al-Dibāj al-Mudhḍhab (Egypt, 1351 A.H.).
- Ibn Hajar al-'Asqalānī (d. 852), Fath al-Bārī. (13 Vols. Egypt, 1329 A.H.).
- Ibn Ḥazm (d. 456), al-Ihkām fī uṣūl al-Ahkām (8 Vols., Cairo, 1345-8).
- Ibn Hishām (d. 218), al-Sirah, ed. Muḥammad Muḥyī al-Dīn 'Abd al-Ḥamīd (4 Vols., Cairo 1937/1356).
- Ibn Manzūr, Lisān al-Arab, (15 vols., Berouth, 1956/1375).
- Ibn al-Muqaffa' (d. 140), Risālah fī al-Ṣaḥābah, in Rasā'il al-Bulaghā', ed. Muḥammad Kurd 'Alī (Cairo, 1954/1374).
- Ibn Murtadā, Ahmad b. Yahyā, Kitāb Ṭabaqāt al-Mu'tazilah (Beyrūt, 1961).
- Ibn al-Qayyim (d. 751), I'lam al-Muwaqqi'in, Urdu trans. by Muḥammad b. Ibrāhīm of Dihli (Dihli, 1353 A.H.).
- Ibn Sa'd (d. 230), al-Tabaqāt (Berouth, 1957).
- Al-Jāhiz (d. 255), al-Bayān wa al-Tabyīn ed. 'Abd al-Salām Muḥammad Ḥarūn (Cairo, 1949).
- Al-Jawharī, Isma'īl b. Ḥammād, al-Sihāh, ed. Ahmad 'Abd al-Ghafūr 'Aṭṭār (6 Vols., Egypt, 1377 A. H.).
- Labid b. Rabi'ah (d. About 40), al-Mu'allaqāt al-'Ashr, ed. Ahmad b. Amin al-Shanqīṭī (Egypt, 1353 A.H.).

Malik b. Anas (d. 179), al-Muwatt', with a commentary by al-Zurqanī (4 Vols., Egypt, 1310 A. H.).

_____, al-Muwatt', ed. 1954.

Muhammad Kāmil Husayn, article on Malik introd. to the Muwatt' ed. to Muhammad Fuwād 'Abd al-Bāqī (Egypt, 1951).

Qāḍī 'Abd al-Nabiyy b. 'Abd al-Rasūl al-Aḥmad Nagari, Jami' al-'ulūm (Dastūr al-'Ulama'), (4 vols., Hyder Abad, 1329 A.H.).

Qāḍī 'Iyād, al-Madārik quoted by Abū Zaharah in his work Malik.
Al-Qarāfi, Sharḥ Tanqih, quoted by Abū Zaharah in his work Malik. 4.

Al-Sahnūn (d. 240), al-Mudawwanah (16 vols. 1323 A.H.).

Al-Shāfi'i (d. 204), Kitāb al-Umm (7 Vols., Cairo, 1324 A.H.).

_____, al-Risalah, ed. al-Halabī.

Shāh Walī Allāh (d. 1176), Izālah al-Khifā.

_____, al-Musawwā min ahādīth al-Muwatt' (Makkah, 1351 A.H.).

Al-Shāṭibi, al-I'tisām (Egypt, 1913/1331).

Al-Shaybānī (d. 189), Kitāb al-Hujjah 'alā ahl al-Madinah (Hyder Abad, 1965).

_____, Kitāb al-Hujaj, MS. in possession of Mawlānā 'Abd Rashid Nu'mānī, Reader, Jāmi'ah Islāmiyah Bahawalpur, W. Pakistan.

_____, al-Muwatt' (Deoband, India).

_____, Al-Siyar al-Kabir and al-Siyar al-Saghīr.

Al-Suyūṭī (d. 911), Tanwīr al-Hawalik (Egypt).

- Al-Tabarī (d. 310), Kitāb Ikhtilāf al-Fuqahā' (Egypt, 1320 A.H).
 _____, Tārīkh al-Umam wa al-Mulūk (Egypt, al-Matba'ah
 al-Husayniyah al-Misriyah).
 _____, Zayl al-Muzzayal, Vol. XIII of the Annales.
 Al-Zurqanī (d. 1122), Sharh al-Muwattā' (4 Vols. Egypt, 1310 A.H).

EUROPEAN

- Coulson, N. J., A History of Islamic Law (Edinburgh: at the
 University Press, 1964).
 Fazlur Rahman, Islamic Methodology in History (Karachi, 1965).
 _____, Islam, paperback edition (Weidenfeld and Nicol-
 son, London, 1966).
 _____, Ummah, a monthly Journal of the Islamic Research
 Institute, Karachi, September issue 1965).
 Gibb, H.A.R., Muhammadanism, second galaxy printing
 (U. S. A. 1963).
 Goldziher, I., Muhammedanische Studien (2 Vols., 1889-90).
 H. Ritter, Der Islam, XXI.
 Iqbal, Sir Mohammad, The Reconstruction of Religious Thought
 in Islam (Lahore, 1962).
 J. Milton Cowan, A Dictionary of Modern Written Arabic (Ithaca,
 N. Y.; Cornell University Press, 1961).
 Khadduri, Majid, War and Peace in the Law of Islam (Johns
 Hopkins, 1960).
 Lammens, H., Islam, Beliefs and Institutions, translated by
 Sir E. Denison Ross (1929).
 Macdonald, Duncan B., Development of Muslim Theology, Juris-
 prudence and Constitutional Theory (Lahore, 1960).
 Margoliouth, D. S., The Early Development of Mohammedanism
 (London, 1914).

Schacht, Joseph, The Origins of Muhammadan Jurisprudence (Oxford, 1959).

_____, The Introduction to Islamic Law (Oxford, 1964).

_____, Art. "Malik b. Anas" in the Encyclopaedia of Islam.

Snouck Hurgronje, C., Mohammedanism (1916).

S. M. Yusuf, "The Sunnah — Its Transmission Development And Revision," Islamic Culture, XXXVII, No.4 (Hyder Abad, India October, 1963).

URDU

Mawdūdī, Mawlānā Sayyid Abū al-A'la, Rasā'il wa Masā'il (Lahore, 1950).

Sindhi, Mawlānā 'Ubayd Allāh, Shah Wali Allāh awr onka Falsafah, ed. Muhammad Sarwar (Lahore: Sindh Sagar Academy, 1964).

Muhammad b. Ibrahim, Urdu translation of I'lām al-Mu-waqqi'in of Ibn al-Qayyim (Dehli, 1353 A. H.).

'Ubayd Allāh Qudsī, Urdu translation of Malik by Abū Zaharah (Lahore, 1960).