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Islamic Legal Thought

A Compendium of Muslim Jurists

Edited by

Oussama Arabi, David S. Powers and
Susan A. Spectorsky

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PART THREE

MODERN PERIOD (1798–PRESENT)

PREFACE

Several years ago we conceived the idea of a volume that would focus on the work of significant individual jurists. We drew up a list of prominent jurists and planned a book in which a chapter for each jurist would include a scholarly biography along with a translated sample of his work. We have contributed our own chapters, and twenty colleagues have joined us by contributing a chapter on a jurist they are engaged in studying. Each chapter offers new biographical material on a particular jurist, along with a new translation of selections of his work. Otherwise we did not ask the contributors to follow any particular format. Although practical considerations made it impossible to include all major jurists from each century, and to represent all schools, we hope that the combination of biography and translation in these twenty-three studies will offer a new way of looking at the development of Islamic legal thought.

All references to the *Encyclopedia of Islam* are to the second edition unless otherwise noted. In general, we use the *EI* system of transliteration, except that we use *j* instead of *dj* and *q* instead of *ḳ*. We have not standardized translations of passages from the Qurʾān. Each contributor has used the translation he or she thinks best. Otherwise, we shortened references in the notes and provided a complete bibliography at the end of the volume.

We would like to thank everyone who contributed a chapter to the volume and, at Brill, we are grateful to Ingrid Heijckers-Velt and Nicolette van der Hoek, who guided the book to completion.

Oussama Arabi
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Susan A. Spectorsky

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INTRODUCTION

Oussama Arabi, David S. Powers and Susan A. Spectorsky

The goal of the present volume is to show how the development of Islamic law is the product of the contributions of individual jurists working in particular times and places. Each of the twenty-three chapters that follow is written by a different scholar and consists of a biography of one prominent jurist and a translated sample of his work. The biographies emphasize first, the scholarly milieu in which the particular jurist worked—his teachers, colleagues and pupils, and his relations with the political authorities; and second, his scholarly output and the kind of juridical thinking for which he is well known. The translated selections of each jurist's work have been chosen to highlight his contribution to the methods of Islamic jurisprudence.

In a widely cited tradition, it is reported that when the Prophet sent the Companion Muʿādh b. Jabal (d. 18/639) to the Yemen as a qāḍī or judge, he asked Muʿādh how he would resolve disputes. Muʿādh replied that he would judge in accordance with the Book of God, and if he did not find anything in the Book of God, then in accordance with the Sunna of the Prophet. When the Prophet asked how he would judge if he found nothing in the Book of God or the Sunna of the Prophet, Muʿādh replied, "I will be zealous in my effort to craft my own opinion (*ajtahidu bi-raʾyī wa-la ālu*)." At this point, the Prophet struck Muʿādh's chest and said, "Praise be to Allah who granted the messenger of His Messenger what would gratify His Messenger."[1] The third alternative proposed by Muʿādh—the careful crafting of his own opinion—points to a key question that would engage subsequent generations of Muslim jurists: In the absence of specific guidance from the Qurʾān and the Sunna of the Prophet, what is the correct decision in any given instance? And, what is the correct way to go about reaching that decision? So long as the Prophet was alive, he would have been available to interpret the Qurʾān and lead the community of Believers, by word and deed, by his Sunna. After his death in 11/632, however, the legislative model he had provided for the early Muslim community

[1] See Ibn Hanbal, *Musnad*, 5:230, 236, 242. For variants, see Wensinck, *A Handbook of Early Muhammadan Tradition*, s.v. "Muʿādh b. Jabal."

had to be enlarged to meet the changing political, economic, and social conditions of the rapidly expanding Islamic empire. The prophetic model consisted, in part, of the rules and regulations in the Qur'ān, and in part, of things the Prophet had said or done at particular times, as remembered by his Companions and subsequently documented in collections of ḥadīth. This combination of Qur'ān and Sunna may have been adequate so long as the boundaries of Islam were limited to the Arabian Peninsula, but it was not sufficient for an empire whose borders circumscribed the Middle East, North Africa, southern Europe, and Central Asia.

The rulers of this empire, both caliphs and provincial governors, wished to ensure the Islamic character of their administration and they turned for advice to the Prophet's Companions, whose knowledge of Islam and concern for its proper implementation made them the first Muslim jurists. As the Arab conquests unfolded, many Companions settled in newly conquered cities and newly established garrison towns and provided legal guidance both to the rulers and to the local community of Believers. Some Companions became governors and qāḍīs, while others eschewed government posts and established informal study groups held in mosques or in their homes to discuss and debate how to live in accordance with the will of God. Often they disagreed with each other on how best to transform local laws and customs into Islamic laws and customs. Such disagreement (*ikhtilāf*) is reflected in conflicting ḥadīths and in debates and discussions between and among subsequent generations of jurists.

The scholarly activity of the Companions was continued by those who had known them, the Successors (often their children and grandchildren). Some of these served as governors and qāḍīs, others discussed and debated questions of ritual and law.[2] The more prominent among these men (and some women) acquired reputations for learning and disseminated their opinions both orally and in writing to their students and to the leadership of the Umayyad and early Abbasid periods. Even if their writings do not survive independently, their views were incorporated into the efforts of subsequent jurists to craft their own opinions.

We have divided the studies included here into three periods: formative, classical and modern. There is widespread agreement that the formative period of Islamic legal thought came to a close ca. 250 AH, by which time the

[2] For a reconsideration of the notion that jurists preferred to operate in a realm separate from or opposed to that of the caliphs, see Zaman, "The Caliphs, the 'Ulamā', and the Law."

four men—Mālik b. Anas, al-Shāfiʿī, Abū Ḥanīfa, and Aḥmad b. Ḥanbal—whose names came to be associated with the four Sunni *madhhab*s—the Mālikī, Shāfiʿī, Ḥanafī, and Ḥanbalī law schools—had established the major subjects and problems of the law.

The classical period is harder to delineate. It begins in the 4th/10th century, when jurists, prompted by ruling elites, began to teach the texts of one or another of the major Sunni and Shiʿi *madhhab*s, depending on their school affiliation, and compiled works of substantive law and legal method built upon these texts. As for the end of the classical period, an older view, espoused by scholars such as Chehata and Schacht, held that it closed in the 7th/13th century, followed by a "post-classical" period in which jurists merely glossed and commented upon earlier texts. A more recent view—to which we subscribe—suggests that the legal creativity of the classical period continued for another 500 years or so. As Norman Calder put it: "In spite of an insistence . . . on the terminology of decline, the great achievements of Islamic jurisprudence are probably spread fairly evenly from the mid-fourth/tenth to the thirteenth/nineteenth century."[3]

The modern period begins in the 19th century, when Muslim jurists were compelled to take into account non-Islamic legal systems, mainly those of the colonial powers. At present, Muslim jurists must engage not only with these non-Islamic legal systems, but also with the political, social and economic challenges faced by Muslim societies in the post-colonial world.

The twenty-three chapters in this volume represent many different categories of legal scholarship. For descriptive purposes, Islamic legal writings can be divided into two main types: *uṣūl* (literally, "roots") and *furūʿ* (literally, "branches"). *Uṣūl* texts explore the rational and epistemological methods to be applied to understanding the sources of the law, the nature of *ijtihād* or independent legal thinking, and the jurist's authority to discover the law from the sources and defend his conclusions. Whereas *uṣūl* texts treat the underlying theoretical basis of the law, *furūʿ* texts are compilations of legal rules. *Furūʿ* texts can be further divided into (1) extended treatises, and (2) résumés, depending on whether they provide extensive justifications for, and discussions of, the rules (*mabsūṭ*) or simple statements of what the rules are (*mukhtaṣar*). Most *furūʿ* texts,

[3] Calder, "Law," ch. 57 in *A History of Islamic Philosophy*, ed. S.H. Nasr, O. Leaman (part II), 986. For the earlier view, see, for example, Chehata, *Études de droit musulman*, 17–18; Schacht, *Introduction*, ch. 10.

certainly those analyzed in this volume, are a combination of both, with one or another tendency emphasized.[4] In both *mukhtaṣar*s and *mabsūṭ*s, one finds considerable attention to *ikhtilāf* or disagreement, as reflected in juristic discussions of which of several possible rulings is best. There are also separate treatises specifically devoted to *ikhtilāf* among the scholars of different schools.[5]

N.B. We are not concerned here with the actual implementation of the law, which can be studied in other sources, especially qāḍī court records and *fatwā*s or expert juridical opinions. The work of the qāḍī and *muftī* has been the subject of two previous—and related— publications: *Dispensing Justice in Islam: Qadis and their Judgments*, ed. Masud, Peters and Powers (Brill 2006); and *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. Masud, Messick, and Powers (Harvard 1996).

Formative Period

This section contains a chapter on each of the four eponymous 'founders' of the Sunni law schools. It also contains one chapter on the Mālikī scholar, Saḥnūn, and another on the Ḥanafī, al-Khaṣṣāf.

Abū Ḥanīfa reportedly was the author of a number of legal treatises, although none has survived. As Yanagihashi demonstrates in Chapter 1, however, Abū Ḥanīfa's views have been preserved in the works of his students, such as al-Shaybānī's *Kitāb al-aṣl* and *Makhārij al-ḥiyal*, and Abū Yūsuf's *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*. In Chapter 2, devoted to Mālik b. Anas, Rapoport has selected passages on procedure, first from Mālik's *Muwaṭṭa'* and then from a letter to his student, al-Layth b. Sa'd (d. 175/791). These passages demonstrate Mālik's method of using Qur'ān and ḥadīth along with the ongoing practice of Medina to reach the correct decision on contested issues. In Chapter 3, Lowry analyzes al-Shāfi'ī's arguments for the authoritative nature of prophetic ḥadīths—including those with a single line of transmitters—and his demonstration that seemingly contradictory ḥadīths can be reconciled. In Chapter 5, Spectorsky translates passages from Ibn Ḥanbal's *Masā'il*, showing how he used ḥadīths to support his opinions on contested legal questions.

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[4] On these two genre categories and variations within them, see *EI*[2], s.v. "Sharī'a," especially 4.2, "The literature of the law."

[5] Ṭabarī's *Kitāb Ikhtilāf al-fuqahā'* is a widely known example.

The close of the formative period is marked here by chapters on the Qayrawani Mālikī jurist Saḥnūn and the Baghdadi Ḥanafī jurist al-Khaṣṣāf. In Chapter 4, Brockopp analyzes Saḥnūn's method of "legal drafting." Using examples from the *Mudawwana*, he shows how Saḥnūn asks second-order questions in order to describe with precision the details of Mālik's statements about rain prayer and funeral prayer. Method is also at the center of Chapter 6: In his treatment of a selection from al-Khaṣṣāf's *Aḥkām al-awqāf*, Hennigan points to the use of dialogue—"he said"/"I said" (*qāla*/*qultu*), along with expository voice, to explain the principles governing the establishment of *waqf*s or pious endowments.

Classical Period

*Ḥanafī*s

The classical-period section includes thirteen chapters, of which four are devoted to Ḥanafī jurists. In Chapter 7, Tsafrir has selected five disputed questions from al-Ṭaḥāwī's *Mukhtaṣar*. She shows how al-Ṭaḥāwī handled a number of questions on which there was disagreement between Abū Ḥanīfa and his disciples and how his resolution of these questions fits into the Ḥanafī legal tradition. In Chapter 8, Bedir translates a section from the *al-Fuṣūl fi'l-uṣūl* by al-Jaṣṣāṣ in which this jurist discusses whether or not it is possible for a *mujtahid* to reason his way to an absolute truth or only to one of several possible truths. In Chapter 11, Taştan translates portions of al-Sarakhsī's *Kitāb al-Uṣūl* in which the central Asian jurist harmonizes the views of Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī on the recitation and transmission of the Qur'ān. In Chapter 18, Imber analyzes selections from Ebu's-su'ud's "Law Books" in which he sought to secure caliphal authority for the Ottoman sultan and to bring land ownership in the empire's European provinces into accord with Ḥanafī legal thinking.

*Mālikī*s

The four Mālikī jurists represented in this section all lived in the Islamic West. In Chapter 13, Serrano translates several of Ibn Rushd al-Jadd's *fatwā*s on both theoretical and practical questions in which he sought to ensure that Mālikī legal method and substantive doctrine would prevail in al-Andalus. In Chapter 14, Gomez-Rivas translates the opening section of Qāḍī 'Iyāḍ's influential biographical work, *Tartīb al-madārik*, which treats

the importance of adhering to Medinese consensus in Mālikī jurisprudence. In Chapter 16, Masud analyzes al-Shāṭibī's understanding of the "objectives of the law" (*maqāṣid al-sharīʿa*), with special attention to the key term *bidʿa*, which the Andalusian jurist wished to see applied exclusively to *religious* innovation. In Chapter 17, Powers translates al-Wansharīsī's comment on a series of *fatwā*s issued by distinguished jurists relating to the status of a synagogue in Tamantīt, a fortified settlement in the Sahara (the synagogue had recently been destroyed and many members of the Jewish community had been killed). In his comment, al-Wansharīsī—sadly—endorsed the view of the jurists who held for destruction of the synagogue.

*Shāfiʿī*s

The classical-period section contains two chapters devoted to Shāfiʿī jurists. In Chapter 12, Moosa translates the section of *al-Mustaṣfā* in which al-Ghazālī responds to four questions relating to an individual's responsibility to acquire religious knowledge: (1) Can truth be known by following authority? (2) From whom should a layperson solicit a legal opinion? (3) How does the person who seeks a legal opinion choose among multiple authorities? And (4) What if two or more jurists who respond to such a request disagree? In Chapter 15, Weiss translates a section from al-Āmidī's *al-Muntahā* in which the author attempts to respond to the following question: Is information about the Prophet transmitted through a line of single transmitters (*khabar wāḥid*) authoritative? The thorough and comprehensive manner in which al-Āmidī answers this question serves as an example of how to marshal arguments in legal disputation.

*Shīʿī*s

The classical-period section also contains two chapters devoted to Shīʿī jurists. In Chapter 9, Stewart translates two texts composed by al-Sharīf al-Murtaḍā: the introduction to his *Intiṣār*; and his answers to sixty-six legal questions from unnamed petitioners living in Mayyāfāriqīn (modern Silvan). In the former text, al-Murtaḍā responds indirectly to the Sunni caliph's denial of legitimacy to the Shīʿī *madhhab*. In the latter, he responds to a wide range of questions dealing *inter alia* with reading legal texts in the absence of qualified jurists, the *khums* tax paid to the Imam; public display of Shīʿī religiosity; praying for Sunni relatives; the sighting of the moon to determine the end of the month of Ramadan; the status

of the Companions and the Imams; dissimulation (*taqiyyah*); inheritance; giving alms to Sunnis; and temporary marriage with Sunni or *dhimmī* women.

In Chapter 19, Gleave translates parts of al-Bihbihānī's treatise on *qiyās*, a source of law that was condemned by the early Imams, albeit without explanation of exactly what they had in mind. Bihbihānī explained that the Imams were referring specifically to a jurist who forms an opinion as to the reason (*ʿilla*) behind a particular ruling and transfers it to a new situation. Excluded from this identification are linguistic inferences, and occasions when God, the Prophet or the Imams explicitly state the reason for a ruling. Gleave suggests that Bihbihānī's treatise on *qiyās* contributed to the hermeneutic ascendancy of the Uṣūlī jurists that formed the basis of subsequent Shīʿī jurisprudence.

*Ẓāhirī*s

The classical-period section also includes a chapter devoted to the Andalusian Ẓāhirī scholar Ibn Ḥazm, the author of *al-Muḥallā*, the largest extant source of Ẓāhirī legal doctrine. In Chapter 10, Kaddouri translates four sections of this text that deal with the following issues: (1) missing a prayer, deliberately; (2) the interdiction of singing and playing music; (3) women and slaves as judges: and (4) child custody. These four texts illustrate the Ẓāhirī legal methodology deployed by Ibn Ḥazm.

Modern Period

The third and final section of the volume includes chapters on four 20th-century scholars. In Chapter 20, Terem analyzes several *fatwās* in which the Moroccan muftī al-Wazzānī expressed support for the sultan in the face of increasing unrest, much of it caused by French imperial designs on Morocco. In Chapter 21, Haddad translates three *fatwā*s in which the reformist jurist Rashīd Riḍā attempted to accommodate rapid political, social, and economic change. In Chapter 22, Arabi examines the Articles dealing with subjective error in Sanhūrī's codification of Arab Civil Laws, expounding the Western-cum-Islamic comparative jurisprudence propounded by Sanhūrī. Finally, in Chapter 23, Layish translates selected passages from the writings of al-Turābī that highlight a new legal methodology developed by the Sudanese jurist. According to Layish, such a project, which combines classical Islamic legal theory with Western legal

principles, does not possess *sharʿī* legitimacy and should not be regarded as a development *within* Islamic law. These last two chapters show Sanhūrī and al-Turābī working to strengthen the modern nation state by inserting a reinvigorated Islamic component into the ruling power structure.

PART ONE

FORMATIVE PERIOD (150–261/767–874)

CHAPTER ONE

ABŪ ḤANĪFA (D. 150/767)

Hiroyuki Yanagihashi

Life, Disciples and Scholarship

Abū Ḥanīfa Nuʿmān b. Thābit b. Zūṭā al-Fārisī was born ca. 80/699–700 in Kufa and died in Baghdad in 150/767, reportedly at the age of 70. It is generally held that his grandfather Zūṭā was captured and brought as a slave to Kufa, where he was manumitted. Like his father Thābit, Abū Ḥanīfa was a merchant who dealt with *khazz*, a kind of silk, and reportedly was successful.

It was the Kufan jurist and traditionist al-Shaʿbī (d. ca. 104/722–3) who first stimulated his interest in the study of law and theology. The list of traditionists and jurists with whom he studied includes the leading Meccan jurist ʿAṭāʾ b. Abī Rabāḥ (d. ca. 114/732–3), Nāfiʿ (d. ca. 117/735–6), the *mawlā* of Ibn ʿUmar, who transmitted many *ḥadīth*s from him, the Medinese traditionist Hishām b. ʿUrwa (d. 146/763–4), and the Medinese legal authority Rabīʿa b. Abī ʿAbd al-Raḥmān (d. ca. 136/753–4).[1] Abū Ḥanīfa regularly attended the circle (*ḥalqa*) of Ḥammād b. Abī Sulaymān for eighteen or twenty years, until the latter's death in 120/737–8, whereupon Abū Ḥanīfa became the leader of the circle. Toward the end of the Umayyad period (41–132/661–750), Abū Ḥanīfa was flogged because of his refusal to take the office of qadi of Kufa, offered by Yūsuf b. ʿUmar b. Hubayra, then governor of Iraq (r. 129–32/746–9). In 130/747–8 he fled to Mecca, perhaps to avoid further punishment, and remained there for several years until he returned to Kufa during the reign of the second ʿAbbasid caliph al-Manṣūr (r. 136–58/754–75). When al-Manṣūr summoned him to Baghdad to appoint him as a qadi, he again refused to take up the post and was imprisoned. It is not clear whether Abū Ḥanīfa died in prison or after his release.

According to Ismāʿīl b. Ḥammād b. Abī Ḥanīfa (d. 212/827–8), his grandfather Abū Ḥanīfa had ten disciples, among whom Ismāʿīl regarded

[1] al-Baghdādī, *Taʾrīkh Baghdād*, 13:324.

Abū Yūsuf (d. 182/798) and Zufar b. al-Hudhayl al-ʿAnbarī (d. 158/774–5) as the most distinguished.[2] According to the Ḥanafī jurist al-Sarakhsī (d. 483/1090), however, the names most frequently associated with the dissemination of Abū Ḥanīfa's teachings are, in addition to Abū Yūsuf and Zufar, al-Ḥasan b. Ziyād al-Luʾluʾī (d. 204/819–20) and al-Shaybānī (d. 189/805), neither of whom are included in the ten disciples listed by Ismāʿīl.[3]

Whether or not Abū Ḥanīfa composed any work on law is a matter of dispute.[4] There are many reports that refer to his "book(s)" (*kitāb*, pl. *kutub*) on law,[5] but none of these books is extant. This is curious because several theological works attributed to him—some mistakenly—are extant. If Abū Ḥanīfa did write works on law, Abū Yūsuf and/or al-Shaybānī may have neglected to transmit them in an attempt to standardize Ḥanafī doctrine (see below, pp. 18–21).

Whatever the case may be, the most authoritative doctrines of Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī, known collectively as *ẓāhir al-riwāya* ("authoritative transmission"), are compiled in six works (all extant) that are also called *ẓāhir al-riwāya*: *Kitāb al-aṣl* (or the *Mabsūṭ*), the *Jāmiʿ al-ṣaghīr*, the *Jāmiʿ al-kabīr*, the *Ziyādāt*, the *Siyar al-ṣaghīr*, and the *Siyar al-kabīr*—the chronological order in which they were first compiled.[6] They are called *ẓāhir al-riwāya* because they were transmitted from al-Shaybānī by trustworthy persons through "either multiple or well-known channels of transmission (*immā mutawātira aw-mashhūra*)."[7] Although the six works are attributed to al-Shaybānī, he is not their ultimate author. Al-Sarakhsī writes, regarding the compilation of the *Jāmiʿ al-ṣaghīr*, that Abū Yūsuf told him to put together what he remembered from what Abū Yūsuf had related to him on the authority of Abū Ḥanīfa."[8] This indicates that the original *Jāmiʿ al-ṣaghīr* contained the opinions of only Abū Ḥanīfa, excluding those of Abū Yūsuf and al-Shaybānī, which is not true

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[2] Ibid., 14:245.

[3] al-Sarakhsī, *Kitāb al-mabsūṭ* (Beirut, 1406/1987), 1:3.

[4] Sezgin, *GAS*, 1:409–10.

[5] Ibn Ḥanbal, *Masāʾil al-imām Aḥmad b. Ḥanbal* (Beirut, 1408/1988), 437; al-Baghdādī, *Taʾrīkh*, 13:338, 342, 402, 403; al-Makkī, *Manāqib al-Imām al-aʿẓam Abī Ḥanīfa*, 2:136; Qāḍī ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Beirut and Tripoli, 1387/1967), 1:317, cited in Tsafrir, *The History of an Islamic School of Law: The Early Spread of Ḥanafism*, 105.

[6] Ḥājjī Khalīfa, *Kashf al-ẓunūn* (Leipzig, 1835–58), 1:326–7.

[7] Hallaq, *Authority, Continuity, and Change in Islamic Law*, 47–8; Ibn ʿĀbidīn, *Ḥāshiyat radd al-muḥtār ʿalā durr al-mukhtār sharḥ tanwīr al-abṣār*, 1:69.

[8] Ḥājjī Khalīfa, *Kashf* (Leipzig, 1835–58), 2:553–4, citing al-Sarakhsī, *Sharḥ liʾl-jāmiʿ al-ṣaghīr*.

of the *Jāmiʿ al-ṣaghīr* in its present form. The six works were brought to their final form by al-Shaybānī's disciples, including Abū Sulaymān Mūsā al-Jūzjānī (d. after 200/815–6), Aḥmad b. Ḥafṣ (known as Abū Ḥafṣ al-Kabīr, d. 217/832) and Ismāʿīl b. Tawba al-Qazwīnī (n.d.), and probably even later Ḥanafīs, who interpolated into the texts at hand opinions of Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī, Prophetic *ḥadīth*s, and the solutions that Abū Ḥanīfa, Abū Yūsuf, and/or al-Shaybānī would have adopted for a case about which no opinion is known from them.[9]

The doctrines of Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī transmitted in texts other than the six works, called *nawādir* or "rare cases," have less authority. Some of these *nawādir* works are extant.[10]

Contribution to Ḥanafī Legal Doctrine

Whereas Muslims have traditionally regarded Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī as the founders of the Ḥanafī school of law, some modern western scholars have called into question their contribution to Ḥanafī doctrine. Schacht writes that it was common practice in Iraq for a legal scholar or an author to ascribe his own doctrine to his master; for this reason, statements attributed by al-Shaybānī to Abū Ḥanīfa or Abū Yūsuf do not necessarily go back to these two scholars.[11] Schacht adds that the same holds for later Ḥanafīs, who attributed to the founders of the school opinions that they could not have held or opinions diametrically opposed to their real views.[12] Hallaq clarifies in detail the process whereby legal opinions transmitted by the founders of a law school from their predecessors were subsequently ascribed to the founders themselves as well as the process of projecting later doctrine back to early authorities. He concludes that the authority of the founder of a school, including Abū Ḥanīfa, was constructed by attributing to him numerous legal opinions advanced by his predecessors and successors.[13]

To assess Abū Ḥanīfa's real contribution to Ḥanafī doctrine, we must determine the authenticity of the opinions attributed to him in the works

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[9] For an essay reconstructing the process by which the *Aṣl* was redacted, see Calder, *Studies in Early Muslim Jurisprudence*, 39–58.

[10] Sezgin, *GAS*, 1:433–35; Hallaq, *Authority*, 48.

[11] Schacht, *Origins*, 238.

[12] Idem, "Sur la transmission de la doctrine dans les écoles juridiques de l'Islam," 399–400.

[13] Hallaq, *Authority*, 24–56.

of (more exactly, in currency under the authorship of) al-Shaybānī. The first question to be asked is: Can we regard the opinions ascribed to Abū Ḥanīfa in these works as genuine? As the above-mentioned modern scholars have suggested, it is often difficult to determine with certainty that such-and-such an opinion is that of Abū Ḥanīfa, while such-and-such an opinion was added by a Ḥanafī author active in the middle of the 3rd/9th century, who used the same premises as Abū Ḥanīfa. A cursory examination of some of the books that constitute the *Aṣl* shows, however, that their compilers and/or transmitters carefully indicate the source of the opinions contained in them. For example, the compiler and/or transmitters of the chapter on leases (*ijārāt*) in *Kitāb al-aṣl* distinguish between, on the one hand, the citation of a statement of the founders of the school, either preceded by the phrase "such-and-such a person said" (e.g., "Abū Ḥanīfa said [*qāla Abū Ḥanīfa*]") or expressed as "according to such-and-such a person" (e.g., "in the thesis of Abū Ḥanīfa [*fī qawl Abī Ḥanīfa*]"), and, on the other hand, a solution inferred by systematic reasoning, usually followed by a phrase such as "according to *qiyās* from the thesis of Abū Ḥanīfa (*fī qiyās qawl Abī Ḥanīfa*)" (see below, Text A). By extracting Abū Ḥanīfa's opinions from the chapter on leases, we discern that they are in general so fully developed that the contribution of Abū Yūsuf and al-Shaybānī to Ḥanafī positive rules appears to have been secondary. For example, Abū Ḥanīfa's statements regarding the contract of manufacture (*istiṣnāʿ*) cover most of the topics discussed in later standard Ḥanafī works such as the *Badāʾiʿ* of al-Kāsānī.[14]

This is not to say that Abū Ḥanīfa created the main corpus of Ḥanafī positive rules. By examining al-Shaybānī's *Āthār* and *Kitāb al-ḥujja ʿalā ahl al-Madīna*, we can assess the extent to which Abū Ḥanīfa owes his doctrine to his predecessors. Most of the headings found in later Ḥanafi legal works are also found in the *Āthār*, with only a few exceptions such as usurpation (*ghaṣb*), agency (*wakāla*), *waqf*, and partnership (*sharika*). The foundation of what became Ḥanafī doctrine was laid by the sayings attributed to Abū Ḥanīfa's Iraqi predecessors, especially Ibrāhīm al-Nakhaʿī (d. ca. 95/713–4). In *Kitāb al-ḥujja*, al-Shaybānī usually invokes the opinions of these Iraqi predecessors to defend Abū Ḥanīfa's position against those of the Medinese jurists, but only after citing the relevant sayings of the Prophet and/or the Companions. Thus, the teachings of Abū Ḥanīfa

[14] Compare al-Shaybānī, *Kitāb al-aṣl*, ms., Dār al-Kutub al-Qawmīya, fiqh ḥanafī, 34, 4a–7a, with al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ* (Beirut, 1402/1982), 5:2–4.

appear to have been firmly rooted in the Iraqi tradition. This impression is reinforced by the following statement of al-Shāfiʿī (d. 204/820) transmitted by his disciple Ḥarmala (d. 243/857–8): "Whoever wants to study *fiqh* thoroughly is dependant on Abū Ḥanīfa. He learned *fiqh* from Ḥammād b. Abī Sulaymān as transmitted by Ibrāhīm [al-Nakhaʿī]."[15] This statement suggests that Abū Ḥanīfa developed the *fiqh* transmitted by his predecessors. In fact throughout the *Āthār* we find the following formulation: "Muḥammad [b. al-Ḥasan al-Shaybānī] said, 'Abū Ḥanīfa, from Ḥammād, from Ibrāhīm al-Nakhaʿī: he said so-and-so.' Muḥammad said: 'We follow this, which was Abū Ḥanīfa's opinion (*bi-hādhā naʾkhudhu wa-huwa qawl Abī Ḥanīfa*)'." According to Schacht, most of the opinions attributed to Ibrāhīm al-Nakhaʿī are in fact derived from Ḥammād, and are not authentic.[16] Be that as it may, we can infer that the foundation of the teachings of Abū Ḥanīfa was laid by his Iraqi predecessors.

What did Abū Ḥanīfa add to the teachings of his predecessors? What distinguished his doctrine from that of his contemporaries, such as Ibn Shubruma (d. 144/761–2), Ibn Abī Laylā (d. 148/765–6), al-Ḥasan b. Ṣāliḥ (d. 167/783–4), and Sharīk b. ʿAbdallāh (d. 176/792–3), "whose teachings stagnated in comparison with those of Abū Ḥanīfa (*kasadat aqāwīlhum ʿinda aqāwīl Abī Ḥanīfa*)," as the Kufan traditionist Yaḥyā b. Ādam (d. 203/818) is reported to have stated?[17] A partial answer to these questions is suggested by the *Kitāb mā ikhtalafa fī-hi Abū Ḥanīfa wa-Ibn Abī Laylā ʿan Abī Yūsuf*, compiled by al-Shāfiʿī.[18] In this work Abū Yūsuf is quoted as mentioning over 250 cases, sub-cases and issues (hereinafter "cases") with regard to which Abū Ḥanīfa and Ibn Abī Laylā (who was also considered one of the *aṣḥāb al-raʾy*) adopted different solutions. In approximately ten percent of these cases, Abū Ḥanīfa cites Prophetic *ḥadīth*s, and he cites *ḥadīth*s attributed to a Companion even more frequently. By contrast, Abū Yūsuf refers to most of Ibn Abī Laylā's solutions as if they were his own solutions. Sometimes Abū Ḥanīfa adopts a solution dictated by strict interpretation of a Prophetic *ḥadīth* with little regard for practice or empirical fact (see below, Text B).

Some decades after Abū Ḥanīfa's death, the Kufan traditionist Ibn Abī Shayba (d. 235/849) included in his *Muṣannaf* a chapter entitled *Kitāb al-radd ʿalā Abī Ḥanīfa*, in which he lists 124 issues about which Abū Ḥanīfa

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15 Shīrāzī, *Ṭabaqāt al-fuqahāʾ* (Baghdad, 1356/1937–8), 67.
16 Schacht, *Origins*, 233–9.
17 Makkī, *Manāqib*, 2:41.
18 Printed in Shāfiʿī, *Kitāb al-umm* (Beirut, 1393/1973), 7:96–163.

held an opinion that contradicts a *ḥadīth*.[19] This is one example of many criticisms directed against Abū Ḥanīfa by traditionists who also claimed that he impiously ignored *ḥadīth* in formulating his legal doctrines. But the cases mentioned by Abū Yūsuf in *Kitāb mā ikhtalafa fī-hi Abū Ḥanīfa wa-Ibn Abī Laylā* indicate that he paid due attention to *ḥadīth*s. Thus, Abū Ḥanīfa's reputation as a representative of *aṣḥāb al-raʾy* or *ahl al-raʾy*, and a poor traditionist, may be exaggerated, as Schacht wrote.[20] But it is certain that he was less informed about *ḥadīth*s than his contemporary traditionists were. This is reflected in a statement attributed to the Basran jurist ʿUthmān al-Battī (d. 143/760–1): "Ḥammād was right when he exercised *raʾy*, but made mistakes when he argued on the authority of others than Ibrāhīm [al-Nakhaʿī]."[21] In the *Āthār*s of Abū Yūsuf and al-Shaybānī, Ibrāhīm is the most important source of *ḥadīth*s that Abū Ḥanīfa transmitted from his master Ḥammād. In view of the proliferation of *ḥadīth*s during the 2nd/8th century, Abū Ḥanīfa, who relied primarily on Ḥammād for *ḥadīth*s, must have had a smaller number of *ḥadīth*s at his disposal than did his contemporary traditionists.

Another feature that characterizes Abū Ḥanīfa's doctrine is his exercise of *raʾy* or discretionary reasoning. Ḥarmala transmitted the statement of al-Shāfiʿī: "Whoever wants to master authentic *ḥadīth* should study with Mālik [b. Anas]. Whoever wants to master debate (*jadal*) should study with Abū Ḥanīfa . . ."[22] It is not clear what al-Shāfiʿī meant by "debate," but we know that he criticized Abū Ḥanīfa and his followers for relying on *raʾy*, i.e. for engaging in personal and often arbitrary reasoning represented by *istiḥsān* or juridical preference, at the expense of revealed texts. The following report cited by al-Sarakhsī may serve as an illustration of Abū Ḥanīfa's reasoning: when a joint wedding party of two brothers (hereafter A and B) was held in Kufa, they led A's wife to B and B's wife to A, whereupon each of them consummated the marriage with the wife of his brother. Among the *'ulamā'* invited to the party was the Kufan traditionist Sufyān al-Thawrī (d. 161/777–8). Asked how to do deal with this accident, he cited the decision rendered by ʿAlī b. Abī Ṭālib, who ordered such a husband [in a similar case] to pay a fair dower to the wife of his brother (because he had intercourse with a woman who was not his wife), and ordered his wife to observe a waiting period, upon the expiration of which

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[19] Ibn Abī Shayba, *al-Muṣannaf fī al-aḥādīth wa'l-āthār*, 8:363–433.
[20] Schacht, *Origins*, 27, 33.
[21] Ibn Saʿd, *al-Ṭabaqāt al-kubrā*, 6:333.
[22] Shīrāzī, *Ṭabaqāt*, 67.

each couple would be permitted to consummate their marriage. On hearing this solution, Abū Ḥanīfa, who was also present at the party, said that he had a better solution. Enraged by this statement, Sufyān said: "What solution do you have to propose against my citation of the decision of ʿAlī concerning intercourse by mistake?" In response, Abū Ḥanīfa summoned the brothers and confirmed that A took a fancy to B's wife and B to A's wife. Then he told each man to repudiate his wife and to marry the wife of his brother, because, Abū Ḥanīfa explained, this solution would cause no animosity between the brothers and the women would not have to observe a waiting period, since each would marry the man with whom she had had intercourse. Those who were present at the party admired his cleverness.[23]

Irrespective of the historicity of this report, a large number of the *ḥiyal* (legal devices used to achieve an objective unattainable directly by lawful means) contained in al-Shaybānī's *Makhārij fī'l-ḥiyal* (see below, Text C) illustrate the utilitarian view of Abū Ḥanīfa (and his disciples). For Abū Ḥanīfa, jurists are authorized to interpret and apply the law to the best advantage of the Muslims insofar as they do not undermine its aim, whereas for the traditionalists law must rest squarely on revealed dicta that require the Muslims' absolute submission.

That Abū Ḥanīfa had a utilitarian view of law may seem to contradict my assertion that Abū Ḥanīfa paid due attention to *ḥadīth*s. In fact Abū Ḥanīfa seems to have been simultaneously a theoretician (jurisprudent) and a practitioner. It is reported that a man entered the silk market and asked for the location of the shop of the "*faqīh* Abū Ḥanīfa." A certain Isḥāq b. al-Ḥusayn said: "He is not a *faqīh*, but a *muftī* who serves against his will (*muftī mutakallif*)".[24] Whatever the exact meaning of this statement may be, it is certain that Isḥāq regarded Abū Ḥanīfa more as a practitioner than as a theoretician. This may be one of the reasons why Abū Ḥanīfa reportedly changed his position frequently:[25] He intended the law to serve human interests, which differ from one case to another, and he considered it contrary to its nature to fix the law. Abū Yūsuf is said to have heard Abū Ḥanīfa state: "Woe unto you, oh Yaʿqūb [viz. Abū Yūsuf], do not write down what you hear from me, because I may abandon tomorrow

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[23] Satoe Horii, *Die gesetzlichen Umgehungen im islamischen Recht* (ḥiyal), citing Sarakhsī, *Mabsūṭ*, 30:243–4.

[24] Makkī, *Manāqib*, 2:94.

[25] Melchert, *Formation*, 11–12.

the view that I hold today, and abandon the day after tomorrow the view that I hold tomorrow."[26]

Ibn Saʿd (d. 230/845) writes about al-Shaybānī: "People frequented him, hearing *ḥadīth*s and *raʾy* from him."[27] The same is true of Abū Ḥanīfa, and this explains why his teachings became predominant in Kufa and Iraq in general.

Transmission of Abū Ḥanīfa's Doctrine

Abū Yūsuf and al-Shaybānī played two important roles in the formation of Ḥanafī law. First, they justified the teachings of their master in light of *ḥadīth*s from the Prophet and his Companions. Ibn Saʿd regarded Abū Yūsuf as a "trustworthy" (*thiqa maʾmūn*) traditionist.[28] Al-Sarakhsī described him as "the leader in the field of the science of *ḥadīth*" (*al-muqaddam fī ʿilm al-akhbār*) among Abū Ḥanīfa's disciples.[29] In *Kitāb al-ḥujja*, al-Shaybānī frequently invokes *ḥadīth*s in order to justify the opinions of Abū Ḥanīfa. This may be due in part to the polemical nature of this work, in which al-Shaybānī seeks to demonstrate the superiority of his master's doctrine over that of the Medinese jurists, who make it a rule to cite *ḥadīth*s in support of their arguments.

Second and most importantly, Abū Yūsuf and al-Shaybānī standardized the Ḥanafī legal doctrines by choosing from their master's solutions and also adding from time to time their own solutions, with the result that we find in Ḥanafī texts numerous issues for which different solutions are given side by side, e.g., Abū Ḥanīfa's solution versus that of Abū Yūsuf and al-Shaybānī.

As is well-known, Abū Yūsuf and/or al-Shaybānī often disagree with their master. Abū Layth al-Samarqandī (d. 393/1003) refers to 481 cases in which both Abū Yūsuf and al-Shaybānī disagree with Abū Ḥanīfa, and 440 cases in which one or the other disagrees with Abū Ḥanīfa.[30] It is true that when either Abū Yūsuf or al-Shaybānī abandons the opinion of his master, his opposition usually concerns a minor detail or is reduced to the question of whether to give preference to a solution dictated by *qiyās*

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[26] Baghdādī, *Taʾrīkh*, 13:402. For a similar report, see Melchert, *Formation*, 11, citing the statement of the Khurasani traditionist Abū Hamza al-Sukkarī (d. 167/783–4?).

[27] Ibn Saʿd, *Ṭabaqāt*, 7:336.

[28] Ibid., 7:343.

[29] Sarakhsī, *Mabsūṭ* (Beirut, 1406/1987), 1:3.

[30] See Samarqandī, *Mukhtalaf al-riwāya*.

or one based on *istiḥsān*. That is to say, as a rule, they reasoned by using the same premises as their master (otherwise, they would have founded a new school, as was the case with al-Shāfiʿī). In some cases, however, they abandon the opinion of their master in favor of another opinion that probably takes into consideration the social practice, e.g. a dispute over the liability of an artisan, the validity of *waqf*, the permissibility of a *muzāraʿa* contract (a lease of agricultural land with profit-sharing), the validity of an act carried out by an agent who works to the detriment of the principal without violating his explicit instructions, or whether or not a sane adult can be placed under interdiction on the ground that he is unable to administer his property.

The fact that there are numerous instances in which the solution of Abū Yūsuf and/or al-Shaybānī is juxtaposed to that of Abū Ḥanīfa suggests that Abū Yūsuf and al-Shaybānī transmitted the bulk of their master's solutions. This was not the case, however. In fact they often omitted their master's solutions in transmitting them. To make this point clear, let us consider the case of a woman whose husband had disappeared and who approached a qadi asking to take out a loan in her husband's name. Abū al-Layth al-Samarqandī writes that Zufar was of the opinion that the qadi must hear the case, whereas Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī maintained that the qadi cannot hear the case, invoking the principle that no judgment can be rendered against an absentee person.[31] Al-Sarakhsī, however, writes that Abū Ḥanīfa had held the same opinion as Zufar before he held this opinion.[32] My contention is that the 281 cases mentioned by Abū al-Layth al-Samarqandī in which Zufar held an opinion in opposition to Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī include a number of cases in which Zufar held the same opinion as one of Abū Ḥanīfa's opinions. This case may be one of them.[33]

This contention is supported by the following evidence. First, whereas earlier sources report that Abū Ḥanīfa frequently changed his position,[34] in later Ḥanafī literature we find only a handful of cases in which he changed his position. Second, al-Ḍaḥḥāk b. Makhlad (d. 212/827–8) is reported to have stated that he heard his master Zufar saying: "I have never abandoned Abū Ḥanīfa's opinion except in favor of another opinion

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[31] Ibid., 2:905–06, no. 803.

[32] Sarakhsī, *Mabsūṭ* (Beirut, 1406/1987), 5:197.

[33] For additional examples, see ibid., 7:8, 11:13; cf. Yanagihashi, *A History of the Early Islamic Law of Property*, 59–67.

[34] Melchert, *Formation*, 11–12, 51–52.

that he had once adopted."[35] Taken literally, this statement implies that Abū Ḥanīfa changed his position in all of the above-mentioned 281 cases, whereas it is very rare that more than one solution is attributed to Abū Ḥanīfa in these cases. It follows that part of Abū Ḥanīfa's doctrine was not preserved in later Ḥanafī literature.

Needless to say, the statement of al-Ḍaḥḥāk b. Makhlad may be exaggerated. But, in this context, it is interesting to cite the following report. Toward the end of Zufar's life, the Kufan traditionist Wakīʿ b. Jarrāḥ (d. 197/812) frequented the lectures of Zufar in the morning and those of Abū Yūsuf in the evening. In the end, however, he attended only Zufar's lectures. He used to say: "Praise be to God who made you succeed to the Imām [viz. Abū Ḥanīfa] for us, although I do not cease to lament his death."[36] Whether authentic or not, this report indicates that the doctrines of Abū Ḥanīfa's inherited by Zufar were more acceptable to traditionists such as Wakīʿ than those of Abū Yūsuf. It is also plausible that Zufar's methodology was favorably received by the traditionists: al-Sarakhsī counted Zufar, by virtue of his mastery of *qiyās*, as one of the four best disciples of Abū Ḥanīfa;[37] likewise the Shāfiʿī jurist al-Shīrāzī (d. 476/1083) describes Zufar as the "*qiyās*" of Abū Ḥanīfa's disciples, i.e. he regards Zufar as representative of systematic reasoning among Abū Ḥanīfa's disciples.[38] In addition, Zufar was highly esteemed as a traditionist by some outstanding traditionists.[39] Zufar retained from Abū Ḥanīfa's doctrines that part which was based mostly on strict *qiyās* from the revealed texts.[40]

As noted, Abū Yūsuf and al-Shaybānī felt more or less free to abandon their master's solutions (by not transmitting them to their disciples) or to juxtapose their own to his. In contrast, their followers seldom advanced a new solution to an issue that had been discussed by Abū Ḥanīfa, Abū Yūsuf, or al-Shaybānī. In other words, the three jurists monopolized authority in the Ḥanafī school. Abū Yūsuf and al-Shaybānī, or their followers, may have been motivated by the fact that toward the end of Abū Ḥanīfa's life, and in particular in the few decades after his death, his

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35 Qurashī, *al-Jawāhir al-muḍiyya* (Hyderabad, 1408/1988), 1:393–4.

36 Ibn al-Bazzāz al-Kardarī, *Manāqib al-Imām al-aʿẓam*, printed with Makkī, *Manāqib*, 2:184.

37 Sarakhsī, *Mabsūṭ* (Beirut, 1406/1987), 1:3.

38 Shīrāzī, *Ṭabaqāt*, 113. See also Ibn Ḥibbān, *Kitāb al-thiqāt*, 3:375, no. 1548.

39 Dhahabī, *Mīzān al-iʿtidāl fi naqd al-rijāl*, 3:105, no. 2870.

40 This may explain in part why Zufar was able to introduce his master's doctrines to Basra, which was a major *ḥadīth* center. Melchert, *Formation*, 41; Tsafrir, *History*, 31–3.

followers began to serve as qadis in different locations.[41] If a private person seeks advice from a *muftī*, he is free to follow it or not, whereas the decision of a qadi is, by definition, binding upon the litigants. It is, however, by no means certain that his decision is the best solution for them in the eyes of God. To be relieved of such anxiety, a qadi needed an established norm, as reflected in a statement attributed to Abū Yūsuf: "In my judgments I reasoned (*ijtahadtu*) in accord with Your [viz. God's] Book and the *Sunna* of Your Prophet. Whenever a case presented a difficulty, I made Abū Ḥanīfa stand between You and me . . ."[42] Such relief was also needed for a practical reason: The parties who bring a case before a qadi expect that he will adjudicate the case in accordance with the doctrine of the circle to which he belongs. So long as the dissemination of Abū Ḥanīfa's doctrine was limited to his circle in the mosques of Kufa or Baghdad, he and his followers may have been free to change his doctrine, but once his doctrine began to spread, they became increasingly reluctant to do so. The fact that the solutions collected in the six works of al-Shaybānī enjoyed the highest authority as *ẓāhir al-riwāya* attests to the need felt by Abū Ḥanīfa's followers to establish and stabilize their master's doctrine.

Translation of Selected Texts

Text A: From al-Shaybānī's Kitāb al-ijārāt

The following are extracts from the seventh chapter of *Kitāb al-ijārāt* in al-Shaybānī's *Kitāb al-aṣl*. In this chapter three phrases are used to indicate the source of a statement or an opinion: (1) "such-and-such person said" (e.g., "*qāla Abū Ḥanīfa*" or "*qāla Abū Yūsuf wa'l-Shaybānī*"); (2) "according to such-and-such person" (e.g., "*fī qawl Abī Ḥanīfa*"); (3) "according to *qiyās* from the thesis of such-and-such person" (e.g., "*fī qiyās qawl Abī Ḥanīfa*). Statement (1) is found mainly in the beginning of this chapter. Statements (2) and (3) appear in the remaining part of this chapter. Let us consider a number of cases containing these phrases to illustrate the difference between them.

> (i) [Regarding a house rental contract in which no clause is stipulated as to the items that the lessee can bring into the house] Abū Ḥanīfa said: "The lessee can live and let anyone live there, and bring into it whatever he likes,

[41] Madelung, *Religious Trends*, 18; Tsafrir, *History*, 18, 24, 40, 68, 72–4, 96.
[42] Baghdādī, *Ta'rīkh*, 14:254.

> e.g., clothes, merchandise, and animals, and he can do whatever work he pleases, except milling, forging, or fulling, for they are harmful to the house. Likewise he cannot bring into the house anything harmful, unless the owner agrees to it or a clause to that effect is stipulated in the contract. Abū Yūsuf and al-Shaybānī said the same thing (*hākadhā qāla*), and they said: "Any work that destroys or weakens a building is similar to milling, forging, or fulling."[43]

The following text concerns the validity of a clause that places a constraint on the person who can live in the rented house. "He" (viz. Abū Sulaymān Mūsā al-Jūzajānī, the compiler of *Kitāb al-ijārāt*) apparently applies the thesis of Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī mentioned in (i) to this case.

> (ii) A person rents his house to someone for one dirham a month, and he stipulates that the lessee should live there by himself. Subsequently the lessee marries a woman or two and they begin to live there together. Can the lessor demand that the lessee evacuate the house? Consider the case in which the lessee rents the house for one year and begins to live with his wives for a month or two. Can the lessor demand that the lessee evacuate the house before the one year has expired? He said: "The clause is considered unwritten. The lessor cannot force the lessee [to evacuate the house] before one year has passed, according to *qiyās* from the thesis of Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī."[44]

The following text shows that the compiler was careful to indicate whether a solution is attributed to the founder of the school or was derived by *qiyās* based on their thesis.

> (iii) The testamentary executor of an orphan rents a house [belonging to the orphan], or the agent of a testamentary executor rents a house belonging to the heirs, who asked the agent to rent it without designating the term of the rent; or they asked him to rent it for twenty years for 200 dirhams, i.e. for 10 dirhams a year. Then the testamentary executor or the agent dies, and the owner of the house [viz. the orphan or the heirs] says to the lessee: "We do not agree to the rent contract between you and our testamentary executor or agent, because the fair rent of our house is higher than 200 dirhams." . . . Can they [viz. the orphan or the heirs] demand that the lessee evacuate the house or part of it if the lessee refuses to pay the fair rent? He said: "The contract is valid and the lessee must pay the rent to the agent or the testamentary executor [if they are alive] rather than to the [orphan or the] heirs, and even if the agent had rented the house for one *dāniq* (i.e. one-sixth of a dirham) or 100 dirhams, the contract is valid according to *qiyās*

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[43] Shaybānī, *Aṣl*, f. 12b.
[44] Ibid., f. 19a.

> from the thesis of Abū Ḥanīfa, and according to Abū Yūsuf and al-Shaybānī, insofar as there is no gross imbalance between the designated rent and the fair rent (*illā an ḥaṭṭ dhālika mimmā yataghābana al-nās fī mithli-hi*). Likewise a rent contract concluded by a testamentary executor is null and void if there is a gross imbalance between the designated rent and the fair rent, according to them all [viz. Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī]."[45]

Text B: Abū Yūsuf's Kitāb mā ikhtalafa fī-hi Abū Ḥanīfa wa-Ibn Abī Laylā

In the following text Abū Ḥanīfa invokes the Prophetic *ḥadīth* that is usually understood to create a tie of filiation between the child and the man who is the owner of the marriage bed (*firāsh*), i.e., the right to have intercourse with the mother of the child, at the moment when she is presumed to have become pregnant. Abū Ḥanīfa mechanically applies this rule to the absentee husband who retains the *firāsh* but cannot have had intercourse with her. It is not certain whether or not he knew the *ḥadīth* of ʿAlī cited by Ibn Abī Laylā (see below). If he did, Abū Ḥanīfa disregarded a more relevant dictum in favor a Prophetic *ḥadīth*.

> [Abū Yūsuf said:] After a woman marries, her husband disappears and he is declared legally dead. Subsequently, she remarries and gives birth to a child of the second husband. Then the first husband returns to her. Regarding this case, Abū Ḥanīfa said: "The child belongs to the first husband, who is the owner of the marriage bed (*ṣāḥib al-firāsh*). We have learned from the Apostle of God that he said: 'The child belongs to the marriage bed, and the adulterer is stoned (*al-walad li'l-firāsh wa-li'l-ʿāhir al-ḥajar*)'." Ibn Abī Laylā said: "The child belongs to the second husband, because he is not an *ʿāhir* (i.e. an adulterer), for he is married to the woman." This is what reached us from (*balagha-nā ʿan*) ʿAlī b. Abī Ṭālib, and Ibn Abī Laylā followed it. Al-Shāfiʿī said: "If the wife is informed of the death of her husband and she observes the waiting period, whereupon she remarries and gives birth to children, and subsequently the first husband returns to her, her second marriage is nullified and she must observe the waiting period from the second marriage. She becomes the wife of the first husband, as she was prior to the second marriage. But the children belong to the second husband, because he married her in a manner that was seemingly lawful (*nakaḥa-hā nikāḥ*^{an} *ḥalāl*^{an} *fī'l-ẓāhir*) and whose legal effect is the same as that of a lawful marriage."[46]

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[45] Ibid., ff. 20b–21a.

[46] *Kitāb mā ikhtalafa fī-hi Abū Ḥanīfa wa-Ibn Abī Laylā ʿan Abī Yūsuf*, in Shāfiʿī, *Kitāb al-umm*, 7:157.

Text C: From al-Shaybānī's Makhārij fī'l-ḥiyal

In the early centuries of Islam, jurists placed numerous restrictions on contracts and treated as valid only a handful of contracts that met well-defined conditions, prohibiting other contracts that were currently practiced. This is true of *muḍāraba*, a commercial association in which the investor (*rabb al-māl*) entrusts capital (*ra's al-māl*) to an agent, who is supposed to purchase goods with the capital and to make a profit by reselling them. The profit is divided between the investor and the agent according to a pre-determined proportion. Jurists treat as unlawful, among others, a *muḍāraba* in which the agent assumes the loss incurred through his transactions, and a *muḍāraba* in which the capital consists of an object other than dinars or dirhams. The 'legal devices' (*ḥiyal*) mentioned in the following text are intended to make such *muḍārabas* lawful. One of the aims of *ḥiyal* seems to have been to validate various forms of customary *muḍāraba* that were not sanctioned by the Islamic law of contract.

> I [viz. al-Shaybānī] said: Consider, if someone wants to give money to another [as capital] in a *muḍāraba* and he requires that the agent guarantees to return the capital, what is the legal device [*ḥīla*, sg. of *ḥiyal*] and a safe means for this?"
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> [Abū Ḥanīfa] said: "The investor can lend the capital, less one dirham and create a partnership between them with the one dirham and the rest of the capital, on the condition that both of them trade with the capital. Then they can divide whatever profit God gives them in half or according to any pre-determined ratio. This is lawful."
>
> I said: "What if only one of the parties engages in commercial activities while the other party does not do so, with the permission of his partner?"
>
> He said: "This is lawful, and the profit is divided according to the proportion that they stipulated."
>
> I said: "Consider, if a person who wants to invest in a *muḍāraba* contract has only merchandise, what is the *ḥīla* to make a *muḍāraba* contract?"
>
> He said: "Sell the merchandise to a reliable man and receive the price. Then give it to the agent as the *muḍāraba* capital. Then if the agent buys the merchandise that the investor sold to the buyer [viz. the reliable man] and pays him the price, the merchandise belongs to the agent [as the *muḍāraba* capital]."
>
> I said: "Consider, someone wants to invest in a *muḍāraba* contract, but he wants to make the agent assume any loss incurred from his trade. What is the *ḥīla* for this?"
>
> He said: "The investor can lend the entire capital to the agent, who is supposed to invest it in a *muḍāraba* contract concluded between him and the investor, in which it is stipulated that the profit will be divided in half between them or according to any predetermined proportion. Then the

investor can invest the capital in a *biḍāʿa*[47] contract made between him and the borrower [viz. agent]."

This procedure is lawful according to Abū Ḥanīfa and Abū Yūsuf. But Zufar said that the profit belongs exclusively to the person who engaged in trade.[48]

[47] A contract in which a merchant (*mubḍiʿ*) entrusts his goods to another person (*mubḍaʿ ilay-hi*), so that the latter takes care of it. At the end of the transaction the latter hands over the profit to the former without demanding a commission.

[48] Shaybānī, *al-Makhārij fi'l-ḥiyal*, 76.

CHAPTER TWO

MĀLIK B. ANAS (D. 179/795)

Yossef Rapoport

Life and Times

Mālik b. Anas, the eponym of the Mālikī school of law, was born in Medina, probably in 93/711, and spent almost all of his life in the city.[1] He studied with the older Successor Nāfiʿ (d. 117/735), the freed slave of ʿAbdallāh b. ʿUmar, and with the younger Successors Ibn Shīhāb al-Zuhrī (d. 124/742) and Rabīʿah b. ʿAbd al-Raḥmān (d. 136/753). Mālik acquired a reputation as both a traditionist and as a jurist, and his legal opinions were sought by laymen as well as by the governor and the *qāḍī* of Medina. The demand for his legal opinions and *ḥadīth* transmission was so great that when he held court, it was necessary for a chamberlain to supervise the entrance to his house.[2] Mālik performed these duties as a private person, supporting himself through private commercial enterprises, never as an official of the state.[3] By the end of his long life, Mālik was widely recognized as the undisputed authority on religious matters in Medina, and he attracted a large number of students from outside the Arabian Peninsula. Mālik died in Medina in 179/795.

During Mālik's lifetime the political fortunes of the city of Medina were in decline. After the Umayyads moved the capital of the caliphate from Medina to Damascus in 661 CE, Medina remained the bastion of the Hijazi aristocracy, and home to most of the ʿAlid family. Over the following

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[1] The secondary literature on Mālik offers conflicting perspectives on the man and his legal methodology. The most comprehensive recent study in a western language is that of Yasin Dutton, *The origins of Islamic Law* and idem, *Original Islam.* See also Wael Hallaq, *Authority*, 31–6; and *EI*[2], s.v. "Mālik b. Anas."

[2] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Beirut, 1998), 1:67. According to al-Wāqidī, Mālik used to adjudicate in litigations (*yaqḍī al-ḥuqūq*). Ibid., 1:94; cf. Ibn Farḥūn, *al-Dībāj*, (Cairo, 1972–6), 1:106.

[3] It is reported that Mālik supported himself and his family by investing 400 dinars in commercial ventures, and that at his death he left an estate valued at 3,600 dinars, including 500 pairs of shoes. See Ibn Farḥūn, *al-Dībāj* (Cairo, 1972–6), 1:95, 134–5; ʿIyād, *Tartīb* (Beirut, 1998), 1:95.

century it was a major center of resistance to the caliphate, supporting a succession of rebellions. Mālik himself witnessed two ʿAlid rebellions centered in Medina, one in 145/762 by Muḥammad b. ʿAbdallāh, known as al-Nafs al-Zakiyya; and the second in 169/786, by Ḥusayn b. ʿAlī, known as Ṣāḥib Fakhkh. These rebellions attracted local support beyond the circles of ʿAlid loyalists. Al-Nafs al-Zakiyya received tacit support from Mālik, who issued a legal opinion stating that the oath of allegiance to the Abbasid caliph al-Manṣūr was not binding, because it had been given under duress.[4] When caliphal authority was restored, Mālik was flogged by the governor of Medina, suffering a dislocation of his shoulder. While it is not clear whether Mālik's atittude toward this ʿAlid rebellion was driven by political or doctrinal motives, his relations with the Abbasid authorities subsequently improved. Shortly before his death in 179/795, he received a visit from the Abbasid caliph Hārūn al-Rashīd, while the latter was performing the pilgrimage.

Despite the fact that political power had shifted away from Medina, the Medinese could still boast of being the closest, geographically and culturally, to the generation of the Prophet. Although a large number of the Prophet's Companions took part in the Arab conquest of the Near East, it is likely that quite a few stayed in Medina, and those who stayed were in direct contact with the social structures, physical environment and dialect of the Prophet's age. The scholarly elite of Medina viewed themselves, and probably were viewed by many Arab tribesmen living outside the Arabian Peninsula, as the guardians of the Prophet's ideal society. Medina produced a school of grammarians and Qurʾānic scholars, including the renowned Nāfiʿ b. ʿAbd al-Raḥmān al-Laythī (d. 169/785), one of Mālik's teachers and the authority for one of the seven canonical readings of the Qurʾān (the reading actually used by Mālik in his legal writings).[5] In the field of law there emerged in Medina a group

[4] *EI²*, s.v.v, "Muḥammad b. ʿAbdallāh"; "Madīna." Mālik ruled that men who swear an oath of allegiance under coercion, and then subsequently break the oath, should not be required to divorce their wives. From the early Islamic period, oaths of allegiance included an oath on pain of triple divorce, which meant that the triple divorce would take place if the allegiance was revoked. See Ibn Farḥūn, *al-Dībāj* (Cairo, 1972–6), 1:130; ʿIyād, *Tartīb* (Beirut, 1998), 1:124–6. Mālik's position was based on a precedent set by ʿAbdallāh b. ʿUmar (d. 73/692) in a case of a Medinese man who was forced by threats of violence to divorce his wife. See Mālik b. Anas, *al-Muwaṭṭaʾ. Riwāyat Yaḥyā b. Yaḥyā al-Maṣmūdī* (Beirut, 2004), p. 245, Bk. 29, Ch. 29; see also Khaled Abou El Fadl, *Rebellion and Violence in Islamic law*, 76.

[5] On Medina as an intellectual center during the second century AH, see *EI²*, s.v. "Madīna"; E. Whelan, "Forgotten Witness: Evidence for Early Codification of the Qurʾān,"

of older Successors, including, most famously, Saʿīd b. al-Musayyab and ʿUrwa b. al-Zubayr (both d. 94/713), who met together to solve legal problems at the behest of the local governor and future caliph ʿUmar b. ʿAbd al-ʿAzīz. This group of older Successors came to be known as the seven jurists of Medina, and their legal views were transmitted to younger Successors, especially Mālik's teacher Ibn Shihāb al-Zuhrī. They were subsequently recorded by Mālik.

Al-Muwaṭṭaʾ

Mālik's single most important contribution to Islamic law is *al-Muwaṭṭaʾ*—literally, "the well-trodden path"—one of the earliest extant legal treatises in Islam, as well as one of the earliest collections of *ḥadīth*. Although it contains both legal rulings and *ḥadīth*, Y. Dutton points out that "the *Muwaṭṭaʾ* is neither a *ḥadīth* collection nor a *fiqh* book. It is, rather, a book of *ʿamal*, a record of the accepted principles, precepts and precedents that had become established as the *ʿamal* of Medina."[6] Mālik was not the only Medinese scholar of his time to produce a work that recorded Medinese legal norms. For example, ʿAbd al-ʿAzīz b. al-Mājishūn (d. 164/780) compiled another *Muwaṭṭaʾ* focusing only on legal rulings.[7] Another *Muwaṭṭaʾ* compiled by ʿAbdallāh b. Wahb (d. 197/812) survives in fragments.[8] Whatever the merits and flaws of these other "*Muwaṭṭaʾ*-āt," Mālik's *Muwaṭṭaʾ* was by far the most successful. Although he is said to have composed additional legal and theological works, the only other extant legal text that safely can be attributed to him is a letter he sent to his Egyptian student al-Layth b. Saʿd (d. 175/791), to which we shall return.

The *Muwaṭṭaʾ* has not reached us directly from Mālik, but only through transmissions, or recensions, made by his students. Of the scores of transmissions that are said to have circulated, only nine are extant, either in complete form or in fragments. The best known and most frequently published transmission is that of Yaḥyā b. Yaḥyā al-Laythī al-Maṣmūdī (d. 234/848), an Andalusian scholar who reportedly heard it from Mālik

12. On Mālik's reliance on Nāfiʿ's canonical reading of the Qurʾān, see Dutton, *Origins*, 55–60.

6 Dutton, *Origins*, 22.

7 Ibn Farḥūn, *al-Dībāj* (Cairo, 1972–6), 1:120–1; Dutton, *Origins*, 29.

8 Muranyi, *ʿAbd Allāh b. Wahb (125/743–197/812)*; Dutton, *Origins*, 24.

in 179/795, the year of his death.[9] His transmission allegedly represented Mālik's compilation in its final form. The earliest transmission, preserved only in fragments, is by ʿAlī b. Ziyād (d. 183/799), who is said to have heard the *Muwaṭṭaʾ* from Mālik as early as 150/767.[10] These transmissions show marked differences in length, presentation of legal material and organization into chapters, and are, in a sense, independent works.[11] On the whole, however, all of the transmissions include a significant amount of shared legal material, which has been termed a "core of Mālik's juristic dicta."[12] Mālik's *Muwaṭṭaʾ* was a work in progress, a text for teaching, disseminated either as lecture notes or as copies read out by students, developed and refined over a period of thirty years. Therefore, some differences between the versions heard at different times are to be expected.[13]

"Book of Judgments"

Let us examine an excerpt from the *Muwaṭṭaʾ*, in the transmission of Yaḥyā, from a chapter entitled the "Book of Judgments." The selection deals with a point of procedural law that pitted Mālik against the majority of jurists outside Medina. Briefly, the question revolved around what constitutes proof. According to Mālik, a claimant in property cases, and only in property cases, can win a dispute by bringing forth a single witness, complemented by his own oath. Many of Mālik's contemporaries outside Medina, however, held that only the testimonies of at least two

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[9] See Fierro, "El alfaquí beréber Yaḥyā b. Yaḥyā al-Laythī (m. 234/848), el inteligente de al-Andalus," 269–344.

[10] The fragments are found in a Kairuoan manuscript that dates to the first half of the 3rd century AH. See Muranyi, *Beiträge*, 8.

[11] The differences between transmissions, as well as the prominent place of Prophetic traditions in the *Muwaṭṭaʾ*, led Norman Calder to question the attribution of the work to Mālik. Calder suggested that Yaḥyā's transmission was compiled in al-Andalus a century after Mālik's death (Calder, *Studies in Early Muslim Jurisprudence*, 20–38). Calder's thesis has been conclusively refuted, most recently by Hallaq ("On Dating Mālik's *Muwaṭṭaʾ*," 47–65) and H. Motzki ("The Prophet and the Cat," 18–83). Mālik's composition of the *Muwaṭṭaʾ* is no longer a matter of contention.

[12] Brockopp, *Early Mālikī law*; idem, "Re-reading the History of Early Mālikī Jurisprudence," 235.

[13] Motzki, "The Prophet and the Cat," 30; G. Schoeler, "Writing and publishing: On the use and function of writing in the first Islamic centuries of Islam," 423–35. According to later Mālikī accounts, the *Muwaṭṭaʾ* was read back to Mālik by his disciples. See ʿIyād, *Tartīb* (Beirut, 1998), 1:76; Dutton, *Origins*, 24ff.

witnesses constitute a sufficient proof.[14] This chapter is of particular interest because, in the face of widespread opposition, Mālik is driven to highlight the characteristics of his legal methodology. The final two paragraphs of the selection are especially useful for understanding Mālik's view of the relationship between the Qurʾān, the *sunna* and the legal norms of Medina.

The organization of the material in the excerpt is as follows. Mālik first cites the relevant *ḥadīth* in support of judgments based on the plaintiff's oath accompanied by a single witness. He then explains the general principles regarding this procedure and its applicability. He limits this procedure to property cases, specifically excluding criminal law, family law and the manumission of slaves. Mālik argues that cases involving the manumission of slaves do not fall under the category of property cases, even though the slave may be considered to be property. Then, in a long digression, Mālik argues that the evidence required in manumission cases is as stringent as the evidence required in criminal cases. Finally, while Mālik's non-Medinese opponents cite the Qurʾān on the need for at least two witnesses, Mālik claims that not every judgment need be derived from the text of the Qurʾān.

Translation

A Judgment Based on Oath accompanied by the Testimony of a Single Witness[15]

1. Yaḥyā said that Mālik said, on the authority of Jaʿfar b. Muḥammad,[16] on the authority of his father, that the Messenger of God, May God bless him and grant him peace, pronounced judgment on the basis of an oath accompanied by a single witness.

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[14] For more on Mālik's view of procedural law in general, and on the probative value of an oath accompanied by a single witness in particular, see P. Scholz, *Malikitisches Verfahrensrecht*, 304–16. See further, Masud, "Procedural law between traditionists, jurists and judges: the problem of *yamīn maʿ al-shāhid*," 389–416.

[15] Mālik, *Muwaṭṭaʾ* (Beirut, 2004), 305–7 (36.4). I have consulted the translation by Aisha Abdurrahman Bewley (Mālik b. Anas, *Al-Muwatta of Imam Malik b. Anas: the first formulation of Islamic law* [297–8]). The last two paragraphs of this chapter have also been translated and discussed by Dutton, *Origins*, 161–2. The division into numbered paragraphs is common in modern editions of the Arabic text, whenever each paragraph is a separate quotation from Mālik.

[16] Jaʿfar b. Muḥammad b. ʿAlī b. al-Ḥusayn b. ʿAlī b. Abī Ṭālib, known as Jaʿfar al-Ṣādiq (d. 148/765). Like other members of the ʿAlīd family, he lived in Medina.

2. On the authority of Mālik, on the authority of Abu'l-Zinād,[17] that [the Umayyad caliph] ʿUmar b. ʿAbd al-Azīz (r. 99/717–101/720) wrote to ʿAbd al-Ḥamīd b. ʿAbd al-Raḥmān b. Zayd b. al-Khaṭṭāb, who was at the time governor of Kufa: "Issue judgment on the basis of an oath accompanied by a single witness."
3. Mālik related to me that he heard that Abū Salama b. ʿAbd al-Raḥmān[18] and Sulaymān b. Yasār[19] were asked whether a judgment can be issued on the basis of an oath accompanied by a single witness. They both said: "Yes."
4. Mālik said: "The *sunna* regarding judgments based on an oath accompanied by a single witness is [as follows:] A judgment is made in the plaintiff's favor if he takes an oath accompanied by his witness. If the plaintiff declines to take the oath, the defendant is asked to take the oath, and if he does so, the claim against him is dropped. If the defendant declines to take the oath, the claim is confirmed against him."
5. Mālik said: "This [procedure] pertains only to property cases. It does not apply in cases of *ḥudūd*, marriage, divorce, manumission of slaves, theft or slander.[20] Should a litigant object that manumission belongs to the category of property cases, he is wrong, as the matter is not as he says. Otherwise, a slave could take an oath accompanied by a single witness, if he brings one forth, testifying that his master had freed him [and a judgment would be pronounced in the slave's favor]. It is true that if a slave claims some property, and has only one witness [to support his claim], he can take an oath, [in which case he] is confirmed in his right, like a free person."
6. Mālik said: "However, the *sunna* here (*ʿindanā*) is that if a slave brings forward a witness to testify that he was set free, his master is asked to take an oath that he did not free him, and if he does so the slave's claim against him is dropped."
7. Mālik said: "The *sunna* here is the same with regard to divorce. If a woman brings forward a witness to testify that her husband has divorced her, her husband is asked to testify that he has not divorced her. If he swears the oath, no divorce takes place."
8. Mālik said: "The *sunna* concerning cases of divorce and manumission when there is only a single witness is the same—namely, that the right to take the oath belongs exclusively to the husband [in divorce] or to the master of the slave [in manumission]. As manumission of slaves is

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[17] ʿAbdallāh b. Dhakwān Abu'l-Zinād (d. 131/748), a Medinese jurist.

[18] Abū Salama b. ʿAbd al-Raḥmān b. ʿAwf (d. 94/713 or 104/722), a Medinese jurist.

[19] Sulaymān b. Yasār (d. ca. 100/718), a Medinese jurist.

[20] *Ḥadd*, pl. *ḥudūd*, are crimes against religion sanctioned by punishments in the Qur'ān. These include unlawful intercourse, false accusation of unlawful intercourse, drinking wine, theft and highway robbery. Although theft and slander fall under the category of *ḥudūd*, Mālik prefers to mention them separately.

a *ḥadd* matter, the testimony of women is inadmissible.[21] [Manumission of slaves is a *ḥadd* matter] because the manumission of the slave means that [as a free man] his rights to his body and his property are established, and full *ḥadd* punishments can be imposed for and against him: if he commits adultery while in the state of *iḥṣān*[22] he is stoned, and if he kills a slave he is executed. Similarly, [the manumission] establishes rights of inheritance between himself and his heirs. [Against this view, an opponent] may argue that if a master manumits his slave, and is then pursued by a creditor who brings forward one male witness and two female witnesses to support his claim, judgment is given against the master of the slave, and the manumission of the slave may be revoked [in order to pay off the debt] if the master has no property except the slave. Thus, [the opponent is] inferring that the testimony of women is admissible in cases of manumission.[23] But the matter is not as the opponent says. Rather, this case resembles that of a master who manumits his slave and then is pursued by a creditor who wins his claim by taking an oath accompanied by a single witness, which may lead to the revocation of the manumission [in order to pay off the former master's debt].[24] It also resembles the case of a man who claims a debt from the former master of a slave, with whom he had frequent dealings and transactions; if the former master refuses to swear that he does not owe what the plaintiff claims, the plaintiff is asked to take the oath, and [if he does so] he is confirmed in his right, which also may lead to the revocation of the slave's manumission."

9. [Mālik] said: "[The opponent's example of revocation of manumission as a result of the testimony of women] also resembles the case of a man who marries a slave-girl, who then becomes his wife. When the master of the slave-girl comes to her husband and claims: 'You and a partner have purchased this slave-girl from me for so-and-so dinars,' and then the husband denies that, the master can bring forth one man and two women to

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[21] After demonstrating that manumission of slaves does not fall under the category of property cases, Mālik starts here a long digression into another procedural aspect of manumission cases—namely, that the testimony of women is also inadmissible.

[22] A person in the state of *iḥṣān* is a free person who concluded and consummated a marriage with a free partner. When a person in the state of *iḥṣān* commits adultery, he or she is subject to the punishment of execution by stoning.

[23] Mālik introduces here a hypothetical counterargument by an opposing jurist. Against Mālik's view, i.e., that women's testimony is inadmissible in cases of manumission, the argument of the opponent is that the testimony of women in property cases may lead to the revocation of an act of manumission; for example, if a man is unable to pay a debt, he may, in certain circumstances, be forced to sell his slaves after having manumitted them.

[24] Here, and in the following paragraphs, Mālik aims to refute his opponent's hypothetical argument that the testimony of women is sometimes admissible in manumission cases. Mālik presents cases where 'soft' forms of proof, such as the oath accompanied by a single witness, are admissible, even though the outcome of the litigation may indirectly influence the judgment in related *ḥudūd* cases, where such forms of proof are not admitted.

testify to this claim. The sale of the slave-girl is then confirmed. Therefore, [because the master of a slave-girl cannot marry her], she becomes forbidden to her husband and they are separated, even though the testimony of women is not admitted in cases of divorce."

10. Mālik said: "It is also like the case of a man who slanders a free person, an offense which carries a *ḥadd* punishment. But then one man and two women come forward and testify that the slandered person was actually a slave. [Since slander directed at a slave does not carry a *ḥadd* punishment], the *ḥadd* punishment is withdrawn. This is so despite the fact that the testimony of women is inadmissible in cases of slander."
11. Mālik said: "Another similar case in which the judgment diverges from the established *sunna* is that of two women [i.e., midwives] who testify that a child was born alive. Their testimony means that the child inherits, and his property is then passed on to his heirs if he subsequently dies. This is so despite the fact that the testimony of these two women is not supported by any male witness or by an oath, and despite the fact that this may involve large sums of gold, silver, livestock, gardens, slaves, and other assets. On the other hand, the testimony of any two women with regard to one silver dirham, or even less, does not affect anything and is not admissible unless it is accompanied by a male witness or by an oath."
12. Mālik said: "Some people hold that an oath accompanied by a single witness is inadmissible, basing their argument on the word of God, the Blessed and Exalted, and His word is the truth: 'And get two witnesses of your own men, and if there are not two men, then a man and two women, such as ye choose for witnesses.'[25] On the basis of this verse they hold that if the plaintiff does not bring forth one man and two women, his claim does not stand; he is not allowed to take an oath accompanied by his witness."
13. Mālik said: "In response to the person who holds this position one should reply: 'Let us consider the case of one man who claims some property from another man. Would not the one against whom the claim is made [either] swear an oath that the claim is false, in which case the claim would be dropped; or refuse to take the oath, in which case the plaintiff would be asked to swear an oath that his claim is true, and thus establish the validity of his claim against his opponent?' This is something about which there is no disagreement among anyone, anywhere. Ask our opponent on what grounds he accepts this procedure, and where he found it in the Book of God? If our opponent concedes this [procedure is not in the Qurʾān], then he has to concede [the validity of] an oath accompanied by a single witness, even if it is not in the Book of God, the Mighty and the Glorious. With regard to this, the established *sunna* is sufficient. But men sometimes like to know the reason for the correct view and where the proof lies. In what we have said here one may find clarification of what is obscure about this matter, if God wills."

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[25] Qurʾān 2:282 (translation by ʿAbdullah Yūsuf ʿAlī, *The Meaning of the Holy Qurʾān*).

Analysis

Let us examine first Mālik's sources of legal authority and their relationship with each other. In this excerpt, as throughout the *Muwaṭṭa'*, Mālik organizes his material in rough chronological order: the Prophetic *ḥadīth* come first, followed by non-Prophetic *ḥadīth*, and, finally, Mālik's own comments, either presented as his personal views or as his assessment of the legal norms in Medina. Although the Prophetic *ḥadīth* are first in order of exposition, Mālik does not endow them with exclusive authority. In the *Muwaṭṭa'* as a whole, the non-Prophetic *ḥadīth* are as numerous as the Prophetic *ḥadīth*, and are as instrumental in the formulation of the law.

The two Medinese Successors cited in paragraph 3, Abū Salamah b. ʿAbd al-Raḥmān and Sulaymān b. Yasār, were both considered to be part of the group of Medinese scholars collectively known as the "seven jurists." In the *Muwaṭṭa'* these scholars are often mentioned both as authorities in their own right and as an essential link in the chain of transmission leading back to the Prophet's era.

Ḥadīth concerning the deeds and sayings of Umayyad caliphs and governors occupy an important place in the *Muwaṭṭa'*. Mālik cites a directive from the Umayyad caliph ʿUmar b. ʿAbd al-ʿAzīz to his governor in Kufa, allowing for judgments on the basis of a single witness accompanied by the plaintiff's oath. This directive is part of a large body of Umayyad administrative practice reported in the *Muwaṭṭa'*, recording the judicial and legislative activity of Umayyad caliphs and governors until the reign of the Umayyad caliph Yazīd b.ʿAbd al-Mālik (r. 101–4/720–5). Mālik treated the Umayyad political authorities as full participants in the development of the law and its interpretation, often in dialogue with the jurists. In the example given here, the directive allowing for judgments on the basis of a single witness accompanied by the plaintiff's oath is cited with no further comment, undoubtedly because it supported Mālik's position. But there are many examples in the *Muwaṭṭa'* in which the caliphs approach the jurists for advice, or, alternatively, are reproached by jurists who object to a particular caliphal policy or judgment.[26]

After citing the relevant *ḥadīth* in support of judgments based on the plaintiff's oath accompanied by a single witness, Mālik explains the general principles regarding this procedure and its applicability. He limits

[26] See further, with examples, Dutton, *Origins*, 130–53; idem, "Juridical practice and Medinan *ʿamal: Qaḍā'* in the *Muwaṭṭa'* of Mālik," 1–21.

this procedure to property cases, excluding other types of litigation, like criminal law, family law and the manumission of slaves. Mālik argues that cases involving the manumission of slaves do not fall under the category of property cases, even though the slave may be considered as property. Therefore, a single witness accompanied by an oath does not constitute a proof in cases of manumission. Mālik declares that the legal practice in Medina is that a slave who seeks his freedom but brings forward only one witness is not allowed to swear that he has been manumitted; rather, the right to take the oath falls to his master.

Mālik then digresses at length and argues that the evidence required in manumission cases is as stringent as the evidence required in *ḥudūd* cases. The established *sunna* is that in manumission cases, not only is the testimony of a single witness insufficient, but also the testimony of women is inadmissible. A counter-argument against Mālik's position is that the testimony of women in property cases may lead to an act of manumission being revoked. For example, if a man is unable to pay a debt, he may be forced to sell his slaves and is not allowed to manumit them at will. But Mālik presents analogous property cases in which women's testimony is accepted, even though the outcome of this litigation may indirectly influence the judgment in criminal cases. In the same way, the testimony of professional female midwives on whether a baby was delivered stillborn may indirectly influence the division of inheritance, even though the testimony of women alone cannot constitute a proof in property cases.

Mālik uses some analogical reasoning in order to justify his position, but the authority on which he bases his formulation of the law is essentially the *sunna*. In the terminology of the *Muwaṭṭa'*, the *sunna* is the continuous practice of the Muslim community in Medina from the Prophet's lifetime up to Mālik's own. Mālik refers explicitly to the Medinese *sunna* to determine what happens if a plaintiff declines to take the oath, or whether a single witness accompanied by an oath constitutes a proof in cases of divorce and manumission of slaves. His discussion of the details of procedural law is grounded in the authority of the *sunna*, whether through his individual interpretation of the *sunna* or through the collective views in Medina.[27] The *ḥadīth* are that part of the *sunna* which grounds the practice of the community in its past; the term *sunna*, on the

[27] See Hallaq, *Authority*, 32; Turki, "Le *Muwatta'* de Mâlik, ouvrage de *fiqh*, entre le *hadîth* et le *ra'y*, ou Comment aborder l'étude du mâlikisme kairouanais au IV^{e}/X^{e} siècle," 18.

other hand, means, for Mālik, the continuous upright practice of the community, both in the past and in his own day.

Ultimately, the *sunna* provides the framework for the understanding of the Qur'ān, as is demonstrated in the final two paragraphs of the excerpt. While Mālik's non-Medinese opponnents argue, based on verses of the Qur'ān, that at least two witnesses are required in all cases, Mālik claims that not every judgment need be derived from the text of the Qur'ān. For example, all Muslims accept the possibility of determining ownership of property even if no witnesses are available, although this procedure is not mentioned in the Qur'ān. Muslims accept this judicial procedure—as well as judgments based on the plaintiff's oath accompanied by a single witness—because this is the *sunna*, and "the established *sunna* is sufficient." This does not mean that the Qur'ān is superfluous, either to Mālik or to the legal practice of Medina. Although the Qur'ān is not often quoted in the *Muwaṭṭa'*, Qur'ānic verses and terms provide the basic building blocks, and occasionally more than that, of what Mālik and the Medinese considered to be Islamic law. But Mālik interprets the text of the Qur'ān in the same way that he interprets *ḥadīth*, that is to say, against the background of the "*sunna* here"—the Medinese legal practice. Even when approaching the Qur'ān, Mālik prefers the evidence of legal practice as a guide to the interpretation of the text.[28]

For Mālik, the superiority of the Medinese legal norms is based on the association of the city with the community established by the Prophet only five generations previously. Mālik's belief in the superiority of Medinese practice is expressed in the final book of the *Muwaṭṭa'*, the "Miscellany Book," whose opening sections extol the merits of Medina. In the *ḥadīth* material cited here, the Prophet's rule in Medina endowed the city with sanctity just as Abraham sanctified Mecca. These *ḥadīth*s are not necessarily unique to Mālik's *Muwaṭṭa'*. Indeed, they are found in other collections, but their inclusion here is significant and drives home the point about the supremacy of the city.[29] The chapter on the merits of Medina is the ideological complement to the legal content of the body of the *Muwaṭṭa'*. This is a work that records the legal norms of a particular city; but the special status of this city means that its local norms should be universally applicable.

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[28] For a discussion of this passage, see Dutton, *Origins*, 162–3.

[29] Mālik, *Muwaṭṭa'* (Beirut, 2004), 381–5.

Mālik articulates the argument for the superiority of Medinese practice in his epistle to al-Layth b. Saʿd. The authenticity of this correspondence, which survives in a 3rd/9th century work, is suggested by its intriguingly intimate and personal tone.[30] Despite the friendly style, the letter conveys Mālik's dissatisfaction with his student's deviations from Medinese consensus:

> For all men (*al-nās*) are followers (*tabaʿ*) of the people of Medina. To it the Hijra was made and in it the Qur'ān was revealed, the lawful made lawful and the forbidden made forbidden. The Messenger of God, may God bless him and grant him peace, lived amongst them and they were present during the very act of revelation. He would tell them to do things and they would follow him, and he would establish *sunna*s for them and they would follow him, until God took him to Himself and chose for him what is in His presence . . . Therefore, if there is something which is clearly acted upon in Medina, I am not of the opinion that a different rule should be followed. That is because of the inheritance that [the Medinese] have; others are not allowed to claim [this inheritance] for themselves. Even if the people in the garrison cities (*amṣār*) were to say, "This is the legal practice (*ʿamal*) in our city," or "This is what those before us used to do," they would not have the same authority for that (i.e., their practice), nor would it be permissible for them in the way it is for [the people of Medina].[31]

Several early Islamic sources, one dating from the 3rd/9th century, report that one of the Abbasid caliphs was interested in making the *Muwaṭṭaʾ* into an imperial code, but that Mālik turned down his offer, arguing that regional differences had become too great to impose uniformity from above.[32] Although the authenticity of this account is suspect, it nevertheless reflects the difficulty of crystalizing Medinese norms into a universal Islamic law. In practical terms, during the second half of the 2nd century AH, Medina was becoming increasingly marginalized, both politically and intellectually. It was untenable for the Muslim communities extending from India to the far Maghrib, and incorporating a growing number of

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[30] See Brunschvig, "Polémiques médiévales autour du rite de Malik," 377–435.

[31] For the Arabic text, see ʿAllūsh (ed.), *Taqrīb al-madārik bi-sharḥ risālatay al-Layth b. Saʿd wa'l-Imām Mālik*, 37. See also the translation of this passage by Dutton, *Origins*, 37–8.

[32] The report first appears in a 3rd/9th century Andalusian source (Ibn Ḥabīb, *Kitāb al-Taʾrīj*, ed. J. Aguadé, 160). Schacht dismisses the report as absolutely fictitious (*EI*[2], s.v. "Mālik"). Crone and Hinds, and Muhammad Qasim Zaman, are less categorical (P. Crone and M. Hinds, *God's caliph*, 85–7; Zaman, "The Caliphs, the *ʿUlamaʾ*, and the Law: Defining the Role and Function of the Caliph in the Early ʿAbbasid Period," 6).

non-Arab converts, to continue to rely on the opinions and practices of one peripheral community, even if it had an illustrious past.

Al-Layth's reply to Mālik on the issue of an oath accompanied by a single witness is illustrative of the tension between Medina and new Islamic centers in the conquered lands outside of Arabia. While acknowledging that a single witness accompanied by an oath is accepted as proof in the legal practice of Medina, al-Layth declares that the Companions of the Prophet who immigrated to Syria, Egypt and Iraq never pronounced judgments on this basis. In what appears to be a direct response to a *ḥadīth* cited in the *Muwaṭṭa'*, al-Layth quotes the caliph ʿUmar b.ʾAbd al-ʿAzīz as acknowledging the regional differences between Medina and Syria. When he was governor in Medina, ʿUmar used to issue judgments on the basis of a single witness; but when he became caliph he found that the procedure was not accepted as binding in Syria. He eventually bowed to the authority of the local Syrian practice.[33]

The core of Mālik's legal methodology, reliance upon Medinese practice, came under attack from the proponents of more formal theories of jurisprudence. The weakness of the Medinese *sunna* was its elusiveness and fluidity. Mālik claimed to be merely a transmitter of Medinese *sunna*, but he was more selective than he cared to admit. As al-Layth b. Saʿd points out, the Medinese scholars were not always of one opinion, and had often changed their minds.[34] If Islamic law was to be universal law, al-Shāfiʿī (d. 204/820) would soon argue, the only feasible and consistent solution would be to ground the *sunna* in textual evidence, that is in valid *ḥadīth* traced back to the Prophet in verifiable chains of transmission. Processes that began in Mālik's lifetime, such as the writing down of *ḥadīth* and the growing importance of Prophetic *ḥadīth*, would lead to the eventual triumph of textual authority over the authority of communal practice.[35]

The *Muwaṭṭa'* is not as systematic, technical or comprehensive as treatises of Islamic jurisprudence written in subsequent centuries. It is instructive to compare the above-cited excerpt from the *Muwaṭṭa'* with

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[33] ʿAllūsh (ed.), *Taqrīb al-madārik*, 41.

[34] Al-Layth reminds his teacher that Ibn Shihāb al-Zuhrī used to issue conflicting opinions, and that some of the opinions of Rabīʿa b. ʿAbd al-Raḥmān were rejected by other scholars in Medina, including Mālik himself. See ʿAllūsh (ed.), *Taqrīb al-madārik*, 40.

[35] Hallaq, *Origins*, 102–22.

the corresponding chapters from the other authoritative text of the Mālikī school, the *Mudawwana* of Saḥnūn (d. 240/854). The first obvious difference is that the discussion in the latter work is many times longer and more exhaustive, while the *Muwaṭṭa'* gives only the general framework of the law. Second, although material in the *Muwaṭṭa'* is reproduced in the *Mudawwana*, the references to the *sunna* of Medina are usually dropped in favor of opinions attributed to specific persons, especially Mālik. For example, in the *Muwaṭṭa'* Mālik makes a general statement, evidently based on practice, according to which judgments based on the testimony of a single witness apply only in property cases, whereas Saḥnūn attributes the same view to seven named authorities from the generation of the Successors.[36] Similarly, Mālik records in the *Muwaṭṭa'* that "the *sunna* here is that if a slave brings forward a witness to testify that he has been set free, his master is asked to take an oath that he has not freed him," whereas Saḥnūn attributes this view to Mālik himself, through the formula, "'Mālik said: 'If a slave brings forward a witness. . .'."[37]

Wael Hallaq has observed that whereas in the *Muwaṭṭa'* Mālik strives to record Medinese practice, or at least presents himself as doing so, the foundational texts of the Mālikī school transform Mālik into the absolute *mujtahid* who is able to deduce the law directly from its sources.[38] It is true that the authority of the Medinese practice is not completely absent from the *Mudawwana*, and Ibn al-Qāsim is cited as saying that laws can be derived from the *ḥadīth* only if the latter is accompanied by a record of the legal practice of the early generations.[39] But, overall, in the generations that came after Mālik's death the real founders of the Mālikī school of law turned their eponym into an ideal authority, endowed with perfect legal knowledge and exceptional personal virtue. The later biographies of Mālik, composed by Mālikī scholars, would dwell on Mālik's dress and hairstyle, his personal courage, piety and honesty, and his meticulous transmission of *ḥadīth*.

Yet Mālik was a real jurist, not merely a trope on which later authority was grounded. His emphasis on the practice of the community as the ultimate guide in formulating Islamic law eventually gave way to the formal and text-based methodology associated with al-Shāfiʿī. It is

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[36] Saḥnūn b. Saʿīd al-Tanūkhī, *al-Mudawwana al-kubrā* (Cairo, 1906–7), 13:32.
[37] Ibid., 13:28. For more examples, see Hallaq, *Authority*, 35; idem, *Origins*, 159.
[38] Hallaq, *Origins*, 157–67.
[39] Saḥnūn, *Mudawwana*, 4:28, cited in Schacht, *Origins*, 63; Dutton, *Origins*, 49–51.

worth remembering, however, that during Mālik's lifetime this outcome was not yet guaranteed. Mālik's *Muwaṭṭa'* represents the legal culture of the early, small and closely bound Islamic community. That spirit would reverberate in the Islamic intellectual and legal tradition long after his death.

CHAPTER THREE

AL-SHĀFIʿĪ (D. 204/820)

Joseph E. Lowry

Introduction

Muḥammad b. Idrīs al-Shāfiʿī, a foundational figure in the early history of Islamic law, played central roles in the formulation of doctrine, in the development of legal hermeneutics, and, through his influence on students in Egypt and Baghdad, in the formation of one of the four recognized schools of legal thought (*madhāhib*, sg. *madhhab*) of Sunni Islam, which came to be named for him. Adherents of the Shāfiʿī school are found today in Egypt, Syro-Palestine, the edges of the Arabian peninsula, and around the Indian Ocean in East Africa, the west coast of India, and Indonesia and Malaysia. What sets al-Shāfiʿī apart from other jurists of the heroic age of Islamic law (approximately 750–850 CE) is the comparatively large corpus of writings that are preserved in his name. In these texts, perhaps for the first time in Islamic legal writing, there emerges a strong authorial voice, exhibiting a sustained concern to justify legal doctrine in abstract theoretical terms by formulating a theory of legal hermeneutics that emphasizes consistent and carefully articulated concepts of legal authority, epistemology, and techniques of textual interpretation. Of special significance is al-Shāfiʿī's insistence on the exclusive use of revealed texts as the sole sources of law, and within this framework, on the exclusive use of *ḥadīth*—short narratives of sayings or actions of the Prophet Muḥammad that function as precedents—as the sole legislative supplement to the Qurʾān. Al-Shāfiʿī's concern with the theoretical justification of legal doctrine and of techniques for elaborating such doctrine also led him to compose several independent works on legal hermeneutics, in addition to his voluminous writings on law.

Life

Reconstructing al-Shāfiʿī's biography is complicated by his enormous stature as a master of the religious law, which lends most accounts of his life

a decidedly hagiographic character. His fame led several later authors to devote independent biographies to him, and he also receives extensive treatment, stretching over many pages, in the most important works of Muslim prosopographical literature.[1]

Al-Shāfiʿī's birthplace is uncertain, but Gaza or ʿAsqalān in Palestine seems most likely. Other possibilities—Mecca, Medina, Yemen—may be extrapolations made by later authors on the basis of events from the subsequent course of al-Shāfiʿī's life. A member of the Prophet Muḥammad's tribe of Quraysh, al-Shāfiʿī grew up poor and orphaned, even though he was himself a distant relation of the Prophet, being descended from al-Muṭṭalib, brother of the Prophet's paternal great-grandfather Hāshim.[2] He first emerges on the legal scene in the Hejazi city of Mecca, where as a teenager he studied with that city's two most important teachers of law, Muslim b. Khālid al-Zanjī (d. 179 or 180/795 or 796) and Sufyān b. ʿUyayna (d. 196/811).[3] Al-Shāfiʿī is thus a late and perhaps the most important representative of a specifically Meccan school of legal thought—already eclipsed during his lifetime by developments in legal thought in Medina and Iraq—and he continued to cite his teachers al-Zanjī and especially Sufyān b. ʿUyayna as authorities in his later works.[4]

Possibly in his late teens (ca. 170/785?) al-Shāfiʿī moved from Mecca to Medina, where he studied for perhaps a decade. Medina preserved a direct connection to sacred history, being the site and then capital of the polity founded by Muḥammad and his immediate successors, and remembered for the short but highly idealized period of rule by the Prophet and the early caliphs (1–40/622–656). Like Mecca, Medina had a group of famous jurists who lived during the formative 2nd/8th century, foremost among

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[1] This chapter was written prior to the publication of Kecia Ali's *Imam Shafiʿi: Scholar and Saint* (Oxford: Oneworld, 2011), which provides a complete, thoughtful, and authoritative account of al-Shāfiʿī's life. For other discussions of his life and works, see my "Muhammad ibn Idris al-Shafiʿi," in M. Cooperson and S. Toorawa, eds. *Dictionary of Literary Biography*, 309–17, at 311. See also E. Chaumont's entries, "al-Shāfiʿī" and "al-Shāfiʿiyya" in *EI²*; J. Schacht, "Shāfiʿī's Life and Personality," 318–26; and, listing his works and followers, *GAS*, I:484–502. Additional information on his life and works can be found in Schact, *Origins* and in Khadduri, *Islamic Jurisprudence: Shāfiʿī's Risāla*.

[2] *EI²*, s.v. "al-Shāfiʿī" (Chaumont).

[3] On al-Zanjī see *GAS*, I:38, and J. van Ess, *Theologie und Gesellschaft*, 2:650–1. On Sufyān b. ʿUyayna, see *EI²*, s.v. "Sufyān b. ʿUyayna" (Spectorsky).

[4] On the early history of Meccan legal thought, see Motzki, *The Origins of Islamic Jurisprudenc*e and his concluding discussion, which focuses on al-Shāfiʿī, at 292–3.

whom was Ibn Shihāb al-Zuhrī (d. 124/742), legal advisor to the Umayyad government and teacher of several of al-Shāfiʿī's own teachers.[5]

Al-Shāfiʿī's most important Medinese teacher was Mālik b. Anas (d. 179/795), a student of al-Zuhrī's, and namesake of the Mālikī school of law (predominant in north and west Africa). A widely reported anecdote claims that al-Shāfiʿī had memorized Mālik's main work on legal doctrine, the *Muwaṭṭaʾ* ("The well-trod path"), before going to Medina. Upon his arrival in Medina, al-Shāfiʿī approached Mālik, who was notably unimpressed until al-Shāfiʿī began reciting the *Muwaṭṭaʾ* from memory, which led Mālik to agree to serve as his teacher. One may wonder whether Mālik's *Muwaṭṭaʾ* had achieved a fixed form by this time, but it is not at all impossible that al-Shāfiʿī had learned Mālik's doctrines in detail while still in Mecca. Mālik had developed an overriding principle of legal authority, namely that the current practice (*ʿamal*) of the inhabitants of Medina be viewed as a living embodiment of the past practice of Muḥammad and his immediate associates. It is tempting to think that the link forged by Mālik between the Prophet's lived practice and legal authority made a lasting impression on al-Shāfiʿī and contributed to his own insistence on Prophetic *ḥadīth*s as the exclusive juridical supplement to the Qurʾān. Along with the Meccan Sufyān b. ʿUyayna, Mālik is the most cited source of traditions in al-Shāfiʿī's writings.

After his initial studies in the Hejaz, for which a chronology is already difficult to establish, the details of al-Shāfiʿī's life become even more challenging to reconstruct. What can be said with certainty is that al-Shāfiʿī spent some time in Baghdad, and probably traveled to other cities in Iraq, such as Kufa. He probably also journeyed to Yemen, but the timing, details, and purpose of this trip are anything but clear.[6] On one or two occasions he may also have returned to the Hejaz; it seems that he owned property there.[7] If it is correct that he left Medina before 174–5/790 (though even this is conjecture), then there is a crucial period of more than two

[5] On early legal thought in Medina, see generally Schacht, *Origins*, and compare generally with Hallaq, *Origins*. On al-Zuhrī see *EI*[2], s.v. "al-Zuhrī, ibn Shihāb" (M. Lecker).

[6] Wadad al-Qadi has devoted an article to this important but obscure episode, "Riḥlat al-Shāfiʿī ilā al-yaman bayna al-usṭūra wa'l-wāqiʿa," in M.M. Ibrahim, ed., *Studies in Honour of Mahmoud Ghul*, 127–41.

[7] Al-Shāfiʿī's last will and testament is preserved in his massive *Kitāb al-umm* (Beirut, 1990), at 4:126, end of the *Kitāb al-waṣāyā*, and 6:196, in a collection of miscellaneous chapters that occur after the end of the chapter on apostasy, "*Bāb al-murtadd al-kabīr*"; they were separately edited and translated by Kern, "Zwei Urkunden vom Imām aš-Šāfiʿī," *Mitteilungen des Seminars für Orientalische Sprachen* 7 (1904), 53–68.

decades—during which he established himself as a scholar, wrote his first works, and acquired an important following in Baghdad—about which we can speak in only very general terms.

The sources are agreed that while in Baghdad, al-Shāfiʿī studied with Muḥammad b. al-Ḥasan al-Shaybānī, one of the two most important students of the great Kufan jurist Abū Ḥanīfa (d. 150/767); like al-Shāfiʿī and Mālik, Abū Ḥanīfa too lent his name to a Sunni school of law, which became predominant in Anatolia, Central Asia, and India, as well as some Arab lands under Ottoman rule. Al-Shaybānī served as a judge in al-Raqqa between 180/796 and 187/802, but returned to Baghdad in 187/803, after being removed from his position by the caliph Hārūn al-Rashīd and died two years later in Iran, in 189/805.[8] It is unclear exactly when al-Shāfiʿī studied with al-Shaybānī, but it was presumably during al-Shaybānī's time in Baghdad, so either before al-Shaybānī's appointment to the judiciary in 180/796, or during the brief period after 187/803 and before al-Shaybānī's death. Al-Shāfiʿī hardly cites al-Shaybānī as a source (in marked contrast to Mālik and Sufyān b. ʿUyayna), but in his writings he was very much polemically engaged with the approach of the early Ḥanafī jurists to legal reasoning.

At the turn of the 3rd/9th century, a rationalist trend in Muslim theology had evolved, led by a loose concatenation of theologians called Muʿtazila; shortly after al-Shāfiʿī's death this trend would find official acceptance with the Abbasid caliph al-Maʾmūn (r. 198–218/813–833) and especially his immediate successor al-Muʿtaṣim (r. 218–227/833–842). The Ḥanafīs were regarded as being at the forefront of the rationalist vanguard, at least among jurists, and became known as the *ahl al-raʾy* (roughly, "adherents of human judgment"), a label that eventually acquired polemical overtones suggesting insufficient reliance on revelation, and became opposed unfavorably to the label *ahl al-ḥadīth* ("adherents of the Prophet's traditions").[9] Although al-Shāfiʿī's attitude toward rationalism and the role of reason in the law is complex, his later writings contain unmistakable indications that he was generally opposed to the techniques of the early Ḥanafīs, and also to some of the more general theological conclusions of the rationalist theologians.[10] Interestingly, however, al-Shāfiʿī seems to

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[8] See *EI*², s.v. "al-Shaybānī" (E. Chaumont).

[9] On the formation of these two groups, see Melchert, "How Ḥanafism Came to Originate in Kufa and Traditionalism in Medina," 318–47; Hallaq, *Origins*, 74–8; and, generally, Schacht, *Origins*.

[10] His short treatise entitled *Ibṭāl al-istiḥsān*, "The Invalidation of *Istiḥsān*," is a polemic against a technique of reasoning identified with the early Ḥanafīs. In his *Risāla* he declares

have acquired a following of students in Baghdad who became known for their adoption of rationalist modes of argumentation in support of anti-rationalist doctrines.[11] Presumably al-Shāfiʿī taught these persons law, not theology, but, like so much else in al-Shāfiʿī's Baghdad period (or periods), it is difficult to reconstruct the course of events.

Whereas al-Shāfiʿī's studies in Medina and Baghdad can be dated in relation to the deaths of his teachers, we have a more precise idea about his move to Egypt. The historian of the early Muslim governors and judges of Egypt, Muḥammad b. Yūsuf al-Kindī (d. 350/961), tells us that al-Shāfiʿī arrived in Egypt in 198/814 in the company of ʿAbdallāh b. al-ʿAbbās, son of the newly appointed governor, al-ʿAbbās b. Mūsā b. ʿĪsā, a member of the Abbasid family.[12] The new provincial administration seems not to have found favor with the army, however, which promptly deposed the new governor's representative and reinstalled the previous governor, who had been imprisoned. As a result, al-Shāfiʿī was forced to retire briefly to the Hejaz before returning to Egypt, where he would settle down to a productive period of work and teaching.[13]

At the time, Egypt was a bastion of Medinese jurisprudence, and many followers of al-Shāfiʿī's teacher Mālik had settled there. Al-Shāfiʿī may have been viewed, initially, as another follower of Mālik, but it soon emerged that he differed from his teacher on many substantive points, as well as in regard to legal reasoning. Displeasure at al-Shāfiʿī's views appears in the form of anecdotes in al-Kindī's history in which al-Shāfiʿī is portrayed as a sower of discord.[14] Still, upon his return from the Hejaz, al-Shāfiʿī was given encouragement and material assistance in the form of a large loan from the wealthy and respected ʿAbdallāh b. ʿAbd al-Ḥakam (d. 214/829), himself a student of Mālik.[15]

The sources are reluctant to disclose how al-Shāfiʿī supported himself. Apart from the hint in al-Kindī of Abbasid patronage and the fact that he

himself a predestinarian (see, e.g., paras. 25, 43, 285 and 290 of Shākir's edition, for which see note 29 below); the Muʿtazila believed in Free Will. For a discussion of these and other passages, see my *Early Islamic Legal Theory: The Risāla of Muḥammad b. Idrīs al-Shāfiʿī*. See also Makdisi, "The Juridical Theology of al-Shāfiʿī: Origins and Significance of Uṣūl al-Fiqh," 5–47.

[11] See Melchert, *Formation*, 70–6, and van Ess, *Theologie und Gesellschaft*, 3:467–8, 4:195, 210.

[12] al-Kindī, *Kitāb al-wulāt*, ed. R. Guest, 154.

[13] Brockopp, *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and his Major Compendium of Jurisprudence*, 29.

[14] E.g., *Kitāb al-wulāt*, ed. R. Guest, 438.

[15] Brockopp, *Early Mālikī Law*, 27–8, and generally on al-Shāfiʿī's relations with this family, 27–33.

seems to have owned property in the Hejaz, how he fed himself and his household remains something of a mystery. The reticence of the sources in regard to scholarly entanglements in mundane affairs is a widespread problem confronting the historian, especially in this early period.

Although it seems that al-Shāfiʿī achieved some notoriety while in Baghdad, it was in Egypt that he composed those works of his that survive, and where he acquired the circle of students who would transmit his works, preserve his legal thought for posterity, and form the nucleus of the later Shāfiʿī school of legal thought, or *madhhab*. Three students in particular stand out among his disciples. Yūsuf b. Yaḥyā al-Buwayṭī (d. 231/846), al-Shāfiʿī's most important student in Egypt and likely successor, collected and edited many of his teacher's writings with a view to passing them on to posterity; his digest (*mukhtaṣar*) of al-Shāfiʿī's doctrines is preserved in manuscript.[16] Al-Buwayṭī's career was cut short, however, due to the Muʿtazili inquisition (218–ca. 236/833–850), in the course of which he was imprisoned and died in Baghdad.

The death of al-Buwayṭī left two much younger students as custodians of al-Shāfiʿī's legacy. Al-Rabīʿ b. Sulaymān al-Murādī (d. 270/884), a state-employed muezzin (prayer-caller), is the transmitter of all of al-Shāfiʿī's extant works. Historical sources remember al-Rabīʿ primarily as a memorizer and transmitter, not as a great legal mind, but there are some indications that he was an aggressive promoter of al-Shāfiʿī's doctrines, and also that he may have transmitted the materials gathered by al-Buwayṭī under his own name.[17] If al-Rabīʿ was, rightly or wrongly, remembered as a mere conduit for al-Shāfiʿī's legal thought, then his co-disciple, Ismāʿīl b. Yaḥyā al-Muzanī (d. 264/878), was viewed by some traditionalists as too rationalist in his inclinations.[18] Al-Muzanī may not have transmitted any of al-Shāfiʿī's works, but he compiled his own digest of the master's views, and there is also a preserved fragment of a work on legal hermeneutics that seems to be a self-conscious elaboration of al-Shāfiʿī's legal theory.[19] It

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[16] *GAS*, I:491. Al-Buwayṭī's *Mukhtaṣar* has recently been studied by Ahmed El Shamsy, "The First Shāfiʿī: The Traditionalist Legal Thought of Abū Yaʿqūb al-Buwayṭī (d. 231/846)," *Islamic Law and Society* 14 (2007), 301–41.

[17] On this problem, see Z. Mubarāk, *Iṣlāḥ ashnaʿ khaṭaʾ fī tārīkh al-tashrīʿ al-islāmī: Kitāb al-umm* (repr. Cairo: Maktabat Miṣr, 1991; orig. 1934); *GAS*, I, 486–7; Melchert, *Formation*, 80–1, idem, "The Meaning of *Qāla 'l-Shāfiʿī* in Ninth Century Sources," 277–301; and my own "Ibn Qutayba: The Earliest Witness to al-Shāfiʿī and his Legal Doctrines," in *ʿAbbasid Studies*, 303–19.

[18] See Melchert, *Formation*, 80–1, 87.

[19] See my "The Reception of al-Shāfiʿī's Concept of *Amr* and *Nahy* in the Thought of his Student al-Muzanī," 128–49. This work of al-Muzanī is edited by R. Brunschvig, "'Le Livre

should be noted that Ibn ʿAbd al-Ḥakam's son Muḥammad (d. 268/882) is also numbered among al-Shāfiʿī's important Egyptian students, though he seems to have parted ways with al-Shāfiʿī's other students after the master's death. It is interesting that this Muḥammad wrote a history of early Islamic Egypt and yet al-Shāfiʿī does not appear in it at all.[20]

Al-Shāfiʿī died in Egypt in 204/820, reportedly in the home of his friend, colleague, and benefactor Ibn ʿAbd al-Ḥakam, and was buried in the ʿAbd al-Ḥakam family plot. Although it is reported that he was attacked and fatally injured by a mob of angry Mālikīs, his last will and testament was drawn up about a year before his death, and the Mālikī Ibn ʿAbd al-Ḥakam was one of the executors.[21] It thus seems more likely that he died after a long illness. Today, a mausoleum and mosque mark his tomb and remain a site of popular pilgrimage.

Al-Shāfiʿī's students in Egypt remained important in the memories of later members of the Shāfiʿī school, but it is really with the career of the Shāfiʿī jurist Abū al-ʿAbbās b. Surayj (d. 306/918) that al-Shāfiʿī's followers become organized into what we know as the Shāfiʿī school of law. It is with Ibn Surayj that the school developed a more or less regular process for forming new jurists, and in which both standard reference works and a standard curriculum emerge. It was also with Ibn Surayj and his followers and their followers that the school's center of gravity moved from Egypt back to Iraq, whence it spread into Iran.[22] Despite al-Shāfiʿī's original insistence on the exclusive use of revelation, one wing of the school would become noteworthy for its connection with Ashʿari rationalist theology, as evidenced by the writings of such luminaries as al-Ghazālī (d. 505/1111), Fakhr al-Dīn al-Rāzī (d. 606/1209), and Sayf al-Dīn al-Āmidī (d. 631/1233). It is the scholars associated with this rationalist current in Shāfiʿism who would elaborate the science of legal theory for which al-Shāfiʿī is especially remembered in the history of Islamic legal thought.

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de l'ordre et de la défense,' d'al-Muzani," *Bulletin d'Etudes Orientales* 11 (1945–1946), 145–96. On al-Muzanī's importance for the curriculum of the early Shāfiʿī school, see Melchert, *Formation*, 102 and *EI*[2], s.v. "al-Shāfiʿiyya."

[20] The work in question is his *Futūḥ Miṣr*, ed. C. Torrey (New Haven: Yale University Press, 1922).

[21] See the references at n. 7 above.

[22] See Melchert, *Formation*, 87–115; W. Madelung, *Religious Trends in Early Islamic Iran*, ch. 3, "The Two Factions of Sunnism: Ḥanafism and Shāfiʿism," 26–38; and H. Halm, *Die Ausbreitung der šāfiʿitischen Rechtsschule*.

Scholarship

It is generally thought that al-Shāfiʿī first developed his own distinctive doctrines in Baghdad, where some of these may have been committed to writing. Although in general his extant writings are associated with his activities in Egypt, his Baghdadi doctrines are occasionally referred to when different from his Egyptian views, for example by al-Muzanī in his digest.

Al-Shāfiʿī's major work on law is called the *Kitāb al-umm*, a title that might be translated as "The Exemplar," or "The Source." A recent critical edition of the *Umm* runs to eleven volumes, including a volume for indices. The *Umm* is usually printed together with a number of shorter works that often pursue a particular polemical agenda against the doctrines of the early Ḥanafis or Mālikīs. In addition, al-Shāfiʿī's corpus contains several works devoted to legal hermeneutics, even though hermeneutical concerns frequently surface in those works whose chief concern is positive or substantive law. The four principal works dealing with legal hermeneutics are the *Jimāʿ al-ʿilm* ("The Summation of Knowledge"), *Ibṭāl al-istiḥsān* ("The Invalidation of Subjective Reasoning"), the *Risāla* ("Epistle") and the *Ikhtilāf al-ḥadīth* ("Contradictory Hadiths"), from which last have been taken those excerpts translated below. In comparison with the extant writings of his contemporaries—especially Mālik and al-Shaybānī—this is a very large corpus covering a wide range of topics in substantive law and legal theory. Al-Shāfiʿī's works on legal hermeneutics are of particular importance because they are the earliest such works that have survived in the Islamic legal tradition.[23]

Before briefly surveying al-Shāfiʿī's ideas about legal hermeneutics, it should be noted that questions have been raised about whether we are entitled to assume that the works ascribed to al-Shāfiʿī are in fact his. In a stimulating but controversial book, the late Norman Calder suggested that all the purportedly early writings on Islamic law that are preserved, including those of al-Shāfiʿī, came into being over a period of decades as the result of continuous elaboration, reworking, redaction, and editing by the disciples of those persons to whom such works are traditionally attributed. In other words, Calder argued, such works achieved their final form only gradually, and long after the deaths of their putative authors.

[23] On the *Umm* and associated writings, see now the comprehensive study by Mohyddin Yahia, *Šāfiʿī et les deux sources de la loi Islamique*.

Most responses to Calder (including my own) have found much to disagree with in this alternative account, but it is an argument that deserves to be taken seriously, and it has pushed the field to reexamine some basic assumptions (always a good thing).[24]

Finally, it would be remiss to fail to mention that there is also a collection (*dīwān*) of poetry ascribed to al-Shāfiʿī.[25]

Legal Thought: *Ikhtilāf al-ḥadīth*

In his extant writings, al-Shāfiʿī argued that Islamic law should be based exclusively on revelation, that is, on the Qurʾān and the corpus of Prophetic *ḥadīth*s. The latter, consisting of traditions reporting Muḥammad's behavior and pronouncements, collectively comprise the Prophetic Sunna. The Qurʾān is God's revelation for humanity in the form of scripture and the Prophetic Sunna contains Muḥammad's divinely inspired precedents. Al-Shāfiʿī insisted that the Prophetic Sunna be the exclusive supplement to the Qurʾān. In those (theoretically) rare cases in which the two revelatory sources of law (Qurʾān and Sunna) fail to supply a direct answer to a legal question, al-Shāfiʿī allowed jurists to analogize from them. Thus, he argued for a particular conception of legal authority—that it be exclusively revelatory, and that the role of human reason be limited. However, as sources of law, both the Qurʾān and the Sunna pose considerable problems of interpretation and application because of their doctrinal diversity and literary complexity. Accordingly, having circumscribed legislation within the two revelatory sources, al-Shāfiʿī was compelled to develop a hermeneutic (an interpretive strategy or method) that could help to sort through the difficult problems of interpretation posed by those sources. This he accomplished mostly by outlining a series of techniques for harmonizing apparent contradictions in the revelatory material.

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[24] Calder, *Studies in Early Muslim Jurisprudence*. Several reviews and articles have taken issue with Calder. Among these are my own "The Legal Hermeneutics of al-Shāfiʿī and Ibn Qutayba: A Reconsideration," *Islamic Law and Society* 11 (2004): 1–41; M. Muranyi, "Die frühe Rechtsliteratur zwischen Quellenanalyse und Fiktion," 225–41; H. Motzki, "The Prophet and the Cat: On Dating Mālik's *Muwaṭṭaʾ*," 18–83; M. Fierro, "Nuevas Perspectivas Sobre la Formación del Derecho Islámico," 511–23; and W. Hallaq, "On Dating Mālik's *Muwaṭṭaʾ*," 47–65.

[25] Ed. Zuhdī Yakan (Beirut: Dār al-Thaqāfa, 1961). Full details on manuscripts and editions of al-Shāfiʿī's works, up through 1967, can be found in *GAS* 1:486–90.

These techniques became an important part of later Islamic legal theory, though the earlier view of scholars—both modern Western scholars and some pre-modern Muslim jurists—that al-Shāfiʿī was the founder of the science of Islamic legal theory (*uṣūl al-fiqh*)—no longer seems tenable.[26] What can be said is that al-Shāfiʿī's argument that the Sunna be the exclusive supplement to the Qurʾān had a decisive impact on all subsequent Islamic legal thought, and his attempt to spell out a precise methodology for interpreting those two sources, including his technical terms, was highly influential.

The following translation consists of excerpts from what may be al-Shāfiʿī's final work, the *Ikhtilāf al-ḥadīth*, whose title may be translated as "Inconsistent (or Contradictory) *Ḥadīth*s."[27] Like his other works on legal theory, it tackles problems of authority and epistemology (arguing for the importance of Prophetic *ḥadīth*s as a means for knowing the law) and hermeneutics (explaining how to interpret seemingly inconsistent *ḥadīth*s). In comparison especially with his *Risāla*, al-Shāfiʿī's other works on legal hermeneutics, including the *Ikhtilāf*, are understudied,[28] but they remain, nonetheless, critical documents for the early history of Islamic legal thought.

The *Ikhtilāf* begins with an introduction in which al-Shāfiʿī lays out his case for the authority of the Prophetic Sunna, briefly explains the interpretive difficulties that arise from such texts, and outlines some possible interpretive approaches. In the remainder of the work, he examines a large number of discrete legal problems and applies the various interpretive approaches to them, in an effort to show how to go about the difficult task of legal interpretation in cases in which applicable *ḥadīth*s are apparently contradictory. The following translation consists of excerpts from al-Shāfiʿī's introduction to the work, covering key passages concerning the importance of the Prophetic Sunna (authority and epistemology) and the outline of interpretive difficulties and approaches (hermeneutics). I have divided the text into paragraphs and numbered the paragraphs to make it easier to follow al-Shāfiʿī's arguments. I now give a summary outline of the main ideas in the translation.

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[26] See Hallaq, *A History of Islamic Legal Theories*, 30–5.

[27] See Schacht, *Origins*, Appendix I, 330, for a chronology of al-Shāfiʿī's writings based on internal citations.

[28] As pointed out by Chaumont, *EI*[2], s.v. "al-Shāfiʿī"; see also A. Musa's recent study and translation of the *Jimāʿ al-ʿilm, Ḥadīth as Scripture: Discussions on the Authority of Prophetic Traditions in Islam.*

Summary

In the translated portion of this text, Shāfiʿī argues that *ḥadīth*s from Muḥammad are an authoritative source of law along with the Qurʾān, and that in the absence of a relevant provision in the Qurʾān, one looks to such pronouncements of the Prophet (para. A). This is a fundamental axiom, perhaps *the* fundamental axiom, of Islamic jurisprudence. He also argues that *ḥadīth*s transmitted by a lone individual in Muḥammad's generation are acceptable, and that there is no minimum number of parallel transmitters that is required to guarantee the authority of Prophetic *ḥadīth*s. In making these arguments, al-Shāfiʿī relies heavily on an extended analogy with testimony by witnesses in legal proceedings. Such testimony, he argues, must be given legal effect, and its legal effect does not depend on the number of witnesses, which differs according to the kind of proceeding in which the witnesses testify (paras. B, D, E and F). Moreover, even though a witness, like a *ḥadīth* transmitter, might be untrustworthy, absent specific information to this effect, the information conveyed by that person must be taken at face value (para. C). In general, the difference between widely transmitted and singly transmitted *ḥadīth*s corresponds to the difference between basic rules of law that everyone must know and more arcane rules that are the preserve of legal specialists (para. F). Al-Shāfiʿī then uses several historical anecdotes to show that the early Muslims accepted legal and political pronouncements from Muḥammad that were transmitted by lone individuals (paras. G-J). Finally, he argues that Prophetic *ḥadīth*s are completely authoritative and outweigh competing sources of authority (except the Qurʾān, para. K). In addition to his stress on the importance of revelation, al-Shāfiʿi also refers to "consensus" (*ijmāʿ*, para. B), an important concept in Islamic legal hermeneutics. He seems to believe that consensus consists of the shared opinion of a relevantly large number of scholars who lived in the past concerning an interpretation of a passage in a revealed text, namely Qurʾān or Sunna.[29]

In the second part of the translation, al-Shāfiʿī discusses the problems of and solutions to interpretive difficulties raised by the use of the Qurʾān and *ḥadīth*s as sources of law. He argues that the Qurʾān was revealed

[29] For a stimulating discussion, with a different view, see N. Calder, "*Ikhtilāf* and *Ijmāʿ* in Shāfiʿī's *Risāla*," 55–81. On al-Shāfiʿī's ideas about consensus more generally, see my *Early Islamic Legal Theory*, 319–57.

in Arabic, a language rich in expressive possibilities, and that the recipients of that revelation (the Arabs) were familiar with this aspect of Arabic (para. A). He also argues that the Qurʾān compels obedience to the Prophet in the form of compliance with Prophetic *ḥadīth*s (para. A). This is because the Sunna clarifies, but never contradicts, the Qurʾān (para. B). Apparent contradiction can arise, however, and although one should strive to construe texts in a such a way as to avoid it (para. C), it can also happen that one text abrogates another (para. D). Apparent contradictions are sometimes seen between *ḥadīth*s, but these are illusory and are made to disappear with appropriate interpretive techniques (para. E). Finally, in deciding between two inconsistent *ḥadīth*s, one can choose between them on the basis of the relative probity of their transmitters, just as in the case of witness testimony (para. F).

Note on the Text

Al-Shāfiʿī's main work on law, the *Kitāb al-umm*, was published several times in Egypt in the early 20th century by the Emiri press in Būlāq. These printings included all of al-Shāfiʿī's extant shorter writings, among them the *Ikhtilāf al-ḥadīth*. Of these printings, the 7-volume edition of 1321/1903 came to be widely used, was reprinted in the 1960s in Egypt, and was also used as the basis of subsequent modern printings. However, it was not until 2001 that Rifʿat Fawzī ʿAbd al-Muṭṭalib produced a critical edition of the *Umm* (11 vols., al-Manṣūra, Eg.: Dār al-Wafāʿ).[30] This edition of the *Umm* also contains the first truly critical edition of the *Ikhtilāf al-ḥadīth*, in volume 10. The *Ikhtilāf* was first printed on the margins of the seventh and final volume of the Būlāq editions of the *Umm*. It appears in a somewhat

[30] In 1940 a critical edition of the *Risāla*, al-Shāfiʿī's other main work on legal theory, was made by the Egyptian scholar A.M. Shākir (Cairo: al-Ḥalabī). The *Risāla* appears in volume one of ʿAbd al-Muṭṭalib's edition of the *Umm*. It had previously been printed as volume one of the 1321/1903 Būlāq edition of the *Umm*, but omitted in many later reprintings. The *Risāla* has also been translated into English by M. Khadduri (Baltimore: Johns Hopkins University Press, 1961; repr. Cambridge: Islamic Texts Society, 1985), but, though Khadduri's is a worthy initial effort to make an important text available to English-reading audiences along with a useful introduction and notes, it is now outdated. There is also a recent French translation by L. Souami, *La Risāla: les fondements du droit musulman* (Paris: Sindbad, 1997). Portions of the *Risāla* have also been translated by K. Semaan, *Ash-Shāfiʿī's Risāla: Basic Ideas* and P. Rancillac, "La IIe Partie de la Risāla d'al-Shāfiʿī (introduction et traduction)," *Mélanges de l'Institut Dominicain d'études Orientales du Caire* 11 (1972), 127–236. My new translation of the *Risāla*, with facing Arabic, is now available in the Library of Arabic Literature, published by New York University Press, in 2013: *The Epistle on Legal Theory*.

more reader-friendly form in a modern type-setting of the text of the old Būlāq edition of the *Umm*, no longer relegated to the margins (Beirut: Dār al-Fikr, 1990, 8 vols. in 5, at 8:586–679). It has been separately published, but not properly edited, by ʿĀmir Aḥmad Ḥaydar (Beirut: Mu'assasat al-Kutub al-Thaqāfīya, 1985). An edition on the basis of late Egyptian manuscripts was also made by Muḥammad Aḥmad ʿAbd al-ʿAzīz (Beirut: Dār al-Kutub al-ʿIlmīya, 1986), but it is not definitive and does not always preserve the best readings. I was not able to obtain a copy of the critical edition of ʿAbd al-Muṭṭalib until after I had prepared this translation, which is based on the modern 8-volume Beirut printing and the version published by Ḥaydar. However, I have indicated the location in all of the above editions of the passages that I have translated in a chart at the end of this introduction.

As for the translation itself, the paragraph divisions are my own. I have tried to keep notes to a minimum, but inevitably some matters require clarification. I have felt free to add phrases and words that are not found in the original to make the text read more smoothly or to make the argument easier to follow. I have also occasionally indicated underlying Arabic terms in square brackets ([ ]). Note that the paragraphs in my translation are non-contiguous in the original text. Because my translation aims to emphasize al-Shāfiʿī's principles of legal interpretation, I have omitted the pious benedictions throughout, though in so doing I do not mean to suggest that piety centered on the figure of Muḥammad is unimportant.

Location of Translated Passages in Editions of the *Ikhtilāf al-ḥadīth*

	Būlāq, mg. of v. 7	Beirut, v. 7	Ḥaydar	ʿAbd al-ʿAzīz	Muṭṭalib, v. 10
I.(A)-(I)	2	587	35	12	5
I.(J)	13, l. 17	589, l. 26	41, l. 7	16, l. 15	12, l. 5
I. (K)	19, l. 8	591, l. 2	44, l. 2	20, l. 12	15, l. 11
II.(A)	38, l. 17	595, l. 6	54, l. 5	29, l. 25	28, l. 10
II.(B)	41, l. 26	595, l. 29	56, l. 5	31, l. 16	30, l. 11
II.(C)-(F)	56, l. 27	599, l. 4	64, l. 14	39, l. 21	40, l. 16

Selections from the Introduction to al-Shāfiʿī's Ikhtilāf al-Ḥadīth

[*Authority of Reports from the Prophet and of Singly Transmitted Reports*]

I. (A) God placed his Messenger in a position to clarify what God obligated His creation to do both in His Book and through His Prophet. If the

obligation that God imposed by means of His Prophet is not expressed by an explicit text [*naṣṣ*] in God's Book, then God made clear in His Book that His Messenger guides to the straight path, the path of God.[31] Thus, He obligated His servants to obey His Messenger and commanded them to adopt what he brought them, and to observe the prohibitions that he imposed.[32] God's imposing of this obligation on everyone who actually saw His Messenger and on those thereafter until the Day of Judgment is one and the same, in the sense that it is incumbent on everyone to obey him. Anyone who is remote in time from beholding God's Messenger cannot know the commandment of God's Messenger except by means of a report from him.

(B) God has imposed on His servants certain limits of behavior [*ḥudūd*][33] and clarified for them certain rights [*ḥuqūq*] between and amongst them as well. He has indicated in regard to these legal rights that his servants, as parties to legal proceedings, are to have things recovered from them, or to recover things for themselves, by means of testimonies. Such testimonies are reports [*akhbār*]. He indicated in His Book, through His Prophet, that there are four witnesses in cases involving adultery, and commanded that in cases involving debts there be two witnesses, or one male witness and two female witnesses, and also that there be two witnesses in cases involving testamentary bequests.[34] There are, besides these, rights affecting people in regard to which the number of witnesses is not mentioned in the Qurʾān, such as in cases of homicide and other matters. In these, the number of witnesses is taken from a Sunna or consensus [*ijmāʿ*]. Thus it came to be adopted, according to the opinion of most scholars, that capital punishment would be imposed in cases other than adultery, and also amputation in cases of theft, and that rights would be exercised in all manner of matters by means of two witnesses. They did not make this rule by means of an analogy from adultery cases.[35] It also came to be the case that property in general

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[31] The last part of this sentence refers to Q 42/al-Shūrā:52, in which it is said that Muḥammad will guide (others) to a "straight path" (*ṣirāṭ mustaqīm*; see also Q 23/al-Muʾminūn:73). Usually it is God who is said in the Qurʾān to guide people to a straight path (*ṣirāṭ mustaqīm*), as in Sura 1/al-Fātiḥa. In regard to the first part of the sentence, it must be borne in mind that God imposes all divinely-inspired obligations on humanity by means of the Prophet Muḥammad, whether in the form of *ḥadīth*s or the Qurʾān. Several times in the course of this discussion, al-Shāfiʿī mentions that the Qurʾān is revealed through Muḥammad, doubtless to underscore Muḥammad's parallel function in regard to both Qurʾān and Sunna, and to emphasize that the two sources are of functionally equal authority.

[32] See, e.g., Q 3/Āl ʿImrān:32.

[33] The limits are the so-called *ḥudūd*, a word that early on came to refer specifically to Qurʾānic penal laws (theft, unlawful sexual activity, false accusations of adultery, and "brigandage," *ḥirāba*), but that is used in the Qurʾān mostly to refer to matters of marriage and family law. See *EQ*, s.v. "Boundaries and Precepts" (R. Kimber).

[34] See Q 24/al-Nūr:13, 2/al-Baqara:282, and 5/al-Mā'ida, respectively, for these rules.

[35] That is, the rules just referred to are based on Prophetic *ḥadīth*s, not on an analogy from the Qurʾān's rules specifying how many witnesses are required in cases involving unlawful sexual intercourse. See Q 4/al-Nisāʾ:15 and Q 24/al-Nūr:4, which call for four witnesses.

would be recovered by means of one male witness and two female witnesses because of God's mention of them in regard to debts, which are a species of property.[36] (We, however, prefer that property be recovered by means of an oath and one witness, on the basis of the Sunna of God's Messenger. We also prefer that the right of compurgation [*qasāma*] become obligatory by means of indications that we have explained elsewhere—even though there be no witness along with those indications—on the basis of a report from God's Messenger.)[37] The reports from God's Messenger that God has imposed as obligations are given effect in their capacity as reports [*muʾaddā khabar*^{an}], just as testimonies are given effect in their capacity as reports.

(C) God also stipulated in regard to witnesses that they be possessed of good character, being persons of whom we approve.[38] What is obligatory is that the report of someone, in regard to something that entails a legal judgment, not be accepted unless that person be of good character in himself, and approved in regard to his reporting. It is quite clear that when God imposes on us the obligation to accept the testimony of persons of probity, He makes us responsible for assessing that probity as we perceive it, according to how it appears to us, since we cannot know what others keep hidden from us.

(D) Thus, when God subjected us to the obligation to accept witnesses on the basis of probity as we perceive it,[39] and the Sunna indicates that legal judgments should be given effect on the basis of their testimonies, and their testimonies are reports, He indicated that the acceptance of what they said, and of their varying numbers in various kinds of proceedings, is a duty of religion [*taʿabbud*]. This is so because there is no number of witnesses such that there is not among people in general a greater number than it, and accepting them[40] notwithstanding their variations in number is acceptable for several reasons—as I have already described—as found in a prooftext, or Sunna, or an opinion of the majority of scholars. It is not necessarily the case that what the witness attests to and testifies to, and on the basis of which testimony we come to a definitive judgment, constitutes our correct perception [*iṣāṭa*] of the objective truth in regard to what is hidden. Rather, it is a

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[36] Al-Shāfiʿī refers here again to Q 2/al-Baqara:282.

[37] *Qasāma* is a procedure to be followed when a likely homicide victim is found in a particular locale whereby the inhabitants of that locale are required to take an oath. See Schacht, *Introduction*, 184. In al-Shāfiʿī's view the *qasāma* procedure becomes applicable when circumstantial evidence suggests that the victim might have died as a result of foul play, a view that rests on a precedent from the Prophet involving the suspicious death of one ʿAbdallāh b. Sahl. See *Kitāb al-umm*, (Beirut, 1990), 6:96–97 ("*al-Qasāma*"). For further information on *qasāma*, see P. Crone, "Jāhilī and Jewish Law," 153–201; D.S. Richards, "The *qasāma* in Mamlūk Society: Some Documents from the Ḥaram Collection in Jerusalem," 245–84; and R. Peters, "Murder in Khaybar: Some Thoughts on the Origins of the *Qasāma* Procedure in Islamic Law," 132–67.

[38] See, e.g., Q 65/al-Ṭalāq:2, in regard to divorce.

[39] See Q 2/al-Baqara:282.

[40] The Cairo edition suggests, plausibly, that the word *fī* in this sentence is a later addition, and I have therefore omitted it.

truth according to appearances, according to our perception of the truth of the report, even though a mistake in it be possible.

(E) In all of this is something that points to the obligation imposed on us to accept reports from God's Messenger.[41] The number of persons who accept his report from him is not taken into account except by reason of one of the indications according to which we accept a certain number of witnesses.[42] Thus, we have seen an indication from God's Messenger that the report of a solitary individual [*khabar al-wāḥid*] be accepted and so we adhere to the acceptance of such a person's report—though God knows best—if the person transmitting the report is veracious, just as we adhere to the acceptance of a certain number of persons, as I previously described, in regard to testimony.[43] Indeed, the acceptance of a solitary individual's report from Muḥammad is more strongly justified in terms of indications from Muḥammad and, moreover, by the fact that I know of no disagreement by any of the past scholars after the generation of God's Messenger, or their followers, up until today, whether in the form of an explicitly formulated revealed report [*khabar naṣṣ*] or a rational inference [*dalāla maʿqūla*] transmitted from them concerning the acceptance of the number of witnesses in regard to some of those matters for which we accept witnesses. I have written in the book *Jimāʿ al-ʿilm*[44] something to indicate what I have here described, which makes repetition of much of it in this book of mine superfluous. I have repeated only some general arguments [*jumal*] from it to show those who have not studied and retained the book *Jimāʿ al-ʿilm* what underlies it, God willing.

(F) If someone says, "Are reports from God's Messenger one kind only or more?" one replies: The report from God's Messenger is of two kinds. The first is the report of a large group [*ʿāmma*], from another large group, from the Prophet, which entails that worshippers fulfill the obligation imposed thereby by means of words and deeds, and have obligations fulfilled in their

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41 It is possible that the two sentences that end the preceding paragraph and begin this one should be divided differently than I have done. One could read them thus: "Rather, it is a truth according to appearances, according to our perception of the truth of the report. Even though a mistake be possible in it, in all of this is nevertheless something that points to the obligation imposed on us to accept reports from God's Messenger." Al-Shāfiʿī's point remains about the same whichever reading one adopts.

42 That is, one knows how many transmitters are required in the case of *ḥadīth*s in the same way that one knows how many witnesses are required: from the Qurʾān, from *ḥadīth*s themselves, and from the opinions of jurists. He wants to argue that a *ḥadīth* transmitted by just one person from the generation of Muḥammad is valid.

43 This is one of the major points that al-Shāfiʿī wishes to make: a *ḥadīth* that is transmitted by one person in the generation of Muḥammad's Companions—the solitary or non-recurrent report, *khabar al-wāḥid*—constitutes valid and binding legal authority.

44 This short work focuses on many of the same issues that are discussed in the *Ikhtilāf al-ḥadīth*, and is traditionally printed along with al-Shāfiʿī's other short works at the end of the *Umm*. Schacht dates it to ca. 814 (between 198 and 199 AH, *Origins*, Appendix I, 330. The standard edition of the *Jimāʿ al-ʿilm* is by A.M. Shākir (Cairo: Maṭbaʿat al-Maʿārif, 1940) and it has been translated by Musa (see the reference at n. 28 above).

favor with regard to their persons and their property.[45] This is something ignorance of which is unknown. What is incumbent on scholars and laypersons alike is that they do these things equally, because each is charged with it, like the number of prayers, the fast of Ramaḍān, the outlawing of sexual immorality, and the fact that God has a claim against them for some of their property. The second is the special report concerning specialized rulings [*khabar khāṣṣa fī khāṣṣ al-aḥkām*].[46] Laypersons are not charged with this and they do not have to carry out most of it whenever the first type of report presents itself.[47] Rather, only those whose number is sufficient [*man fihi al-kifāya*] and who are directly concerned with such special matters, not laypersons in general, are charged with that. Such things include, for example, what they do during prayer in the way of inattentiveness that would necessitate the additional prostration to make up for such inattention and what would not necessitate such a prostration, or what does and does not invalidate the pilgrimage, or what does and does not require a sacrifice offering [*badana*] in Mecca, among the various things that one does in regard to which there is no explicit passage in the Book.[48] Such things make incumbent on scholars (though God knows best) that they accept the report of a veracious person on the basis of his veracity.[49] It is not allowed for them to reject that just as it is not possible for them to reject the number of witnesses whose testimony is accepted. This holds so long as the person in question is, in their view, veracious, according to appearances, as is the case in regard to that about which witnesses testify.

(G) Whoever raises an objection in regard to any aspect of accepting the report of a lone individual is subject to a counter objection concerning the acceptance of a certain number of witnesses, who are not described in an explicit scriptural proof text or Sunna, such as the number of witnesses for homicide and other matters, God willing.

(H) If it is said, "Where, then, is the indication of the validity of the report of the lone individual from God's Messenger?" one replies to him, God willing: People used to face Jerusalem while praying, then God turned them

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[45] In other words, these obligations upon Muslims involve speech and acts, and sometimes also result in their favor, in regard to their persons and property. This last phrase seems to refer to recoveries in legal proceedings wherein financial or corporal penalties are imposed.

[46] The term *khabar al-khāṣṣa* is also used in the *Risāla* (Cairo, 1940; repr. 1979), at, e.g., paras. 967, 998. The term *khāṣṣa* itself is not free from ambiguity in this context and could refer (1) to the specialists who interpret such reports, (2) to the specialized doctrinal information contained in the report, or even (3) to the epistemological difficulties caused by the fact that the report is that of a lone transmitter, *khabar wāḥid*. These differences are important, but also subtle, and do not really affect the main thrust of Shāfiʿī's argument.

[47] Ḥaydar's text has *lam ya'ti aktharahu ka-mā jā'a al-awwal*; the Beirut edition has *kullamā jā'a al-awwal*, which I have used.

[48] In other words, these are all technical matters of ritual worship that (1) rarely arise in the lives of ordinary believers and (2) are the subject of the specialized rules and scholarly expertise.

[49] Because the rules in question are often found in the reports of lone transmitters.

towards the Sacred House in Mecca. Someone came to the inhabitants of Qubā'[50] while they were praying and informed them that God had revealed to His Messenger a scriptural passage and that the direction of prayer [*qibla*] had been transferred to the Sacred House, so they turned towards the Kaʿba while they were praying.[51] Also, Abū Ṭalḥa[52] and a group of people were drinking date wine [*faḍīkh busr*] once, no intoxicating beverages having been outlawed at that time, and someone came to them and informed them that wine [*khamr*] had been outlawed.[53] They thereupon ordered some people to break the jars containing that drink of theirs. There is no doubt that they would not have introduced such an innovation without attributing it to God's Messenger, God willing.

(I) If accepting the report of someone who, considered veracious by them, informed them of something, were among those things not allowed for them, that would be as if God's Messenger had said to them, "You had a prayer-direction [*qibla*] and it was not for you to turn away from it—since I was present among you—unless I informed you personally, or a group, or some other number of informants," which he would have identified for them. He would have informed them that authority would have been established for them by the like of it, and not by less than that, if it were the case that such authority were not established by means of one person. Iniquity may not be attributed to God's Messenger, or to a scholar [*ʿālim*]. Yet, the pouring out of what is lawful is a form of iniquity,[54] so if authority had not also been established for them by means of the report of the person who informed them of the outlawing of something, that would be as if God's Messenger had said, "Something was lawful for you and it was not for you to declare it wicked [*ifsāduhu*] unless I informed you that God outlawed it, or until a certain number of persons comes to you"—which he then would have defined for them—"informing you on my behalf of its having been outlawed."

(J) As for whoever claims that authority is not affirmed by means of the solitary, veracious reporter for those whom he informs, what do such persons say about Muʿādh,[55] when God's Messenger sent him to the people of

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[50] A southern suburb of Medina.

[51] The change in prayer direction is thought to have occurred in the year 2/624, shortly after the emigration (*hijra*) by the Prophet and his followers from Mecca to Medina.

[52] One of the Prophet's Companions.

[53] Many jurists hold that wine was once lawful and only later outlawed. Q 4/al-Nisā':43 suggests that wine is licit, but that intoxication vitiates an otherwise valid prayer. Q 5/al-Mā'ida:90 declares wine an abomination. Somewhere between the two, Q 2:al-Baqara:219 holds that wine (like certain gambling activities) contains both benefit and sin, but that the sin is greater than the benefit. The change in the legal status of wine is adduced as an instance of abrogation (*naskh*).

[54] That is, it would have been iniquitous to pour out the date wine if it had indeed been lawful to consume. The fact that it was poured out shows, however, that the change in its legal status—to unlawful in this case—could validly be determined on the basis of a report from a lone individual.

[55] Muʿādh b. Jabal, a Companion of the Prophet who was sent to be governor of Yemen, is famous in legal history for the (probably fictional) story of his promise to the Prophet to

Yemen as governor [*wālī*] and to battle those who opposed him? He summoned people who had not met the Prophet to have alms taken from them and to other things, and when they refused he fought them. Those among them who had accepted Islam fought alongside him, by order of God's Messenger. For those who fought with him, or for most of them, all they had was their perception of Muʿādh's veracity in regard to the fact that the Prophet had ordered him to fight those who opposed him, since they were obedient to God by assisting Muʿādh and deeming him truthful in what he reported about the Prophet. Indeed, authority also became established for those who rejected what Muʿādh brought them inasmuch as Muʿādh killed them, they being refuted and Muʿādh being obedient to God. And what would they say about those whom God's Messenger sent in his armies and detachments to those who were sent to, summoning them to Islam or to payment of the poll-tax, such that if they refused, they fought them? Were the commanders of the army and of the detachment, and the troops and the detachments themselves, obedient to God in regard to those whom they battled, and were not those who refused, who had been summoned, refuted? Did his detachments not consist of ten persons, or more or less? If someone claims that the persons to whom Muʿādh and the commanders of the detachments were sent were refuted by means of Muʾādh's and the commanders' report, then he has claimed that authority is established by means of the lone individual's report. If, on the other hand, he claims that authority was not established for them, then he has expressed a monstrous opinion.

(K) The report from God's Messenger is self-sufficient and requires nothing else. Other things do not increase its authority if they agree with it and neither do they impugn it if they are contrary to it. Indeed, all people have need of him and of reports from him, and he is to be followed, and does not follow. If the ruling of one of the Companions of God's Messenger contradicts it, then it is incumbent on people to have recourse to the report from God's Messenger and to reject what contradicts it.

[*Brief Survey of Hermeneutical Problems and Techniques Affecting Prophetic Reports*]

II. (A) God explained to His creation that He revealed His Book in the language of His Prophet, and it is the language of his people, the Arabs.[56] Thus, He addressed them in their own language using the concepts of their language. Among the concepts in their language with which they are acquainted is that they express something in unrestricted language intending thereby something unrestricted, or they use unrestricted language intending thereby

adjudicate according to the Book of God, or the Sunna of the Prophet, or to use his own judgment (*ijtihād al-raʾy*), in that order.

[56] See, for example, Q 16/al-Naḥl:103.

something restricted.[57] God indicated to them what He intended in that regard in His Book, and by means of His Prophet, and He explained to them that whatever they accept from His Prophet they accept from Him, on the basis that He has imposed the obligation to obey His Messenger in more than one place in His Book.[58]

(B) Thus the Sunna of God's Messenger is set up along with the Book of God as a means of clarifying, on God's behalf, the details [*ʿadad*][59] of the obligations that He imposed, like the clarification of whether, by His revelation of unrestricted language, He intended something unrestricted or restricted, and of what He revealed as an obligation, etiquette, an expression of mere permissibility, or general guidance [*farḍ wa-adab wa-ibāḥa wa-irshād*].[60] It is not[61] the case that something from the Sunna of God's Messenger contradicts God's book in any instance, because God has informed His creation that His Messenger guides to the straight path, the path of God. Neither is it the case that any of the Sunnas of God's Messenger abrogate God's Book, because He has informed His creation that He only abrogates the Qurʾān by means of a Qurʾānic passage that is similar to it, and the Sunna is subordinate [*tabaʿ*] to the Qurʾān.[62]

(C) Whenever two *ḥadīth*s can possibly be used together, then they are in fact to be used together, and one of the two should not be made to invalidate the other.

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[57] In other words, the apparent meaning (unrestricted) may be the same as the actual meaning (unrestricted), or the apparent meaning (unrestricted) may be other than the actual meaning (restricted). Al-Shāfiʿī here describes a potential source of ambiguity.

[58] Al-Shāfiʿī offers an extensive justification for the authority of Prophetic *ḥadīth*s in the *Risāla*. He relies in particular on several Qurʾānic passages that refer to "the Book and wisdom," and equates "wisdom" with the Sunna of the Prophet. See, e.g., Q 2/al-Baqara:129. On these passages, see my article "Early Islamic Exegesis as Legal Theory: How Qurʾānic Wisdom (*Ḥikma*) Became the Sunna of the Prophet."

[59] Literally, "number," which would fit better if the discussion concerned something with precisely enumerated components, such as daily prayers. In the *Risāla*, al-Shāfiʿī does argue that the Qurʾān articulates a general obligation to pray and that this obligation is made more precise by the Sunna, which specifies that one pray five times daily. See, e.g., *Risāla* (Cairo, 1940; repr. 1979), paras. 93, 95, where he uses the words *farḍ* and *ʿadad* in close proximity, as in the above passage.

[60] Here al-Shāfiʿī recognizes that seemingly legislative language in revealed source-texts may contain something less than an obligation the performance of which is mandatory.

[61] Both editions have *illā*, but this must be a mistake for *lā*.

[62] In the *Risāla*, al-Shāfiʿī argues that only intra-source abrogation can occur. He bases his view on a fairly literal reading of the following verses of the Qurʾān: Q 10/Yūnus:15 (Muḥammad is urged to say that it is not for him to replace any part of the Qurʾān on his own initiative); 13/al-Raʿd:39 (God deletes and confirms whatever He likes; He has the original exemplar of the Qurʾān); 2/al-Baqara:106 (God reports that He does not abrogate a verse without replacing it with something better or at least similar); and 16/al-Naḥl:101 (if Muḥammad [?] were to replace one verse with another—and God knows best what He reveals—then people would say Muḥammad was a fabricator). He also argues, in effect, that allowing inter-source abrogation would enable anti-*ḥadīth* jurists to abrogate *ḥadīth*s using the Qurʾān. See *Risāla* (Cairo, 1940; repr. 1979), paras. 312–35. On the topic of abrogation in general, see Burton, *The Sources of Islamic Law*.

(D) Among the corpus of *ḥadīth*s are those that abrogate and those that are abrogated, as I have explained in regard to the prayer-direction of Jerusalem that was abrogated in favor of facing the Sacred Mosque in Mecca. If the two *ḥadīth*s in question can only be interpreted as being in irreconcilable contradiction, in the way that the prayer-direction of Jerusalem and of the Sacred Mosque contradict each other, then one of the two is abrogating and the other abrogated. In addition, one infers the existence of abrogating and abrogated *ḥadīth*s only by means of a report from God's Messenger, or a statement [*qawl*], or an indication of time which shows that one of the two is subsequent to the other, such that one would know that the later of the two is the abrogating *ḥadīth*, or by means of a statement from someone who heard the *ḥadīth*, or the collective opinion of jurists. I have already written this down in my book. In regard to *ḥadīth*s that come to be construed as contradictory because abrogating and abrogated, one adopts the abrogating *ḥadīth* rather than the abrogated one.

(E) Among the *ḥadīth*s, too, are those that are contradictory in regard to a particular act because the two different matters are both permissible, like the merely apparent contradiction between the acts of standing and sitting.[63] Both of them are permitted. Among them also are those that are contradictory for other reasons. Of these, it must be the case that one of the two *ḥadīth*s is closer in meaning to the Book of God, or to the meaning of those Sunnas of the Prophet that are other than the two apparently contradictory *ḥadīth*s, or closer to a conclusion derived by means of analogy. So whichever of the contradictory *ḥadīth*s that is, it is the one more worthy, in our view, of adoption. Also among them are those considered by persons who investigate matters of religious knowledge to differ in regard to the fact that the particular act in them is different in the two cases, or not to differ in regard to the particular act in them except that its legal status [*ḥukmuhu*] differs in the two cases, or the act differs in them in regard to its being merely permissible such that if one performs the act in question, it merely appears that one is doing so in order to opine as to its obligatory character. Among them, too, are those that are underdetermined [*jumla*] and those that are rendered precise [*mufassar*]. If an underdetermined *ḥadīth* is construed as being unrestricted in application, then it might be narrated in such a way that it appears contrary to one that is made precise. But that is not a true contradiction, but rather merely part of the expansiveness [*saʿa*] of the Arabic language that I have already described.[64] It may express something as unrestricted but intend it to be restricted, and the

[63] In other words, if one *ḥadīth* made standing mandatory and another made sitting mandatory, it would be possible to read them as hopelessly contradictory (one must either stand *or* sit), or complementary (one must stand when appropriate and then sit when appropriate). Shāfiʿī urges a complementary reading in such instances.

[64] A more extensive discussion of language as a source of interpretive difficulty is found at paras. 127–78 in the *Risāla* (Cairo, 1940; repr. 1979). See also Montgomery, "Al-Jāḥiẓ's *Kitāb al-bayān wa al-tabyīn*," 91–152, at 101–7. I discuss al-Shāfiʿī's views on language in *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfiʿī* and in "Some Preliminary Observations on al-Šāfiʿī and *Uṣūl al-Fiqh*: The Case of the Term *Bayān*," 505–27.

two *ḥadīth*-texts in question would then be used together. For each category of apparent hermeneutical difficulty I have already given an example that explains it, God willing.

(F) In regard to all of this, one does not accept a *ḥadīth* unless it is well established [*thābit*], just as one does not accept among witnesses any but those whose probity is known. So if the *ḥadīth* in question is unknown or transmitted by an undesirable person, it is just as if it had not been transmitted at all, because it is not firmly established.

CHAPTER FOUR

SAḤNŪN B. SAʿĪD (D. 240/854)

Jonathan E. Brockopp

Mālikism

The Mālikī school of Islamic law is now predominant in North and West Africa, but it has not always been so. In fact, looking back at the history of this region in the first few centuries of the Islamic era, it is surprising that the Mālikī school survived at all. In the 3rd/9th century, reflecting Abbasid predilections, most capital cities were dominated by Ḥanafī jurists. By the 4th/10th century, Fāṭimid Shīʿīs prevailed over large parts of North Africa while Ibāḍī Shīʿīs made inroads among the Berbers. Yet increasingly, Mālikism became intertwined with the identity of African Islam to the point that today the study of Islamic law in Fez or Dakar is virtually synonymous with the study of the Mālikī tradition.

The identification of this region with Mālik b. Anas had little to do with the activities of Mālik himself. He rarely left his home in Medina, and there is no record of his ever traveling to Egypt or Africa. Rather, Africa traveled to him. Among Mālik's students, it is the Egyptians—Ibn Wahb, Ibn al-Qāsim, Ashhab, Ibn ʿAbd al-Ḥakam and others—who distinguished themselves the most, collecting and organizing his transmissions of *ḥadīth* and his own legal opinions on every imaginable subject. Students of this first generation, therefore, are remembered by history as vital intermediaries, transmitters of Mālik's ideas. Yet, the evidence indicates that however deep their personal connections to Mālik b. Anas, they also wrote highly independent works of law. Had this example been followed by later generations, there would have been no Mālikī school of law at all.

In fact, the following generation of students was not so independent. While they dutifully passed on the original works of this first generation, they also used these scholars as conduits to Medina, specifically to Mālik b. Anas. It is in this second generation, those who had no personal association with Mālik, that we find the origins of the Mālikī school in North Africa. For while we have clear evidence that the second and third generations of students studied a wide variety of legal texts, a clear focus on Mālik's interpretations and opinions also emerges.

Saḥnūn b. Saʿīd

The most important student of this generation was Abū Saʿīd ʿAbd al-Salām b. Saʿīd b. Ḥabīb al-Tanūkhī, known as Saḥnūn. He was born in the year 160/776 and, after a long and interesting life, died in 240/854. Saḥnūn's personality fascinated biographers. In Andalusia and the Maghrib he is a hero, the ideal jurist and qadi, while in Egypt and the East he is recognized as an authority from the Western frontier, though his reputation and scholarship is never equated with more famous local proponents of Mālikism. These differences in perception result in somewhat varying accounts of the key events in Saḥnūn's life, and in some cases historical fact is difficult to discern from imaginative construct. To date, no modern scholar has undertaken a critical study of Saḥnūn's biography,[1] despite the fact that the Arabic sources on his life are quite extensive. Abu'l-ʿArab al-Tamīmī (d. 333/944), a native of North Africa whose teachers were themselves Saḥnūn's students, gives us our earliest preserved account of Saḥnūn's life.[2] Qāḍī ʿIyāḍ b. Mūsā (d. 544/1149), the great historian of the Mālikī school, places Saḥnūn at the head of his list of scholars from Ifrīqiyā, and of the hundreds of scholars profiled by him, Saḥnūn's biography is the longest of any, after Mālik.[3] Likewise, Saḥnūn's famous book, the *Mudawwana*, was considered second in importance only to Mālik's *Muwaṭṭaʾ*. It survives in dozens of manuscript copies and has been the subject of numerous com-

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[1] Mohamed Talbi has laid the foundation for the study of Saḥnūn (*L'Emirat Aghlabide*. 227–39), and *EI*[2], s.v. "Saḥnūn." Most recently, Muḥammad Zaynuhum Muḥammad ʿAzb has written a volume entitled *al-Imām Saḥnūn*. While this text has much to recommend it, the author does not take into account either recent manuscript discoveries or Muranyi's *oeuvres*, particularly *Die Rechtsbücher des Qairawāners Saḥnūn b. Saʿīd: Entstehungsgeschichte und Werküberlieferung*, which includes an extensive discussion of Saḥnūn's teachers and students based on analysis of manuscripts and marginalia. Other modern sources for Saḥnūn's biography include Fuat Sezgin, *GAS*, 1:468 ff.; Krenkow, *EI*[1], s.v. "Saḥnūn"; and J.M. Forneas, "Datos para un estudio de la *Mudawwana* de Saḥnūn en al-Andalus," 93 ff.

[2] Abu'l-ʿArab al-Tamīmī, *Kitāb ṭabaqāt ʿulamāʾ Ifrīqiyā*, ed. Mohammed ben Cheneb, 101–4. The editor of Abu'l-ʿArab's text has followed the convention of his manuscripts by publishing it together with two other works: the continuation by his student Muḥammad b. al-Ḥārith b. Asad al-Khushanī (d. 371/981), also called *Kitāb ṭabaqāt ʿulamāʾ Ifrīqiyā*; and a second work by Abu'l-ʿArab, *Kitāb ṭabaqāt ʿulamāʾ Tūnis*. The first book runs from 1–125, the second from 127–241, and the third from 243–256. To avoid confusion, I follow Muranyi's convention of noting all citations from this work as Ben Cheneb, *Ṭabaqāt.*

[3] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:45–88; see also Mohamed Talbi, *Tarājim Aghlabiyya* (*Biographies Aghlabides*), 86–136. For an extensive list of the Arabic sources on Saḥnūn's life, see al-Dhahabī, *Taʾrīkh al-Islām*, yrs. AH 231–40, pp. 247–9, but add, Ben Cheneb, *Ṭabaqāt*, 101–4 and 236; and Abu'l-ʿArab, *Kitāb al-miḥan*, 454–8.

mentaries. Despite its fame, however, the *Mudawwana* remains a curious, idiosyncratic text that is difficult to classify.

I will turn to an analysis of Saḥnūn's writings after addressing his biography, which I separate into five phases: his early life and training in North Africa; his travel to the East in search of knowledge; his return to Kairouan and early teaching; his mature teaching phase; and his tenure as Qadi of Kairouan.

Life

1. *Early Life in North Africa, 160–85/776–801*

In 160/776,[4] Saḥnūn was born in Kairouan, an established city, one hundred years old, with a large mosque and several holy sites where Companions of the Prophet were buried. We know little about his parents. His father, Saʿīd, apparently arrived in Kairouan some time in the mid-2nd/8th century with an Arab army contingent from Ḥimṣ, Syria, perhaps in 155/772 as part of an Abbasid plan to move Syrian elements to the frontier.[5] His tribe, the mostly Christian Tanūkh, joined forces with Muslim Arabs early on in the conquests.[6] Saḥnūn's older brother Ḥabīb was also apparently a scholar,[7] so the family must have been reasonably well off, despite Saḥnūn's complaints of poverty.

Although Saḥnūn's fame rests on the knowledge he gained during his trip to Egypt, his first teachers were local authorities, some of whom

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[4] Abu'l-ʿArab gives Saḥnūn's birth date as A.H. 160, apparently on the basis of two pieces of evidence: that he was 74 years old when he was named qadi in A.H. 234 (Ben Cheneb, *Ṭabaqāt*, 101); and that Saḥnūn said: "My birth was in the year that Sufyān al-Thawrī died, 160" (idem, 104). Other sources give Sufyān's death date as 161. All other sources give either A.H. 160 or 161 as Saḥnūn's birth date. I address the issue of variant dates in Brockopp, "Contradictory Evidence and the Exemplary Scholar: The Lives of Saḥnūn b. Saʿid (d. 854)," 115–132, at 120.

[5] Ben Cheneb, *Ṭabaqāt*, 101; *EI²*, s.v. "Saḥnūn" (Talbi).

[6] ʿAbd al-Karīm al-Samʿānī, *al-Ansāb*, 1:484.

[7] Ben Cheneb, *Ṭabaqāt*, 97. The shift from Arab to Muslim names is a curious phenomenon (cf. Brockopp, *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and his Major Compendium of Jurisprudence*, 10–11. ʿAbd al-Salām and Ḥabīb could be Christian names, while the names of Saḥnūn's children, Muḥammad and Khadīja, unmistakably signal a public identification with Muslim history. See, in this regard, Muḥammad b. Saḥnūn's question in ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:45.

left a lasting impression.[8] ʿAbd Allāh b. Ghānim (d. 190/805),[9] was one of Saḥnūn's earliest influences. He was appointed qadi in 171/787 when Saḥnūn would have been eleven, and his assertion of the powers of his office seems to foreshadow Saḥnūn's later efforts to control the territory. Most sources agree that Saḥnūn also studied with al-Buhlūl b. Rāshid (d. 183/799) in Kairouan,[10] but it was apparently ʿAlī b. Ziyād (d. 183/799) in Tunis who gave Saḥnūn his first direct contact with Mālik's teachings.[11] Ibn Ziyād's transmission of Mālik's *Muwaṭṭa*' seems to have been the best known version of Mālik's book in Kairouan for some time.[12]

2. *The Trip to Egypt and Beyond, 185–191/801–806*

Saḥnūn was apparently much beloved in Egypt, and he established there the foundation for a lifetime of teaching.[13] We have evidence of his mastery and transmission of several key texts from this period: the law book of ʿAbd al-ʿAzīz al-Mājishūn, the *Samāʿ* of Ibn al-Qāsim, Ibn Wahb's *Muwaṭṭa*' and law books of Ashhab, but it was his notes from Ibn al-Qāsim that would form the basis of his famous book, the *Mudawwana*. Saḥnūn's relationship to each of these scholars, Mālik's greatest companions, is worth examining in detail.

ʿAbd al-Raḥmān b. al-Qāsim al-ʿUtaqī (d. 191/806) was clearly the most important influence on Saḥnūn. Ibn al-Qāsim studied with Mālik for twenty years and was the teacher of a whole generation of legal scholars in North Africa and Andalusia.[14] He was said to have had a library of three

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[8] Our oldest source, Abu'l-ʿArab, lists no teachers from Ifrīqiyā in his entry on Saḥnūn, but elsewhere in his book he describes Saḥnūn as a student of both ʿAlī b. Ziyād (Ben Cheneb, *Ṭabaqāt*, 251), and al-Buhlūl b. Rāshid (p. 54). On occasion, Saḥnūn quotes from both Ibn Ghānim and ʿAlī b. Ziyād in the *Mudawwana*, but not from al-Buhlūl.

[9] Abū Bakr al-Mālikī, *Riyāḍ al-Nufūs*, 1:250; Ben Cheneb, *Ṭabaqāt*, 43–4 and Muranyi, *Beiträge*, 12–15.

[10] Al-Buhlūl, who was not as famous for his *fiqh* works, is not quoted in the *Mudawwana*, although he apparently transmitted the books of Sufyān al-Thawrī. See Ben Cheneb, *Ṭabaqāt*, 52–61; Muranyi, *Beiträge*, 10–11.

[11] On Ibn Ziyād, see *GAS*, 1:465; Muranyi, *Beiträge*, 7–10; Ben Cheneb, *Ṭabaqāt*, 251–3.

[12] A small fragment has been preserved. *Muwaṭṭa' al-imām Mālik: Qiṭ'a minhu bi-rìwāyat Ibn Ziyād (*Beirut, 1984*)*. Muranyi points out (*Beiträge*, 7–8) that the dating of the manuscript should probably go back to Saḥnūn's own lifetime. Another fragment of Ibn Ziyād's recension is in Damascus, unpublished (see J. Sourdel-Thoumine and D. Sourdel, "Nouveaux documents sur l'histoire religieuse et sociale de Damas au moyen age," 1–25 at 15).

[13] The dates of Saḥnūn's travel are disputed; for several reasons, 185–91/801–06 seems the most likely to me, though the desire to determine specific dates runs counter to the nature of our sources. See Brockopp, "Contradictory Evidence," 120–24.

[14] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 3:243–61; al-Dhahabī, *Taʾrīkh*, yrs. 191–200, pp. 274–8; *GAS*, 1:465–6; *EI²*, s.v. "Ibn al-Ḳāsim."

hundred volumes (*jild*) of Mālik's sayings; a portion of these has turned up in the British Museum, transmitted by Saḥnūn himself.[15] Ibn al-Qāsim figures so significantly in the *Mudawwana* that he has been mistaken as its author, yet Muranyi's comparison of Ibn al-Qāsim's *Samāʿ* with the *Mudawwana* reveals them to be independent works.[16]

Abd Allāh b. Wahb al-Fihrī (d. 197/812) was in some ways even more renowned than Ibn al-Qāsim.[17] He was extraordinarily pious and completed the ḥajj thirty-six times. Of all Mālik's students in Egypt, only he received the designation "*faqih* of Egypt."[18] Saḥnūn was one of his few students from the western territories, though it is largely through this chain of transmission that many of Ibn Wahb's writings are preserved.[19] Many chapters of Saḥnūn's *Mudawwana* are supplemented by the addition of *ḥadīth*s transmitted on Ibn Wahb's authority, generally near the end of chapters. The relationship between the two scholars is exemplified by Saḥnūn's remark that he re-read Ibn Wahb's book on *maghāzī* "until it was in my breast like the *umm al-Qurʾān*."[20]

Ashhab b. ʿAbd al-Azīz al-Maʿāfirī (d. 204/819)[21] and ʿAbd Allāh b. ʿAbd al-Ḥakam (d. 214/829) were the last of the great Egyptian Mālikīs with whom Saḥnūn studied. Both were much closer to Saḥnūn in age, with Ibn ʿAbd al-Ḥakam only fifteen years his senior, which may explain why his name never appears in the *Mudawwana*. However, a comparison of Ibn

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[15] Muranyi, "A Unique Manuscript from Kairouan in the British Library: the *Samāʿ*-work of Ibn al-Qāsim al-ʿUtaqī and Issues of Methodology," 325–68.

[16] Muranyi, "A Unique Manuscript," 356.

[17] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 3:228–43; al-Dhahabī, *Taʾrīkh*, yrs. 191–200, pp. 264–9; *GAS*, 1:466; *EI*², s.v. "Ibn Wahb." Fragments of his *Jāmiʿ* have been published; see: *Le Djāmiʿ d'Ibn Wahb*, ed. J. David-Weill; *al-Djāmiʿ: die Koranwissenschaften*; *al-Djāmiʿ: tafsīr al-Qurʾān* (*die Koranexegese*); *al-Djāmiʿ: tafsīr al-Qurʾān*, *Koranexegese* 2. Teil (part 2). More important for the study of Saḥnūn's *Mudawwana*, however, is Muranyi, *ʿAbd Allāh b. Wahb: Leben und Werk. Al-Muwaṭṭaʾ, kitāb al-muḥāraba* and Ibn Wahb, *al-Muwaṭṭaʾ, kitāb al-qaḍāʾ fi'l-buyūʿ* (ed. Muranyi). In his extensive notes, Muranyi compares Ibn Wahb's texts with those of Mālik, Saḥnūn and others.

[18] Jalāl al-Dīn al-Suyūṭī, *Ḥusn al-muḥāḍara fī taʾrīkh Miṣr waʾl-Qāhira*, 1:303.

[19] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 3:229; the other students listed were largely from Egypt and the East.

[20] Ibn Farḥūn, *Kitāb al-dībāj al-mudhahhab* (Cairo, 1351/1931–2), 2:33.

[21] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 3:262–71; al-Dhahabī, *Taʾrīkh*, yrs. 201–210, pp. 64–6; *GAS*, 1:466–7. To the list of his works in *GAS*, add manuscripts described in Schacht, "On Some Manuscripts in the Libraries of Kairouan and Tunis," *Arabica* 14 (1967): 233–5; Muranyi, "Fiqh," in *Grundriss der arabischen Philologie*, 2:314; Muranyi, *Materialien zur mālikitischen Rechtsliteratur*, 94–7; idem, *Ein altes Fragment medinensischer Jurisprudenz aus Qairawān*, 23. In *Beiträge*, 37–8, Muranyi compares portions of Ashhab's books, in Saḥnūn's own transmission, with the *Mudawwana* itself.

ʿAbd al-Ḥakam's book with the *Mudawwana* suggests that a shared body of Mālik's juristic dicta formed the basis of both texts.[22]

In addition to his studies with these scholars in Egypt, Saḥnūn also went to Mecca and Medina, but the timing of this trip is uncertain. Manuscript evidence preserves the fact that Saḥnūn transmitted the law book of ʿAbd al-ʿAzīz al-Mājishūn (d. 164/780–1) from Anas b. ʿIyāḍ, a Medinan scholar who may have died as early as 185/805;[23] therefore Saḥnūn could have been in Arabia by this time. In Mecca he studied with Sufyān b. ʿUyayna (d. 196/811). Saḥnūn is said to have had books containing two years of lecture notes from Sufyān in his house,[24] and Abu'l-ʿArab noted that Saḥnūn followed Ibn al-Qāsim and Ashhab in *fiqh*, but took *Ḥadīth* from Ibn Wahb and Sufyān b. ʿUyayna. Another important authority from whom Saḥnūn transmits numerous *ḥadīth*s in his *Mudawwana* is ʿAbd al-Raḥmān b. Mahdī (d. 198/813).[25]

3. *Return to Kairouan and Teaching Career: 191–221/806–836*

Saḥnūn is best known as a student, teacher and judge, yet it seems that the middle years of his life, between the ages of thirty and sixty, were occupied more with family and farm than with teaching. As mentioned above, Abu'l-ʿArab tells us that Saḥnūn returned to Kairouan in 191/806, at which point it is reported that he immediately began teaching; this may not be accurate, however, since the historians record no student of any consequence for at least twenty years.[26]

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[22] For Ibn ʿAbd al-Ḥakam's biography, see Brockopp, *Early Mālikī Law*, 1–65; for a comparison with Ibn ʿAbd al-Ḥakam's *Major Compendium*, see 95–111.

[23] Muranyi, *Ein altes Fragment*, 12–13; al-Dhahabī (*Taʾrīkh*, yrs. 191–200, pp. 112–3) records his death date as 200/816.

[24] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:50.

[25] Ben Cheneb, *Ṭabaqāt*, 184–5; ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:47. Al-Dhahabī says that Saḥnūn did not hear directly from Ibn Mahdī and Wakīʿ b. al-Jarrāḥ (d. 197/812), but through Mūsā b. Muʿāwiyā (d. 225/840); Muranyi argues for direct transmission (*Rechtsbücher*, 32–3).

[26] According to ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:47, Saḥnūn said that ʿAbd al-Malik Zūnān (d. A.H. 232) was "the first to read with me (*awwal man qaraʾa ʿalayya*)"; ʿIyāḍ places this anecdote after Saḥnūn's arrival in Kairouan. Compare, however, ʿIyāḍ's biography of Zūnān (4:110–11), which suggests that Zūnān studied with Saḥnūn in Egypt. (Note also that the editor erroneously reads Zūnān's death date as A.H. 332 [cf. Ibn Farḥūn, *Kitāb al-dībāj al-mudhahhab* (Cairo, 1351/1931–2), 2:19]). Other candidates for early students are ʿAbd al-Raḥīm b. ʿAbd Rabbihi (Ben Cheneb, *Ṭabaqāt*, 112) and Ḥammād b. Yaḥyā al-Sijilmāsī (Ben Cheneb, *Ṭabaqāt*, 118; Muranyi, *Beiträge*, 32–3; Talbi, *Tarājim Aghlabiyya*, 146–7; Ḥammād also studied with ʿAbd al-Malik b. al-Mājishūn, d. 212/827). Both of these, however, were so close in age to Saḥnūn that they may have been companions, not students.

Perhaps the first story that portrays Saḥnūn as a teacher places him on his farm, Manzil Ṣiqlāb, in the Sahel region between Kairouan and the coast:

> ʿAbd al-Jabbār b. Khālid said: "We used to listen to Saḥnūn seated in front of his house, on the ground. He appeared one day with a plow in his hand and the oxen in front, and he said to us, 'The slave has a bad fever, so your lessons are finished for the day!' So I said to him, 'I'll go plow and you lecture to our colleagues; when I come back, I will recite for you what I have missed.' So he did this, and when I came back he gave me his dinner: barley bread and old oil."[27]

This story cannot be dated any earlier than 209/824, when Saḥnūn was already in his late 40s. The source of this narrative, ʿAbd al-Jabbār b. Khālid (d. 281/894),[28] was not born until 194/809, and could not have handled a team of oxen until he was perhaps fifteen years of age. In fact, he is one of the few students of Saḥnūn known to have been born before the year 200/814–15, so it seems plausible that Saḥnūn began his teaching career with the formation of his son, Muḥammad, and that ʿAbd al-Jabbār was part of this initial cohort.

Muḥammad b. Saḥnūn (d. 256/870) and his sister Khadīja are the only two of Saḥnūn's children named in the sources. The author of many scholarly works, Muḥammad is often compared favorably with his father, sometimes even exceeding his fame.[29] Born in 200/815–16 or 201/816–17, he apparently began studying with his father before heading off on his own journey in search of knowledge. Ibn Saḥnūn appears to have been a master of biography and *ḥadīth* in addition to law,[30] and he took over his father's lectures after Saḥnūn's death. Other students who were born

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[27] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:54; *Tarājim*, 97. Many other stories offer us insights into common details from the classroom. For example, on that same page an anonymous report: "Saḥnūn would sit at the door of his house for the lecture (*samāʿ*), and we would sit on the ground, except those who brought mats. When we would finish, he would say: 'Stand as one man!' and we would depart."

[28] Ben Cheneb, *Ṭabaqāt*, 145–6; Muranyi, *Beiträge*, 76–7.

[29] See the many stories in al-Khushanī (Ben Cheneb, *Ṭabaqāt*, 129–32; biographies of twelve of Muḥammad b. Saḥnūn's students are found on 163–7) and Talbi, *Tarājim*, 170–88.

[30] Muranyi gives a list of Ibn Saḥnūn's works (*Beiträge*, 56–9); Sezgin's mention of Ibn Saḥnūn's interest in history (*GAS* 1:472–3) is perhaps due to the listing of a *Kitāb al-taʾrīkh* in the sources, but this is more likely a work on biography, as evidenced by quotations from this work in ʿIyāḍ b. Mūsā, *Tartīb al-madārik*. Ibn Saḥnūn is also quoted, in paraphrase, in al-Qayrawānī's *Kitāb al-nawādir waʾl-ziyādāt* (Muranyi, *Materialien*, 76–81). It is worth noting that Ibn Saḥnūn is apparently one of the few scholars in Kairouan to have written on the science of *ḥadīth* (Muranyi, "Das *Kitāb Musnad ḥadīth Mālik b. Anas*,"

about the same time as Ibn Saḥnūn include Ibn ʿAbdūs (Muḥammad b. Ibrāhīm, d. 260/874), who was as famous as Muḥammad and wrote a commentary on the *Mudawwana*,[31] and Ḥabīb b. Naṣr (d. 287/900), who headed the court of complaints under Saḥnūn.[32]

One other key event during this period deserves mention: the death of one of the leading jurists of Kairouan, Asad b. al-Furāt,[33] who died during the conquest of Sicily in 213/828. Asad and Saḥnūn are portrayed in the sources as rivals. However this may be, Asad's death does coincide with a change in Saḥnūn's status; after this date, Saḥnūn's student group expanded to include famous jurists and wealthy patrons, and he himself was important enough to be threatened with torture and death.

4. *Mature Teaching Period and Relationship with Authorities, 221–34/836–49*

Among these new students was the Wazir's grandson, ʿAbd Allāh b. Aḥmad b. Ṭālib al-Tamīmī (d. 275/888). Born in 210/825–6 to a wealthy family, he is said to have studied with Saḥnūn at a young age. He would eventually have many students of his own, including the historian Abu'l-ʿArab al-Tamīmī, and would serve twice as qadi under later Aghlabid Amirs.[34] Other students who probably studied with Saḥnūn in the 220's include Yaḥyā b. ʿUmar al-Kinānī (d. 289/902),[35] a famous scholar with a large following who produced several books. He took two trips to the East, bringing to Kairouan new works by Ashhab b. ʿAbd al-ʿAzīz and Aṣbagh b. al-Faraj (d. 225/839). Nearly as important in terms of transmitting the *Mudaw-*

144). For a complete list of manuscripts of books attributed to Muḥammad b. Saḥnūn, see Brockopp, "Re-reading the History of Early Mālikī Jurisprudence," 236.

[31] *GAS*, 1:473, born in 202/817 in Kairouan. The commentary is *al-Tanbīh ʿalā mabādiʾ al-tawjīh* (*GAS*, 1:469). Ben Cheneb, *Ṭabaqāt*, 133 (on pp. 167–80, al-Khushanī lists many of Ḥabīb b. Naṣr's most important students); Muranyi, *Beiträge, 55–6*; idem, *Materialien*, 66–70.

[32] Ben Cheneb, *Ṭabaqāt*, 141. In "On some Manuscripts," 248–9, Schacht describes a manuscript of his *Kitāb al-aqḍiya*. Muranyi, *Beiträge*, 85–6, doubts its authenticity.

[33] Ben Cheneb, *Ṭabaqāt*, 83; ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 304–6; *EI³*, s.v. "Asad b. al-Furāt." Asad's relationship to Saḥnūn is mentioned above.

[34] Talbi, *L'Emirat Aghlabide*, 223–5; Ben Cheneb, *Ṭabaqāt*, 136–8; Muranyi, *Beiträge*, 73; Ibn Farḥūn, *Kitāb al-dībāj* (Cairo, 1351/1931–2), 1:151, reports that ʿAbd Allāh b. Aḥmad's father was also a student of both Saḥnūn and Asad, although he is not identified as such by other biographers.

[35] He was born in 213/828, so his knowledge of Ashhab's and Aṣbagh's works was through their students. *GAS*, 1:475; Ben Cheneb, *Ṭabaqāt*, 134–6, Muranyi, *Beiträge*, 92–117. Muranyi calls him "die bedeutendste Persönlichkeit in the Schülergeneration Saḥnūns" (*Beiträge*, 62).

wana to later generations was ʿĪsā b. Miskīn (d. 295/907), who is said to have transmitted all of Saḥnūn's and Ibn Saḥnūn's works.[36] This may also be the period when Muḥammad b. Aḥmad al-ʿUtbi (d. 255/869)[37] studied with Saḥnūn. The author of one of the best known works of Mālikī law, *al-Mustakhrija mimmā laysa fi l-Mudawwana*, al-ʿUtbī was instrumental in bringing Saḥnūn's works to his hometown of Cordoba.[38] Many of Saḥnūn's other famous students can be dated to this period or later, including several named in the transmission records of extant manuscripts.[39]

This period was one of mixed blessings for Saḥnūn. On the one hand, he appears to have achieved great fame as a teacher, attracting students from all over North Africa and Andalusia and passing on many important books from the Medinan school. On the other hand, the rise of his reputation, and his apparently intransigent personality, led to a clash with the political authorities. As Talbi has pointed out, however, Saḥnūn's triumph in this clash had mixed results. For the brutality of the inquisition (*miḥna*), he substituted his own stringent form of Mālikism, one that would eventually define orthodoxy for North Africa.[40]

The *miḥna* was prosecuted unevenly in Kairouan, depending on who was in power at the moment, and given the political implications of the event, we have reason to be skeptical of our sources. What does seem clear is that Abū Jaʿfar Aḥmad b. al-Aghlab's rise to the position of Amir in 231/846 led to the trial of many of Kairouan's elite, forcing Saḥnūn into

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[36] Ben Cheneb, *Ṭabaqāt*, 142–3; Muranyi, *Beiträge*, 128–37.

[37] *GAS*, 1:472; Muranyi, *Materialien*, 50–65. It is doubtful that he was in Kairouan before 215/830, since he is known to have missed studying with Ibn ʿAbd al-Ḥakam, who died in 214/829.

[38] Ana Fernández Félix, *Cuestiones legales del islam temprano*. See also Schacht, "On some Manuscripts," 245–6; Muranyi, *Materialien*, 48, 50–65. An excerpt is printed and analyzed in Muranyi, *Beiträge*, 356–65.

[39] Saḥnūn is said to have had hundreds of students, and many of these have brief entries in the biographical literature. Muranyi devotes his energies to those students who appear on the pages of Kairouan manuscripts. These include two students mentioned in the printed version of the *Mudawwana*: Yazīd b. Ayyūb (unknown in the sources) and Sulaymān b. Sālim, known as Ibn al-Kaḥḥāla (Ben Cheneb, *Ṭabaqāt*, 147–8; Muranyi, *Beiträge*, 90–1). He was named qadi in Sicily in 281/894–5. He is a source for many stories in the biographical dictionaries. Also, Jabala b. Ḥammūd b. ʿAbd al-Raḥmān b. Jabala al-Ṣudfī was born in 210/825–6 and died in 299/911 (Ben Cheneb, *Ṭabaqāt*, 143–4; Muranyi, *Beiträge*, 149–51); therefore he must have studied with Saḥnūn after AH 220. Also important is Muḥammad b. Waḍḍāḥ (d. 287/900), who traveled to Kairouan during his second *riḥla*, sometime in the 220s (Ibn Farḥūn, *Kitāb al-dībāj* [Cairo, 1351/1931–2], 2:179–81; ʿIyāḍ b. Mūsā, *Tartīb al-madārik* [Rabat, 1970], 4:435–40). He is not listed in *GAS*, but his *Kitāb al-bidaʿ* has now been found and published (ed. Maribel Fierro [Madrid, 1988]).

[40] *EI*[2], s.v. "Saḥnūn" (Talbi).

hiding.[41] Our earliest source for these events suggests that Saḥnūn did not suffer and quickly gained a pledge of protection from the new Amir.[42] Later compilations, however, portray a much higher level of drama, with Saḥnūn as heroically defiant and the new Amir and his qadi, Ibn Abi'l-Jawād, as blood-thirsty bureaucrats:

> When Saḥnūn reached the Amir, he gathered together his entourage and his qadi, Ibn Abi'l-Jawād, and others, and he asked him about the Qur'ān. Saḥnūn answered: "Is this something I have begun myself? No! Rather I have heard from those with whom I have studied and from whom I have recorded [*ḥadīth*s], all of them say: 'The Qur'ān is the Word of God, Uncreated.' " Ibn Abi l-Jawād said: "He's a heretic! Kill him and may his blood be upon my neck." Others who thought as he did said the same thing, and one of them said: "Draw him in quarters and put each quarter in a different place in the city [as a sign] to say: this is the reward for one who does not say [that the Qur'ān is created]."[43]

Regardless of what actually happened, these accounts suggest that a highly charged political environment formed the background for the biographers' accounts, and that they regarded Saḥnūn as a leader who would stand up to unjust authority.[44] When Muḥammad b. al-Aghlab returned to the throne the following year, he deposed Ibn Abi'l-Jawād and spent two years convincing Saḥnūn to take the position of qadi. At first, this seemed to signal a rapprochement between the ruling family and the jurists, as well as a truce between the Iraqī and Medinan scholars. By the time of Saḥnūn's death, however, this fragile truce had completely collapsed.

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[41] There is some evidence of an earlier altercation during Ziyādat Allāh's reign (i.e. before 223/838); see ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:69–70 and Abu'l-ʿArab, *Kitāb al-miḥan*, 457. The story, which is important for making sense of the relationship between ʿAlī b. Ḥumayd and Saḥnūn, need not trouble us here.

[42] Ben Cheneb, *Ṭabaqāt*, 227. In this version Saḥnūn arrives at court and says to the Amir: "I was fearful until I came into your presence, but now I feel secure," at which point the Amir grants him protection. A garbled version of this account is preserved by ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:73. The fact that Abu'l-ʿArab does not include this story in *Kitāb al-miḥan* adds to my suspicions that this text may be a pseudopigraphon. For discussion of these variant accounts, see Brockopp, "Contradictory Evidence, 124–6."

[43] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:71. A more elaborate version of this story is found in Abu'l-ʿArab, *Kitāb al-miḥan*, 456.

[44] This impression is reinforced by accounts of personal conversions and miraculous interventions during Saḥnūn's trials (ʿIyāḍ b. Mūsā, *Tartīb al-madārik* [Rabat, 1970], 4:71–2; Abu'l-ʿArab *Kitāb al-miḥan*, 456).

5. *Election to Qadi 234–240/849–854*

Saḥnūn was elected qadi on Monday, 4 Ramadan 234 (April 1, 849), at the age of 74. According to the historians who recorded these events in great detail, Saḥnūn serves as an example for later generations in several ways: (1) his reluctance to ascend to power and his criticism of the Amirs; (2) his promise to defend justice and the rights of the people; (3) his generous attitude toward his fellow jurists; and (4) his persecution of "heretics" such as the Muʿtazilīs and the Khārijīs. While he was not the first Mālikī scholar to reach political power, his was one of the few cities to be dominated by Mālikism.

Interestingly, the new Amir, Muḥammad b. al-Aghlab, departed from precedent and did not appoint the new qadi himself, nor did Baghdad impose its will on the decision. Rather, Muḥammad b. al-Aghlab gathered together the jurists of Kairouan and consulted with them.[45] Despite the fact that most of them were Ḥanafīs, they chose Saḥnūn, who did not immediately agree. In fact, he avoided the issue for over a year until he had extracted guarantees from Ibn al-Aghlab that anyone could bring claims to his court and that Saḥnūn had free rein to prosecute injustice, even in the Amir's household.[46] By all accounts, the Aghlabid family had a reputation for exploiting their subjects and flaunting public decency. Further, while Saḥnūn took care to see that his staff was compensated, he refused to take a wage himself.

> Ibn Saḥnūn said: "I heard [my father] say to the Amir: 'By God, if you were to give all that is in your treasury (or he said: 'If you filled this audience chamber of yours with dirhams and dinars for me'), God would not question me for taking this from you. But I will not take anything from you.' He added, 'But if I did take something, it would be permitted me.' "[47]

The clear implication of this anecdote is not only that Saḥnūn wished to separate himself from the Amir, but also that God was on his side.

Arguably, Saḥnūn's insistence on an independent judiciary was in defense of the right of individuals to make claims against unjust authority. He made a point of this in his inaugural speech as qadi in the great

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[45] For an account of a similar meeting (also after the removal of a controversial Iraqi qadi), see Brockopp, *Early Mālikī Law*, 39–41.

[46] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:56–7. For a translation and discussion of the meaning of these stories, see Brockopp, "Theorizing Charismatic Authority in Early Islamic Law," 1–34, at 18–20.

[47] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:59.

mosque of Kairouan, when he said, "No man should fear for himself [in front of the court]."[48] He set up specific protocols to ensure that every plaintiff was heard, and also reached out to the Ḥanafī jurists who had supported his election, quickly appointing Sulaymān b. ʿImrān as his assistant.[49] In these ways, Saḥnūn increased the power of the judiciary in Kairouan while consolidating a consensus of Sunni scholars.

As a corollary to these activities, Saḥnūn ordered the public flogging of his predecessor, Ibn Abi'l-Jawād, and drove Ibāḍīs out of the mosque. Talbi interprets these actions as the suppression of independent thought, which may be true, although the sources claim that the flogging was punishment for Ibn Abi'l-Jawād's extorting money during his long tenure as judge.[50] What is clear is that Saḥnūn's active agenda won him enemies in the ruling class, leading to an erosion of his political influence toward the end of his life. The Amir, perhaps under pressure to remove Saḥnūn from office, appointed an associate qadi to dilute his influence.

If the record of Saḥnūn's political accomplishments was mixed, his scholarly reputation only increased as he continued teaching up to the last year of his life. At the time of his death, he was said to have left behind some 700 students who were like "lamps in every city."[51] Saḥnūn died on 7 Rajab, 240 (December 2, 854), and the Amir presided over his funeral, the protests of his entourage notwithstanding.[52]

Translation of Selected Texts

Saḥnūn is justly famous for composing the *Mudawwana*, a remarkable if enigmatic text. Numerous commentaries, expansions and summaries attest to its centrality in the Mālikī school, and to this day the word *mudawwana* is used to mean *legal code* in Morocco. In this section I will concentrate almost exclusively on the *Mudawwana*, attempting to explain some of the most important controversies surrounding this text. It must be kept in mind, however, that for the historian of Islamic law, Saḥnūn is

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[48] Ibid., 4:56.

[49] It was Sulaymān b. ʿImrān who persuaded Ibn al-Aghlab to appoint Saḥnūn, saying, "No one else deserves the judgeship while Saḥnūn is alive" (ʿIyāḍ b. Mūsā, *Tartīb al-madārik* [Rabat, 1970], 4:56).

[50] In *EI*[2], s.v. "Saḥnūn" Talbi points out that Ibn Abi'l-Jawād was the nephew of Asad b. al-Furāt; cf. Ben Cheneb, *Ṭabaqāt*, 227.

[51] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:74, the statement is attributed to Ibn Ḥārith.

[52] Ibid., 4:85.

no less important for his transmission of several ancient legal texts from Egypt and Medina. Al-Mājishūn's law book, the *Samāʿ* of Ibn al-Qāsim, manuscript fragments of Ibn Wahb's works, and Ibn Ziyād's version of the *Muwaṭṭaʾ*—all of these are known to us only through manuscripts transmitted by Saḥnūn to his students. Saḥnūn's teaching activities, therefore, extended far beyond the transmission of his own compilation of Mālikī law.

Part of the difficulty in both dating and understanding the *Mudawwana* is the fact that it combines, unevenly, several styles of legal drafting. Of these, only the dialogue with Ibn al-Qāsim is present throughout the entire text.[53] A short section from the chapter on the rain prayer (*ṣalāt al-istisqāʾ*) typifies the way that question and answer bounce back and forth:

> I asked Ibn al-Qāsim: "Does [the imam] bring out the *minbar* for the rain prayer?"
>
> He replied: "Mālik reported to us that the Prophet (God's blessings and peace be upon him) brought no *minbar* with him to the prayer of the two festivals . . ."
>
> I asked Ibn al-Qāsim: "Does [the imam] sit [during the interval] between the two sermons in the rain prayer?" He replied: "Mālik said yes, he sits between the two sermons."
>
> I asked: "Does he sit before the sermon, just as the imam does at Friday services, and as Mālik required in the sermon of the two festivals?"
>
> He said: "Yes, but he does not bring out a *minbar* for the rain prayer; rather the imam supports himself on a cane. This is the dictum (*qawl*) of Mālik."

This stylistic form presents a framework of questions put forward by Saḥnūn and answered by Ibn al-Qāsim with a variety of sources: he cites Mālik's juristic dicta, refers to various *ḥadīth*s, gives his own opinion, etc. Importantly, Ibn al-Qāsim depends on these sources in a general way, preferring paraphrase to precise quotation. As for Saḥnūn, he asks second-order questions, both in this example and typically throughout the text. By second-order, I mean that he seems quite uninterested in clarifying the first-order rules of ritual or practice.[54] Rather he goes beyond these to

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[53] Saḥnūn b. Saʿīd, *al-Mudawwana al-kubrā* (Cairo, AH 1324–5; reprint in six volumes: Beirut: Dār Sādir, n.d.). There are places in the text where the dialogue form is eclipsed by lengthy quotations of *ḥadīth*s or elaborations on rules (3:26–30; 3:285–8; 5:26–32), but these are rare.

[54] For the earliest example of these first-order questions, see Brockopp, "The *Minor Compendium* of Ibn ʿAbd al-Ḥakam (d. 214/829)," at 164–74. In my view, third-order ques-

the small details, interstitial categories and controversies that arise after application of these first-order rules.[55] As an example of the last, Saḥnūn presses Ibn al-Qāsim on the role of the imam during the funeral:

> Saḥnūn said: "I asked ʿAbd al-Rahman ibn al-Qāsim: 'Is anything said over the deceased according to the statements of Mālik?' He replied: "Personal prayer (*duʿāʾ*) for the deceased."
>
> I asked: "Is there a recitation [of the Qurʾān] at the funeral according to the statements of Mālik?" He said: "No."
>
> I asked: "Did Mālik set a specific time for you to give praise to the Prophet (God's blessings and peace be upon him) or to the believers?" He replied: "I know nothing about what he said, except for personal prayer over the deceased alone!"[56]

Regardless of whether Saḥnūn actually asked these questions, the text is drafted in a realistic way, giving us a sense of both Saḥnūn's and Ibn al-Qāsim's personalities.[57] When Ibn al-Qāsim is at the end of his knowledge, Saḥnūn often inserts authority and narrative *ḥadīth*s to illustrate the same subject.[58] For example, the *Mudawwana* continues its discussion of funeral prayers with the following:

> Ibn Wahb on the authority of Dāwūd b. Qays that Zayd b. Aslam reported to him that the Messenger of God (God's blessings and peace be upon him) said concerning prayer over the deceased: "Release him with personal prayer!"
>
> Ibn Wahb on the authority of men of people of knowledge on the authority of ʿUmar b. al-Khaṭṭāb, ʿAlī b. Abī Ṭālib [and eleven more luminaries]: "None of them recited [the Qurʾān] when praying over the deceased."

The citing of narrative and authority *ḥadīth*s from Ibn Wahb is the next most common stylistic form in the *Mudawwana*, and many sub-chapters begin with a short conversation between Saḥnūn and Ibn al-Qāsim, followed by the citation of several *ḥadīth*s. Unlike the dialogue form, however, *ḥadīth*s are not everywhere included. For example, all three chapters

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tions would be those that seek to draw theoretical categories around actions, connecting them with fundamental and wide-reaching principles of jurisprudence. Such questions are not found in the *Mudawwana.*

[55] Muranyi has uncovered evidence that Saḥnūn used the same framework of questions for both Ibn al-Qāsim and Ashhab (Muranyi, *Beiträge*, 37–8; *Rechtsbücher*, 28–9). This offers further evidence that this framework was produced first, and that the resulting dialogue with Ibn al-Qāsim was the first layer of the *Mudawwana.* Interestingly, in this case Saḥnūn does not incorporate Ashhab's answers into the *Mudawwana.*

[56] *Mudawwana*, 1:174.

[57] See, for example, *Mudawwana*, 5:524, where Ibn al-Qāsim seems impatient, saying: "As I already related to you, Malik said . . ."

[58] For a fuller discussion of these stylistic terms, see Brockopp, *Early Mālikī Law*, 90–2.

on pilgrimage, covering 144 pages, consist solely of a dialogue with Ibn al-Qāsim.[59] In other sections, Ibn Wahb's voice disappears and is replaced by that of Ashhab or other authorities.[60] Although it is not possible to discern a pattern for the inclusion or exclusion of Ibn Wahb's voice, comparison of the *Mudawwana* with Ibn Wahb's own writings (transmitted separately by Saḥnūn) demonstrates some connection to Ibn Wahb's *Muwaṭṭa'*.[61]

All other forms of legal drafting are inconsistently found throughout the text. These may be divided into four categories in order of prevalence: (1) narrative and authority *ḥadīth*s transmitted from teachers other than Ibn Wahb; (2) juristic dicta from teachers other than Mālik and Ibn al-Qāsim; (3) Saḥnūn's own comments and judgments; (4) unattributed cases and rules.[62] Even if more work needs to be done on these sources to see whether there is a logic to their incorporation into Saḥnūn's text,[63] the variety of drafting forms, along with manuscript evidence, strongly suggests that the *Mudawwana* was put together in stages by Saḥnūn himself, and that his students took pains to preserve the text as he left it.[64]

To illustrate the haphazard juxtaposition of materials in the text, I translate the entire sub-section on the rain prayer, which begins with Mālik's juristic dicta transmitted by an anonymous interlocutor:

> He said: "I asked Mālik about someone who goes to the open prayer area (*muṣallā*) for the rain prayer and prays before the imam [arrives], or after he

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[59] *Mudawwana*, 1:360–504. Other significant sections where the dialogue is the only form of drafting are: 5:433–502; 6:150–227 and 409–56.

[60] Lengthy sections in which Ibn Wahb's voice disappears include 2:51–76 and 129–51; 4:33–117 and 459–74; 5:10–31; 43–69, 263–87, 296–384; 6:144–346 and 387–456. Norman Calder, who noted some of these differences, did not sufficiently distinguish among various forms, and he incorrectly stated (*Studies in Early Muslim Jurisprudence*, 13) that insertions of *āthār* are more prevalent in the beginning of the text than in the end.

[61] This is an independent work, not Ibn Wahb's recension of Malik's *Muwaṭṭa'*. See Muranyi, *Rechtsbücher*, 24, and idem, *ʿAbd Allah b. Wahb*, 214–49.

[62] Unique forms occur on occasion, such as a letter from Ibn Ghānim to Mālik (*Mudawwana*, 3:136).

[63] For example, Ibn Mahdī appears occasionally throughout the text, and then is quoted intensively at certain points (see, for examples 1:194–5 and 244–343; 2:82–128; 5:155–202). Likewise, Ibn Ziyād appears often in the first 200 pages of volume one but rarely thereafter. Unfortunately, the first 200 pages of the *Mudawwana* are not covered in the published fragments of Ibn Ziyād's recension. Nor are there obvious connections to Ibn al-Qāsim or al-Mājishūn. Muranyi concludes, therefore, that Saḥnūn was a highly independent scholar who did not incorporate into his own text much of the Egyptian-Ḥijāzī tradition (*Rechtsbücher*, 126).

[64] It is worth recalling the sheer size of the *Mudawwana*, which, until the 4th/10th century, was the longest book in the Mālikī tradition. Imposing a single stylistic template on such a text would have been a difficult task.

> [leaves]: 'Do you think that there is any fault in this?' He said: "There is no fault in this." He said: "Mālik said concerning the rain prayer that it should be [performed] during the forenoon of the day, not at any other time of the day." He said: "Mālik said this was *sunna* [for the rain prayer]."

This dialogue is a curious way to introduce a new topic: the subject is not clearly identified and the question itself is trivial. One may guess at the etiology of this beginning,[65] but its preservation in this form is strong evidence of a very conservative editing of the text after Saḥnūn's death. This paragraph is followed by the dialogue between Saḥnūn and Ibn al-Qāsim, partly quoted above and repeated here in full:

> I asked Ibn al-Qāsim: "Does [the imam] bring out the *minbar* for the rain prayer?"
>
> He replied: "Mālik reported to us that the Prophet (God's blessings and peace be upon him) brought no *minbar* with him to the prayer of the two festivals, neither did Abū Bakr nor ʿUmar. The first for whom a *minbar* was created for the two festivals was ʿUthmān b. ʿAffān, a *minbar* of clay which Kathīr b. al-Ṣalt created for him."
>
> I asked Ibn al-Qāsim: "Does [the imam] sit [during the interval] between the two sermons in the rain prayer?"
>
> He replied: "Mālik said yes, he sits between the two sermons."
>
> I asked: "Does he sit before the sermon, just as the imam does at Friday services, and as Mālik required in the sermon of the two festivals?"
>
> He said: "Yes, but he does not bring out a *minbar* for the rain prayer; rather the imam supports himself on a cane. This is the dictum (*qawl*) of Mālik."

The dialogue format is now abandoned as Ibn al-Qāsim (presumably) cites other dicta in no discernable order:

> He said: Mālik said: "[The imam] recites aloud during the rain prayer." He said: "This is *Sunna*." He said: Mālik said: "I do not believe (*lā arā*) that Christians should be prevented [from joining the prayer] if they want to pray for rain." He said: We asked Mālik: "Does one pray for rain twice or three times in one year?" He replied: "I do not believe there is any problem in this."

These short dicta are interrupted by one question and answer, followed by an unusually long and elementary overview of first-order information on the ritual:

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[65] The confusion may be resolved if we accept Muranyi's argument, based on his review of extant manuscripts, that section titles are later additions. The last dicta of the previous section, all from Ibn Wahb, already diverge from the putative subject of that section, since they discuss the prayer at the eclipse and not the fear prayer. We could therefore read the subject of "*qāla*" here as Ibn Wahb.

I asked: "Did Mālik instruct that menstruating women, [other] women or boys be sent to pray for rain?"

He said: "I do not believe that he ordered their being sent out, and menstruating women do not go in any case. As for other women and boys, if they go, then I do not prevent them, but as for a boy who does not know how to pray, he does not go. No one goes who does not know the prayer."

He said: "Mālik said concerning the rain prayer: 'The imam goes out and when he reaches the place of prayer he prays two cycles with the people, reciting in both of them [*sūra*s such as]: "Glorify the name of your Lord the most high!" (Q 87:1); "By the sun and its brightness"! (Q 91:1), and the like. Then he faces the people and gives two sermons, separating the two of them by sitting. When he completes his two sermons, he remains in his place, faces the *qibla* and turns his cloak while standing: that which is on his right he puts on his left, and that which is on his left [he puts] on his right, in his place while he is facing the *qibla*. He does not face [the people], but he places the bottom on top and the top on the bottom.[66] The people turn their cloaks just as the imam turns [his], and they place that which is on their right on their left, and that which is on their left on their right. Then the imam offers personal prayer while standing and they offer personal prayer while they are sitting. When they have finished with the personal prayer he departs and they depart.' "[67]

He said: "The people turn their cloaks while seated, but the imam turns his cloak while standing." He said: "The imam offers personal prayer while standing, and the people offer personal prayer while seated." He said: "Mālik said that there is no saying of '*Allāhu akbar*' in the sermon of the rain prayer, nor during the ritual prayer." He said: "The cloak is turned once during the rain prayer."

This first-order information is rare in the *Mudawwana*, and it seems misplaced here. Note also that information on the imam sitting during the interval between the two sermons reiterates a point made earlier. The dialogue continues:

I asked Ibn al-Qāsim: "What is your opinion about the imam passing gas (*aḥdatha*) during the sermon; does someone else come forward [to take his place because he is ritually defiled] or does he complete [the sermon]?"

He said: "I do not remember anything from Mālik on this. But I believe that it is easier to let him complete it."

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[66] This sentence appears to be an interpolation, possibly an alternative form of Mālik's instructions that is not attested in other sources I have consulted.

[67] Except for the sentence noted above, this section is remarkably similar to the succinct summary of the ritual by ʿAbd Allāh b. ʿAbd al-Ḥakam. See Brockopp, "*Minor Compendium*," 172–3. My gloss there of *yanzilu* as "he descends [from the *minbar*]" is perhaps unwarranted in light of Saḥnūn's discussion here.

> I asked: "Does the imam make personal prayer long during the rain prayer or not, according to the dicta of Mālik?"
>
> He said: "I do not remember anything from Mālik on this, but [I would say] the middle of these two [i.e. neither long nor short]."
>
> He said: "Mālik said that the imam makes the recitation aloud [not silently]; during every public prayer in which there is a sermon the imam makes the recitation aloud."

Finally, the section closes with several narrative and authority *ḥadīth*s, followed by one last comment from Mālik. Worth noting here are the two direct citations of Mālik without the usual intermediaries of Ibn al-Qāsim or Ibn Wahb, and the citation of Saḥnūn, who is supposedly the author:

> Ibn Wahb said: Ibn Abī Dhi'b said in the *ḥadīth*: He recited during both [prayer cycles].
>
> Saḥnūn [said], on the authority of Ibn Wahb, on the authority of al-Layth b. Sa'd, on the authority of Yazīd b. Abī Ḥabīb who said: No one called to prayer for the Messenger of God (God's blessings and peace be upon him) during the rain prayer.[68]
>
> Ibn Wahb [said], on the authority of Ibn Abī Dhi'b, on the authority of al-Zuhrī on the authority of 'Abbād b. Tamīm that the Messenger of God (God's blessings and peace be upon him) prayed two cycles for the rain prayer, reciting in both of them aloud.
>
> Mālik said: There is no problem with supererogatory prayers (*al-ṣalāt al-nāfila*) before or after the rain prayer.[69]

The sub-section on the rain prayer is typical of the *Mudawwana* in its wide variety of drafting styles, its haphazard organization, and its shifting voices. The repetition of detail reveals a greater interest in preserving debating positions than in subjugating one of these positions to another or to an organizational schema. In this sense, Norman Calder's assessment of the *Mudawwana*'s jurisprudence—"It is not a logical presentation of known rules but a reflection of developing thought about rules"[70]—seems closely aligned with my own notion of second-order questions.

Calder and I differ, however, over the meaning we draw from these observations, both in terms of the dating of the *Mudawwana* and in the place of this text within the developing thought of early Mālikī jurisprudence. While I cannot fully adjudicate these issues here, it is worth noting that much new scholarship has appeared in the twenty years since Calder

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[68] The word used to refer to the rain prayer in this *ḥadīth* is *al-istimṭār*, an archaic form not found in legal texts, which prefer *al-istisqā'*, as in the rest of the *Mudawwana*.

[69] *Mudawwana*, 1:165–6.

[70] Calder, *Studies*, 7.

wrote his important book. Calder placed the composition of the *Mudawwana* well after Saḥnūn's death, in the second half of the 3rd/9th century,[71] but he was not aware of Kairouan manuscript fragments, one of which contains the note: "I heard this from Saḥnūn, reciting it back to him, in the year 235."[72] Therefore the composition of the *Mudawwana*, if not its compilation, must date to Saḥnūn's lifetime.

Similarly, new work on other early texts from the Mālikī school provides a new context for Calder's observation that Saḥnūn does not seem overly concerned with Mālik's *Muwaṭṭaʾ*. We now know that Saḥnūn passed on a substantial fragment of Ibn al-Qāsim's *Samāʿ Mālik* without making any quotations in the *Mudawwana.*[73] He transmitted Ibn Wahb's *Muwaṭṭaʾ*, but quotes only a portion of its *ḥadīth*s. The fragments we possess of Saḥnūn's transmission of Ibn Ziyād's recension of Mālik's *Muwaṭṭaʾ*,[74] and fragments from al-Mājishūn's legal text, also reveal no direct connection to the *Mudawwana*.

Therefore the *Mudawwana* is not, as Calder argued, concerned "to gather all relevant material" from the very numerous texts available to Saḥnūn. Rather, it represents a limited selection of *ḥadīth*s and juristic dicta aimed at second-order questions of law. Very likely, Saḥnūn did not see his *Mudawwana* as superseding the works of Ibn al-Qāsim, Ibn Wahb and others, but as complementing them.[75] Placed within the context of these other compilations, we would be right to see Saḥnūn as both recognizing the value of Qurʾān and *ḥadīth*, while also organizing his text based on the words of Mālik b. Anas. This is only one side to his jurisprudence, however. At the same time, he is taking great pains to pass on the books of his own masters, along with their very different constructions of legal authority.

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[71] Ibid., 19.

[72] I have seen and photographed this fragment. Miklos Muranyi first told me of its existence (located with dozens of other loose parchment pages in folder [*milaff*] number 69); my thanks to him and to the late Shaykh al-Ṣādiq Mālik al-Gharyānī for directing me to this page. I also express my deep appreciation to Dr. Mourad Rammah, director of manuscripts at the Raqqada Center for Islamic Arts, for facilitating my scholarship in Tunisia and for giving me permission to photograph this fragment. I transcribe and discuss this fragment in "Sahnūn's *Mudawwana* and the piety of the 'Shariah-minded,'" in *Alta Essays in Honor of Bernard Weiss*, ed. Kevin Reinhart and Ruud Peters (forthcoming).

[73] Muranyi, "A Unique Manuscript," 356.

[74] On several occasions, the editor of Ibn Ziyād's *Muwaṭṭaʾ* points out *ḥadīth*s that were not included in the *Mudawwana*.

[75] This is certainly how his students regarded this text (Muranyi, "A Unique Manuscript," 367).

Conclusion

The nickname "Saḥnūn" means "twittering bird," suggesting the vigorous presence noted by one historian: "average height, between white and brown, of a good beard with lots of hair, bright-eyed, broad-shouldered. Great in silence and little of speech—though he used many words in rendering judgments—very generous."[76] This generosity was particularly evident in the time that he appears to have devoted to his students, guiding them through the intricacies of Islamic law. It is in this teaching activity, perhaps even more than in his famous book, that we should look for Saḥnūn's contribution to Islamic law. His broad knowledge and significant library of texts by Mālik's companions must have made him a formidable teacher, in addition to his roles as farmer, father and judge.

At the same time, we see in the *Mudawwana* the primacy given to Mālik's opinions in Saḥnūn's generation. *Ḥadīth* and Qur'ān were also important, but for those scholars who sought to enlarge the boundaries of Islamic law to encompass new, unforeseen cases, Mālik's juristic dicta as transmitted by his authoritative companions were seen as indispensable. During this period of expansion, law needed to be placed on a firmer footing while also allowing for application to new problems. By including Mālik's dicta among the acceptable sources, those scholars vastly increased the number of authoritative texts.

Because of this devotion to Mālik, and to Mālik's students, Saḥnūn was a pivotal figure in the spread of Mālikī law, a position that was recognized by ensuing generations. Saḥnūn's place in history is perhaps best expressed by these words from one of his disciples: "In a vision, I saw the Prophet (God's blessings and peace be upon him) walking on a path, and Abū Bakr behind him, and ʿUmar behind Abū Bakr, and Mālik behind ʿUmar, and Saḥnūn behind Mālik."[77]

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[76] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:53; the source is Abu'l-ʿArab, presumably from his book, *Faḍā'il Saḥnūn*, which is lost to us. The sources also pay a good deal of attention to Saḥnūn's dressing habits, the material of his head-wrap, and the color of his cloak. This careful recording of minute details is a sign of Saḥnūn's importance and his position in the school as an object of emulation, a point I discuss further in Brockopp, "Theorizing Charismatic Authority."

[77] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 4:87; this is just one of several visions of Saḥnūn in heaven.

CHAPTER FIVE

AḤMAD B. ḤANBAL (D. 243/855)

Susan A. Spectorsky

Life and Learning

Abū ʿAbd Allāh Aḥmad b. Muḥammad b. Ḥanbal (164–241/780–855) was one of the foremost religious scholars of 3rd/9th century Baghdad. He was an Arab of the Banū Shaybān of Rabīʿa. His grandfather was a governor of Sarakhs under the Umayyads and also an early Abbasid supporter. His father was in the Khurasanian army and moved to Baghdad in 164/780, several months before Aḥmad was born. Except for travel to study with various scholars and to make the pilgrimage, Ibn Ḥanbal lived almost his entire life in Baghdad. Toward the end of his life, he was pressured to spend time in Samarra at the court of the Caliph al-Mutawakkil (r. 232–47/847–61), but he stayed there only briefly in 237/851. He was buried just outside the Ḥarb Gate, and his tomb was venerated until it was destroyed by flood in the 8th/14th century.[1] His reputation for learning was based primarily on his knowledge of traditions; his reputation for piety was based on the austerity of his lifestyle and his demeanor under duress during the *miḥna*.

Ibn Ḥanbal and his extended family resided in a compound in the northwestern part of the city. He owned at least one shop, which he rented out and which provided him with some income, but he shunned ease out of conviction, and he and his family were often in straitened circumstances. A number of anecdotes describe moments of particular hardship, but despite many offers from colleagues and students, he was always unwilling to accept gifts or money. After the *miḥna* was over, he was especially unwilling to accept anything from al-Mutawakkil and resisted the caliph's attempts to provide him with substantial gifts. When his son Ṣāliḥ agreed to accept the caliph's largesse, Ibn Ḥanbal refused to continue associating with him, despite Ṣāliḥ's protestations that his own family was large and needy.

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[1] See Lassner, *The Topography of Baghdad*, 112 and 286, n. 4.

The main sources for these details of Ibn Ḥanbal's life are found in *Manāqib al-Imām Aḥmad Ibn Ḥanbal* by ʿAbd al-Raḥmān b. al-Jawzī (d. 597/1200) and in the biography of him by Shams al-Dīn al-Dhahabī (d. 753/1353) in his *Tārikh al-Islām*. Qāḍī Muḥammad b. Abī Yaʿlā (d. 458/1066) begins his *Ṭabaqāt al-ḥanābila* with a biography of Ibn Ḥanbal,[2] and there are entries on him in many other bio-bibliographic dictionaries.[3] Until recently, modern scholarly studies of Ibn Ḥanbal in Western languages were limited to Goldziher's article on his *Musnad*, Patton's study of the *miḥna* and Laoust's article on the Ḥanbalī school in Baghdad.[4] In the last decade or so, a number of studies of Ibn Ḥanbal's life and works have appeared in English. Michael Cooperson has examined the biographical tradition of Ibn Ḥanbal's role in the *miḥna* and Nimrod Hurvitz has provided a picture of the study circle around him.[5] Christopher Melchert has written several informative articles dealing with different aspects of his thinking, as well as a full biography which, although brief, is fully documented and useful for specialists and non-specialists alike.[6] Given the availabilty of this material, my outline of Ibn Ḥanbal's life below emphasizes those aspects of it most relevant to his contribution to the legal thought of the formative period of Islamic law.

Ibn Ḥanbal began his studies of *fiqh* and *ḥadīth* in Baghdad at about the age of sixteen. Subsequently, he studied in Kufa and Basra, as well as in Mecca and Ṣanʿāʾ. Biographies of him list a great many teachers, as well as a number of men from whom he heard at least some traditions. Among the most important of his teachers, we can single out one in each of the

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[2] Ibn al-Jawzī, *Manāqib al-Imām Aḥmad Ibn Ḥanbal* (Cairo, 1349); Dhahabī, *Tarjamat al-imām Aḥmad min Tārīkh al-Islām*; Ibn Abī Yaʿlā, *Ṭabaqāt al-ḥanābila* (Cairo, 1952), 4–20.

[3] For a full list of Arabic bio-bibliographical sources on Ibn Ḥanbal's life and works, see *GAS*, 1:503–4.

[4] Goldziher, "Neue Materialien zur Literatur des Uberlieferunswesens bei den Muhammedanern," 465–506; Walter M. Patton, *Aḥmad Ibn Ḥanbal and the Miḥna*; Henri Laoust, "Le Hanbalisme sous Le Califat de Baghdad," 67–128.

[5] Cooperson, *Classical Arabic Biography* (Chapter 4 examines how different sources treat the way Ibn Ḥanbal behaved during his interrogation and imprisonment, over the course of the *miḥna*). Hurvitz, *The Formation of Hanbalism: Piety into Power* emphasizes Ibn Ḥanbal's unwillingness to assume a leadership role as a scholar lest it interfere with the study of *ḥadith* by means of which believers could discover and follow the *sunna* of the Prophet.

[6] Melchert, "The Adversaries of Aḥmad Ibn Ḥanbal," 234–53; idem, "The Hanabila and the Early Sufis," 352–67; idem, "The Piety of the Hadith Folk," 425–39; idem, "Aḥmad ibn Ḥanbal and the Qurʾān," 22–34; idem, "The *Musnad* of Aḥmad ibn Ḥanbal: How it was composed and what distinguishes it from the six books," 32–51; idem, *Ahmad bin Hanbal*.

cities just mentioned: Hushaym b. Bāshir (d. 188/803) in Baghdad; Wakīʿ b. al-Jarrāḥ (d. 197/812–13) in Kufa; ʿAbd al-Raḥmān b. Mahdī (d. 198/813) in Basra; Sufyān b. ʿUyayna (d. 198/813–14) in Mecca, and ʿAbd al-Razzāq b. Ḥammām (d. 211/827) in Yemen. The biographies of all these men describe them as polymaths, but they are particularly known as traditionists.

In Baghdad, although Abū Yūsuf was the first person whose study sessions he attended, his main early teacher in that city was Hushaym b. Bāshir, who is reported to have been a pupil of al-Ḥasan al-Baṣrī and also of Ibrāhīm al-Nakhaʿī.[7] In Kufa, Ibn Ḥanbal studied *ḥadīth* with Wakīʿ b. al-Jarrāḥ—who, although often accused of *tadlīs*—was one of that city's leading *ḥadīth* scholars. Wakīʿ transmitted *ḥadīth* on the authority of a number of prominent 2nd/8th century scholars, including ʿIkrima b. ʿAmmār, al-ʿAmash, al-Awzāʿī and Mālik b. Anas.[8] In Basra, Ibn Ḥanbal studied with ʿAbd al-Raḥmān b. Mahdī, who had studied with the traditionists Shuʿba b. Ḥajjāj and Sufyān b. ʿUyayna, as well as with the jurists Sufyān al-Thawrī[9] and Mālik. About Wakīʿ and Ibn Mahdī, Ibn Ḥanbal is reported to have said, "Whenever Wakīʿ and ʿAbd al-Raḥmān disagreed, ʿAbd al-Raḥmān was the more reliable because he was more knowledgeable about the Book."[10]

Ibn Ḥanbal made the pilgrimage to Mecca five times, in 187/803, 191/807, 196/811, 197/812 and 198/814. Whenever he was in Mecca, his main teacher was Sufyān b. ʿUyayna until the latter's death in 198/813. Sufyān was one of the foremost traditionist scholars of the Ḥijāz. In his teens he had heard al-Zuhrī and is considered one of the main transmitters of his *ḥadīth*. In Ṣanʿā', Ibn Ḥanbal heard traditions from ʿAbd al-Razzāq b. Ḥammām (d. 211/827) whose most important teachers were Maʿmar b. Rāshid (d. 154/770) and Ibn Jurayj (d. 150/767).[11] Ibn Ḥanbal's teachers all studied with prominent scholars who were themselves Successors, or who had in turn heard various Successors who were repositories of knowledge about the Companions and hence ultimately about the Prophet.

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[7] For Hushaym b. Bāshir, see *GAS*, 1:38. Al-Ḥasan al-Baṣrī (d. 110/728) and Ibrāhīm al-Nakhaʿī (d. 96/715) were both Successors.

[8] For Wakīʿ b. al-Jarrāḥ, see *GAS*, 1:96. For ʿIkrima b. ʿAmmār (d. 159/776), see Juynboll, *Encyclopedia of Canonical Ḥadīth*, 240–1; For al-ʿAmash (d. 147 or 148/764–5), see ibid., 78–126. For al-Awzāʿī and Mālik b. Anas, see *EI²*, s.vv.

[9] For ʿAbd al-Raḥmān b. Mahdī (d. 198/813), see *GAS*, 1:488; for Shuʿba (d. 160/766), see ibid., 1:92; for Sufyān al-Thawrī (d. 161/778), see ibid., 518–19; for Sufyān b. ʿUyayna (d. 198/813), see ibid., 96.

[10] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-tahdhīb*, 6:280.

[11] For Sufyān b. ʿUyayna, see *EI²*, s.v. For ʿAbd al-Razzāq b. Hammām, see *GAS*, 1:99; for Maʿmar b. Rāshid, see ibid., 1:290–91; for Ibn Jurayj, see ibid., 91.

Stories of his travels provide further anecdotes about Ibn Ḥanbal's refusal ever to accept financial assistance, as well as about his zealous pursuit of knowledge. In one, he reports that in 187/803, when he first made the pilgrimage, he would have gone to Rayy to study with Jarīr b. ʿAbd al-Ḥamīd if he had had fifty dirhams.[12] The traditionist and jurist Ibn Rāhwayh (d. 238/853) said that once when he and Ibn Ḥanbal were on their way to Ṣanʿā' to study *ḥadīth* with ʿAbd al-Razzāq, Ibn Ḥanbal ran out of money. Rather than accept any collegial assistance, he hired himself out as a porter to be able to afford the trip.[13] Another time, al-Dawraqī (d. 246/860), who was a contemporary and student of Ibn Ḥanbal's, is reported to have said that when Ibn Ḥanbal returned to Mecca after having gone to Ṣanʿā' to study with ʿAbd al-Razzāq, he looked pale and tired. When al-Dawraqī remonstrated with him for undertaking the burden of travel, he said, "What an easy burden! We benefitted from ʿAbd al-Razzāq by writing on his authority al-Zuhrī's *ḥadīth*s on the authority of Sālim b. ʿAbd Allāh on the authority of ʿAbd Allāh b. ʿUmar on the authority of his father. In addition [we wrote down] al-Zuhrī's *ḥadīth*s on the authority of Saʿīd b. al-Musayyab on the authority of Abū Hurayra."[14]

Many more scholars are listed as Ibn Ḥanbal's teachers in each of the cities he visited. A number of them also became his students.[15] Qutayba b. Saʿīd[16] related that on one occasion, when Wakīʿ returned home at the end of the day, Ibn Ḥanbal accompanied him. At the door of Wakīʿ's house, Ibn Ḥanbal stood with him and they engaged in *mudhākara* (competition to recall alternate *isnād*s). When night fell, Wakīʿ started to open the door, then offered to teach Ibn Ḥanbal an *isnād* which he turned out to know. Then he mentioned another *isnād* which Ibn Ḥanbal also knew. After several attempts to teach his pupil something new, the roles were

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[12] Ibn al-Jawzī, *Manāqib*, 25. For Jarīr b. ʿAbd al-Ḥamīd (d. 188/804), see Juynboll, *Encyclopedia of Canonical Ḥadīth*, 263 and references to him in Ibn Ḥanbal, *Kitāb al-ʿilāl*, 1:543, no. 1289 and n. 2.

[13] See Dhahabī, *Tarjamat al-imām Aḥmad*, 84. For Ibn Rāhwayh, see *EI²*, s.v.

[14] *Manāqib*, 32–33. For Aḥmad b. Ibrāhīm al-Dawraqī (d. 246/860), see Ibn Abī Yaʿlā, *Ṭabaqāt al-Ḥanābila* (Cairo, 1952), 1:21. Sālim b. ʿAbd Allāh and ʿAbd Allāh b. ʿUmar are grandson and son of the caliph ʿUmar b. al-Khaṭṭāb. For the famous Successor, al-Zuhrī (d. 124/742), see *EI²*, s.v. For the Successor, Saʿīd b. al-Musayyab (d. 94/713), see *GAS*, 1:276; for the Companion, Abū Hurayra (d. 58/678), see *EI²*, s.v.

[15] See Ibn al-Jawzī, *Manāqib*, 33–56 for an extensive list. See also Melchert, *Aḥmad ibn Ḥanbal*, 33–9.

[16] For Qutayba b. Saʿīd, see Ibn Abī Yaʿlā, *Ṭabaqāt al-ḥanābila* (Cairo, 1952), 1:257–8, no. 362.

reversed and Ibn Ḥanbal began teaching Wakīʿ. They stood at the door until a servant appeared and said that the stars had come out.[17]

It is not entirely clear at what date Ibn Ḥanbal acquired his reputation and began to hold teaching sessions in the mosque close to his home. Several anecedotes in the *Manāqib* make a point of the fact that in his youth, he would sometimes give *fatwā*s or relate *ḥadīth* if asked, but he did not esteem his own legal pronouncements. Nūḥ b. Ḥabīb al-Qūmisī relates that in 198/814, he saw Ibn Ḥanbal in the Mosque of al-Khayf (in Mina) surrounded by traditionists to whom he was teaching *fiqh* and *ḥadīth*, and he was also giving *fatwā*s regarding the pilgrimage rites.[18] In that year, he would have been about thirty-four years of age. In another report, Ḥajjāj b. al-Shāʿir said that he went to Ibn Ḥanbal in 203 and asked to be taught *ḥadīth*, but Ibn Ḥanbal refused and sent him to study with ʿAbd al-Razzāq b. Ḥammām. But in 204, when he went back to Ibn Ḥanbal, he found him instructing a large group in *ḥadīth*. At that time Ibn Ḥanbal was forty years of age.[19]

At the peak of his teaching career, Ibn Ḥanbal regularly held two teaching sessions: one in the mosque for anyone who wished to hear him, which was attended by a great many people; the other in his house for a more select group that included his sons and his favored students. Descriptions of his demeanor emphasize his modesty. When he went to the mosque, he would arrive at his session and take a seat wherever there was room. He would not stretch his feet out and he respected those sitting next to him. Further, in his afternoon sessions devoted to *iftāʾ*, he would never speak first but always wait to be questioned. When it was time to leave, he would ask permission before rising to return home.[20] This kind of teaching was interrupted by the *miḥna*, and Ibn Ḥanbal would not return to it again.

The *miḥna*, instituted by the Caliph al-Maʾmūn shortly before his death in 219/833, was pursued more or less actively by his two successors,

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[17] Dhahabī, *Tarjamat al-imām Aḥmad min Tārīkh al-Islām*, 16.

[18] Ibn al-Jawzī, *Manāqib*, 187. Nūḥ b. Ḥabīb al-Qūmisī (d. 242/856) studied *ḥadīth* with many of the same teachers as Ibn Ḥanbal, and ʿAbd Allāh b. Aḥmad related from him, as did Abū Dāwūd al-Sijistānī and al-Nasāʾī. See Ibn Ḥajar, *Tahdhīb*, 10:481–2, no. 869. For al-Qūmisī, see also Ibn Abī Yaʿlā, *Ṭabaqāt* (Cairo, 1952), 1:390, no. 505. The mosque of al-Khayf is three miles from Mecca. See Hughes, *Dictionary of Islam*, 343, s.v., "Masjidu ʻl-Khaif."

[19] Ibn al-Jawzī, *Manāqib*, 188–9. For Ḥajjāj b. al-Shāʿir, see Ibn Abī Yaʿlā, *Ṭabaqāt al-ḥanābila* (Cairo, 1952), 1:148–9, no. 196.

[20] Ibn al-Jawzī, *Manāqib*, 218, and see further Melchert, "The Etiquette of Learning in the Early Islamic Study Circle," 33–44.

al-Muʿtaṣim (r. 218–27/833–42) and al-Wāthiq (r. 227–32/842–47) and then ended gradually but completely by al-Mutawakkil (r. 232–47/847–61).[21] Under al-Maʾmūn, Ibn Ḥanbal was imprisoned for refusing to confess that the Qurʾān was not eternal but created in time, and he remained in captivity for over two years at the beginning of al-Muʿtaṣim's reign. At the end of this period, Ibn Ḥanbal's uncle, Ḥanbal b. Isḥāq, attempted to have his nephew released by urging that he be allowed to debate the question publicly. Ibn Ḥanbal debated the court's theologians, but he refused to grant their arguments any status since he did not find them grounded in the Qurʾān and the *sunna*. When he repeatedly refused to accept the notion that the Qurʾān was created, he was flogged and then released. Reports on why he was released differ widely. A case can be made that he capitulated; another, for the fact that the caliph realized that his popularity was such that continued imprisonment would lead to popular unrest.[22]

Regardless of whether or not he succumbed to torture and confessed that the Qurʾān was created, his personal reputation did not suffer. Once he had recovered from his ordeal, he continued to teach, although it is not clear how openly, or to how many people. When al-Wāthiq became caliph and showed renewed interest in the *miḥna*, Ibn Ḥanbal went into hiding until the accession of al-Mutawakkil. Dating the final days of the *miḥna* is difficult. Some reports say it ended as soon as al-Mutawakkil became caliph, others that it petered out gradually.[23] Certainly it was over when al-Mutawakkil dismissed his chief qāḍī, in 237/851.[24] This is the year in which the caliph also ordered the release of all those imprisoned because of the inquisition and in which he summoned Ibn Ḥanbal to Samarra, where he refused to accept the caliph's largesse or tutor his son. When

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[21] For a clear description of the historical events of the *miḥna* and the theological issues involved, see *EI*[2], s.v. "Miḥna."

[22] In addition to the *EI* article on the *miḥna*, see Michael Cooperson's *Classical Arabic Biography* for an excellent summary of the issues in question. He suggests that the available evidence does not make it possible to determine decisively whether Ibn Ḥanbal capitulated. Madelung provides a useful overview of the nuances of the discussion in "The Controversy over the Creation of the Koran," 504–25.

[23] See Melchert, "Religious Policies of the Caliphs," 316–42, esp. 320–6 for a discussion of the different views. Melchert describes the gradual end of the *miḥna* through an examination of the people al-Mutawakkil appointed as judges and concludes that his repudiation of the *miḥna* was limited. This may explain in part why Ibn Ḥanbal was so wary of any contact with him.

[24] Ibn Abī Duʾād became chief qāḍī under al-Muʿtaṣim and was instrumental in examining Ibn Ḥanbal. Shortly after the accession of al-Mutawakkil, Ibn Abī Duʾād's son Abuʾl Walīd Muḥammad, took over his position, and it was Abuʾl Walīd who al-Mutawakkil finally dismissed. See *EI*[2], s.v. "Aḥmad b. Abī Duʾād."

he returned to Baghdad, he continued to live in poverty until his death several years later.[25]

Scholarship

Although a number of works are ascribed to Ibn Ḥanbal, they were in fact compiled by close associates, his sons ʿAbd Allāh (d. 290/903) and Ṣāliḥ (d. 265/878), or one or another of his students. In the field of theology, they include *Kitāb al-radd ʿalā ʾl-Jahmiyya waʾl-Zanādiqa* and *Kitāb al-waraʿ*, a short work on devotion and upright behavior.[26] In addition, six creeds are attributed to him.[27] Here, I focus on his legal works.[28]

Ibn Ḥanbal's *Musnad* was compiled by his son ʿAbd Allāh and contains between 27– and 29,000 *ḥadīth*s (depending on how reports are counted). Unlike the Six Books, the *Musnad* is arranged by Companion rather than subject matter. The *ḥadīth*s are Prophetic, except for some at the beginning that are attributed to the Rāshidūn, followed by other Companions and, at the end, traditions from women contemporaries of the Prophet. Repetition goes some way to accounting for the size of the *musnad*, along with the inclusion of a number of *ḥadīth*s with weak *isnād*s.[29] The inclusion of weak *isnād*s can be considered a matter of conviction: ʿAbd Allāh b. Ḥanbal reports that his father said, "A weak *ḥadīth* is better than Abū Ḥanīfa's *raʾy*,"[30] and that he also said, "Preserve this *musnad*; it will be an *imām* for people."[31]

Kitāb al-ʿilal wa maʿrifat al-rijāl (*The Book of Defects in Traditions and Knowledge of Men*), also compiled by ʿAbd Allāh, contains bio-bibliographical information on tradition transmitters. It has no discernible order and the information on each transmitter can be extensive or merely a line or

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[25] For Ibn Ḥanbal's place in the renunciant tradition, see Melchert, *Aḥmad Ibn Ḥanbal*, Chapter 5, "Piety."

[26] See Hurvitz, *The Formation of Ḥanbalism*, Chapters 3 ("Private Acts and Social Meaning") and 5 ("Social Critique and Group Identity") for the personal discipline Ibn Ḥanbal expected of himself and those around him.

[27] For discussion of these creeds, see Melchert, *Aḥmad ibn Ḥanbal*, Chapters 4 ("Correct Belief") and 5 ("Piety").

[28] For a full listing of works attributed to Ibn Ḥanbal, see *GAS*, 1:503–9.

[29] Melchert's article on the *Musnad*, (see above n. 6) describes studies of it subsequent to Goldziher's (see Melchert, *Musnad*, 6, 36–7), as well as the several editions currently in print (ibid., 34). The edition I use below is in 6 vols. (Cairo, 1895, reprint Beirut, 1985).

[30] ʿAbd Allāh b. Ḥanbal, *Masāʾil*, 488.

[31] Ibn al-Jawzī, *Manāqib*, 191.

two. In addition, an entry on one transmitter may include information on a number of others.[32]

Ibn Ḥanbal's *fiqh* is found in five of the extant versions of his responses (*masāʾil*). One was compiled by his son ʿAbd Allāh, a second by his son Ṣāliḥ, a third by the famous traditionist Abū Dāwūd al-Sijistānī (275/888), a fourth by the Khurasanian jurist and traditionist Isḥāq b. Manṣūr al-Kausaj (251/865), and a fifth by one of Ibn Ḥanbal's students, Ibn Hāniʾ al-Nīsābūrī (d. 275/888–89).[33] These collections of his responses provide a body of doctrine that makes it possible to examine Ibn Ḥanbal's legal thinking, despite the fact that he urged his students not to write down his opinions, but instead to devote themselves to studying *ḥadīth*.[34] With respect to the transcription of his responses, Ibn Ḥanbal at one point said to one of his favorite students, Abū Bakr al-Marwadhī (d. 275/888), "As for *ḥadīth*, I am comfortable with it; as for *masāʾil*, I have sworn that if anyone asks me about anything, I will not answer."[35] Further, his cousin, Ḥanbal b. Isḥāq, said, "I observed that Abū ʿAbd Allāh disliked having any opinion or *fatwā* of his written down."[36] Ibn Ḥanbal was certainly not against written material; he had a large library. His objection to having his responses committed to writing was consistent with his legal position that

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[32] *Kitāb al-ʿilal wa maʿrifat al-rijāl* has been edited and annotated by Waṣī Allāh b. Muḥammad ʿAbbās, who has numbered the entries and provided an excellent index with cross references of all the transmitters mentioned. 8 vols in 4 (Riyadh, Dār al-khānī, 1408/1988).

[33] For ʿAbd Allāh b. Aḥmad, see *GAS*, 1:511; for Ṣāliḥ b. Aḥmad, see *GAS*, 1:510; for Abū Dāwūd al-Sijistānī, see *GAS*, 1:149–52; for Isḥāq b. Manṣūr al-Kausaj, see *GAS*, 1:509. For Ibn Hāniʾ, see Ibn Abī Yaʿlā, *Ṭabaqāt* (Cairo, 1952), 1:108–9.

[34] A sixth version by Ibn Ḥanbal's student Muḥannā b. Yaḥyā al-Shāmī, ed. Ismāʿīl b. Ghāzī Marḥabā (Madina: Maktabat al-ʿulūm waʾl-ḥikam, 1426/2005–06) has been rearranged by the editor to accord with *al-Inṣāf fī maʿrifat al-rājiḥ min al-khilāf ʿalā madhhab al-Imām al-mubajjal Aḥmad ibn Ḥanbal* by the later Ḥanbalī scholar ʿAlī b. Sulaymān al-Mardāwī (d. 855/1480–81). The rearrangement makes it a less immediate reflection of Ibn Ḥanbal's own *fiqh*, and I have not used it here. For publication information of the versions of Ibn Ḥanbal's *masāʾil* by Abū Dāwūd al-Sijistānī, by Ibn Ḥanbal's sons ʿAbd Allāh and Ṣāliḥ, and by Ibn Hāniʾ al-Nīsābūrī, see the consolidated bibliography. The version by Isḥāq b. Manṣūr al-Kausaj, which includes responses by the traditionist and jurist Isḥāq b. Rāhwayh (d. 238/853), remains unpublished, except for the section on transactions (*muʿāmalāt*), ed. Ṣāliḥ b. Muḥammad al-Fahd (Madīna: Maktabat al-ʿulūm waʾl-ḥikam, 1422/2001) and my translation of the sections on marriage and divorce in Spectorsky, *Chapters* (see *Chapters*, 256–57 for manuscript information). All versions of Ibn Ḥanbal's *masāʾil* also contain responses of ritual and dogmatic interest which I have not dealt with here.

[35] Ibn Abī Yaʿlā, *Ṭabaqāt al-ḥanābila* (Cairo, 1952), 1:57. For more on Ibn Ḥanbal's relationship with al-Marwadhī (or al-Marūdhī) and other favored students, see Hurvitz, *Formation of Hanbalism*, 76–80.

[36] Ibn al-Jawzī, *Manāqib*, 193. Here, "*fatwā*" is used to refer to an opinion on a point of law from a scholar, rather than an opinion given as part of a case brought before a qāḍī.

the answers to all questions are found in the Qurʾān and in the *sunna*, the normative practice of the Prophet and the early community. Knowledge of these is contained in traditions.

Ibn Ḥanbal is best characterized as a traditionist-jurist, meaning that he was both a traditionist, a *muḥaddith*, and a member of the *aṣḥāb al-ḥadīth*, those scholars who believed that law should be based on the Qurʾān and the *sunna*.[37] He was against the use of *raʾy*, personal opinion; hence his comment above, "A weak *ḥadīth* is better than Abū Ḥanīfa's *raʾy*." *Masāʾil* (sing. *masʾala*) are legal questions, most often ones about which there is disagreement (*ikhtilāf*). By the 3rd/9th century—certainly on the topics of marriage and divorce to be examined below—virtually all questions had been asked and answered, but many with different answers. What the compilers of these *masāʾil* wished to know is how Ibn Ḥanbal would answer questions on which there was *ikhtilāf*. As a traditionist-jurist, he does not answer every question with a tradition, but if he is not satisfied with the traditions known to him that are relevant to a particular issue, he refuses to answer at all and thereby to let his personal opinion, his *raʾy* prevail. Abū Dāwūd says, "I have often heard Aḥmad asked about topics on which there are conflicting opinions (*ikhtilāf fiʾl-ʿilm*), to which he would reply, 'I do not know.'"[38] Further, Ibn Ḥanbal disparaged writing down the opinions of other jurists. ʿAbd Allāh reports, "When writing books was mentioned, I heard my father say, 'I dislike it. Here, Abū Ḥanīfa wrote a book; then Abū Yūsuf came and wrote one, then Muḥammad b. al-Ḥasan (i.e., Shaybānī) wrote one. There is no end to this; men are always writing books. Mālik wrote one, then Shāfiʿī also, then Abū Thawr (d. 240/854). Writing these books is *bidʿa*, [that is] whenever a man writes a book and abandons the *ḥadīth* of the Prophet and his Companions.'"[39] However, several centuries later, Ibn al-Jawzī says, "He used to forbid people from

[37] Ibn Ḥanbal "staunchly opposed the teaching of law apart from the transmission of *ḥadīth* reports. . . ." Melchert, "The Adversaries of Aḥmad Ibn Ḥanbal," 235 and n. 4. Further, he "was most hostile towards *aṣḥāb al-raʾy*, jurisprudents who relied heavily on *raʾy* (common sense or reason) and the opinions of previous jurisprudents in preference to *ḥadīth* reports." Ibid., 236. See also Spectorsky, "Aḥmad Ibn Ḥanbal's *Fiqh*."

[38] Abū Dāwūd, *Masāʾil*, 275. See Spectorsky, "Aḥmad Ibn Ḥanbal's *Fiqh*," 463–64, where I discuss a question regarding which Ibn Ḥanbal knows a number of contradictory traditions, but does not prefer one set over another. In such an instance, he says, "I am afraid to give an answer. . . ."

[39] ʿAbd Allāh b. Ḥanbal, *Masāʾil*, 437. For Abū Thawr, see *GAS*, 1:491.

writing down his words, but God saw the goodness of his intentions, so his words were transmitted and preserved."[40]

The several versions of Ibn Ḥanbal's *masā'il* cover the same topics, although not always the same details, since the compilers record the questions of most interest to them. They indicate several different kinds of transmission. Mainly they say, "I asked Aḥmad," or "I asked Abū ʿAbd Allāh," or they indicate being present when a third party asked a question: "Abū ʿAbd Allāh was asked," and "I heard him asked." Ibn Ḥanbal's two sons say, "I asked," or "I read to my father" (indicating a question about which they had already collected information), or sometimes, "My father dictated to me." Abū Dāwūd indicates another possibility when he begins a problem by saying, "I saw Aḥmad after a sheet of paper had been brought to him." The version by al-Kausaj introduces two more possibilities: he often combines answers from both Ibn Ḥanbal and Ibn Rāhwayh with the answers Sufyān b. ʿUyayna had previously given him.

Translations

The responses translated below demonstrate how Ibn Ḥanbal based his *fiqh* on traditions. The first is about the oath of *īlā'*. Since this is an oath mentioned in the Qur'ān, he relies on and defends those traditions that he thinks most accurately interpret it. The second is a question not specifically referred to in the Qur'ān—the question of the extent of a father's authority to give his daughter in marriage. Here, Ibn Ḥanbal refers to the history of the early community. The third is the question of whether an intoxicated man's divorce is valid, a question about which Ibn Ḥanbal changed his mind.

1. al-Īlā'

An oath of *īlā'* is taken by a man who swears to abstain from sexual relations with his wife either for an indefinite period of time, or for a period of time longer than four months. A man who does this is called a *mūlī*. The procedure for *īlā'* is referred to in Qur'ān 2:226–27: *Those who forswear their wives must wait four months; then if they change their minds, lo! Allah*

[40] Ibn al-Jawzī, *Manāqib*, 191.

is Forgiving, Merciful. And if they decide upon divorce, (let them remember that) Allah is Hearer, Knower.[41]

An oath of *īlāʾ* leaves the status of a marriage in doubt. Swearing such an oath is described as a pre-Islamic practice which was limited and regularized in the Qurʾān.[42] In the early Qurʾān commentary by Muqātil b. Sulaymān (d. 150/767), he says, "God set a time limit of four months for *īlāʾ*. . . ."[43] In his *Asbāb al-nuzūl*, the Qurʾān scholar al-Wāḥidī (d. 468/1076) relates two traditions that offer a context for these verses regulating *īlāʾ*. In one, the Companion Sāʿid b. al-Musayyab says that during the *Jāhiliyya*, a man who did not want his wife himself, rather than divorce her, might deny her the possibility of remarrying by taking an oath of *īlāʾ* for an unlimited period of time. In the other, the Companion Ibn ʿAbbās said that during the *Jāhiliyya*, men might take a vow of *īlāʾ* for one or two, or possibly more years, so God set a time limit for this vow.[44]

Jurists disagreed and debated about what happened at the end of the four-month period. In the following question, Ṣāliḥ asks about a number of possibilities:

> I read to my father saying, "A man swears that he will not approach his wife for a year, or [in any case] more than four months. There are those who say that after four months his marriage is suspended (*mawqūf*) and that then he must either have intercourse with his wife or divorce her. Others say that when four months have passed, his wife is divorced from him, a single divorce. Others say that this is a single divorce, but not an irrevocable one. Others say that if a man swears an oath of *īlāʾ* for fewer than four months, it is not [tantamount to] an oath of *īlāʾ*. However, others say that it becomes one whenever four months have passed. But if a man says [to his wife], "By God I will not have intercourse with you in this house for one year," that is not an instance of *īlāʾ* because if he wishes, he can have intercourse with her elsewhere.
>
> Some say that after she has been divorced [as a result of her husband's oath of *īlāʾ*], she waits the *ʿidda* of a divorcee and that [*ʿidda*] follows the period of four months. Others [disagree and] say that when four months have passed, she may remarry if she wishes and does not need to wait an

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[41] Trans., Pickthall, *The Meaning of the Glorious Koran*.

[42] *Īlāʾ* is often discussed in conjunction with *ẓihār* since both were considered pre-Islamic practices that were regulated for Muslims by Qurʾānic verses. On the pre-Islamic origins of both *ẓihār* and *īlāʾ*, see *EI*[1], s.v., "Ṭalāq"; Gerald Hawting, "An Ascetic Vow and an Unseemly Oath? *Īlāʾ* and *Ẓihār* in Muslim Law," 113–25. See also *EQ*, s.v. "Oaths" (especially under "*Vocabulary and types of oaths*"), 3:562–3.

[43] See Hawting, "An Ascetic Vow," n. 16 for this reference to Muqātil b. Sulaymān's *Tafsīr al-khams miʾat āya*, ed. I. Goldfarb, 204.

[44] See al-Wāḥidī al-Nīsābūrī, *Asbāb al-nuzūl*, 49.

> *ʿidda* after the passage of four months. That has been related on the authority of Ibn ʿAbbās, who said, "Do not prolong things for her; once four months have passed, she is not required to wait an *ʿidda*."

Ṣāliḥ starts by pointing out the possibility that at the end of four months the marriage might be suspended, at which point a man might either resume sexual relations with his wife or divorce her. Another possibility, however, is that a man's wife is automatically divorced from him at the end of the four-month period. If she is, then the question arises of whether her divorce is only a single one, or whether it is a single irrevocable divorce.

Ṣāliḥ also brings up two possibilities regarding a man's oath to cease sexual relations with his wife, if he takes it for fewer than four months: either it does not count as an oath of *īlāʾ*, or, once four months have passed, it turns into one. Ṣāliḥ does not actually ask, but rather affirms that if a man swears to cease sexual relations with his wife in a particular locale, that is not an oath of *īlāʾ*, because he can have intercourse with her elsewhere. His final question is whether a woman who has been divorced by a *mūlī* must wait an *ʿidda* before she can remarry (the *ʿidda* of a divorcee, three months or three menstrual periods), or whether, in accordance with the opinion he quotes from the Companion Ibn ʿAbbās, she does not need to wait one. He relates his father's reply:

> My father said, "I say that when four months have passed after a man has sworn not to have intercourse for more than four months, [and] then his wife inquires of him [what his intentions are], her marriage is suspended. Then he must either have intercourse with her or divorce her. There is no divorce until [and unless] the marriage has been suspended. Further, if the matter is prolonged so that a year or more passes, no divorce takes place unless the husband declares it. Then, if she has been divorced, she waits the *ʿidda* of a divorcee, three menstrual periods, or three months if she does not menstruate. Suspending the marriage is closest to the meaning of the Qurʾān, because God said, *Those who forswear their wives*—He said that they take an oath—*must wait four months; then if they change their mind* (2:226)....[45] If they do change their minds after the passage of four months, intercourse [is resumed]. *And if they decide upon divorce* ... (2:227). Thus, He required intercourse and the resolution to resume intercourse after the passage of four months. Further, there cannot be a divorce unless the husband declares it, because God said, *if they change their mind ... and if they decide upon divorce* (2:226–27). These two (i.e., resuming intercourse or declaring a divorce) are brought about by the husband. Divorce does not come about

[45] The Arabic is *fa-in fāʾū*, literally, "if they have sexual intercourse."

> [merely] from the passage of four months. Further, a man should not prevent his wife from remarrying once the marriage has been suspended: either he should have intercourse with her or divorce her. A man came to ʿĀ'isha, who said to him, 'The time has come for you to have intercourse [with your wife].'"[46]

Ibn Ḥanbal answers Ṣāliḥ's first question by saying that at the end of four months, a *mūlī*'s marriage is suspended, but he adds the detail that it is suspended when the wife inquires about her husband's intentions. Otherwise, even if a year or more goes by without his resuming sexual relations with her, Ibn Ḥanbal says that nothing happens. He is adamant that divorce does not take place unless the husband declares it. He quotes the Qur'ān to point out that resuming intercourse and declaring a divorce are both "brought about by the husband." In the event that the husband neither resumes having intercourse with his wife nor divorces her, she may inquire about his intentions, and at that point her husband should either divorce her or resume intercourse with her. He ends his answer by referring to a tradition in which ʿĀ'isha urged a man to end the period of uncertainty by either resuming sexual relations with his wife or divorcing her. He does not refer to Ibn ʿAbbās, but merely states his disagreement by noting that if a *mūlī* divorces his wife at the end of four months, she waits a normal *ʿidda*. The part of Ṣāliḥ's question Ibn Ḥanbal does not answer here is whether a divorce pronouncement that follows an oath of *īlāʾ* results in a single divorce, or in a single irrevocable divorce.[47] That answer is in the version of his *Masāʾil* compiled by al-Kausaj, who asks him, "How many divorces result from divorce after *īlāʾ*?" He (Ibn Ḥanbal) said, "A single one."[48]

In his response to Ṣāliḥ's question above, Ibn Ḥanbal obliquely answered the question of whether, if a *mūlī* divorces his wife after four months, she needs to wait an *ʿidda* before she may remarry, by saying that she waits an *ʿidda* of three menstrual periods or three months. But Ṣāliḥ ended his question by noting that the name of the Companion Ibn ʿAbbās is associ-

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[46] Ṣāliḥ b. Aḥmad b. Ḥanbal, *Masāʾil*, 2:180–3, no. 743. For this tradition from ʿĀ'isha (also footnoted by the editor of Ṣāliḥ's *Masāʾil*), see ʿAbd al-Razzāq, *Muṣannaf*, 6:458, no. 11659. Here, ʿAbd al-Razzāq relates, on the authority of al-Thawrī—Jābir—al-Qāsim b. Muḥammad, that a man swore an oath of *īlāʾ* from his wife, and then after twenty months, ʿĀ'isha said to him, "The time has come for you to have intercourse [with her]."

[47] If a divorce is merely single, a man can return to his wife at any time before her *ʿidda* ends. If it is single and irrevocable, he cannot return to her during her *ʿidda*. If he wishes to remarry her, he must do so on the basis of a new contract and a new marriage portion.

[48] Spectorsky, *Chapters*, 234, §300. For a discussion of statements and actions that produce single, double or triple divorces, see ibid., 27–39.

ated with the view that after four months, such a woman need not wait an *ʿidda* before remarrying.[49] Sāliḥ presses this point in another question:

> I said, "Ibn ʿAbbās's doctrine is [as follows]: Once four months have passed, Ibn ʿAbbās said, 'Do not obstruct her; her appointed time (*ajaluhā*) has come to an end. Let her marry whomever she wishes.' Thus in accordance with Ibn ʿAbbās's doctrine, her *ʿidda* comes to an end at the end of four months. Does anyone [else] agree with him about this?"[50]
>
> He [Ibn Ḥanbal] said, "No, except for Jābir b. Zayd who used to relate (*rawā*) it from him. But Companions of the Prophet disagreed with him. Among them were Ibn Masʿūd, but some people disagreed with him [as well]—those who said they would suspend the marriage."[51]

In this response, Ibn Ḥanbal disagrees with Ibn ʿAbbās and points to the fact that only one Successor, Jābir b. Zayd (d. 103/721–22) related this tradition from him.[52] In any case, he points out, other Companions, among them Ibn Masʿūd (d. 32/632), disagreed with Ibn ʿAbbās.[53] But then he adds another element: "Those who said they would suspend the marriage."

In Ibn Hāni''s version of Ibn Ḥanbal's *Masāʾil*, we find that Ibn Masʿūd disagreed with Ibn Ḥanbal about the suspension of a marriage at the end of four months and held that at the end of the four-month period, the couple are automatically divorced a single, irrevocable divorce. Ibn Hāniʾ reports:

> I said to Abū ʿAbd Allāh, "Do you follow Ibn Masʿūd's doctrine about *īlāʾ* [which is] that after four months have passed, the passage of time itself results in a single irrevocable divorce?"[54]

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[49] Ibn ʿAbbās was only thirteen years of age when the Prophet died. Nonetheless he is reported to have spent a fair amount of time with the Prophet. In *Kitāb al-ʿilal*, ʿAbd Allāh b. Ḥanbal says of Ibn ʿAbbās that the number of times he said, "I heard the Prophet," or "I saw the Prophet," or "I spent time with the Prophet," was between seventy and eighty times. See Ibn Ḥanbal, *Kitāb al-ʿilal*, 2:107, no. 1717. Otherwise, Ibn ʿAbbās is reported to have acquired his knowledge of prophetic traditions from other Companions. See further *EI²*, s.v. "ʿAbd Allāh b. ʿAbbās" and *GAS*, 1:23–8.

[50] For a tradition from Ibn ʿAbbās that a woman divorced by a *mūlī* need not wait an *ʿidda*, see ʿAbd al-Razzāq, *Muṣannaf*, 6:455, no. 11646.

[51] Ṣāliḥ b. Aḥmad b. Ḥanbal, *Masāʾil*, 3:67–8, no. 1355.

[52] In *Kitāb al-ʿilal*, 1:226, no. 276, Ibn Ḥanbal mentions Jābir b. Zayd along with five other Successors as a particular group known for relating traditions from Ibn ʿAbbās. The others are Ṭāwūs b. Qaysān (d. 106/724), Mujāhid b. Jabr ((d. 104/727), Saʿīd b. Jubayr (d. 95/713), ʿAṭāʾ b. Abī Rabāḥ (d. 114/732) and ʿIkrima, the *mawlā* of Ibn ʿAbbās (d. 105/723). See also 1:294, no. 477, where ʿAbd Allāh b. Ḥanbal says, "My father said, 'Those who associated with Ibn ʿAbbās are *muḥaddithūn* and muftīs.'"

[53] For ʿAbd Allāh b. Masʿūd, see *EI²*, s.v. "Ibn Masʿūd."

[54] For a tradition in which Ibn Masʿūd says that in cases of *īlāʾ* a divorce automatically occurs after four months, see ʿAbd al-Razzāq, *Muṣannaf*, 6:454, no. 11639.

> He said, "No, I do not follow his [doctrine]. I follow the doctrine of ʿAlī, ʿĀ'isha and Ibn ʿUmar, which is that in cases of *īlā'*, a wife has the most right to herself (i.e., has the right to ask for clarification of her status).[55]

There are two separate issues here. One is whether divorce automatically occurs at the end of four months. Ibn Ḥanbal disagrees with Ibn Masʿūd. He does not think the marriage is automatically over at the end of four months. He agrees instead with several other Companions that at the end of four months, the marriage should be suspended and the husband must act.[56] The other issue, which Ibn Ḥanbal does not address here, is whether such an automatic divorce would be both single and irrevocable. As noted above, he thinks that if a *mūlī* divorces his wife at the end of four months, his divorce is single, but not irrevocable.[57] Ibn Hāni' asks several additional questions in a way that makes Ibn Ḥanbal clarify just how he thinks the procedure for *īlā'* should be handled. Ibn Hāni' begins one question by bringing up a possible variation in the procedure to be followed at the end of four months:

> I asked him about *al-īlā'*: "If a man says to his wife, 'By God, I will not have intercourse with you,' and then, after four months have passed, he is told either to have intercourse with his wife or divorce her, if he does not divorce her, can the qāḍī pronounce a divorce for him?"
>
> He replied, "The qāḍī does not pronounce a divorce on the husband's behalf, but he can request the husband to resume sexual relations with his wife. If the husband does not do so, then the marriage is suspended."
>
> He [Ibn Ḥanbal] was asked about a man who swears that he will be divorced from his wife if he does not have intercourse with her for one year. He was asked whether that means the man in question becomes a *mūlī*?
>
> He replied, "No. That man has not become a *mūlī*. God said, *Allah is Forgiving, Merciful*. ʿAlī said, "The matter of suspending the marriage is up to

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[55] Ibn Hāni', *Masā'il*, 1:231, no. 1121. It is reported on the authority of ʿAlī that in cases of *īlā'*, a marriage is suspended after four months. For two such traditions, see ʿAbd al-Razzāq, *Muṣannaf*, 6:457, nos. 11656, 11657; for one from ʿĀ'isha, see ibid., no. 11658; for one from Ibn ʿUmar, see ibid., 458, no. 11661. Despite the fact that Ibn Ḥanbal studied traditions with ʿAbd al-Razzāq, these may be, but are not necessarily, the traditions he had in mind when he responded to this question. There are two from ʿAlī, but, as the editor of ʿAbd al-Razzāq's *Muṣannaf* notes, each of these traditions may be related with different *isnād*s.

[56] In disagreeing with Ibn Masʿūd, Ibn Ḥanbal does not refer to the detail of whether the automatic divorce is single and irrevocable. Ṣāliḥ b. Aḥmad b. Ḥanbal makes sure of this by asking, "Don't you yourself think that it (i.e., her marriage) should be suspended?" Ibn Ḥanbal replies, "Certainly. That is absolutely the correct interpretation." Ṣāliḥ b, Aḥmad b. Ḥanbal, *Masā'il*, 3:68, no. 1356. For several references by Ibn Ḥanbal to traditions in support of his position that a marriage must be suspended after four months, see Spectorsky, *Chapters*, 128–30, §124.

[57] See again, Spectorsky, *Chapters*, 234, §300.

> the wife; intercourse is up to her husband (*And if they decide upon divorce*). She can summon him before a judge." But I think [in this particular case] the husband does not become a *mūlī*.
>
> I heard him say, "*Īlā'* is not a divorce."[58]

Here, Ibn Ḥanbal clarifies the fact that nothing happens unless the wife publicly asks for clarification of her status. A husband does not automatically become a *mūlī* unless she does so. This is also the case if a husband makes a conditional divorce statement (that he will be divorced from his wife if he does not have intercourse with her for one year). Once she has brought her status to the attention of the qāḍī, he cannot pronounce a divorce on the husband's behalf. Only the husband can pronounce his own divorce. A tradition Ibn Ḥanbal related to his son ʿAbd Allāh in response to a question about *īlā'* illustrates this: the Successor Saʿīd b. Jubayr (d. 95/713) said, "There was once a quarrel between one of the *anṣār* and his wife. ʿUmar b. al-Khaṭṭāb came to them to mediate, but they refused to reconcile. So ʿUmar said, 'If you two refuse to reconcile, then when four months have passed, you [the husband] must divorce her if you have not had intercourse with her.'"[59] Finally, Ibn Hāni' reports that Ibn Ḥanbal said quite clearly that an oath of *īlā'* is not in and of itself a divorce statement.

2. *A Father's Authority to Give His Daughter in Marriage*

The oath of *īlā'* is described in the Qur'ān and therefore Ibn Ḥanbal refers to the traditions he believes support the meaning of Q. 2:226–27.[60] However, the extent of a father's authority to give his daughter in marriage is a topic not specifically mentioned in the Qur'ān, and therefore in his responses Ibn Ḥanbal refers to traditions about the practice of the early community. There is no disagreement on the *re*-marriage of his daughter (a woman who has previously been married is referred to as an *ayyim* or a *thayyib*), a father should consult her. But there *is* disagreement on whether a father should consult an unmarried daughter (*bikr*) before giving her in marriage. Abū Dāwūd reports,

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[58] Ibn Hāni', *Masā'il*, 1:232, no. 1123.

[59] See Spectorsky, *Chapters*, 130, §124.

[60] In ʿAbd Allāh's *Masā'il* (Spectorsky, *Chapters*, 129, §124), where Ibn Ḥanbal relates six traditions that support suspension of the *mūlī*'s marriage after four months, he says that suspension of a marriage "is closest to the meaning of the Book" (*al-mawqūf ashbahu bi'l-kitāb*).

> I said to Aḥmad, "There is the *ḥadīth* of Ibn ʿAbbās [that] the *ayyim* has more right to dispose of herself than her guardian."[61]
>
> He said, "Just as the Prophet revoked the marriage of Khansāʾ bt. Khudhām."[62]

After Khansāʾ bt. Khudhām's husband had been killed at the Battle of Uḥud, her father gave her in marriage against her will. She complained to the Prophet, who revoked her marriage and told her to marry whomever she wished. Her story establishes that an *ayyim* must be consulted. However, there is disagreement about a *bikr*. ʿAbd Allāh says,

> I heard my father say, "There is no disagreement about the *thayyib*. She is given in marriage only with her permission."
>
> I asked my father, "What about the *bikr*?"
>
> He said, "There are those who disagree about her."
>
> I asked my father, "What do you prefer?"
>
> He said, "That her *walī* consult her. Then if she gives her permission, he gives her in marriage."
>
> I asked, "What if she does not give her permission?"
>
> He said, "If her father is alive, and she is under nine years of age, her father's giving her in marriage is valid, and she has no option."[63]

Ibn Ḥanbal's answer to a question posed by his son Ṣāliḥ identifies "those who disagree about her":

> I asked him [my father] about a man who gives his virgin daughter in marriage after she has matured and without asking her permission."
>
> He [Ibn Ḥanbal] replied, "There is disagreement about her. As for the Medinese, they say that his giving her in marriage is valid and she has no option. Some people say she has the option [both] if she has matured and if she has not. But, if she has matured, she [definitely] has a choice. If she is a minor whose father gives her in marriage, as far as we are concerned, she has no option, even once she has matured. . . ."[64]

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[61] If a woman is married, her guardian (*walī*) is her husband. If not, her guardian is her father or her nearest agnate relative. For a *ḥadīth* on the authority of Ibn ʿAbbās in which he reports that the Prophet said that a *thayyib* must be consulted about her marriage, see, for example, ʿAbd al-Razzāq, *Muṣannaf*, 6:145, no. 10299 (this is not necessarily the one that Abū Dāwūd had in mind). For Khansāʾ bt. Khudhām, see Wensinck, *Concordance*, 8, s.v. "Khansāʾ bt. Khudhām."

[62] See Spectorsky, *Chapters*, 62, §20.

[63] See Spectorsky, Chapters, 97–8, §22. A girl is a minor until she menstruates. The youngest age at which she is expected to menstruate is nine, the age at which ʿĀʾisha went to live with the Prophet. For menstruation, see *EI*², s.v. "Ḥayḍ." For minority, see *EI*², s.v. "Ṣaghīr"; for majority, see *EI*², s.v. "Bāligh."

[64] Ṣāliḥ b. Aḥmad, *Masāʾil*, 2:238, no. 827.

In the *Muwaṭṭa'*, Mālik refers to the practice of the Medinese Successors al-Qāsim b. Muḥammad (d. 106/725) and Sālim b. ʿAbd Allāh (d. 106/725), both of whom used to give their virgin daughters in marriage without asking their permission. He adds, "This is our practice regarding the marriage of virgins." Further, in his *Muṣannaf*, Ibn Abī Shayba reports Mālik saying, "al-Qāsim and Sālim used to say, 'When the father of a *bikr* gives his daughter in marriage, that is valid regardless of whether the marriage displeases her.'" And in the *Muṣannaf* of ʿAbd al-Razzāq, the Medinese Successor ʿAṭāʾ b. Abī Rabāḥ says, "It is valid for a father to give a *bikr* daughter in marriage, but not a *thayyib*.[65] A vast number of traditions support Ibn Ḥanbal's view that fathers *should* ask their daughters' permission before giving them in marriage. The Medinese position is the minority one. However, knowing that the point was disputed, on another occasion, when he was asked about it, Ibn Ḥanbal hesitated. Abū Dāwūd says,

> I asked, "What about the *bikr*? We do not give her in marriage, do we, until we ask her permission?"
>
> He said, "No."
>
> I said, "What if she is given in marriage [without her consent]?"
>
> He became apprehensive about saying anything concerning her.[66]

3. *The Divorce of an Intoxicated Man*

The question here is whether an intoxicated man's divorce statement is valid. Ibn Ḥanbal refuses to take a stand on this question in some of his responses, but then changes his mind. Al-Kausaj reports:

> I said, "What about the divorce of a man in a state of intoxication?"
>
> Aḥmad said, "I do not say anything about it."
>
> He was asked about [the divorce of] the intoxicated man repeatedly, while I watched, but he would say, "I do not say anything about it." Then I asked him, saying, "What if the intoxicated man divorces, kills, steals, fornicates, or acts aggressively, or buys or sells?"
>
> Aḥmad said, "I avoid [saying anything about] it. As far as I am concerned, nothing sound has been related to me (*lā yaṣiḥḥu lī shayʾun*) on the question of the intoxicated man."[67]

Similarly, Abū Dāwūd was unable to elicit an answer from Ibn Ḥanbal about an intoxicated man's divorce:

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[65] Mālik, *Muwaṭṭa' Yaḥyā b. Yaḥyā* (Cairo, 1959), 3:126–7; Ibn Abī Shayba, *Muṣannaf*, 3:278, no. 9. ʿAbd al-Razzāq, *Muṣannaf*, 6:144, no. 10294.

[66] Spectorsky, *Chapters*, 63, §21.

[67] See Spectorsky, *Chapters*, 164–5, §70.

> I heard Aḥmad asked more than once about the divorce of the intoxicated man, but he would not answer. Once he said, "I do not give a *fatwā* about anything to do with this matter. Ask someone else."
>
> I [Abū Dāwūd] said, "Once someone said to him, 'As long as the intoxicated man is rational'?"
>
> He said, "Ask someone else about this."[68]

But then, another time, ʿAbd Allāh obtained an answer as part of a larger question about the validity of the divorce pronouncements of an insane man or one who is sleeping or delirious with fever:

> I asked my father about the divorce of the intoxicated man.
>
> He said, "There is disagreement about this. Ibn Abī Dhi'b related, on the authority of al-Zuhrī, on the authority of Abān b. ʿUthmān on the authority of ʿUthmān, who said, 'Neither the insane nor the intoxicated man can divorce.' This is the best information on this matter (*arfaʿu shayʾin fihi*), but Rajā' b. Ḥaywa said that Muʿāwiya permitted it."
>
> I asked my father about the divorce of the insane man.
>
> He said, "Since he does not conduct his life rationally, his divorce pronouncement is not valid. The same is true of the man delirious with fever and the sleeping man."
>
> I said to my father, "What then [do you think] of the man in a state of intoxication? Do you think he is [irrational] in this sense (i.e., like the others)"?
>
> He said, "No." And he adduced as proof Shāfiʿī and said, "The pen is not lifted for the man who is intoxicated. . . ."
>
> My father said, "Shāfiʿī said, 'I find the pen is not lifted for the intoxicated man.'" This opinion pleased my father and he followed it.[69]

Here, Ibn Ḥanbal is willing to respond with the information he has gathered on the practice of various authorities. Ibn Abī Dhi'b (d. 258–9/875–6) was a jurist and contemporary of Ibn Ḥanbal's who transmitted a tradition from al-Zuhrī, who related it on the authority of the third caliph ʿUthmān's son from ʿUthmān himself, that he associated the intoxicated man with the insane man and said that neither man might pronounce a valid divorce. So far, Ibn Ḥanbal thinks that is the best information he has on the subject. However, he notes the contrary information that the Successor Rajā' b. Ḥaywa (d. 112/730) permitted the divorce of the intoxicated man and so did the Umayyad caliph Muʿāwiya. When ʿAbd Allāh asks whether Ibn Ḥanbal would put the intoxicated man in the same category as the one who is delirious or asleep, he says he would not by settling on Shāfiʿī's opinion that the pen is not lifted for the intoxicated man.

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[68] Ibid., 73–4, §92.
[69] Ibid., 127, §119.

"The Pen" (*al-qalam*) is a reference to Sūra 68 where "the pen" in the first *āya* is understood to refer to the pen with which God had recorded all the actions of men.[70] There are a number of traditions in the Six Books, as well as in Ibn Ḥanbal's *Musnad*, about those for whom "the pen is lifted" because they cannot be held responsible for whatever they do or say.[71] Two examples from Ibn Ḥanbal's *Musnad* will demonstrate the absence of the intoxicated man from this group. In one, on the authority of ʿĀ'isha, the Prophet said, "The pen is lifted from three: the sleeping person until he awakes, the infant until he matures and the madman until he becomes rational."[72] In another, al-Ḥasan al-Baṣrī said that ʿUmar b. al-Khaṭṭāb wanted to stone a [mad] woman [who had committed adultery], but ʿAlī said to him, "You cannot do that." Then he said to him, "I heard the Prophet say, 'The pen is lifted for three people: the sleeper until he awakes, the infant until he matures and the madman until he becomes rational.' So ʿUmar averted the punishment from her."[73]

However, the fact that the pen is not lifted for the intoxicated man does not mean that Ibn Ḥanbal believes that his behavior is rational. Ṣāliḥ reports,

> My father was asked while I was present (*wa-anā shāhid*) whether someone who imbibes should marry.
>
> He said, "No, he should not marry. When he imbibes, he might unwittingly pronounce a divorce. What can be worse than intoxication!"[74]

Conclusion

Most of the time, Ibn Ḥanbal answers questions—with or without reference to traditions—satisfied with what he knows about a particular problem. But when there is *ikhtilāf*, unless he knows traditions to support his answer, he will not answer. On the problems associated with the oath of *īlāʾ*, he marshals a number of authorities to give weight to his view about exactly what happens at the end of four months, and he discounts the *isnād*s of the traditions he rejects. On the problem of whether a father can give a mature daughter in marriage without her consent, although at

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70 See *EI*², s.v. "Ḳalam."
71 For this tradition, see Wensinck, *Concordance*, s.v. "*qalam*."
72 Ibn Ḥanbal, *Musnad*, 6:100–01.
73 Ibid., 1:140.
74 Ṣāliḥ b. Aḥmad, *Masāʾil*, 2:253, no. 850.

one point he hesitates to answer, at others, he is satisfied that the Medinese position is countered by a sufficient number of traditions for him to disagree with it. On the problem of the divorce of the intoxicated man, Ibn Ḥanbal adamantly refuses to answer until he remembers, or learns (we cannot at this distance know which) traditions about those for whom the pen is lifted and Shāfiʿī's opinion about the problem. The tradition is applicable precisely because the intoxicated man is *not* included.

I think it is fair to speculate that Ibn Ḥanbal himself would not have isolated his *masāʾil* from his *Musnad* or from *Kitāb al-ʿilal*, but would have considered them all part of the ongoing effort to learn how best to live in accordance with the Qurʾān by discovering the *sunna*. For him, travel and study to hear and learn more traditions was not only a question of gathering *isnād*s and deciding which chains of transmission were or were not reliable, but of gathering the information about the meaning of the Qurʾān and about the Prophet and his Companions found in the *matn*s that went with the *isnād*s.

CHAPTER SIX

AL-KHAṢṢĀF (D. 261/874)

Peter C. Hennigan

Life and Times

Aḥmad b. ʿUmar (or ʿAmr) b. Muhayr al-Shaybānī is commonly known as Abū Bakr al-Khaṣṣāf or simply al-Khaṣṣāf.[1] There is some confusion over how he acquired the eponym "al-Khaṣṣāf." One report suggests that "al-Khaṣṣāf" might have been a family name, since his father[2] was known as ʿAmr b. Muhayr al-Khaṣṣāf.[3] Other reports allege that he received this appellation because he lived a life of piety and asceticism and ate only from the meager earnings he attained from repairing sandals (*yakhṣifu al-naʿl*).[4]

As a jurist, al-Khaṣṣāf was known for his expertise in the calculation and division of inheritance shares (*kāna faqīh*^{an} *fāriḍ*^{an}, or *farḍiyy*^{an} *ḥāsib*^{an}),[5] and as a prolific author of legal texts. Of the fourteen books attributed to him, only five are extant: a treatise on pious endowments (*Aḥkām al-awqāf*); a treatise on the decorum and practices of jurists (*Kitāb adab al-qāḍī*); a discussion of legal fictions (*Kitāb al-ḥiyal*); a work on expenditures and maintenance (*Kitāb al-nafaqāt*); and a treatise on wet-nurses and foster relationships (*Kitāb al-riḍāʿ*).[6] The nine non-extant works covered bequests (*Kitāb al-waṣāyā*), inheritance (*Kitāb iqrār al-waratha*), taxation (*Kitāb al-kharāj*), maintenance for close relations (*Kitāb al-nafaqāt ʿalā al-aqārib*), contracts (*Kitāb al-shurūṭ al-kabīr* and *Kitāb al-shurūṭ al-ṣaghīr*), court documents and records (*Kitāb al-maḥāḍir wa'l-sijillāt*),

[1] Al-Ziriklī, *al-Aʿlām*, 1:178; al-Nadīm, *al-Fihrist li'l-Nadīm* (Cairo, 1991), 1:428; Ḥajjī Khalīfa, *Kashf al-ẓunūn* (New York/London, 1835–38), 1:175.

[2] Al-Khaṣṣāf's father reportedly was a student of al-Shaybānī. See al-Laknawī, *Kitāb al-fawāʾid al-bahiyya fī tarājim al-ḥanafiyya*, 246.

[3] Al-Khaṣṣāf, *Kitāb adab al-qāḍī*, 3.

[4] Al-Khaṣṣāf, *Kitāb al-nafaqāt*, 8; al-Ziriklī, *al-Aʿlām*, 1:178.

[5] Al-Khaṣṣāf, *Kitāb adab al-qāḍī*, 3; idem, *al-Nafaqāt*, 7; al-Ziriklī, *al-Aʿlām*, 1:178; al-Nadīm, *al-Fihrist* (Cairo, 1991), 1:428.

[6] These five works are the only ones mentioned in Sezgin, *GAS*, 1:436–8.

the rules for prayer (*Kitāb al-ʿaṣr*[7] *wa-aḥkāmuhu wa-ḥisābuhu*), and a discussion of the holy sites in Mecca and Madīna (*Kitāb dharʿ al-kaʿba wa'l-masjid wa'l-qabr*).[8]

In addition to writing legal treatises, al-Khaṣṣāf was a *qāḍī* in Baghdad. Apart from the following (unflattering) tradition, nothing is known about the length of his tenure as *qāḍī* or the level of his position:[9]

> He [Ibn al-Najjāʾ] said: I heard Abū Sahl Muḥammad b. ʿUmar, a *shaykh* from Balkh, say: When I came to Baghdad, there was a man standing on the bridge and shouting for three days. The *qāḍī* Aḥmad b. ʿAmr al-Khaṣṣāf was asked for a responsum on such-and-such a question and gave such-and-such an answer, but that is wrong! The answer is such-and-such, may God have mercy on whomever reports it to one who ought to know it.[10]

Al-Khaṣṣāf's life ended in disgrace and failure, in part because of his close ties to the ʿAbbāsid regime. His first recorded intersection with the ʿAbbāsid regime occurred during the caliphate of al-Muʿtazz (r. 252–55/866–69) when he failed to secure a judgeship. According to the account in al-Ṭabarī's *Taʾrīkh*, Muḥammad b. ʿImrān al-Ḍabbī, al-Muʿtazz's teacher (*muʾaddib*), had appointed al-Khaṣṣāf and seven other men as *qāḍī*s.[11] The letters of appointment had already been written when three of al-Muʿtazz's advisors warned the caliph that the eight men were followers of Ibn Abī Duʾād (d. 240/854)—the Muʿtazilī *qāḍī* who had persuaded al-Maʾmūn to enforce acceptance of the createdness of the Qurʾān during the *Miḥna* or Inquisition—and members of various heterodox and Shīʿī groups: "Verily, they are among the followers of Ibn Abī Duʾād, and they are Rāfiḍa, Qadariyya, Zaydiyya, and Jahmiyya."[12] Wary of appointing *qāḍī*s with links to such groups,[13] al-Muʿtazz rescinded the appointments, demoted

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[7] The *Fihrist* gives the spelling of this word as "*al-ʿAṣīr*" which refers to the juice that is extracted from a grape. It is difficult to see how this meaning could pertain to the remainder of the book's title. The word "*al-ʿAṣr*," on the other hand, provides a meaning more consistent with the rest of the title.

[8] Al-Nadīm, *al-Fihrist* (Cairo, 1991), 1:428.

[9] It does not appear that al-Khaṣṣāf ever attained the position of chief *qāḍī* (*qāḍī al-quḍāt*), as the title page to the *Aḥkām al-awqāf* alleges.

[10] Al-Qurashī, *al-Jawāhir al-muḍiyya fī ṭabaqāt al-ḥanafiyya* (Hyderabad, 1408/1988), 1:142; al-Tamīmī, *al-Ṭabaqāt al-saniyya fī tarājim al-ḥanafiyya*, 1:419.

[11] Al-Ṭabarī, *Taʾrīkh al-rusul wa'l-mulūk* (Cairo, 1960–69), 9:371.

[12] Ibid.

[13] For an analysis of the impact of theological beliefs on political and judicial appointments during the 2nd/8th and 3rd/9th centuries, see Tsafrir, *The History of an Islamic School of Law*, 41–9. The chief view associated with the Jahmiyya was a belief in the createdness of the Qurʾān. Montgomery Watt, however, concluded that "Jahmite" was a vituperative term meaning "renegade" or "quisling" and that there never was a body of men

al-Ḍabbī, and ordered that the eight men be expelled from Samarra and exiled to Baghdad. The appointment of al-Khaṣṣāf, in particular, seems to have enraged the populace of Samarra, who reportedly attacked him while the others were able to flee to Baghdad unscathed.[14]

There may be some truth to this description of al-Khaṣṣāf. He was reportedly affiliated with the "Jahmiyya" sect,[15] and, according to al-Nadīm (d. 380/990), the people of Iraq later associated al-Khaṣṣāf's appointment under the subsequent caliph al-Muhtadī (discussed below) with a revival of Ibn Abī Du'ād and, by extension, the *miḥna*.[16] By the 3rd/9th century, individuals associated with the *miḥna* had become targets of street movements seeking to defend the Sunna against those who were believed to hold heretical theological views.[17]

Al-Khaṣṣāf's second brush with power came during the brief caliphate of al-Muhtadī (r. 255–56/869–70), when he apparently served in the caliph's administration. Al-Nadīm reports that it was at the behest of al-Muhtadī that al-Khaṣṣāf wrote his no longer extant *Kitāb al-kharāj*.[18] Al-Khaṣṣāf's brief success ended, however, when the Turkish military overthrew and assassinated al-Muhtadī in 256/870. The sources suggest that it was al-Muhtadī's vigorous promotion of rationalism (*ra'y*) and his hostility to the traditionalists (*ahl al-ḥadīth*) that contributed to his downfall.[19] Al-Khaṣṣāf, perhaps on account of his strong association with the rationalists (*ahl al-ra'y*) and/or the caliph, appears to have been a target of this coup.[20] It is reported that his home was ransacked following the assassination of al-Muhtadī, resulting in the loss of some of his books.[21]

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who were followers of Jahm b. Ṣafwān (d. 128/746) or who professed to be such. Rather, Watt argues, the "Jahmiyya" sect was a creation of heresiographers. Watt speculates that the doctrine of the createdness of the Qur'ān was placed on the sect's "founder," Jahm b. Ṣafwān, in order to dissociate the Ḥanafīs from the doctrine. Watt, *The Formative Period of Islamic Thought*, 147–8.

[14] Al-Ṭabarī, *Ta'rīkh* (Cairo, 1960–69), 9:371.

[15] Al-Nadīm, *al-Fihrist* (Cairo, 1991), 1:428; al-Khaṣṣāf, *Kitāb adab al-qāḍī*, 4.

[16] Al-Nadīm, *al-Fihrist* (Cairo, 1991), 1:428.

[17] Tsafrir, *The History of an Islamic School of Law*, 43.

[18] Al-Nadīm, *al-Fihrist* (Cairo, 1991), 1:428.

[19] Melchert, "Religious Policies of the Caliphs from al-Mutawakkil to al-Muqtadir, A.H. 232–295/A.D. 847–908," 338; al-Ṭabarī, *Ta'rīkh* (1960–69), 9:392–3, 459–61, 467.

[20] Tsafrir observes that 3rd century Ḥanafī scholars who followed the Mu'tazila were, as a general rule, denied access to governmental positions. Tsafrir, *The History of an Islamic School of Law*, 44.

[21] Al-Nadīm, *al-Fihrist* (Cairo, 1991), 1:428; al-Ziriklī, *al-A'lām*, 1:178. The ransacking of al-Khaṣṣāf's home may also account for the nine missing texts.

Whatever hopes al-Khaṣṣāf may have had of returning to the ʿAbbāsid administration were cut short by his death four years later in 261/874.[22]

Legal Discourse

Al-Khaṣṣāf's *waqf* treatise, the *Aḥkām al-awqāf*, exemplifies rhetorical and literary conventions that characterized 3rd/9th century rationalist and Ḥanafī legal discourse.

Norman Calder defined the "discursive tradition" of rationalist legal discourse as being dominated by "(1) generalizing activity, the search for categories and (2) analogical reflection, the search for parallels within the known juristic structure."[23] By contrast, he observed that the traditionalist or "hermeneutic tradition" purported to derive law exegetically from Prophetic sources.[24] While al-Khaṣṣāf's *waqf* treatise clearly falls within the discursive tradition, it nonetheless provides evidence that elements of hermeneutic legal discourse were beginning to be incorporated into the discursive tradition, foreshadowing the increasing importance of hermeneutic discourse as the foundation for legal legitimacy.

A. Qultu/Qāla *Dialectic*

The dominant literary convention used in the *Aḥkām al-awqāf* is the dialectical interplay between the "I said" (*qultu*) and "He said" (*qāla*) figure. The *qultu/qāla* form of literary presentation is common in Ḥanafī and Mālikī legal texts from the 2nd/8th and 3rd/9th Islamic centuries.[25] Frequently, it is used in conjunction with the phrase "What is your opinion?" (*a-raʾayta*), which serves to introduce and extend the dialectical conversation:

> I said: What is your opinion if he says, "This land of mine is *mawqūfa* after my death"?
>
> He said: The *waqf* is invalid [because] he did not say "*ṣadaqa*. . . ."[26]
>
> . . .

[22] The common era date of al-Khaṣṣāf's death is October 16, 874. Ḥajjī Khalīfa, *Kashf al-ẓunūn* (New York/London, 1835–38), 1:175.

[23] Calder, *Studies*, 7–8.

[24] Ibid., 8.

[25] Ibid., 10; Brockopp, "Early Islamic Jurisprudence in Egypt," 171.

[26] Al-Khaṣṣāf, *Aḥkām al-awqāf*, 260.

> I said: What is your opinion of a man who says, "I have made my land a *ṣadaqa mawqūfa* for my poor kin relations," without adding anything else to this statement.
>
> He said: The *waqf* is invalid and this land is an inheritance (*mīrāth*) among his heirs on account of the fact that if his poor kin relations become extinct or rich, there would be no one on whom to bestow the yields. Nor did the founder designate [its yields] for the destitute (*al-masākīn*). For this reason, the *waqf* is invalid.
>
> I said: What is your opinion if he says: "I have made my land a *ṣadaqa mawqūfa* for my kin relations and after their [extinction], it is for the destitute (*al-masākīn*)"?
>
> He said: The waqf is permitted.[27]

In recent years, some effort has been made to ascertain whether the *qultu* and *qāla* figures refer to real people.[28] In the *qultu/qāla* dialectic, the *qultu* figure emerges as the questioning, even argumentative, student who provides the platform from which the master—the *qāla* figure—can explicate the law. As a general rule, it is reasonable to assume that the *qāla* figure refers to al-Khaṣṣāf unless otherwise stated.[29] However, the non-digressive, sequentially logical quality of these dialogues indicates that they may be stylized literary techniques for presenting the law rather than the record of actual exchanges between a master and his student(s).[30] Whether one views the *qultu/qāla* dialogues as representative of actual conversations or mere literary conventions, the format of these dialogues suggests a self-conscious desire to replicate the orality of early Islamic legal culture.[31]

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[27] Ibid., 50.

[28] See Calder, *Studies*, 9–10, 50–1, 146; Brockopp, "Early Islamic Jurisprudence in Egypt," 167–82, esp. 171–2. Calder is careful to note that while the *qultu*/*qāla* dialogue may not be authentic, it may "reflect a discursive *Sitz im Leben*." Calder, *Studies*, 10.

[29] In his study of the *Mukhtaṣar* of Ibn ʿAbd al-Ḥakam, Brockopp discusses a passage in which the appellation of the *qāla* figure is ambiguous. In such cases, he suggests, the *qāla* figure may refer to either the author of the text, the previous authority cited—in Brockopp's case, Mālik b. Anas—or to an unspecified third source. Brockopp speculates that this ambiguous use of the *qāla* figure may "merely be a literary device." Brockopp, "Early Islamic Jurisprudence in Egypt," 171.

[30] Calder, *Studies*, 49–50.

[31] William Graham, Michael Cook, and Brinkley Messick have observed in their respective studies of the Qur'ān, *Ḥadīth*, and Yemeni law that the need to construct written texts as oral texts attests to the continued privileging of oral culture over written culture in the Muslim world. See Graham, *Beyond the Written Word, passim*; Messick, *The Calligraphic State*, 25–8; Cook, "The Opponents of the Writing of Tradition in Early Islam," *passim* & esp. 438 ("For it was on the oral continuity of transmission that the very authenticity of Tradition was seen to rest; mere literary transmission, and *a fortiori* literary finds, could carry no such authority.").

B. *Expository Voice*

Although the *qultu/qāla* dialectic is predominant throughout al-Khaṣṣāf's *waqf* treatise, the author sometimes abandons this dialectical interplay and employs an expository voice to explicate the subtle distinctions and principles underlying the *qāla* figure's responses. For example, near the introduction to his *waqf* treatise al-Khaṣṣāf provides a brief commentary in which he states that the basis for the law of *waqf* is the *Sunna* manifested in endowments created by the Companions:

> Abū Bakr Aḥmad b. ʿAmr al-Khaṣṣāf: These traditions (*al-āthār*) in the matter of *al-wuqūf*,[32] along with that which the Messenger of God commanded in the matter of his land—to endow its principal and to distribute to charitable purposes its fruits/yields (*yuḥabbisu aṣlahā wa yusabbilu thamaratahā*)—all of this has come to be an established *sunna* in this matter. Likewise, the actions of the Companions of the Prophet with respect to their landed properties and moveable properties that they endowed (*waqafū*); these actions constitute a consensus (*ijmāʿ*) among them to the effect that endowments (*al-wuqūf*) are permissible and established.[33]

The expository voice can vary considerably in length.[34] In some cases, an anonymous "objector" (*qā'il*) may be mentioned, but the *qā'il* figure is clearly meant to be part of an interior monologue that the author is maintaining with himself.

C. *Past Authorities/Exegetical Elements*

A third literary convention used by al-Khaṣṣāf is to invoke the voices of 2nd/8th century Ḥanafī jurisprudents and members of the early Islamic community. In some contexts, these voices appear as *ikhtilāfāt*, or statements about disputes between Abū Ḥanīfa, Abū Yūsuf, Muḥammad b. al-Ḥasan al-Shaybānī, and "Baṣran jurists." For example, the following passage from al-Khaṣṣāf's treatise contrasts the opinions of Abū Yūsuf and those of al-Shaybānī on the special case of a wife who dies after her share of the *waqf*'s yields has come into existence:

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[32] Al-Khaṣṣāf's use of the plural form "*wuqūf*" is difficult to explain, particularly when the title of his treatise employs the plural form "*awqāf*." An examination of al-Khaṣṣāf's *waqf* treatise reveals that "*wuqūf*" is used more frequently than "*awqāf*." I found seven uses of "*wuqūf*" in the *qultu/qāla* dialogues and only one usage of "*awqāf*." Why al-Khaṣṣāf should prefer one plural form over the other remains a mystery, although it does highlight a discontinuity between the title of the treatise and al-Khaṣṣāf's use of terminology.

[33] Al-Khaṣṣāf, *Aḥkām al-awqāf*, 18.

[34] See, e.g., the three-page expository section in al-Khaṣṣāf, *Aḥkām al-awqāf*, 149–51.

> I said: And what if this founder made a *waqf* during his death-sickness, and a wife who was one of [the beneficiaries of the *waqf*] died after the yields had come forth, leaving [only] her husband and her brother.
>
> He said: Abū Yūsuf said: Her husband is entitled to half of her share, and her offspring are entitled to (*li-ʿaqibihā*) the remaining half. Her brother is not entitled to anything from this. This applies if the brother is among the beneficiaries of the *waqf*, because this is only a bequest (*waṣiyya*) [from the founder] and he has no right to take [twice].[35] Muḥammad b. al-Ḥasan said: This is exclusively an inheritance (*mīrāth*) and not a bequest (*waṣiyya*). Thus, the husband is entitled to one-half, and the brother is entitled to the remaining half.[36]

Nor is it uncommon for al-Khaṣṣāf to present opinions that diverge or contradict those of the school's founder, as illustrated by the following *ikhtilāf* or scholarly disagreement between Abū Ḥanīfa and Abū Yūsuf:

> I said: What is your opinion if the founder [of a *waqf*] says, "I have entrusted the administration of my *ṣadaqa* to so-and-so during my life, and after my death it is for my son when he comes of age. And when he comes of age he is a partner of so-and-so in its administration, [both] during my life and after my death."
>
> [He said]: Verily, al-Ḥasan b. Ziyād transmitted on the authority of Abū Ḥanīfa, may God's mercy be upon both of them, that he said: "That which he entrusted to his son from this is not permitted." Abū Yūsuf said: "That which he entrusted to his son is permitted."[37]

Such appeals to earlier jurists point to differing notions of authority held by rationalists (*ahl al-raʾy*) and traditionalists (*ahl al-ḥadīth*). Whereas traditionalists would have seen the traditions of the early Muslim community as most persuasive, rationalists such as al-Khaṣṣāf instinctively cited the opinions of their teachers and other learned jurists within their legal community.

Nevertheless, one also finds elements of hermeneutical exegesis in al-Khaṣṣāf's *waqf* treatise. For example, when al-Khaṣṣāf is pressed to stipulate the number of *dirham*s that distinguish a rich person from a poor one, he does not turn to a past authority (here, the Prophet) as

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[35] Abū Yūsuf is pointing out that the "no bequest to an heir" maxim (*lā waṣiyya li-wārith*) prevents the brother from receiving his sister's share of the *waqf* yields as an inheritance because the yields are the result of a "bequest" from the founder.

[36] Al-Khaṣṣāf, *Aḥkām al-awqāf*, 72–3. See pp. 21 and 150 for additional *ikhtilāf* between Abū Yūsuf and al-Shaybānī; pp. 15, 201 and 207 for *ikhtilāf* between Abū Yūsuf and Abū Ḥanīfa; and p. 149 for an *ikhtilāf* between al-Khaṣṣāf and the "Baṣran jurists."

[37] Al-Khaṣṣāf, *Aḥkām al-awqāf*, 201.

an exemplum for his own discursively-formed legal opinion. Rather, the Prophet is relied upon to derive the rule of law exegetically:

> I said: And likewise, if he said "*ṣadaqa mawqūfa* for the poor of my household."
>
> He said: The *waqf* is permitted for them, and the yields are for all of those who are poor among them.
>
> I said: And who are the poor who are included in this *waqf*?
>
> He said: It was transmitted on the authority of the Messenger of God that he said: "He who possesses fifty *dirhams* or their equivalent in gold is considered a rich man."[38]

Such hermeneutical elements are even more pronounced in al-Khaṣṣāf's introduction, where the sequential presentation of Prophetic and Companion *ḥadīth*s forms an implicit exegetical link between the principles conveyed in these *ḥadīth*s and the discursive legal reasoning that dominates the remainder of the treatise.[39]

It is possible that these three conventions—the *qultu/qāla* dialectic, the expository style and the reliance on past authority—emerged from different redactional approaches. In his analysis of early Ḥanafī texts, Calder argued that the *qultu/qāla* dialectic was the authentic format of Ḥanafī legal works in the 2nd/8th and 3rd/9th centuries,[40] and that authority statements—*āthār* and *ikhtilāfāt*—constituted secondary materials that accumulated through successive redactions and interpolations.[41] Although the *qultu*/*qāla* dialectic is the predominant literary convention in the *waqf* treatise, Calder's privileging of this dialectic is too sweeping. The use of an expository voice as well as past authorities indicates that Ḥanafī jurists used a range of argumentative approaches and styles to derive the law.[42]

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[38] Ibid., 38. Al-Dāraquṭnī, *Kitāb takhrīj al-aḥādīth al-ḍi'āf*, 224–5, classifies this tradition as weak.

[39] Except for the introduction, only one other full *ḥadīth* is cited in al-Khaṣṣāf's *waqf* treatise. Al-Khaṣṣāf, *Aḥkām al-awqāf*, 151. Instead, most traditions of the Prophet and his Companions are presented in authority statements, called *akhbār* or *āthār*. In contrast to a full *ḥadīth*, which contains both a narrative (*matn*) and a chain of transmitters (*isnād*), these *akhbār/āthār* contain only the former. See, e.g., al-Khaṣṣāf, *Aḥkām al-awqāf*, 21, 38–40, 113–4, 149, 151.

[40] Calder, *Studies*, 40.

[41] Ibid., 40–52, esp. 40, 49.

[42] Support for this conclusion is found in Brockopp's examination of a 3rd/9th century Mālikī text, the *Mukhtaṣar al-kabīr* of Ibn ʿAbd al-Ḥakam. In the appendices to his dissertation and in *Early Mālikī Law*, Brockopp includes a portion of the *Mukhtaṣar* in both Arabic and English. The selection, which highlights the use of the *qultu/qāla* dialectic within the Mālikī tradition, includes unattributed disputes on points of law that resemble *ikhtilāf*

D. Qiyās *and* Istiḥsān

The use of *qiyās* and *istiḥsān* figures prominently in al-Khaṣṣāf's *waqf* treatise. In fact, it is not uncommon for al-Khaṣṣāf to present two different solutions to a problem, one derived through *qiyās* and the other through *istiḥsān*.[43] Although it is common to refer to *qiyās* as analogical reasoning and *istiḥsān* as juristic preference, neither of these definitions completely captures the variegated uses of these terms in his *waqf* treatise.

In recent decades several scholars have attempted to document the different types of analogical reasoning employed in Islamic legal texts. Wael Hallaq, for example, has identified seven types of *qiyās*.[44] Additionally, historians have observed that Muslim jurists expounded upon the components of *qiyās*—particularly the *ʿilla*—that permitted valid analogical reasoning.[45] Determining the *ʿilla*, i.e., the commonality between the original case anchored in the religious law (*aṣl*) and the new case (*farʿ*), was crucial because it was through this shared essence that established religious law could be extended into new areas.[46] There appears to be a consensus amongst scholars of Islamic jurisprudence (*uṣūl al-fiqh*)—including Hallaq—that most of these developments in legal reasoning did not occur until the 4th/10th and 5th/11th centuries,[47] and that 2nd/8th and 3rd/9th century analogical reasoning "lacked a coherent logical basis,"[48] and was "simple and unsophisticated."[49]

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as well as legal analyses that might be characterized as expository. Brockopp, "Slavery in Islamic Law: An Examination of Early Mālikī Jurisprudence," 1–87; idem, *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and his Major Compendium of Jurisprudence*, Appendix A, 227–83.

[43] The comparison/contrast between *qiyās* and *istiḥsān* was a common form of legal argumentation among 2nd/8th and 3rd/9th century Ḥanafī scholars. For example, in the *Kitāb al-aṣl*, al-Shaybānī states, "We part with *qiyās* and follow *istiḥsān*," or "*qiyās* would be . . . but we do not follow it." Al-Shaybānī, *Kitāb al-aṣl* (Cairo, 1954), 1: 23, 81–2, 218, 222. Also cited in Aḥmad Ḥasan, "Early Modes of *Ijtihād*," 67.

[44] Hallaq, *A History of Islamic Legal Theories*, 101–5, 126, 217, 228–9. The seven types of *qiyās* are: *qiyās dalāla*, *qiyās ijmālī wāsiʿ*, *qiyās ʿilla*, *qiyās jalī*, *qiyās khafī*, *qiyās maṣlaḥa mursala*, and *qiyās shabah*.

[45] Hallaq, "The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law," 94. Hallaq notes that Ibn Taymiyya claimed that analogical argumentation had four components: (i) the *aṣl*; (ii) the *farʿ*; (iii) the *ʿilla*; and (iv) the *ḥukm*, or rule, which was transferred from the *aṣl* to the *farʿ*.

[46] Hallaq, "The Development of Logical Structure in Sunnī Legal Theory," 43–4.

[47] Schacht, *Origins*, 110; Ḥasan, "Early Modes of *Ijtihād*," 64, 70; Ansari, "Islamic Juristic Terminology Before Šāfiʿī: A Semantic Analysis with Special Reference to Kūfa," 292; Hallaq, "The Development of Logical Structure," 44–6, 65; idem, *A History of Islamic Legal Theories*, 2.

[48] Hallaq, "Considerations on the Function and Character of Sunnī Legal Theory," 681.

[49] Ḥasan, "Early Modes of *Ijtihād*," 64.

Al-Khaṣṣāf's use of *qiyās* in his *waqf* treatise is consistent with these assessments. Nowhere in either text is the term *'illa* cited, nor does al-Khaṣṣāf express any interest in assessing whether the analogies drawn to bequest, slave and marriage law are truly analogous to the *waqf* cases at hand. This lack of theoretical concern suggests that this use of *qiyās* is merely *argumentum a simile*, or analogy based solely on the similarity of two cases.[50]

It is also possible that al-Khaṣṣāf intended his use of *qiyās*—especially the analogies drawn to bequest law—to be a form of *a fortiori* argumentation. Unlike standard analogies, in which the original and assimilated cases are considered to have parity with another, in *a fortiori* argumentation, the original case contains a "greater" or "lesser" dimension than the assimilated case.[51] This type of argumentation would have been familiar to al-Khaṣṣāf, since prominent Ḥanafī jurists such as Abū Ḥanīfa and Abū Yūsuf were alleged to have used *a fortiori* analogies.[52]

Al-Khaṣṣāf's use of *qiyās* is not limited solely to *argumentum a simile* and *a fortiori* analogy, however. In certain circumstances a judgment reached through *qiyās* is contrasted with one attained by *istiḥsān*. In such cases *qiyās* appears to be equated with "a strict literalist or formalistic application of the law,"[53] while *istiḥsān* seems to convey the spirit of the law or the preference of the jurist.[54] As the following *qultu/qāla* dialogue concerning imperfect testimony illustrates, whereas the letter of the law (i.e., *qiyās*) would require that ambiguity nullify the testimony, the application of *istiḥsān* validates the testimony:

> I said: What is your opinion if the two [witnesses] say, "We testify that he endowed his share from this house" and [then] they say, "We do not know the [quantity] of his share."
>
> He said: The testimony, according to *qiyās*, is invalid, but according to *istiḥsān*, the testimony is permitted.[55]

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[50] Support for this assumption is evidenced from al-Khaṣṣāf's use of the terms *bi-manzila* (equivalent), *mithāl* and *mathal* (likeness) to convey the similarity between the cases. As Ḥasan remarks in his discussion of *qiyās*, such expressions "indicate the simple nature and wide scope of *qiyās*" prior to the development of a more sophisticated understanding of the *'illa*. Ḥasan, "Early Modes of *Ijtihād*," 70.

[51] Hallaq, "Non-Analogical Arguments in Sunnī Juridical *Qiyās*," 301; J. Gregorowicz, "L'argument *a maiori ad minus* et le problème de la logique juridique," 69–75.

[52] Schacht, *Origins*, 110–11.

[53] Tyan, "Méthodologie et sources du droit en Islam," 84; Ansari, "Islamic Juristic Terminology Before Šāfi'ī," 292; Ḥasan, "Early Modes of *Ijtihād*," 74.

[54] Ḥasan, "Early Modes of *Ijtihād*," 74.

[55] Al-Khaṣṣāf, *Aḥkām al-awqāf*, 217.

In this dialogue, *istiḥsān* functions as a safety valve when the application of *qiyās* would create an unsatisfactory or unjust result. In other cases, however, the use of *istiḥsān* more closely resembles *ad hoc* reasoning without any reference to social or religious norms. For example, al-Khaṣṣāf recounts the case of two groups of beneficiaries who lay claim to the same *waqf*. In the absence of any living witness or legal records, al-Khaṣṣāf bases his judgment on his own independent assessment of the situation: "And if they make a case for taking it, and there are no legal records in the *qāḍī*'s *dīwān* (*laysa lahum rasm fī dīwān*) to be used as a basis for a decision, then I rely on *istiḥsān* to execute this for them, and I divide the yields between them."[56]

Partly due to these various uses, it is often difficult to identify one definition of *istiḥsān* in al-Khaṣṣāf's writing. Although 5th/11th century Ḥanafī jurists such as al-Bazdawī (d. 482/1089) and al-Sarakhsī (d. ca. 483/1090) would describe *istiḥsān* as a form of legal reasoning based on recognized sources of law—Qurʾān,[57] *Sunna*[58] *and qiyās*,[59] this hermeneutical grounding is absent in the 3rd/9th century writings of al-Khaṣṣāf. Not only does al-Khaṣṣāf fail to invoke the Qurʾān in his *waqf* treatises, but he also does not exhibit a great concern with grounding his reasoning in Prophetic practice.[60]

Through most of the 3rd/9th century, it is probably correct to view *istiḥsān*—as used by Ḥanafī jurists such as al-Khaṣṣāf—as a safety valve to achieve just and equitable results when rationalist discourse might have demanded a less desirable or even unjust result. Although this use of

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[56] Ibid., 134.

[57] The basis for *istiḥsān* is believed to be located in two Qurʾānic verses in which God urges His servants to "listen to the word and follow what is best in it" (*alladhīna yastamiʿūn al-qawla fa-yattabiʿūn aḥsanahu*) and to "follow the best of what was sent down to you by your Lord" (*waʾttabiʿū aḥsana mā unzila ilaykum min rabbikum*). See Qurʾān 39:18 and 39:55, respectively.

[58] The Prophet reportedly supported the use of *istiḥsān* when he asserted, "That which is considered good by the Muslim community is likewise considered good in the opinion of God (*mā raʾāhu al-muslimūna ḥasanᵃⁿ fa-huwa ʿinda Allāhī ḥasan*). Al-Āmidī, *Iḥkām fī uṣūl al-aḥkām*, 4: 214.

[59] Al-Sarakhsī, *Uṣūl al-Sarakhsī* (Beirut, 1973), 199–215, esp. 202–4; Fakhr al-Islām al-Bazdawī, in al-Bukhārī (d. 730/1329), *Kashf al-asrār*, 4: 2–14. See also John Makdisi, "Legal Logic and Equity in Islamic Law," 75–8; Weiss, "Interpretation in Islamic Law: The Theory of *Ijtihād*," 202.

[60] Al-Shāfiʿī's polemics in the *Risāla* and the *Kitāb al-umm*, against those who used *istiḥsān* as a form of unprincipled equity (i.e., *ad hoc*, independent legal reasoning not grounded in the Qurʾān and *Sunna*) is further evidence that 3rd/9th century jurists did not ground their reasoning in these "fundamental sources." Al-Shāfiʿī, *al-Risāla* (Cairo, 1979), 503–59; idem, "*Kitāb ibṭāl al-istiḥsān*," in *Kitāb al-umm* (Cairo, 1961), 7: 293–304.

istiḥsān seems unprincipled, it is likely that rationalists such as al-Khaṣṣāf viewed its use as appealing to a general common law and/or to meta-principles within *waqf* law and Islamic law. Such principles might include fulfillment of the founder's intent, as well as the more abstract principles of fairness, justice, and charity. However, as criticisms of this seemingly unprincipled *istiḥsān* began to multiply in the 4th/10th century,[61] this earlier *ra'y*-based form of *istiḥsān* was displaced by a hermeneutically-derived version that restricted the potential for juristic preference and independent reasoning. By the 5th/11th century, the doctrine had acquired exegetical legitimacy, but it had also lost some of its flexibility as a means of fashioning equitable results.

His Place in the Ḥanafī School

Making sense of the biography of al-Khaṣṣāf is complicated by the gaps in our understanding of early Islamic legal culture and its development during the 2nd/8th and 3rd/9th centuries. Until recently, it was generally assumed that al-Khaṣṣāf was a "Ḥanafī"—an assumption supported by the Islamic tradition's recollection of this period.[62]

Recent historical scholarship has problematized the development of the early schools of law. Hallaq has argued that the typology of authority in the four schools of law—with legal authority descending from a single master-jurisprudent—was an *ex post facto* phenomenon, and that Abū Ḥanīfa was not even the most logical choice for the school that now bears his name.[63] Instead, both Hallaq and Nimrod Hurvitz have argued that the early schools were distinctly personal and that master-disciple

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[61] Although al-Shāfi'ī's critiques of *istiḥsān* existed by the beginning of the 3rd/9th century, Hallaq has persuasively argued that his critiques had "very little, if any, effect during most of the [3rd] century." Instead, Hallaq contends that al-Shāfi'ī's ideas did not begin to exert their effect on Islamic law and legal reasoning until the next century. Hallaq, "Was al-Shafi'i the Master Architect of Islamic Jurisprudence?" 587–8.

[62] According to Tsafrir's classification al-Khaṣṣāf would be an "unquestionable" Ḥanafī. See Tsafrir, "Semi-Ḥanafis and Ḥanafī Biographical Sources," 68 (defining "unquestionable" Ḥanafis as those who "both studied under Ḥanafi teachers and had Ḥanafi students, and also those of whom we know that they wrote Ḥanafī law books."). According to Melchert, the incorporation of earlier "Ḥanafī" jurists' opinions into works is indicative of school consciousness: "Such works as these imply a specifically Ḥanafī school, both inasmuch as they collect the doctrine (*madhhab*) of one jurisprudent (and a few close to him) and inasmuch as they suggest that his doctrine (and theirs) is all one need know." Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries C.E.*, 33.

[63] Hallaq, *Authority, Continuity, and Change in Islamic Law*, 30–1.

relationships provided the organizing framework.[64] Jonathan Brockopp has similarly described legal authority during the formative period as residing in "Great Shaykhs," individuals whose knowledge of the religious sources, wisdom and lineage gave their words legal authority.[65]

While al-Khaṣṣāf operated within an intellectual milieu in which prominent "Ḥanafīs"—Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī—were considered legal authorities, it is not clear that al-Khaṣṣāf would have labeled himself as a "Ḥanafī." His *waqf* treatise provides indications that he did not see his legal scholarship as merely following in the footsteps of these earlier jurists.[66] For example, while al-Khaṣṣāf adheres to the general parameters of the debates set forth by Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī, he is neither reluctant to disagree with his teachers nor to offer his own opinion. The types of legal treatises attributed to al-Khaṣṣāf generally emerge at a stage in the legal culture when the broad categories and subjects of the law have stabilized and become recognizable, but the substantive law within those categories and subjects is still taking shape. It is possible, therefore, that al-Khaṣṣāf viewed his treatises as not simply synthesizing the legal arguments of these earlier jurists, but also surpassing them.

If al-Khaṣṣāf did in fact see himself as transcending the preceding generation of Ḥanafī jurists, later jurists within the Ḥanafī school did not share this perception. Christopher Melchert has observed that by the 4th/10th century, Ḥanafī jurists had canonized the work of Abū Ḥanīfa and his two disciples as the basis of school doctrine.[67] In the 5th/11th century *Mabsūṭ* of al-Sarakhsī (d. *ca*. 483/1090), al-Khaṣṣāf is portrayed as a follower of Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, and even Mālik b. Anas.[68] The 19th century *Rasā'il* of Ibn ʿĀbidīn (d. 1888), also reflects this typology

[64] Hallaq, "From Regional to Personal Schools of Law? A Reevaluation," 37–64; Nimrod Hurvitz, "Schools of Law and Historical Context: Re-Examining the Formation of the Ḥanbalī *Madhhab*," 37–64.

[65] Brockopp, "Competing Theories of Authority in Early Mālikī Texts," 3–22.

[66] A similar attempt by 3rd/9th century jurists to surpass their masters has been noted by Brockopp in his study of two Mālikī jurists, Ibn ʿAbd al-Ḥakam (d. 214/829) and Ismāʿīl b. Yaḥyā al-Muzanī (d. 264/877). Brockopp, "Early Islamic Jurisprudence in Egypt," 172–3, 177.

[67] Melchert, *The Formation of the Sunni Schools of Law*, 60.

[68] Al-Sarakhsī, *Kitāb al-Mabsūṭ* (Cairo, 1906–13), 12: 27–47. For example, in a section on *waqf*s, al-Sarakhsī mentions that al-Khaṣṣāf wrote a work on the subject, but he never refers to al-Khaṣṣāf's opinions when citing authority statements. Instead, al-Sarakhsī refers to the opinions of Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, and Mālik b. Anas.

of authority.[69] In the *Rasā'il*, jurists are classified into seven ranks based upon their capacity to engage in independent reasoning, or *ijtihād*.[70] The highest rank belongs to the founders of the four schools of law, said to be jurists capable of exercising *ijtihād* on any subject. For the Ḥanafīs, this founding *mujtahid* was Abū Ḥanīfa. The second rank, by contrast, consists of *mujtahid*s who are capable of exercising *ijtihād* only within the framework of the principles set down by the school's founder. To this second rank belongs Abū Ḥanīfa's closest disciples, Abū Yūsuf and al-Shaybānī. Ibn ʿĀbidīn's third class consists of *mujtahid*s whose independent reasoning is limited to cases not ruled upon by the school's founder, and this is where al-Khaṣṣāf and other prominent 4th/10th and 5th/11th century jurists such as al-Ṭaḥāwī (d. 321/933), al-Bazdawī (d. 482/1089), and al-Sarakhsī (d. *ca*. 483/1090) are ranked. The lower rankings include those jurists who lacked the capacity to conduct *ijtihād* and were permitted to make only basic inferences (*takhrīj*)[71] from, or simple discriminations between, the opinions of *mujtahid*s.

The (re)conceptualization of al-Khaṣṣāf as a "third tier" jurist and follower of Abū Ḥanīfa is indicative of changes that swept across Islamic legal culture in the 3rd/9th and 4th/10th centuries. For reasons that are not entirely clear,[72] the construction of legal authority within the Ḥanafī school (as in the other schools of law) became fixated on the school's earliest founders—Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī—transforming al-Khaṣṣāf into a mere footnote in the development of the school.

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[69] This seven-tier typology of authority, and its origins, is discussed in greater detail in Hallaq, *Authority*, 14–17.

[70] Ibn ʿĀbidīn, *Rasā'il*, 1: 11–13; Suhrawardy, "The *Waqf* of Moveables," 330–1.

[71] The 8th/14th century Granadan jurist Abū Isḥāq al-Shāṭibī defined *takhrīj* as investigating the texts in order to extract what is otherwise an unspecified *ratio legis*, or legal inference. See Hallaq, *A History of Islamic Legal Theories*, 201.

[72] See Hallaq, *Authority*, 30–1. At one time Melchert held that traditionist-jurisprudents had provoked Ḥanafīs to "traditionaliz[e] their own jurisprudence" by assigning their doctrines to venerable jurisprudents such as Abū Ḥanīfa instead of local opinion or practice. Melchert, *The Formation of the Sunni Schools of Law*, 48. Melchert has since retracted this claim. Idem, "Traditionist-Jurisprudents," 400–401. It is also interesting to note than an opponent of the *ahl al-raʾy*, Ibn Qutayba (213–76/828–89), seemingly adopted this typology prior to the canonization of Abū Ḥanīfa and his two disciples in the 4th/10th century Ḥanafī school commentaries. In his list of rationalists, Ibn Qutayba omits al-Khaṣṣāf, even though his literary output was formidable and almost certainly known to him. Instead, Ibn Qutayba's list of rationalists is limited to nine 2nd/8th-century figures: Ibn Abī Laylā, Abū Ḥanīfa, Rabīʿa al-Raʾy, Zufar b. al-Hudhayl, al-Awzāʿī, Sufyān al-Thawrī, Mālik b. Anas, Abū Yūsuf, and Muḥammad b. al-Ḥasan al-Shaybānī. Ibn Qutayba, *Kitāb al-maʿārif*, 676–7.

PART TWO

CLASSICAL PERIOD (300–1213/912–1798)

CHAPTER SEVEN

ABŪ JAʿFAR AL-ṬAḤĀWĪ (D. 321/933)*

Nurit Tsafrir

Life

Aḥmad b. Muḥammad b. Salāma, Abū Jaʿfar al-Azdī al-Ṭaḥāwī, was born in Ṭaḥā (or, according to Yāqūt, in the adjacent village of Ṭaḥṭūṭ),[1] in Upper Egypt, in the year 239/853,[2] to a leading Egyptian Shāfiʿī family. He studied Qurʾān under Abū Zakariyyāʾ Yaḥyā b. Muḥammad b. ʿAmrūs,[3] and received his first juridical training under his maternal uncle, Ismāʿīl b. Yaḥyā al-Muzanī (d. 264/877), the celebrated disciple of al-Shāfiʿī.[4] When al-Ṭaḥāwī was about twenty years old, however, he abandoned the Shāfiʿī school and transferred to the Ḥanafī school. Later in his life, he would become the head of the Ḥanafīs of Egypt and one of the most prolific Ḥanafī authors of his time. The sources suggest several reasons for his conversion to the Ḥanafī school,[5] and it is difficult to know what the real one was. According to the most common account, one day al-Muzanī told al-Ṭaḥāwī, with whose progress in his studies he was dissatisfied, that he would never make a name for himself. Al-Ṭaḥāwī responded by joining the Ḥanafī school. According to another report, al-Ṭaḥāwī decided to transfer to the Ḥanafī school when he noticed that al-Muzanī continually consulted Ḥanafī works. Yet another report attributes the change of school to the influence of Aḥmad Ibn Abī ʿImrān (d. 280/893), who had

* I am indebted to Frank Stewart for his extensive, sharp comments on drafts of this chapter, and to Etan Kohlberg and Simon Hopkins, whose meticulous reading of the translations presented below greatly improved their accuracy.

1 Yāqūt, *Muʿjam al-buldān*, 4:25 (s.v. "Ṭaḥā").

2 Ibn Abī al-Wafāʾ, *Jawāhir* (*Cairo, 1413/1993*), 1:273; according to other reports he died in either 238 AH (Ṣaymarī, *Akhbār Abī Ḥanīfa* [*Beirut, 1405/1985*], 168; Shīrāzī, *Ṭabaqāt al-fuqahāʾ* [*Beirut, 1970*], 142); in 230 AH (Laknawī, *Fawāʾid* [*Beirut, 1418/1998*], 59); or in 229 AH (Ibn Abī al-Wafāʾ, *Jawāhir* [*Cairo, 1413/1993*], 1:273).

3 Ibn Ḥajar, *Lisān al-mīzān*, 1:281.

4 Ibn Abī al-Wafāʾ, *Jawāhir* (*Cairo, 1413/1993*), 1:273.

5 Kawtharī, *al-Ḥāwī*, 244ff; Melchert, *Formation*, 117; Tsafrir, *The History of an Islamic School of Law*, 167, n. 51.

recently moved to Egypt from Iraq and was to become al-Ṭaḥāwī's first teacher of Ḥanafī law.[6]

Whatever the reason, al-Ṭaḥāwī's transfer to the Ḥanafī school must have shocked his contemporaries, particularly his family. The sources do not dwell on the dismay caused by his transfer to the Ḥanafī camp among Egyptian Shāfiʿīs, but we may guess what their feelings were by looking at the context in which it took place. In al-Ṭaḥāwī's time Egypt was a center of both the Mālikī and the Shāfiʿī schools. The most important disciples of Mālik were Egyptians, and the main representatives of the Shāfiʿī school likewise came from Egypt; it was mainly through al-Muzanī's *Mukhtaṣar* that Shāfiʿī doctrine first spread.[7] However, for the Ḥanafī school, whose center remained in Iraq, Egypt was of secondary importance. Unlike the local Mālikī and Shāfiʿī schools, the Ḥanafī community in Egypt consisted of scholars who had emigrated from Iraq during the second and third centuries AH.[8] Their aim was to establish, with ʿAbbāsid support, a solid Ḥanafī foothold, but their influence in Egypt, compared to that of the Shāfiʿīs and the Mālikīs, remained limited. In the year 326/937 the Mālikīs and the Shāfiʿīs each had fifteen learning circles in the main mosque of Fustat, the Ḥanafīs only three.[9] Al-Ṭaḥāwī's transfer to the Ḥanafī school meant, then, abandoning the local, well-rooted and dominant legal school to which his family belonged for a school of outsiders from Iraq, which at that time did not enjoy much support in Egypt. His conversion must have appeared as a significant gain for the Ḥanafīs and a great loss for the Shāfiʿīs.

That the Ḥanafī school was represented in Egypt by foreigners was probably one reason why it did not achieve wider acceptance there in al-Ṭaḥāwī's time. Another reason was related to the *miḥna*.[10] The Ḥanafīs were generally connected with the official doctrine of the created Qurʾān, the Mālikīs and the Shāfiʿīs with the opposite view. The *miḥna* in Egypt was, in fact, carried out by a Ḥanafī *qāḍī*, Muḥammad b. Abī al-Layth, after a Mālikī *qāḍī* refused the task.[11] In his *Kitāb al-Wulāt wa-kitāb al-quḍāt*, al-Kindī (d. 350/961) preserves evidence of the harsh measures taken in

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[6] Ṣaymarī, *Akhbār Abī Ḥanīfa* (*Beirut, 1405/1985*), 168; Shīrāzī, *Ṭabaqāt al-fuqahāʾ* (*Beirut, 1970*), 142.

[7] Halm, *Ausbreitung*, 237.

[8] Tsafrir, *The History of an Islamic School of Law*, 96ff.

[9] Mez, *The Renaissance of Islam*, 214.

[10] Tsafrir, *The History of an Islamic School of Law*, 99–100.

[11] Kindī, *Kitāb al-Wulāt*, 447, 451.

Egypt against those who refused to acknowledge that the Qurʾān was created; many of them were forced to escape, others were imprisoned.[12] These were mainly Shāfiʿīs and Mālikīs. Moreover, Muḥammad b. Abī al-Layth forbade Mālikī and Shāfiʿī scholars from entering or even approaching the mosque because they denied the doctrine of the created Qurʾān.[13] The *miḥna* no doubt provoked among the Shāfiʿīs and the Mālikīs hostile attitudes towards the Ḥanafīs. Al-Ṭaḥāwī was born just a few years after the *miḥna* had ended, and its memory, and the feelings towards the Ḥanafīs that it generated, must have been vivid when he decided to transfer to the Ḥanafī school. Against this background, we may assume that al-Ṭaḥāwī's change of school annoyed the Shāfiʿīs.

Al-Ṭaḥāwī's teacher, Aḥmad b. Abī ʿImrān, was the head of the Ḥanafīs in Egypt, having moved there from Baghdad during the reign of al-Muʿtamid (r. 256–279/870–892). In Baghdad Ibn Abī ʿImrān had studied under Bishr b. al-Walīd (d. 238/852), a student of Abū Yūsuf (d. 182/798), and Muḥammad b. Samāʿa (d. 233/847), a student of both Abū Yūsuf and al-Shaybānī (187/802).[14] The distinguished scholar and *qāḍī*, Bakkār b. Qutayba (d. 270/883), also contributed to al-Ṭaḥāwī's Ḥanafī education.[15] He came to Egypt from Basra in 246/860, bringing the Ḥanafī Baṣrī tradition, which he had studied under Hilāl al-Raʾy (d. 245/859), one of the most important teachers in Basra.[16] Ibn Abī ʿImrān and Bakkār b. Qutayba thus connect al-Ṭaḥāwī with the Ḥanafī legal tradition of Basra, Kufa and Baghdad. In the year 268/881 al-Ṭaḥāwī took his only *ṭalab al-ʿilm* journey, to Syria. On his way there he attended *ḥadīth* sessions in Jerusalem, Gaza and ʿAsqalān.[17] In Syria he studied under the famous Ḥanafī from Baghdad, ʿAbd al-Ḥamīd b. ʿAbd al-ʿAzīz, known as Abū Khāzim (d. 292/904), then the *qāḍī* of Damascus.[18] He returned to Egypt in 269/882.[19]

Al-Ṭaḥāwī's two teachers in Egypt, Ibn Abī ʿImrān and Bakkār b. Qutayba, were representative of the Egyptian Ḥanafīs, almost all of whom, as noted above, were of non-Egyptian, mainly Iraqi origin. In that sense, al-Ṭaḥāwī was an exception: he was the first outstanding Egyptian-born

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12 Ibid., 451.
13 Ibid.
14 Ṣaymarī, *Akhbār Abī Ḥanīfa* (*Beirut, 1405/1985*), 165; Shīrāzī, *Ṭabaqāt al-fuqahāʾ* (*Beirut, 1970*), 140.
15 Ibn Abī al-Wafāʾ, *Jawāhir* (*Cairo, 1413/1993*), 1:459.
16 Ibid., 1:458.
17 Ibn Ḥajar, *Lisān al-mīzān*, 1:275.
18 Ibn ʿAsākir, *Taʾrīkh madīnat Dimashq*, 5:367.
19 Ibn Ḥajar, *Lisān al-mīzān*, 1:275.

Ḥanafī. His switch to the Ḥanafī school was thus a turning point not only in his own life but also in the history of the Egyptian Ḥanafī community. His teachers and other Ḥanafī scholars in Egypt must have been gratified; when they emigrated from Iraq their goal was to create a local Ḥanafī community, and they could not have hoped for a more promising candidate to initiate such a community than al-Ṭaḥāwī. In one respect al-Ṭaḥāwī fulfilled their hopes. His vast and varied work gave the Ḥanafī branch in Egypt—marginal until then—a place of pride in the Ḥanafī school. At the same time, however, the hope that al-Ṭaḥāwī would educate students materialized only in part. His study circle attracted many *qāḍī*s and scholars who related *ḥadīth* from him and transmitted his works. Among them were ʿUbaydallāh b. ʿAlī al-Daʾudī (d. 376/986), the head of the Ẓāhirīs in Khurasān, and Abū al-Qāsim al-Ṭabarānī (d. 360/971), well-known for his three *Muʿjam*s, biographical dictionaries of *ḥadīth* transmitters.[20] But al-Ṭaḥāwī had no illustrious disciples. Only three Ḥanafīs who received their main legal training under him appear in Ibn Abī al-Wafāʾ al-Qurashī's *al-Jawāhir al-muḍiyya fī ṭabaqāt al-Ḥanafiyya*: his son, Abū al-Ḥasan ʿAlī b. Aḥmad b. Muḥammad al-Ṭaḥāwī;[21] Muḥammad b. Badr b. ʿAbd al-ʿAzīz al-Ṣayrafī, *qāḍī* in Egypt for three terms between 324/935 and his death in 330/941;[22] and Abū Bakr Aḥmad b. Muḥammad al-Damaghānī, who also studied under Abū al-Ḥasan al-Karkhī (d. 340/951), the pre-eminent Ḥanafī teacher in Baghdad.[23] The first two are of no great significance for the Ḥanafī school. Al-Damaghānī, a prominent and pious scholar, was *qāḍī* in Wasit; when al-Karkhī was stricken with paralysis while *qāḍī* of Baghdad, he entrusted al-Damaghānī with issuing *fatwā*s.[24] Otherwise, we do not know much about him. The leading Ḥanafī scholars of the generation after al-Ṭaḥāwī (listed by Abū Isḥāq al-Shīrāzī [d. 476/1083] in his *Ṭabaqāt al-fuqahāʾ*) were not al-Ṭaḥāwī's disciples, but rather those of Abū al-Ḥasan al-Karkhī.[25]

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[20] For lists of men who transmitted from al-Ṭaḥāwī, see Ibn Abī al-Wafāʾ, *Jawāhir* (*Cairo, 1413/1993*), 1:275–6; Kawtharī, *al-Ḥāwī,* 238; Melchert, *Formation*, 122–3.

[21] Ibn Abī al-Wafāʾ, *Jawāhir* (*Cairo, 1413/1993*), 2:541.

[22] Ibid., 3:105; Kindī, *Kitāb al-Wulāt*, 486–90. For a detailed biography of al-Ṣayrafī, see ibid., 557–62 (appendix).

[23] Ṣaymarī, *Akhbār Abī Ḥanīfa* (*Beirut, 1405/1985*), 170; Ibn Abī al-Wafāʾ, *Jawāhir* (*Cairo, 1413/1993*), 1:318.

[24] Ṣaymarī, *Akhbār Abī Ḥanīfa* (*Beirut, 1405/1985*), 170; Ibn Abī al-Wafāʾ, *Jawāhir* (*Cairo, 1413/1993*), 1:318.

[25] Shīrāzī, *Ṭabaqāt al-fuqahāʾ* (*Beirut, 1970*), 143–4. For a list of al-Karkhī's students, see Melchert, *Formation*, 125–8.

That al-Ṭaḥāwī left no distinguished disciples does not necessarily mean that he was not an outstanding teacher. After returning from Syria, at the age of about thirty, he gradually achieved prominence in Egypt as a teacher and legal expert. Scholars in Egypt, as in other places, enjoyed high social status: they constituted an important element of the elite of Muslim cities, serving as non-elected leaders of the city and as a link between its residents and the caliph. They represented these residents to the caliph, and, because of their influence and the respect they enjoyed among the local population, the caliph recognized them as his unofficial representatives to this population. Prominent scholars, even those who never served in a governmental position, were often involved, in one way or another, with politics. Al-Ṭaḥāwī is a case in point. He was the secretary of the *qāḍī* Muḥammad b. ʿAbda (in office 277–283/890–896)[26] and perhaps also of Bakkār b. Qutayba (in office 246–270/860–883);[27] even if he was not a *qāḍī* himself, he played a political role in the legal system and beyond it. In the year 311, the caliph's representative sent a letter to Egypt informing the governor that Abū ʿUbayd ʿAlī b. al-Ḥusayn, the *qāḍī* of Egypt, was to be replaced by ʿAbdallāh b. Ibrāhīm b. Mukram. In an accompanying letter addressed to al-Ṭaḥāwī and three other prominent Egyptians, the new *qāḍī*, who remained in Baghdad, instructed the four to select a deputy for him in Egypt, which they did.[28] On another occasion, the chief *qāḍī* of Baghdad, Ibn Abī al-Shawārib, sent to Egypt orders to replace the local *qāḍī*, Muḥammad b. Mūsā al-Sarakhsī, with Muḥammad b. ʿAlī al-Ṣayrafī, al-Taḥāwī's above-mentioned student. When the able vizier Muḥammad b. ʿAlī al-Madhāraʾī was reluctant to comply with the governmental instruction, al-Ṭaḥāwī was among those who successfully pressed al-Madhāraʾī to do what he was told.[29] These examples reflect al-Ṭaḥāwī's high rank in the authorities' eyes and his importance in implementing governmental policy. The authorities were certainly aware of the need to show him respect, and al-Ṭaḥāwī was sufficiently politic to show respect to them. When Abū al-Jaysh, the Ṭūlūnid ruler of Egypt and Syria between 270/883 and 282/895, gathered a group of witnesses, including al-Ṭaḥāwī, to give written testimony about a certain issue, each witness referred to Abū al-Jaysh as "*mawlā amīr al-Muʾminīn*"; al-Ṭaḥāwī alone added a series of wishes for divine grace upon the ruler, to the latter's

[26] Kindī, *Kitāb al-Wulāt*, 516 (appendix).
[27] Ibn Abī al-Wafāʾ, *Jawāhir* (*Cairo, 1413/1993*), 1:275.
[28] Ibn Ḥajar, *Rafʿ al-iṣr*, 2:263; Kindī, *Kitāb al-Wulāt*, 532 (appendix).
[29] Kindī, *Kitāb al-Wulāt*, 550 (appendix).

great satisfaction.[30] Ibn al-Nadīm mentions a book on marrying slave girls (*nikāḥ mulk al-yamīn*) written by al-Ṭaḥāwī for Aḥmad b. Ṭūlūn, in which al-Ṭaḥāwī provided Ibn Ṭūlūn with the legal justification for marrying his slave girls.[31] Al-Ṭaḥāwī's vast knowledge also earned him the respect and favor of contemporary *qāḍī*s, for whom he was a source of advice and with whom he maintained close connections.[32] But he also attracted envy, which produced tension between him and some of his contemporaries. For example, he was prevented from serving as a witness in court, a highly prestigious position, by those who did not want him to enhance his already eminent status.[33]

Most of the sources date al-Ṭaḥāwī's death to 321/933, drawing on a report by the Egyptian historian Abū Saʿīd b. Yūnus (d. 347/958).[34] Ibn al-Nadīm gives the year 322/934,[35] supported by another Egyptian historian, al-Ḥasan b. Ibrāhīm b. Zūlāq (d. 387/997), who describes an event that occurred in 322/934, in which al-Ṭaḥāwī took part.[36]

Scholarship

Al-Ṭaḥāwī lived during the transition from the formative to the classical period of Islamic schools of law. Among the literary characteristics of the transition is the compilation of the first *Mukhtaṣar*s,[37] of the first biographical works devoted to followers of a particular legal school[38] and of the first commentaries on works attributed to the eponyms of the school.[39] The approximately three dozen works compiled by al-Ṭaḥāwī include works in each of these three genres: the first Ḥanafī *Mukhtaṣar*,

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30 Ibid., 517 (appendix).
31 Ibn al-Nadīm, *Fihrist* (*Cairo, 1348/1929–30*), 292.
32 Ibn Khallikān, *Wafayāt al-aʿyān*, 5:291 (no. 741); Ibn Ḥajar, *Rafʿ al-iṣr*, 1:49–50; 2:315.
33 Ibn Khallikān, *Wafayāt al-aʿyān*, 1:72 (no. 25).
34 Dhahabī, *Siyar aʿlām al-nubalā'*, 15:31; Ibn Ḥajar, *Lisān al-mīzān*, 1:277.
35 Ibn al-Nadīm, *Fihrist* (*Cairo, 1348/1929–30*), 292.
36 Kindī, *Kitāb al-Wulāt*, 550 (appendix).
37 Calder, *Studies*, 245–6.
38 Melchert, *Formation* (p. 87), lists biographical dictionaries as one of the distinguishing marks of the classical school. The compilation of comprehensive biographical dictionaries that sought to cover all the followers of a given school began only in the beginning of the 5th/11th century. But biographical works more limited in scope devoted to followers of a particular school, and works on the virtues of a given school's eponym started already in the second half of the 3rd century AH (Melchert, 145–6).
39 Ibid., 60.

one of the first Ḥanafī biographical works,[40] the earliest commentary on al-Shaybānī's *al-Jāmiʿ al-ṣaghīr* and one of the earliest commentaries on his *al-Jāmiʿ al-kabīr*.[41] (Only the first of these four works is extant.) The subjects covered by al-Ṭaḥāwī's works also include *shurūṭ* or legal formularies, Qurʾān commentary, *Ḥadīth*, and dogma. A list of al-Ṭaḥāwī's works is given by Abū al-Wafāʾ al-Afghānī in his introduction to al-Ṭaḥāwī's *Mukhtaṣar* (Cairo, 1370, 12–14); by ʿAbdallāh Nadhīr Aḥmad in his introduction to al-Jaṣṣāṣ' *Mukhtaṣar* of al-Ṭaḥāwī's *Ikhtilāf al-ʿulamāʾ* (2nd ed., Beirut, 1417/1996, 1:46–53, a list divided into extant and non-extant items); by F. Krenkow in *EI*[1], s.v. "Ṭaḥāwī", and by others.

Four of al-Ṭaḥāwī's legal works have survived, in part at least, and have been published: the *Mukhtaṣar*, two compilations of *shurūṭ*, and an *ikhtilāf* work, entitled *Ikhtilāf al-ʿulamāʾ* or *Ikhtilāf al-fuqahāʾ*, which is preserved only as an abridgment by Abū Bakr al-Jaṣṣāṣ (d. 370/980).[42] The rest of this chapter is devoted to these legal writings.

1. *The* Shurūṭ

Three works on *Shurūṭ* by al-Ṭaḥāwī are mentioned in the sources: *Kitāb al-Shurūṭ al-kabīr* (or: *al-Jāmiʿ al-kabīr fī al-Shurūṭ*), *Kitāb al-Shurūṭ al-awsaṭ* and *Kitāb al-Shurūṭ al-ṣaghīr*.[43] Of these, the entire *Kitāb al-Shurūṭ al-ṣaghīr* is extant, as are five chapters of *Kitāb al-Shurūṭ al-kabīr*. Two of these chapters, on claims for debts and pledges (*kitāb adhkār al-ḥuqūq wa'l-ruhūn*) and on pre-emption (*kitāb al-shufʿa*), were published by Joseph Schacht (Heidelberg, 1927 and 1930, respectively). An edition of another chapter, *kitāb al-buyūʿ*, on contracts of sale, was published by Jeanette Wakin in *The Function of Documents in Islamic Law* (Albany, 1972), with an extensive introduction and notes. The *Kitāb al-Shurūṭ al-ṣaghīr*, which is an abridgment of *Kitāb al-Shurūṭ al-kabīr*, was published by Rawḥī Ūzjān (Baghdad, 1974), together with all five surviving chapters of *Kitāb al-Shurūṭ al-kabīr* (i.e., the three chapters published by Schacht and Wakin

[40] Tsafrir, *The History of an Islamic School of Law*, 11.

[41] Melchert, *Formation*, 60, 63, 116.

[42] Although of a different genre, al-Ṭaḥāwī's *Aḥkām al-Qurʾān* also focuses on legal issues. It is a commentary of the Qurʾānic verses dealing with law, arranged by legal subject. The surviving part of the *Aḥkām* (which covers mainly ritual law) was edited by Saʿd al-Dīn al-Awnāl, and published in two volumes in Istanbul in 1416–18/1995–8.

[43] Wakin, *The Function of Documents*, 24; Ṭaḥāwī, *al-Shurūṭ al-ṣaghīr* (editor's introduction), 1:30.

and two additional chapters, one on the nomination of *qāḍīs* [*kitāb wilāyāt al-quḍāt*], the other on the minutes of the court [*kitāb al-maḥāḍir*]).[44]

In his works on *shurūṭ*—the earliest extant examples of this genre—al-Ṭaḥāwī put in writing the Ḥanafī tradition of *shurūṭ* that had developed in the centuries before him and that in his time was still partly oral.[45] Major transmitters of the early Ḥanafī *shurūṭ* tradition to al-Ṭaḥāwī were 3rd/9th century Ḥanafī scholars of Iraqi origin who lived in Egypt, such as Sulaymān b. Shuʿayb (d. 278/891?), Muḥammad b. al-ʿAbbās b. al-Rabīʿ (d. 272/885), and ʿAlī b. Maʿbad (d. 259/873).[46] Bakkār b. Qutayba also contributed to al-Ṭaḥāwī's knowledge of *shurūṭ*.[47] He transmitted to him the Basran *shurūṭ* tradition, which began in the 2nd/8th century with Yūsuf b. Khālid al-Samtī (d. 189/804) and continued with Hilāl al-Raʾy, who taught it to Bakkār before the latter left Basra for Egypt. Bakkār's contribution is reflected in al-Ṭaḥāwī's work, in which the Basran tradition occupies a special place, and in which the opinions of Hilāl al-Raʾy (who himself wrote a book on *shurūṭ*) and of Yūsuf b. Khālid al-Samtī are prominent.[48]

2. *The* Mukhtaṣar *and* Ikhtilāf al-ʿulamāʾ, *and al-Ṭaḥāwī's Legal Work as it Emerges from Them*

According to the Ḥanafī biographer al-Ḥusayn b. ʿAlī al-Ṣaymarī (d. 436/1044), the *Mukhtaṣar* was the first work compiled by al-Ṭaḥāwī.[49] As noted above, it was also the first Ḥanafī *Mukhtaṣar*. It was probably the example of his uncle al-Muzanī that led al-Ṭaḥāwī to compose it: in the arrangement of the material al-Ṭaḥāwī's *Mukhtaṣar* generally follows that of al-Muzanī.[50]

Al-Jaṣṣāṣ' abridgment of al-Ṭaḥāwī's *Ikhtilāf al-ʿulamāʾ*, entitled *Mukhtaṣar Ikhtilāf al-ʿulamāʾ*, has come down to us in its entirety.[51] While

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[44] Ṭaḥāwī, *al-Shurūṭ al-ṣaghīr* (editor's introduction), 1:33–5.

[45] Wakin, *The Function of Documents*, 14–15.

[46] Ibid., 15, n. 5; On the role of Sulaymān b. Shuʿayb and Muḥammad b. al-ʿAbbās in establishing the Ḥanafī school in Egypt, see Tsafrir, *The History of an Islamic School of Law*, 97, 99.

[47] Wakin, *The Function of Documents*, 22.

[48] Ibid., 17 and 19. For literature on *shurūṭ* see Schacht, *Introduction*, 243–4.

[49] Ṣaymarī, *Akhbār Abī Ḥanīfa* (*Beirut, 1405/1985*), 168.

[50] Ḥājjī Khalīfa, *Kashf al-ẓunūn*, 2:1627.

[51] It was published by ʿAbdallāh Nadhīr Aḥmad in 5 volumes (Beirut, 1417/1996), based on two fragments, from Istanbul and Cairo. The Cairo fragment was also published by Muḥammad Ṣaghīr al-Maʿṣūmī (Islamabad, 1971). While Aḥmad identifies the work as *Mukhtaṣar Ikhtilāf al-ʿulamāʾ* by al-Jaṣṣāṣ, al-Maʿṣūmī takes the fragment he brought to light to be part of the *Ikhtilāf* itself, by al-Ṭaḥāwī (see his introduction to the book, 31–2).

al-Ṭaḥāwī's *Mukhtaṣar*—a summary of the law written with the utmost concision—does not allow for explanations of what led al-Ṭaḥāwī to prefer certain legal opinions over others, his *Ikhtilāf al-ʿulamāʾ* does give us some idea of the reasons behind his legal preferences. In this book, arranged much like a *fiqh* work, al-Ṭaḥāwī devotes a short section to each legal question. He gives the views of various scholars, Ḥanafī and non-Ḥanafī, pertaining to that question. He includes views of ancient scholars who were not affiliated with any of the four Sunnī schools of law (for instance, Ibn Abī Laylā [d. 148/765] and Sufyān al-Thawrī [d. 164/780] of Kufa, and the Egyptian al-Layth b. Saʿd [d. 174/790]), but he omits the opinions of Ibn Ḥanbal (as did al-Ṭabarī, al-Ṭaḥāwī's contemporary, in his own *Ikhtilāf al-ʿulamāʾ*). Following each listing of views, al-Ṭaḥāwī adduces texts (Qurʾān or *ḥadīth*) or arguments in support of the view he prefers. What follows is an attempt to characterize al-Ṭaḥāwī's juridical work and his contribution to Ḥanafī law, based on both the *Mukhtaṣar* and *Ikhtilāf al-ʿulamāʾ*.

2.1. *Al-Ṭaḥāwī and Controversies within the Ḥanafī School*

The author of a *Mukhtaṣar* summarizes the law of his school as known in his lifetime so as to provide a basis for commentaries and further development. But the purpose of such an author is not simply to hand down legal material in an abridged form. In selecting what to include and what to leave out of his *Mukhtaṣar*, he no doubt intends to influence the lines of future legal discussion. Another way in which authors of Ḥanafī *Mukhtaṣar*s try to leave their mark on Ḥanafī law is by deciding questions disputed within the school. As is well known, Ḥanafī law goes back to three major authorities—Abū Ḥanīfa (d. 150/767), and his two students Abū Yūsuf and al-Shaybānī—who are said to have disagreed with each other on numerous points. These controversial questions are dealt with by authors of Ḥanafī *Mukhtaṣar*s in at least three ways: by mentioning only the view that the author follows, omitting views with which he disagrees;[52] by presenting the various opinions about a given disputed issue without taking sides;[53] and by presenting the various opinions about such an issue, and then indicating which of them the author considers correct. Al-Ṭaḥāwī adopts this third way in his *Mukhtaṣar*. For most of the moot points mentioned in this work, he indicates, after listing the relevant Ḥanafī views,

[52] See notes 62, 68 and 75 below.

[53] For example, Samarqandī, *Tuḥfat al-fuqahāʾ*, 3:64–5, 66.

the one he considers the best, using the phrase "and this is [the view][54] we follow (*wa-bihi na'khudhu*)." Two questions about his legal choices concern us here. First, do they have anything in common? Second, what influence did al-Ṭaḥāwī's decisions have on later legal works? In other words, to what extent were his legal preferences on disputed questions adopted by later scholars, incorporated in their works and influential in shaping Ḥanafī law? I shall begin by providing some information relevant to the first question.

As al-Ṭaḥāwī states in his brief introduction to the *Mukhtaṣar*, the work contains the legal opinions of Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī.[55] An examination of al-Ṭaḥāwī's legal choices throughout the *Mukhtaṣar* reveals a clear predilection for views held by either Abū Yūsuf or al-Shaybānī, or both, as against views held by Abū Ḥanīfa.[56] The following figures illustrate this. The six chapters (*kutub*) of the *Mukhtaṣar* that contain the largest number of disagreements are those on divorce (*kitāb al-ṭalāq*), retaliation, indemnity[57] and wounds (*kitāb al-qiṣāṣ wa'l-diyāt wa'l-jirāḥāt*), marriage (*kitāb al-nikāḥ*), the discipline of the judge (*kitāb adab al-qāḍī*), expiation, vows and oaths (*kitāb al-kaffārāt wa'l-nudhūr wa'l-aymān*), and prayer (*kitāb al-ṣalāt*).[58] In these chapters al-Ṭaḥāwī mentions a total of 217 controversial legal questions—that is, questions on which more than one Ḥanafī opinion exists—and he indicates the view he follows in 189 of them. The views preferred by al-Ṭaḥāwī are those of al-Shaybānī or Abū Yūsuf, or both, in about 70 percent of the total (of 189); in only 10 cases, i.e., a little more than 5 percent, does al-Ṭaḥāwī endorse a view followed only by Abū Ḥanīfa. In about 14 percent of the disputes he follows an opinion held by Abū Ḥanīfa and either al-Shaybānī or Abū Yūsuf, and in the remaining 20 questions, a little more than 10 percent, al-Ṭaḥāwī follows miscellaneous authorities. These trends are apparent in other chapters in the *Mukhtaṣar*, and although they are not always so prominent, the overall picture remains: al-Ṭaḥāwī clearly preferred Abū

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[54] Complementary additions within translated texts are given in square brackets, and explanatory additions in parenthesis.

[55] Occasionally views of other Ḥanafī authorities are also mentioned, but their number is marginal.

[56] In his *Ha-Din ha-Muslemi*, 70, Ya'akov Meron noted al-Ṭaḥāwī's loyalty to the views of Abū Yūsuf.

[57] I translate *diya* as "blood-money" when it refers to payment for homicide, and as "indemnity" when it refers to payment for bodily harm. The word *diyāt* here includes both meanings.

[58] Ṭaḥāwī, *Mukhtaṣar*, 191–229, 229–57, 169–91, 325–51, 305–25 and 23–42, respectively.

Yūsuf and al-Shaybānī over Abū Ḥanīfa. With a few exceptions, al-Ṭaḥāwī does not explain what guided his preferences, and it is difficult to know whether he decided in favor of certain views because they originated with certain authorities (that is, he practiced a kind of *taqlīd* within the school), or he preferred these views because he accepted their underlying principles, without regard for the authorities who stood behind them.

What influence did al-Ṭaḥāwī's decisions have on later Ḥanafī legal literature? To answer this question I shall now examine the five disputed questions that appear in the chapter on hunting and ritual slaughter (*kitāb al-ṣayd wa'l-dhabā'iḥ*) of al-Ṭaḥāwī's *Mukhtaṣar*.

A. Is the meat of a fetus found dead in the womb of a beast that has been ritually slaughtered licit? The answer depends on the principle one follows. If the fetus is merely a part of its mother's body, then its mother's slaughter applies to it, and it may be consumed if found dead in her womb. But if it is considered an independent being, then it must be slaughtered separately; its meat is forbidden if found dead in the womb. The former view is ascribed to Abū Yūsuf and al-Shaybānī, the latter to Abū Ḥanīfa.[59] Al-Ṭaḥāwī, who lists both opinions in his *Mukhtaṣar*, prefers that of Abū Yūsuf and al-Shaybānī.[60] A few decades later, al-Jaṣṣāṣ followed Abū Ḥanīfa's view and offered textual evidence supporting it.[61] In the following century, al-Qudūrī (d. 428/1036), in his *Mukhtaṣar*, omits Abū Yūsuf and al-Shaybānī's view, presenting only the view ascribed to Abū Ḥanīfa.[62] The prominent Ḥanafī legal scholars of the 5th/11th and 6th/12th centuries, al-Sarakhsī, al-Kāsānī and al-Marghīnānī, also prefer Abū Ḥanīfa's view.[63]

B. Is it permissible to consume milk from the udder of a dead beast? Since a beast becomes impure when it dies, the question is whether its milk also becomes impure. There are two Ḥanafī views on this question, and it is worth presenting them in al-Ṭaḥāwī's words, for in a fashion not typical of his method in the *Mukhtaṣar*, he gives the underlying reason for each view:

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[59] Sarakhsī, *Mabsūṭ* (*Beirut, 1414/1993*), 12:6; Kāsānī, *Badā'iʿ* (*Beirut, 1418/1997*), 6:212; Marghīnānī, *Hidāya*, 4:1454.

[60] Ṭaḥāwī, *Mukhtaṣar*, 298 (for *tu'kal* read *yu'kal*)

[61] Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 1:137.

[62] Qudūrī, *Mukhtaṣar*, 110.

[63] Sarakhsī, *Mabsūṭ* (*Beirut, 1414/1993*), 12:7–8; Kāsānī, *Badā'iʿ* (*Beirut, 1418/1997*), 6:215–16; Marghīnānī, *Hidāya*, 4:1455.

> Abū Ḥanīfa, may God be pleased with him, said: there is no harm in consuming it for milk is not subject to death. Abū Yūsuf and Muḥammad (al-Shaybānī), may God be pleased with them, said: if it is solid like an egg it may be consumed, but if it is liquid it may not be consumed because it is milk within a dead vessel.[64]

In his *Ikhtilāf al-ʿulamāʾ* al-Ṭaḥāwī explains why he follows the latter view:

> [It is true that] milk [in a ewe's udder] does not become alive by virtue of the ewe's life, and [that] it does not die when it (i.e., the ewe) dies; yet it should be considered impure because it is contiguous to an impure udder.[65]

To put it differently, although the reasoning behind Abū Ḥanīfa's view—that milk is not subject to death, for which reason the beast's death does not cause its death and hence impurity—is correct, the case in point should be determined by another principle, namely, that an impure vessel (i.e. the udder) contaminates the liquids contained in it.

As in the previous example, al-Ṭaḥāwī's preference for the view of al-Shaybānī and Abū Yūsuf over that of Abū Ḥanīfa was not followed by later Ḥanafī authors. Al-Jaṣṣāṣ, al-Sarakhsī and al-Kāsānī all preferred the opinion of Abū Ḥanīfa.[66]

C. A similar picture arises from discussions of the consumption of horse meat. According to Abū Ḥanīfa, the consumption of such meat is reprehensible (*makrūh*), whereas al-Shaybānī and Abū Yūsuf see no harm in it. Al-Ṭaḥāwī follows the latter view,[67] but later Ḥanafī authors—al-Jaṣṣāṣ, al-Qudūrī, al-Sarakhsī, al-Kāsānī and al-Marghīnānī—adopted Abū Ḥanīfa's view.[68]

D. Abū Ḥanīfa permits a Muslim to consume the meat of an animal slaughtered by a Sabian (*Ṣābiʾ*), because, according to him, the Sabians are subject to a scripture (*yadīnūna bi-kitāb*). Abū Yūsuf and al-Shaybānī

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[64] Ṭaḥāwī, *Mukhtaṣar*, 299. According to *Mukhtaṣar Ikhtilāf al-ʿulamāʾ*, al-Shaybānī and Abū Yūsuf considered the drinking of such milk reprehensible, but not prohibited (Jaṣṣāṣ, *Mukhtaṣar*, 4:357).

[65] *Laysa al-laban mimmā yaḥyā bi-ḥayāt al-shāt wa-lā yamūtu bi-mawtihā illā annahu yanbaghī an yakūn najasᵃⁿ li-mujāwaratihi bi-ḍarʿ najas* (Jaṣṣāṣ, *Mukhtaṣar*, 4:358).

[66] Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 1:148; Sarakhsī, *Mabsūṭ* (*Beirut, 1414/1993*), 24:27; Kāsānī, *Badāʾiʿ* (*Beirut, 1418/1997*), 6:217 and 1:371.

[67] Ṭaḥāwī, *Mukhtaṣar*, 299.

[68] Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 5:2–3; idem, *Sharḥ Mukhtaṣar al-Ṭaḥāwī* (Beirut, *1431/2010*), 7:288–291; Qudūrī, *Mukhtaṣar*, 110 (al-Qudūrī does not even mention the view of Abū Yūsuf and al-Shaybānī); Sarakhsī, *Mabsūṭ* (*Beirut, 1414/1993*), 11:234; Kāsānī, *Badāʾiʿ* (*Beirut, 1418/1997*), 6:187ff.; Marghīnānī, *Hidāya*, 4:1458.

prohibit such meat, maintaining that the book that the Sabians consider to be a scripture is not recognized as such by the Muslims.[69] Al-Ṭaḥāwī follows Abū Yūsuf and al-Shaybānī, and, in contrast to the previous examples, later Ḥanafī authors agree with him. In fact, the view ascribed to Abū Ḥanīfa seems to them so unacceptable that they try to clear him of having held it.[70]

E. Disagreement exists about the case of a sheep that falls from a high place, is seriously injured, and then slaughtered. If the cause of the sheep's death is taken to be its fall, then its meat is illicit. If, however, the sheep is considered to have died as a result of having been slaughtered, then its meat may be consumed. Abū Ḥanīfa held that the meat of such a sheep is licit. According to Abū Yūsuf, if the sheep was so seriously injured by the fall that its death from the injury was inevitable, then its meat is prohibited even if it is slaughtered before it dies. If, however, the sheep's condition was such that it would have survived had it not been slaughtered, then its meat may be consumed after the animal has been slaughtered. Al-Shaybānī refines the view of Abū Yūsuf by establishing a way to estimate the condition of the sheep: its meat is licit if it is slaughtered when in a condition that would allow it to survive for about one day. If, however, the sheep is slaughtered when in the throes of death (*al-iḍṭirāb li'l-mawt*), its meat is forbidden.[71] Al-Ṭaḥāwī follows al-Shaybānī and justifies his view by analogy to the case of cattle that suffer from a lethal disease; if they are in the throes of death, then ritual slaughter does not make the meat of such cattle licit, but if the slaughter takes place before the throes of death occur, then the meat is licit.[72] Unlike al-Ṭaḥāwī, other scholars agree with Abū Ḥanīfa: if the beast was alive, then ritual slaughter makes its meat lawful, no matter how close to death it was. This is

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[69] Ṭaḥāwī, *Mukhtaṣar*, 297.

[70] Al-Jaṣṣāṣ (in *Aḥkām al-Qurʾān*, 3:328) suggests that Abū Ḥanīfa was led to believe in this view by a mistake. The Sabians pretend to adhere to Christianity, while concealing their real faith. This misled Abū Ḥanīfa, who took them to be Christians and therefore held that meat slaughtered by them is permitted. Al-Sarakhsī explains Abū Ḥanīfa's view in a different way, and mentions yet another explanation, by al-Karkhī (*Mabsūṭ*, 11:247). See also: Jaṣṣāṣ, *Sharḥ Mukhtaṣar al-Ṭaḥāwī* (Beirut, *1431/2010*), 7:247–8. Al-Qudūrī and, following him, al-Marghīnānī, do not discuss this question. Al-Kāsānī mentions the dispute but not his own attitude towards it. See al-Kāsānī, *Badāʾiʿ* (*Beirut, 1418/1997*), 6:229 (slaughter by Sabians); 3:465 (marriage with Sabians).

[71] Ṭaḥāwī, *Mukhtaṣar*, 298; Jaṣṣāṣ, *Mukhtaṣar*, 3:203–4. The view ascribed to al-Shaybānī in al-Ṭaḥāwī's *Mukhtaṣar* is ascribed to Abū Yūsuf in al-Sarakhsī, *Mabsūṭ* (*Beirut, 1414/1993*), 12:5.

[72] Jaṣṣāṣ, *Mukhtaṣar*, 3:204.

the opinion of al-Ḥākim al-Shahīd al-Marwazī (as it appears in al-Sarakhsī's *Mabsūṭ*),[73] al-Jaṣṣāṣ,[74] Abū Qāsim al-Samarqandī (d. 556/1160) (who omits the views of Abū Yūsuf and al-Shaybānī, presenting that of Abū Ḥanīfa alone),[75] and al-Marghīnānī.[76]

In four of these examples, al-Ṭaḥāwī supports a view held by both al-Shaybānī and Abū Yūsuf, and in one instance he follows a view held by al-Shaybānī alone. Later Ḥanafī authors, in contrast, usually follow the views of Abū Ḥanīfa; in these as well as in other instances al-Ṭaḥāwī failed to establish the views of al-Shaybānī and Abū Yūsuf over those of Abū Ḥanīfa. In fact, in later Ḥanafī guidelines for deciding disputed legal questions, Abū Ḥanīfa's views were, generally speaking, given preference over those of his students.[77]

2.2. *Expository Method*[78]

The method of exposition in both the *Mukhtaṣar* and the *Ikhtilāf* is casuistic: the law is displayed in the form of lists of individual cases. These cases are determined by principles that can sometimes be inferred from them, but are rarely referred to explicitly. This method is not unique to al-Ṭaḥāwī. The "simple enumeration of cases and their solutions," and the absence of explicitly stated principles are features of the Ḥanafī literature of the time.[79] Nor do the principles underlying the cases always dictate the order of presentation. Some attempt can be discerned at grouping together cases subsumed under a single principle, but this attempt is not always evident: cases governed by the same principle may appear in different places, while cases with no obvious connection between them sometimes follow each other. The following text from al-Ṭaḥāwī's chapter on retaliation, indemnity and wounds (*Mukhtaṣar*, 236–7) illustrates these features of the work. For the sake of the discussion that follows the text, I have numbered the cases.

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[73] Sarakhsī, *Mabsūṭ* (*Beirut, 1414/1993*), 12:5 (on the assumption that what appears within parentheses reflects the view of al-Ḥākim al-Shahīd).

[74] Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 3:300.

[75] Samarqandī, Nāṣir al-Dīn, *al-Multaqaṭ*, 301.

[76] Marghīnānī, *Hidāya*, 4:1552.

[77] Ibn ʿĀbidīn, *Sharḥ al-Manẓūma*, 20ff.

[78] This section is greatly indebted to the observations made by Wael Hallaq in his *Authority*, ch. 4 (86–120).

[79] Johansen, "Casuistry", 137–8, citing Chafik Chehata, *Etudes de Droit Musulman* (Paris, 1971), and Ya'akov Meron, "The Development of Legal Thought in Hanafi Texts"; Hallaq, *Authority*, 89ff (the quotation is from Johansen, 137).

> [1] He who intentionally cuts off the hand of another or leg or finger or fingertip or the like at the joint is subject to retaliation (*qiṣāṣ*) [1a] after the wound has healed; he is not subject to retaliation before this. [2] He who intentionally cuts off the arm of another at the middle of his forearm is not subject to retaliation for this; the offender (*al-qāṭiʿ*) must pay the *diya* (indemnity) for the hand and [pay] *ḥukūma*[80] for that part of the forearm that he cut off… [3] He who accidentally cuts off all the fingers [of one hand] of another, must pay one-tenth of the [full] *diya* for each finger, provided that the victim recovers. [3a] The total amount required of him for that [offense] is half of the [full] *diya*, [and the obligation to pay it] falls on his blood-money group (*ʿāqila*)[81] [who must pay it] within two years: two-thirds in the first year thereof, one-third in the second year. [3b] And had he cut off the hand at the joint (i.e., the wrist), he should also pay the same amount (i.e., as is paid for the fingers alone), [because] the payment for the hand is included in the payment for the fingers. [4] There is no retaliation for [the breaking of] bones, [5] with the sole exception of a tooth, [the retaliation for which is carried out] by means of a file (*mibrad*); it (i.e., the damaged tooth) is measured,[82] and retaliation for it is applied by means of a file according to what was broken from it. [6] The left hand should not be cut off in retaliation for the right hand, nor the right hand for the left hand. [7] No retaliation is due in a case of *āmma*[83] or *jāʾifa*,[84] each of which requires the payment of a third of the [full] *diya* for homicide, [7a][to be paid] after the [victim's] recovery. [8] There is retaliation for the ear, nose, and tooth. [9] A healthy hand cannot be cut off in retaliation for a paralyzed one.

Ḥanafī authors in subsequent generations dealt not only with cases but also with concepts and general norms.[85] The case-by-case method of exposition was replaced by a more developed one in which principles, definitions, conditions and generalizations are articulated and, moreover, determine the (much more systematic) arrangement of material. The tendency in some later works is to state the principles and definitions

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[80] *Ḥukūma* is an amount of money estimated in each case of individual bodily harm for which no specific indemnity is prescribed by the law. For the manner in which such an estimation is determined, see Schacht, *Introduction*, 186.

[81] On the composition of the *ʿāqila* see Schacht, *Introduction*, 186.

[82] For *tuqāṣu* (or *tuqāṣṣu*) read *tuqāsu*, as in one of the manuscripts (*Mukhtaṣar*, 237, n. 2).

[83] A wound by which the head is broken (Lane, *Arabic-English Lexicon*, s.v.).

[84] A spear-wound that reaches the interior of the body (Lane, *Arabic-English Lexicon*, s.v.).

[85] Meron, "The Development of Legal Thought in Hanafi Texts," 79, cited by Johansen in "Casuistry," 138.

at the outset, and then to group the individual cases under the relevant headings.[86]

Al-Kāsānī's *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ* reflects an impressively high level of this method of exposition. An examination of his discussion of retaliation for bodily harm illuminates the evolution of this method over the two and a half centuries since al-Ṭaḥāwī's death.[87] Principles and conditions of retaliation for bodily harm that are only implied in al-Ṭaḥāwī's text are explicitly stated by al-Kāsānī, with each principle or condition followed by a list of cases that fall under it. In the following three paragraphs from the chapter on offenses (*kitāb al-jināyāt*) in his *Badāʾiʿ al-ṣanāʾiʿ*, al-Kāsānī lists the conditions (*sharāʾiṭ* or, interchangeably, *uṣūl*, principles) governing the cases in which retaliation for bodily harm is applicable. These paragraphs shed light on al-Ṭaḥāwī's text: they help us to uncover the principles underlying the cases mentioned by him and to understand better the logic, as well as the imperfections of its arrangement.

> 1) As for the conditions (*sharāʾiṭ*) pertaining specifically to bodily harm, one of them is equality between the two bodily members (*al-maḥallayn*, i.e., the injured bodily member of the victim and that of the offender on which retaliation is to be performed) in terms of their uses (*manāfiʿ*), [between] their functions, and between their *arsh* payments.[88] This is because in [cases of] bodily harm equality should be considered as much as possible. In the absence of such equality, retaliation is not applicable . . .[89]
>
> 2) Another condition is that complete equality [in retaliation] be possible (*an yakūn al-mithl mumkin al-istīfāʾ*) . . . [Various] rulings (*masāʾil*) are based on these two principles (*aṣlayn*) (i.e., the one just mentioned and the one mentioned in paragraph 1) . . . retaliation for a thing is permitted only by retaliation on its like: retaliation for a hand is applicable only by retaliation on a hand, because [any bodily member] other than the hand is of a different kind and is therefore not its like, since a condition for equality [between the two bodily members] is their being of the same kind. The same holds for a leg, a finger, an eye, a nose or the like, according to what we have said. Similarly, retaliation for a thumb is applicable only by retaliation on

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[86] Hallaq, *Authority*, 114.

[87] Here I follow Wael Hallaq (*Authority*, 114ff.), who demonstrates how the method of exposition has developed by comparing a text from al-Ṭaḥāwī's *Mukhtaṣar* to a text from *al-Ikhtiyār li-taʿlīl al-mukhtār* by the Ḥanafī jurist ʿAbdallāh b. Maḥmūd al-Mawṣilī (d. 683/1284).

[88] *Arsh* is the legally prescribed payment for wounding an organ (see Schacht, *Introduction*, 186).

[89] Kāsānī, *Badāʾiʿ* (*Beirut, 1418/1997*), 10:399.

a thumb; likewise, an index finger for an index finger, a middle finger for a middle finger, a ring finger for a ring finger, a little finger for a little finger, because each finger has a different use, so it is as if they were of different kinds.

In the same way, retaliation for the right hand is permitted only by retaliation on the right hand; and the left hand on the left hand, because the right has superiority over the left—for this reason it was named *yamīn*.[90] The same holds for the leg, the fingers, the toes—retaliation for the right one of any of them is permitted only by retaliation on the right, and the left on the left; the same holds for the eyes, according to what we have said, and for the teeth: [retaliation for] the middle incisor [is permitted only by retaliation] on the middle incisor (and so on for the rest of the teeth) . . . and retaliation for a perfect bodily member is permitted only by retaliation on a perfect one; a perfect hand or one whose fingers are complete cannot be cut off in retaliation for a hand with missing fingers or finger joints, and the same holds for a leg, a finger and the like, because of the lack of equality between perfect and imperfect [members].[91]

3) Retaliation is permitted only for a bodily member cut off at the joint, [be it] the joint of the forearm, elbow, shoulder, ankle, knee, or hip. But no retaliation is due [for a bodily member cut off] in a place other than the joint, such as in the forearm, upper arm, shank, or thigh, because [when the cutting off is] at the joint, complete equality [in retaliation] is possible (*yumkinu istīfāʾ al-mithl*), whereas otherwise such retaliation is impossible. There is [therefore] no retaliation for [cutting] the flesh of the forearm, upper arm, shank, or thigh, nor for that of the rump, flesh of the cheeks, back, or belly, nor for the skin of the head, or skin of the hands when these are cut, because a complete equality [in retaliation] is not feasible, nor for a slap, punch, stab, or blow, according to what we have said.[92]

Al-Kāsānī's conditions are clear: Retaliation is permitted (A) only by harming a bodily member of the offender equivalent to the member of the victim that was harmed, and only when the former is in the same condition as the latter before it was harmed; and (B) only when completely equal retaliation is possible—i.e., when the harm suffered by the victim may be measured exactly, and precise reciprocation is possible. After presenting these conditions, al-Kāsānī first lists cases that fall under A (in paragraph 2), and then cases that fall under B (in paragraph 3).

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[90] I.e., good fortune, strength. The right and left hands represent good and evil, respectively. The left hand and left side are connected with evil, sin, error and misfortune. The right hand and the right side represent the right belief, good deeds and good fortune (*Encyclopaedia of the Qurʾān*, s.v. "Left Hand and Right Hand" [I. Hasson]).

[91] Kāsānī, *Badāʾiʿ* (*Beirut, 1418/1997*), 10:401–2.

[92] Ibid., 10:403–4.

Equipped with these conditions (A and B), we may now return to al-Ṭaḥāwī's text and discover the extent to which he had them in mind and what weight they carried in the arrangement of his material.

No. [1] in al-Ṭaḥāwī's text reflects B, as do nos. [2], [4], [5], [7] and [8]; nos. [6] and [9] fall under A; nos. [3], [3a] and [3b] do not belong to the discussion of retaliation because they deal with accidental harm, whereas retaliation applies only to intentional harm (as stated by al-Kāsānī at the outset of his discussion of this subject).[93]

Al-Ṭaḥāwī seems to have been aware of the conditions articulated by al-Kāsānī; most of the cases he lists reflect one or another of them. Unlike al-Kāsānī, however, he sees no need to state these conditions in any systematic way. They are in fact absent from the discussion (or rather the list of cases) of retaliation in the *Mukhtaṣar*, and in the *Ikhtilāf* they appear only occasionally. Similarly, whereas al-Kāsānī arranges the individual cases in groups according to the condition that gave rise to them, al-Ṭaḥāwī reveals some attempt to group together cases pertaining to the same principle, but the ordering is quite rudimentary, both in the *Mukhtaṣar* and in the *Ikhtilāf*.

But al-Ṭaḥāwī was not merely aware of the principles in some general way; he seems to have known them in detail, in their fully-elaborated form, just as they were known to al-Kāsānī. An example is found in his *Ikhtilāf al-ʿulamāʾ*, where the section devoted to cutting off part of the tongue and the section devoted to slapping, punching and lashing appear next to each other.[94] In neither case is retaliation due. In his discussion of the tongue, al-Ṭaḥāwī gives the reason for this by reference to condition B, which he clearly articulates:

> Retaliation [requires] completeness [of equality], and this is impossible in [the case of] the tongue (*al-qiṣāṣ istīfāʾ wa-dhālika ghayr mumkin fī al-lisān*), because if part of it is cut off, and the [victim's] ability to talk is partly impaired, one cannot know whether the part of the [offender's] tongue cut off by way of retaliation would impair his ability to talk to the same extent that the victim's ability was impaired. And if the tongue is cut off at its root, then it (the root) can be reached only by pulling it (the tongue), and [the retaliator] might pull a larger or smaller part [of the tongue] than that taken by the offender. Hence there is no possibility of completely equal [retaliation] in this [case] (*fa-lā sabīl fīhi ilā istīfāʾ al-mithl*).[95]

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[93] Ibid., 10:399.5.
[94] Jaṣṣāṣ, *Mukhtaṣar*, 5:125–6.
[95] Ibid., 5:126.

In the slap-punch-lash section, al-Ṭaḥāwī refers only implicitly and in passing to condition B,[96] and we need the assistance of al-Kāsānī, who subsumes the slap case under this condition,[97] to reveal the connection between the case of the tongue and that of the slap, punch and lash: both originate in the same condition. It is probably because of this connection that al-Ṭaḥāwī juxtaposed them.

Al-Ṭaḥāwī's exposition of condition B shows that he knew it well. The term *istīfāʾ al-mithl* used by al-Kāsānī to express this condition was also known to and used by al-Ṭaḥāwī. Cases 6 and 9 in the text from Tahawi's *Mukhtaṣar* translated above (p. 137) indicate that he was aware of condition A as well. This leads to the conclusion that, in this case at least, the difference between al-Ṭaḥāwī's work and that of al-Kāsānī lies in the style and organization of the legal material, rather than in the conditions and principles involved.

An illustration of the way in which al-Ṭaḥāwī's thinking was guided by principles, even if he does not express them, is found in the following text from the *Ikhtilāf*, which provides valuable evidence of how a new Ḥanafī ruling comes into being. This text contains a unique attestation by al-Ṭaḥāwī of the way in which he derived this ruling from a Ḥanafī legal principle, which he neatly articulates.

> [The section] about a person who peeps into the house of another and has his eye gouged out:
>
> Abū Jaʿfar (al-Ṭaḥāwī) said: We know nothing formulated by Abū Ḥanīfa and his companions (*aṣḥābihi*) regarding this [question], but their principle (*aṣluhum*) [is that] whoever does something that he is entitled to do, and does it in self-defense, is not liable for whatever damage is caused thereby (*man faʿala shayʾan dāfiʿan bihi ʿan nafsihi fīmā lahu fiʿluhu annahu lā yaḍman mā talifa bihi*). Under this [principle] falls [the case of] someone who is bitten by another, and pulls his hand from the mouth of the biter, with the result that the latter loses his two middle incisors. He has no liability because by this (i.e., by pulling out his hand) he defended himself against being bitten. [Similarly,] since the houseowner has the right (*min ḥaqq ṣāḥib al-bayt*) that no one peep into his house intentionally, [and] is entitled to prevent it and to defend himself against it, the loss of his (the peeper's) eye, which prevents him from this (i.e., from peeping into the house), is *hadr* (i.e., there is no retaliation for it). Their doctrine (that of Abū Ḥanīfa and his companions) leads to this [ruling] (*ʿalā hādhā yadullu madhhabuhum*).[98]

[96] Ibid., 5:127.11.
[97] Kāsānī, *Badāʾiʿ* (*Beirut, 1418/1997*), 10:404.2.
[98] Jaṣṣāṣ, *Mukhtaṣar*, 5:195.

Here al-Ṭaḥāwī adduces the biting case to *illustrate* the self-defense principle, following a clear articulation of this principle; elsewhere he employs legal cases to *substitute* for an explicit reference to principles. That is, instead of articulating the principle underlying a certain decision, he points to that principle indirectly by referring to another decision that is determined by and reflects it. This feature of al-Ṭaḥāwī's method of exposition has attracted the attention of Wael Hallaq, who considers it a salient feature of early Muslim legal literature.[99] I here offer another example of it, as found in the section devoted to the biting case in al-Ṭaḥāwī's *Ikhtilāf*:

> Our companions (*aṣḥābunā*, i.e., the Ḥanafīs) and al-Shāfiʿī said, regarding one who bites another man's arm, who then pulls away his arm, thereby dragging out one of the biter's teeth, that he is not liable for the tooth . . .[100] [N]o disagreement exists also [in the case of] a man of sound mind who unsheathes a weapon against another, indicating that he is going to kill him, and the one against whom the weapon has been unsheathed then kills him (the aggressor) in self-defense, that no liability falls on him (the killer). Just as he is not liable for his (the aggressor's) life when acting in self-defense, so too he is not liable for the tooth [that was knocked out] while defending himself against being bitten.[101]

The principle to which al-Ṭaḥāwī alludes here is the same one he articulates in the previous quotation: "whoever does something that he is entitled to do, and does it in self-defense, is not liable for whatever damage is caused thereby." Instead of formulating the principle explicitly, however, he presents a case that reflects it.

2.3. *Development of the Law*

So far we have identified two kinds of differences between al-Ṭaḥāwī's work and that of later Ḥanafīs. First, the opinions preferred by al-Ṭaḥāwī in disputed issues are usually different, in the cases examined, from those adopted by later Ḥanafī authors. Second, in its method of exposition al-Ṭaḥāwī's work is less developed than later Ḥanafī literature, as represented by al-Kāsānī. A third difference relates to the stage of development of the substantive law. A full description of this difference is not yet available, but I shall present here two examples from the area of criminal law that may give some idea of its nature.

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99 Hallaq, *Authority*, 89–91.
100 Jaṣṣāṣ, *Mukhtaṣar*, 5:141.
101 Ibid., 5:142.

The Ḥanafīs classify cases of unlawful homicide under five headings: (1) *ʿamd*, deliberate homicide committed with the intention to kill and by means likely to achieve this end; (2) *shabah* or *shibh ʿamd*, quasi-deliberate homicide, in which the killer deliberately assaults the victim, using a means that indicates an intention to injure but not to kill; or, whatever his intention, he uses means not likely to prove fatal;[102] (3) *khaṭa'*, accidental homicide, in which the killer's intention was to kill either a person other than the victim or an animal; (4) *jārī majrā al-khaṭa'*, equivalent to accidental homicide, in which the killer causes the death by an action he had no intention of performing (e.g., he fell on the victim in his sleep);[103] and (5) *bi-sabab*, indirect homicide, which occurs when one causes the death of another without doing anything directly against him.[104]

Al-Ṭaḥāwī, like al-Shaybānī before him, knew only the first three of these categories; in his *Mukhtaṣar*, cases of unlawful homicide are divided into: deliberate, quasi-deliberate and accidental.[105] The five-fold division first appears in the work of al-Jaṣṣāṣ, who explains what distinguishes the two additional categories from the other three. The cases in the first three categories are the result of an intentional act on the killer's part, while the fourth category covers homicide committed by a sleeping or unmindful person, to whom no intention can be ascribed.[106] Whereas in the first four categories the homicide results from an action performed by somebody on the person of another, be it directly, as by a blow, or indirectly, as in shooting an arrow, the fifth category covers cases of homicide resulting from an action performed by a man not on the victim's person, but on something else.[107] The fifth category also includes other cases of death caused without physical contact between the victim and the person who caused his death, such as poisoning or imprisoning someone and letting him starve to death.[108]

Cases in the fifth category, as al-Jaṣṣāṣ says in the following quotation, are not really homicide, for they do not fall under the definition of killing. Yet in standard Ḥanafī law they came to be considered as homicide, with the result that they give rise to the payment of blood-money:

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102 Anderson, "Homicide in Islamic Law," 821.
103 Ibid.
104 Ibid., 818ff; *EI*², s.v. "Ḳatl" (J. Schacht).
105 Shaybani, 4:394; Ṭaḥāwī, *Mukhtaṣar*, 232.
106 Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 3:193; *Kitāb al-Aṣl* (Beirut, 1410/1990).
107 Ibid. Translated on the next page.
108 Anderson, "Homicide in Islamic Law," 821–2.

> To the cases governed by the law of homicide was attached what is not really a homicide, whether deliberate or accidental (*wa-qad ulḥiqa bi-ḥukm al-qatl <mā laysa bi-qatl> fī al-ḥaqīqa lā ʿamdᵃⁿ wa-lā ghayr ʿamd*),[109] such as a man who digs a pit or lays on the way a stone, as a result of which someone dies. This [man] is not really a killer, since he does not perform an action that kills him (the victim). An action [that kills] is either direct (*mubāsharatᵃⁿ*, e.g., a blow) or indirect (*mutawallidᵃⁿ*, e.g., shooting an arrow). A man who lays a stone or digs a pit performs no action on the [person of the] one who stumbles upon the stone, or falls into the pit, whether directly or indirectly, and he is therefore not really a killer. For this reason, our companions (*aṣḥābunā*, i.e., the Ḥanafīs) say that no expiation is required of him. By analogy, he also should not be required to pay blood-money. The jurists (*al-fuqahāʾ*) are nevertheless unanimous that blood-money is obligatory in this case.[110]

Al-Jaṣṣāṣ' definition of homicide was known to and accepted by al-Ṭaḥāwī, who articulates it when justifying the Ḥanafī opinion that a man who shouts at another man, who is standing on a high place and who consequently falls and dies, is not liable for his death:

> Offenses (*jināyāt*)[111] [include] only direct killing (*mubāsharat al-qatl*; i.e., that the offender kills the victim by means of direct physical contact), and [killing] by an agent that connects [the offender] with the victim, such as shooting [an arrow] or the like. Shouting is not an offense on the part of the shouter. [The cause of death in this case is] merely the being startled of the one at whom the shout is directed, not any action of the shouter on his person. The shouter is therefore not an offender. If the victim had been startled without the shout, he (the shouter) would in no way have been liable. In the same way, [he is not liable] if he (the deceased) was startled by his shout, because startling is not an action that the shouter performed on the [person of the] startled one (*al-irtiyāʿ laysa huwa fiʿlᵃⁿ min al-ṣāʾiḥ aḥdathahu fī al-murtāʿ*).[112]

Only death resulting from an action performed on the person of the victim, al-Ṭaḥāwī says, is homicide. Al-Ṭaḥāwī and al-Jaṣṣāṣ seem to agree on the definition of homicide. But the deviation from this definition, which led to the inclusion of "what is not really a homicide" under the law of homicide, as appears in the work of al-Jaṣṣāṣ, took place after al-Ṭaḥāwī compiled his works.

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[109] The words in the angle brackets are missing from the text in the edition I use, but they appear in the Cairo edition of 1347, 2:271.

[110] Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 3:193.

[111] The word *jināyāt* here refers specifically to homicide, not to offenses in general.

[112] Jaṣṣāṣ, *Mukhtaṣar*, 5:169.

Another refinement that occurred after al-Ṭaḥāwī's time is in the notion of accidental killing, *qatl khaṭa'*, the third category mentioned above. Al-Ṭaḥāwī defines accidental killing as follows: "As for *al-khaṭa'*, this is a case in which someone hits and kills a man whom he did not intend [to kill], while intending [to kill] another (*wa-ammā al-khaṭa' fa-huwa mā aṣābahu fa-qatalahu mimmā lam yuridhu fa-innamā arāda ghayrahu*)."[113] Al-Ṭaḥāwī's definition is similar to that of al-Shaybānī in *Kitāb al-Aṣl*: "As for *al-khaṭa'*, this is a case in which you hit a man while intending another, whom you miss" (*wa-ammā al-khaṭa' fa-huwa mā aṣabta mimmā kunta ta'ammadta ghayrahu fa-akhṭa'ta bihi*).[114] By the time of al-Jaṣṣāṣ, the idea of accidental killing had been refined and two categories within it were distinguished. One of them is *khaṭa' fī al-qaṣd* (accident in intention). This occurs, for instance, when a man intends to shoot something that he thinks is an animal or an infidel, and he hits and kills the victim, but the victim turns out to be a Muslim. The other category is *khaṭa' fī al-fi'l* (accident in the act), which occurs, for instance, when a man aims at a target and, by misadventure, hits and kills a man whom he did not intend to hit.[115] Al-Jaṣṣāṣ' more elaborated idea of accidental killing remained the standard Ḥanafī law.

In these two examples Ḥanafī legal doctrine advanced a stage further just after al-Ṭaḥāwī's time. If there is a distinguishable line between the formative period of Islamic law, towards the end of which al-Ṭaḥāwī was working, and its classical period, these differences between the law in al-Ṭaḥāwī's *Mukhtaṣar* and in al-Jaṣṣāṣ' *Aḥkām al-Qur'ān* are necessarily among the elements that form that line.

113 Ṭaḥāwī, *Mukhtaṣar*, 232.
114 Shaybānī, *Kitāb al-Aṣl* (*Beirut, 1410/1990*), 4:395.
115 Anderson, "Homicide in Islamic Law," 821; Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 3:192–3.

CHAPTER EIGHT

AL-JAṢṢĀṢ (D. 370/981)

Murteza Bedir

Historical Background

Al-Jaṣṣāṣ lived in the transitional period between the High Caliphate of the Abbasids and the rise to power of non-Arab peoples in the lands of Islam. In 334/945 when he was twenty-nine and studying under the famous Abū al-Ḥasan al-Karkhī, Muʿizz al-Dawla Aḥmad b. Būyah entered Baghdad. Until then, the state apparatus was both *de jure* and *de facto* in the hands of the Abbasid caliphs, who relied on Turkish, Iranian and Kurdish military forces. This shift of power from Arabs to non-Arabs must have affected the manner in which Muslim intellectuals viewed the structure of power and led them to adopt an increasingly conciliatory approach to scholarship, emphasizing points of convergence rather than divergence.

The 4th/10th century was the period in which Muslim scholars developed classical knowledge in all fields. In law, the four schools of law were recognized as legitimate, and representatives of each school treated their colleagues in other schools with a certain degree of respect. During this century, all schools of law defined themselves by producing textbooks articulating their doctrines.[1] The debate between traditionalists and rationalists (*ahl al-ḥadīth* and *ahl al-raʾy*) nearly came to an end. In a sense the Sunni consensus had finally been achieved.[2] By contrast, in the field of theology (*kalām*), the Ashʿarīs, Māturīdīs and Ḥanbalīs were still in the process of formation, even if the theory of consensus (*ijmāʿ*) points to theological reconciliation. It was in the 4th/10th century that the intellectual and social divisions between the Shīʿa and *Ahl al-Sunna* were finalized.[3] However, it would not be until the following century that the final

[1] On the development of law schools, see Melchert, *Formation*.

[2] Ibid., chs. 5–8; Hallaq, *A History of Sunni Legal Theories*, 30–5, 75–81; Bedir, "Early Development of Hanafi *Uṣūl al-Fiqh*," ch. 7.

[3] Stewart, *Islamic Legal Orthodoxy*, 125–8.

separation between the differing intellectual approaches of Muʿtazilism and Sunnism would be achieved.

It was also during the 4th/10th century that the intellectual tradition of *uṣūl al-fiqh* produced its first products, texts that reflect the conciliatory and conformist features of the period. The Sunni understanding of the bases of law, which were formally and unanimously accepted as *Kitāb, Sunna, ijmāʿ and qiyās*, was established in these *uṣūl* texts. In Baghdad, Iran and Khurāsān, the Muʿtazila were a recognized and legitimate party. The likes of Qādī ʿAbd al-Jabbār and Abū ʿAbd Allāh al-Baṣrī are the most prominent examples.

Life

Abū Bakr Aḥmad b. ʿAlī al-Rāzī, better known as al-Jaṣṣāṣ,[4] was born in 305/917, in Rayy, one of the chief towns of the province of Jibāl, which was then the capital of the Būyid state.[5] In 325/937 al-Jaṣṣāṣ came to Baghdad where he studied under the famous Ḥanafī jurist Abū al-Ḥasan al-Karkhī. Two departures from Baghdad are recorded in the sources, one for Ahwāz,[6] the other for Nishapur. The sources note that the journey to Nishapur was undertaken at the recommendation of his teacher, who suggested that he accompany the famous traditionist al-Ḥākim al-Nīsābūrī (321–404/933–1014) to that city. Al-Jaṣṣāṣ returned to Baghdad in 344/955, four years after the death of his master, and he assumed al-Karkhī's position, after Abū ʿAlī al-Shāshī (344/955), as head of the Ḥanafīs in Baghdad, both as a teacher and as a *muftī*. He was reportedly offered the office of chief justice on two occasions, but he rejected the offer, both times, due to his extreme piety.[7] It is possible, however, that he did not wish to be associated with

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[4] For his biography, see al-Nadīm, *Kitāb al-Fihrist* (Cairo, 1991), 208; al-Ṣaymarī, *Akhbār Abī Ḥanīfa*, 166–7; al-Khaṭīb al-Baghdādī, *Taʾrīkh Baghdād*, 4:314; Ibn Abī al-Wafāʾ al-Qurashī, *al-Jawāhir* (Cairo, 1413/1993), 1:220–4; al-Dhahabī, *Siyar Aʿlām al-Nubalāʾ*, 14:340–1. There are several modern studies on the life of al-Jaṣṣāṣ. See, for example, *EI*², s.v. "Ḏjaṣṣāṣ" (O. Spies); Khalīlūfitsh, *al-Imām Abū Bakr al-Rāzī al-Jaṣṣāṣ wa-Manhajuhū fī al-Tafsīr*; Güngör, "Cassās ve Fıkhi Tefsiri"; *idem*, "Cessās", *İslam Ansiklopedisi* (hereinafter *DIA*), 17:427–8. Some writers seem to have been confused about his name; see al-Qurashī, *al-Jawāhir*, 1:84.

[5] Guy Le Strange, *Lands of the Eastern Caliphate*, 186.

[6] Al-Ṣaymarī, *Akhbār* (Haydarabad, 1974), 171–2.

[7] His biographers record many anecdotes about the piety of al-Jaṣṣāṣ and his teachers, which led them to abstain from official posts. See Jaṣṣāṣ, *Fuṣūl*, 1:13; al-Ṣaymarī, *Akhbār* (Haydarabad, 1974), 166–7; Khalīlūfitsh, *al-Imām Abū Bakr al-Rāzī*, 57–69.

the Shīʿī Būyid rulers who exercised real power at that time.[8] Al-Nadīm (380/990)[9] and others give his death date as 7 Dhū al-Ḥijja 370/12 June 981. Like his teacher, he is identified in Muʿtazilī sources as a Muʿtazilī.[10]

Teachers

In addition to Abū al-Ḥasan al-Karkhī, his mentor in both jurisprudence (*uṣūl*) and positive law (*furūʿ*), al-Jaṣṣāṣ studied law in Nishapur with Abū Sahl al-Zujjājī; grammar, linguistics and exegesis with Ghulām Thaʿlab (d. 345/957) and Abū ʿAlī al-Fārisī (d. 377/988); and *ḥadīth* with several great *ḥadīth* scholars.

A note recorded in the *Akhbār* of al-Ṣaymarī, the early biographer of Baghdādī Ḥanafīs, reads, "With the permission and suggestion of Abū al-Ḥasan al-Karkhī, he [viz., al-Jaṣṣāṣ], together with Ḥākim al-Nīsābūrī, went to Nishapur."[11] This note has led some modern scholars to assert that al-Jaṣṣāṣ was a student of the *ḥadīth* scholar al-Ḥākim al-Nīsābūrī.[12] This is unlikely. Even if we accept the latest possible date for this journey, i.e. 339/950 (al-Karkhī died in 340/951), al-Jaṣṣāṣ would have been in his mid-thirties whereas al-Ḥākim was only about eighteen years old. It would have been unusual for a thirty-five year-old jurist who had studied with important figures, including scholars of *ḥadīth*, to receive instruction from an eighteen year old. Some scholars argue that the age difference between al-Jaṣṣāṣ and al-Ḥākim was a sign of al-Jaṣṣāṣ' respect for knowledge (*ʿilm*), here *ḥadīth*. This would explain why most modern Muslim scholars interpret the anecdote in al-Ṣaymarī's *Akhbār* as evidence that al-Jaṣṣāṣ studied with al-Ḥākim. By making al-Jaṣṣāṣ, who was a controversial figure, a student of an outstanding *ḥadīth* scholar, they sought to bring him under the umbrella of orthodoxy. In fact, this passage neither explicitly states nor implicitly suggests that al-Jaṣṣāṣ went to Nishapur to study under al-Ḥākim. Thus, O. Spies' assertion that al-Jaṣṣāṣ studied *uṣūl al-ḥadīth* under al-Ḥākim is implausible:[13] it appears to have been based

[8] On Buwayhid rule in Baghdad, see Kabir, *The Buwayhid Dynasty of Baghdad*, for Jaṣṣāṣ' criticisms of the rulers of his time, see Khalīlūfitsh, *al-Imām Abū Bakr al-Rāzī*, 33–4.

[9] Al-Nadīm, *Fihrist* (Cairo, 1991), 293.

[10] Reinhart, *Before Revelation*, 46.

[11] Al-Ṣaymarī, *Akhbār* (Haydarabad, 1974), 167.

[12] *EI*², s.v. "Ḏjaṣṣāṣ"; Güngör, "Cassās ve Fıkhi Tefsiri," 113–4; Khalīlūfitsh, *al-Imām Abū Bakr al-Rāzī*, 94–5.

[13] *EI*², s.v. "Ḏjaṣṣāṣ."

on this assertion, as well as on the assumption that al-Ḥākim, the author of *ʿulūm al-ḥadīth*, must have influenced al-Jaṣṣāṣ' *uṣūl*.

Al-Jaṣṣāṣ does not refer to al-Ḥākim in either his *uṣūl* work or his other works. Even those scholars who argue that al-Jaṣṣāṣ was al-Ḥākim's disciple do not mention any example of the former transmitting from the latter, although they do give examples of al-Jaṣṣāṣ' transmissions from other *ḥadīth* scholars. As noted, al-Jaṣṣāṣ met many important *ḥadīth* scholars, including ʿAbd al-Bāqī b. al-Qāniʿ (d. 351/962), a teacher of Dāraquṭnī, from whom he transmitted hundreds of *ḥadīth*s in his *Aḥkām al-Qurʾān*;[14] Muḥammad b. Bakr al-Baṣrī (d. 346/958), from whom he transmitted Abū Dāwūd's *Sunan*;[15] and ʿAbd Allāh b. Muḥammad b. Isḥāq al-Marwazī (d. 329/941), from whom he related *ḥadīth*s collected by the famous Ṣanʿānī.[16] It seems that he met these scholars long before his visit to Nishapur (Marwazī died before al-Jaṣṣāṣ' trip to Nishapur, al-Baṣrī died two years after al-Jaṣṣāṣ' return from Nishapur, and al-Qāniʿ died nine years after al-Jaṣṣāṣ' return, reportedly at the age of 125--surely, he was no longer able to teach).

Al-Jaṣṣāṣ spent at least five years in Nishapur, where he studied *fiqh* with Abū Sahl al-Zujjājī,[17] a Ḥanafī jurist. We may speculate that al-Ḥākim's involvement in this story had to do with his links with Nishapur; it may be argued that in response to a request from Abū al-Ḥasan al-Karkhī, al-Ḥākim introduced al-Jaṣṣāṣ to the notables of Nishapur, one of whom was al-Ḥākim himself. At that time, Nishapur was an important centre for the study of not only *ḥadīth* but also all branches of knowledge. It had large Shāfiʿī and Ḥanafī communities.[18]

Later Ḥanafī scholars (*muta'akhkhirūn*) made a number of attempts to classify Ḥanafī jurists according to their status as *mujtahid*s and *muqallid*s. According to one well-known typology, scholars are divided into seven categories ranging from independent *mujtahid* to complete *muqallid*.[19] Within this classification system, al-Jaṣṣāṣ falls in the category of "people of deduction (*aṣḥāb al-takhrīj*)," i.e. scholars who cannot derive law directly from the divine sources (which only a *mujtahid* can do), but who can issue *fatwā*s in accordance with the *ẓāhir al-riwāya* doctrine of

[14] Khalīlūfitsh, *al-Imām Abū Bakr al-Rāzī*, 92–3.
[15] Ibid., 104–5.
[16] Ibid., 106–7.
[17] Al-Qurashī, *al-Jawāhir*, 4:51–2.
[18] Bulliet, *The Patricians of Nishapur*, 26–45.
[19] See Ibn ʿĀbidīn, *Radd al-Mukhtār*, 1:179–82.

the school.[20] This categorization is rightly criticized in school circles on the grounds that al-Jaṣṣāṣ was no less qualified than those scholars who occupied the third category, 'the people of *ijtihād* in particular,' such as Sarakhsī and Pazdawī.[21] It is possible that this demotion of al-Jaṣṣāṣ is related to his links with the Muʿtazila, a point to which we shall return.

In sum, al-Jaṣṣāṣ studied *fiqh* and *uṣūl al-fiqh* with two jurists, he studied language and exegesis with two famous linguists, and he transmitted from, and probably studied *ḥadīth* with, a few famous *ḥadīth* scholars. His writings reflect the information given in the biographical dictionaries.

Scholarship

Like most Ḥanafī scholars, al-Jaṣṣāṣ' main interest was the science of *fiqh* in the broad sense of substantive law and jurisprudence. He produced original works, commentaries and abridgements.

Original Works

1. *Aḥkām al-Qurʾān*.[22] This is actually a Qurʾān commentary that belongs to the genre known as *aḥkām al-Qurʾān*, the purpose of which is to explore the legal content of the Qurʾān. Al-Jaṣṣāṣ' treatise seems to be one of the earliest and, at the same time, the most comprehensive in the field. In this *tafsīr*, al-Jaṣṣāṣ explores the relation between the Ḥanafī tradition and the first source of law. He pays special attention to disputes between and among different schools as well as among individual jurists, some of whom receive little attention in later *ikhtilāf* works, such as ʿUthmān al-Battī (d. 143/761).[23]

2. *Al-Fuṣūl fī al-uṣūl*. This seems to be the earliest extant text on *uṣūl al-fiqh*, apart from *al-Risāla* by al-Shāfiʿī (d. 204/820), who died more than 150 years before al-Jaṣṣāṣ. As we learn from the introduction to the *Aḥkām al-Qurʾān*, the *Fuṣūl* was intended to be a preparatory work for his

[20] Ibid., 180.

[21] Editor's Introduction to Jaṣṣāṣ, *al-Fuṣūl fi'l-Uṣūl*, 1:17–21.

[22] The text was printed in Istanbul (1338/1919) and in Cairo (1347/1928) in 3 vols. A new edition by M. Ṣādiq Qamḥāwī in 5 vols. was printed in Cairo (Dār al-Muṣḥaf, n.d.). This version has been re-printed several times. There are three studies of it: Güngör, "Cassās ve Fıkhi Tefsiri"; Masʿūd al-Oueznī, "al-Jaṣṣāṣ al-Rāzī wa-Manhajuhū fi'l-Tafsīr"; Khalīlūfitsh, *al-Imām Abī Bakr al-Rāzī al-Jaṣṣāṣ wa-Manhajuhu fī al-Tafsīr*.

[23] See, for example, Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 1:43, 171, 172, 178; 2:82, 92.

monumental *tafsīr* work.[24] The extant manuscript of the *Fuṣūl*, however, lacks the introduction and a few chapters from the beginning of the topic of "the general (*al-ʿāmm*)."[25]

Commentaries

3. *Sharḥ al-Jāmiʿ al-kabīr*. *Al-Jāmiʿ al-kabīr* by Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805) is one of the important texts of the school upon which many Ḥanafī scholars wrote a commentary. That of al-Jaṣṣāṣ is one of the earliest.[26]

4. *Sharḥ Mukhtaṣar al-Ṭaḥāwī*[27] is the earliest commentary on the legal manual written by Abū Jaʿfar al-Ṭaḥāwī (d. 321/933).[28]

5. *Sharḥ Adab al-qāḍī*.[29] According to Ḥājjī Khalīfa, this is the earliest commentary on *Adab al-qāḍī* by Abū Bakr al-Khaṣṣāf (d. 261/874), a work on the etiquette of judgeship (see Chapter 6).[30]

Abridgement

6. *Mukhtaṣar Ikhtilāf al-ʿulamāʾ* or *Ikhtiṣār Ikhtilāf al-fuqahāʾ*,[31] an abridgement of a treatise on *ikhtilāf* (disputes among jurists) written by Abū Jaʿfar al-Ṭaḥāwī (see Chapter Seven).[32]

The sources attribute a number of other works to al-Jaṣṣāṣ, mainly on *fiqh* or substantive law, except for one, the *Sharḥ asmāʾ al-ḥusnā* (commentary on the attributes of God). These latter works are no longer extant.[33]

The list of al-Jaṣṣāṣ' writings gives us an idea of the nature and extent of his intellectual achievements. He produced original works in the fields that

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[24] Ibid., 1:6.

[25] Apart from these few sub-sections, *al-Fuṣūl* seems to be complete. See note 22.

[26] For its commentaries see Ḥājjī Khalīfa, *Kashf al-ẓunūn*, 1:301; Sezgin, *GAS*, 1:424–5.

[27] Sezgin, *GAS*, 1:441.

[28] Edited as four different doctoral dissertations by a group of students from Umm al-Qurā University, Mecca (1412/1991, 1415/1994), not yet published.

[29] Edited and published by F. Ziadeh (Cairo: American University of Cairo Press, 1978).

[30] *Kashf*, 1:220; Sezgin, *GAS*, 1:437.

[31] Sezgin, *GAS*, 1:441. The text was edited by Dr ʿAbdullah Nadhir Ahmad and published in 1995 in five volumes (Beirut: Dār al-Baṣāʾir al-Islamiyya, 1416/1995).

[32] Only a small percentage of al-Ṭaḥāwī's extensive writings is extant. See Ḥājjī Khalīfa, *Kashf*, 1:53; al-Nadim, *Fihrist*, 261; and the editor's introduction to the *Mukhtaṣar Ikhtilāf al-ʿUlamāʾ*, 1:48.

[33] In addition to the six works mentioned above, Ḥājjī Khalīfa mentions five more; others mention ten more. See, for example, Bakdash, "Taḥqīq al-Juzʾ al-Thānī min *Sharḥi Mukhtaṣar al-Ṭaḥāwī li'l-Jaṣṣāṣ: min Kitāb al-Buyūʿ ilā Ākhiri Kitāb al-Nikāḥ*," 1:64–73.

were least explored in his time, such as *uṣūl al-fiqh* and *Aḥkām al-Qurʾān*, as well as detailed commentaries on the standard school manuals on substantive law (*furūʿ al-fiqh*), whose main purpose was to justify Ḥanafī legal doctrine within the theoretical framework of *uṣūl al-fiqh*. Since the school tradition in this field had already produced a significant body of scholarship, al-Jaṣṣāṣ worked on it by either writing commentaries (e.g., on *al-Jāmiʿ al-kabīr* and *al-Jāmiʿ al-ṣaghīr, Kitāb al-aṣl, Mukhtaṣar al-Ṭaḥāwī* and *Mukhtaṣar al-Karkhī*), or by summarizing more detailed works (e.g., *Ikhtilāf al-fuqahāʾ* of al-Ṭaḥāwī). To this class, one should add his commentary on *Adab al-qāḍī* by al-Khaṣṣāf.

An Assessment of his Scholarly Contributions

Jurisprudence

Based on his extant works, al-Jaṣṣāṣ' contribution to Muslim scholarship spans three fields, all of which are related to *fiqh*, i.e. law, in the broad sense.

The first field, in which he was an influential innovator, is jurisprudence (*uṣūl al-fiqh*). After al-Shāfiʿī's famous *al-Risāla*, written in the early 3rd/9th century, purportedly the first book on Islamic jurisprudence, al-Jaṣṣāṣ' voluminous *al-Fuṣūl fi'l-uṣūl* is the earliest text that contains a complete picture of classical jurisprudence. It discusses almost all of the jurisprudential issues treated in the later school manuals. Since al-Jaṣṣāṣ wrote before the 5th/11th century, when ideological debates among different schools of thought were resolved, his book is an important source for the intellectual history of legal and theological thought in the early 4th/10th century and before that. He records in full the arguments of those who were adherents of a certain position. As a result, one can reconstruct from his work the arguments used by his opponents, even if he does not name them. For example, his discussion of whether or not a *mujtahid*'s interpretation is always correct (nearly 150 pages in the published version of the text) mentions the arguments of almost all the positions held in that debate.[34] Without *al-Fuṣūl*, we would be unable to reconstruct the early phase of Islamic jurisprudence.

In the field of Ḥanafī jurisprudence, al-Jaṣṣāṣ is the earliest writer. Although a few books are attributed to scholars who lived before him, none

[34] Al-Jaṣṣāṣ, *al-Fuṣūl*, 4:294–383.

of these books are extant. In fact, al-Jaṣṣāṣ was the originator of the legal-theoretical writing style associated with the Ḥanafīs, which later would be called "the style or the way of the jurists (*ṭarīqat al-fuqahā'*)."[35] Unlike later examples of this style, *al-Fuṣūl* contains rich theological discussions. Among the Ḥanafīs, two traditions of jurisprudence co-existed, one prevalent and the other less favored. The prevalent *uṣūl* tradition began in Iraq and later moved to Transoxania, where it spread among the Ḥanafīs who were a majority there.[36] Al-Jaṣṣāṣ and his master Abū al-Ḥasan al-Karkhī established the principles and structure of this tradition. Through the *uṣūl* work of Pazdawī (d. 480/1088), the later Ḥanafīs adopted this tradition. It became the prevalent *uṣūl* tradition in the post-classical history of the school and was closely followed by Ottoman and Mughal jurists. Since later Islamic thought tends to censure seemingly less acceptable views held by early Ḥanafīs, *al-Fuṣūl*, which was produced in the middle of the 4th/10th century, preserves many long-forgotten or misrepresented views in their original forms. For instance, the Ḥanafī position on *ḥadīth* differs from that of the *ahl al-ḥadīth*; but our understanding of this difference is obscured by the later authors, who developed certain interpretative techniques that minimize the differences. However al-Jaṣṣāṣ' work reflects the early 4th/10th century discourse, and at times preserves authentic material from the previous century.[37] By reading it, and comparing it to later works, one obtains a better understanding of the issues.

Al-Jaṣṣāṣ' no longer extant *Sharḥ asmā' al-ḥusnā* (commentary on the attributes of God) is probably his only writing on theology (*kalām*). However, his *al-Fuṣūl* and *Aḥkām al-Qur'ān* sometimes record his participation in extensive debates on important theological issues. In these debates, al-Jaṣṣāṣ usually adopts Muʿtazilī positions, and modern western scholarship almost unanimously regards him as a Muʿtazilī, a point to which we shall return.

Legal Exegesis: Aḥkām al-Qur'ān

The second field in which al-Jaṣṣāṣ became prominent is the field of legal exegesis, that is, exegesis of the legal injunctions of the Qur'ān.

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35 Ibn Khaldūn, *Muqaddima*, 455.
36 On these two *uṣūl* traditions, see M. Bedir, "Early Development," 11–17.
37 M. Bedir, "An Early Response to Shāfiʿī," 285–311.

Al-Jaṣṣāṣ' *Aḥkām al-Qurʾān* seems to have been the first work designed to interpret the Qurʾān from the perspective of jurisprudence.[38] Although he focuses more on the legal aspects of the Qurʾān, his work seems to be an exegesis of the entire text. For al-Jaṣṣāṣ, theology and jurisprudence were tightly intertwined and he regards both as falling under the rubric of "*aḥkām*" or divine regulations. Consequently, he makes lengthy comments and expresses his views on theologically charged Qurʾānic passages. He makes this clear in his short preface to *Aḥkām al-Qurʾān*:

> We have already presented, at the beginning of this book, an introduction (*muqaddima*) that covers statements regarding the science of the oneness of God (*uṣūl al-tawḥīd*), of which one is not allowed to be ignorant, and a preparatory work about what is needed such as knowing—the ways of deducing the meanings of the Qurʾān and of inferring its proofs and legal consequences of its words, as well as for understanding the ways in which various aspects of the Arabic language, linguistic terms and legal expressions (*al-asmāʾ al-lughawiyya waʾl-ʿibārāt al-sharʿiyya*) operate. This is because the knowledge that deserves utmost priority is knowledge of the oneness (*tawḥīd*) of God, of repelling from Him any resemblance to created things, and of refuting those who wrongly say that He does injustice to His servants.

This passage suggests that al-Jaṣṣāṣ' introduction to the *Aḥkām al-Qurʾān* contained an extensive discussion of both theology and *uṣūl al-fiqh*, but that the extant versions of this text do not preserve either discussion. It is also possible that he was referring to his earlier separate treatise on *uṣūl al-fiqh*, which has reached us in incomplete form. In that case, it is likely that al-Jaṣṣāṣ began this book by establishing the theological precepts—this part of the text is lost—and then moved on to jurisprudence. The section on jurisprudence is almost complete; the only missing issues in the extant copies are those dealing with "general terms." Given the speculations about al-Jaṣṣāṣ' affiliation with the Muʿtazila (see below), the removal of the entire theological section of his book(s) may have been deliberate, while the loss of the small section on jurisprudence was an accidental by-product of this redactional decision. Another possibility is that he did in fact write a separate book on theology that did not survive.

[38] The *Aḥkām al-Qurʾān* attributed to al-Shāfiʿī is in fact a 5th/11th century compilation of his writings and those of other al-Shāfiʿī figures; another *Aḥkām al-Qurʾān*, by the Ḥanafī scholar al-Ṭaḥāwī, has survived only in part. See *DIA*, 1:552–3 ("Ahkamü'l-Kur'an").

Substantive Law

The third area in which al-Jaṣṣāṣ worked was *furūʿ al-fiqh*, that is legal rulings or substantive law, about which he wrote at least ten treatises, only four of which have survived. His extant works, which are voluminous, allow us to speculate about his achievements in this field.

Recall that because of al-Jaṣṣāṣ' extreme piety he avoided engagement in legal practice. How then can we account for his extensive engagement with substantive law? To my mind, the explanation lies in the fact that Muslim jurists, like their counterparts in other cultures, fall into two camps: those who engage in legal practice and those who prefer to devote their energies to the theoretical discussion of the law. Al-Jaṣṣāṣ' writings in this area show that his interest in substantive law was a product of his concern for the theoretical justification of legal doctrine rather than for the application of the law. In other words, he was more concerned with the intellectual aspect of the law than with its application. In the Islamic tradition, this meant justifying law (*fiqh*) in the light of its sources (*uṣūl*). Since substantive law (*furūʿ al-fiqh*) developed before extensive debate on its theoretical justification (*uṣūl al-fiqh*), this is understandable.

Alleged Association with the Muʿtazila

As noted, some Muʿtazilī biographers classify al-Jaṣṣāṣ as a Muʿtazilī. No non-Muʿtazilī source confirms this point, although al-Dhahabī notes that al-Jaṣṣāṣ' writings manifest Muʿtazilī tendencies.[39]

Al-Khaṭīb al-Baghdādī, one of the earliest biographers of al-Jaṣṣāṣ, does not mention his affiliation with the Muʿtazila, although he is usually careful to note the affiliation of other scholars with the Muʿtazila.[40] In modern times, Madelung, M. Bernard and Shehaby have accepted this information uncritically and classified him as a Muʿtazilī.[41] The fact that Sunni and especially Ḥanafī sources do not mention his affiliation with the Muʿtazila should not mislead us, because al-Jaṣṣāṣ was an influential jurist whose affiliation with this non-Sunni movement may have been suppressed. On the other hand, as Reinhart notes, those Muʿtazilī biographers who do count him among the Muʿtazila are also questionable (they tend to

[39] Al-Dhahabī, *Siyar Aʿlām al-Nubalā*, 16:341.
[40] Al-Khaṭīb al-Baghdādī, *Taʾrīkh*, 4:314–5.
[41] Reinhart, *Before Revelation*, 46.

classify many controversial scholars as Muʿtazilī in an attempt to inflate their numbers).[42] Also important is the fact that in the 4th/10th century, when al-Jaṣṣāṣ lived, the boundaries between theological schools were not as clear-cut as they would become in the late 5th/11th century. Added to that, in al-Jaṣṣās' lifetime, the Muʿtazila were not regarded as totally outside the mainstream religious community.[43]

According to W. Madelung, until the beginning of the 6th/12th century, Ḥanafī scholars did not share a uniform theological position.[44] Leaving aside the Transoxanian Ḥanafīs, one finds different ideological positions in the same town in Iran, Baghdad or Egypt. In Rayy, where al-Jaṣṣāṣ was born, there were Ḥanafī Najjārīs, Muʿtazilīs and Traditionalists. In Baghdad, the Muʿtazilīs generally associated themselves with the Ḥanafī school. It is well known that early Ḥanafī masters such as Abū Ḥanifa (d. 150/767) were rationalists (*ahl al-raʾy*) in the field of Qurʾān interpretation and in their approach to the authority of the Prophet, which seems to have been more in tune with Muʿtazilism than with traditionalism.[45] This was, however, more than one and one-half centuries before Jaṣṣāṣ's time. Following al-Shāfiʿī, Islamic intellectual culture became increasingly eclectic and conciliatory. By the time of al-Jaṣṣāṣ a consensus had been reached on the basics of Islamic jurisprudence. In the fierce battles between traditionalism and rationalism, the opposing parties agreed in principle on the overriding authority of the Prophet, including the authority of a *khabar al-wāḥid* (isolated report).[46]

Neither the rationalists nor the traditionalists were a single unified camp. At times, different groups of rationalists joined forces, both intellectually and politically, against the strong traditionalist attack. This was the case with the *miḥna*, or conversely, with the enforcement of the Qādirī Creed.[47] Over time it is possible that the mainstream Ḥanafī movement gave increasing emphasis to the legal tradition and tried to avoid conflict

[42] Ibid., 46–47.

[43] For example, the famous Ḥanafī *qāḍī* Abū ʿAbd Allāh al-Ṣaymarī and others were put to the test of orthodoxy only at the beginning of the 5th/11th century. See Makdisi, *Ibn ʿAqil*, 11.

[44] Madelung, "Spread of Maturidism and the Turks," 112–7.

[45] Watt, *Formative Period*, 189–204.

[46] On the Ḥanafī understanding of *ḥadīth*, see Bedir, "An Early Response"; idem, *Fıkıh, Mezhep ve Sünnet: Hanefi Fıkıh Teorisinde Peygamber'in Otoritesi*.

[47] On the Qādirīs, see Makdisi, *Ibn ʿAqil*, 3–16.

over issues regarded as sensitive for the growing traditionalist movement.[48] The traditionalists were always suspicious of the Ḥanafīs, especially after the *miḥna*. The fact that we find a mature science of *uṣūl al-fiqh* in al-Jaṣṣāṣ' work indicates that Ḥanafī scholars tried hard to open a space for themselves in this growing traditionalist atmosphere by undertaking the difficult hermeneutical task of reconciling their school tradition with the *ḥadīth* material.

Because neither al-Jaṣṣāṣ nor his teacher al-Karkhī produced a standard work of *kalām* (al-Jaṣṣāṣ' *Sharḥ asmā' al-ḥusnā*, which may be characterized as a *kalām* work, is not extant), it is very difficult to determine whether or not they were Muʿtazilīs. It is true that al-Jaṣṣāṣ shares a lot with the Muʿtazila, as demonstrated by Bakdash and Özen.[49] A survey of his *uṣūl* work (in no way exhaustive) indicates that he assigned a prominent position to reason (*ʿaql*), and this apparently was not a mere pretext. For example, he makes 'reason' one of the criteria on the basis of which one may assess the reliability of *khabar al-wāḥid*. This criterion would disappear from later Ḥanafī *uṣūl* works.[50] Likewise, he believes that one cannot see God, either in this world or in the hereafter, and he rejects a *ḥadīth* that is related in support of the doctrine of beatific vision, a disputed point between the Muʿtazila and later Sunnism.[51]

On the other hand, al-Jaṣṣāṣ' special interest in *ḥadīth* is evident both from his writings, which contain numerous *ḥadīth*s with long *isnād*s, and from his training (see above). This is unusual for a Ḥanafī, let alone a Muʿtazilī, despite the latter's recognition of the authority of the *khabar al-wāḥid*. An earlier figure, al-Ṭaḥāwī, undertook the ambitious task of reconciling Ḥanafī legal doctrine with the corpus of *ḥadīth*, and al-Jaṣṣāṣ seems to have followed his path. By writing commentaries and abridgements on al-Ṭaḥāwī's works, al-Jaṣṣāṣ developed a more theoretically sophisticated framework that set the standard for later Ḥanafīs. His engagement with *ḥadīth* discourse seems to have secured the friendship of otherwise ardent opponents of rationalists, the Ḥanbalīs of Baghdad, who treated him with respect. Abū Yaʿlā al-Farrā' (d. 458/1066) quotes his views frequently in his

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48 The Ḥanafī method of *uṣūl* writing, as noted by classical and modern observers, seems to have been shaped by their concerns about the accusations of traditionalists; see Bedir, "Early Development," Ch. I.

49 Bakdash, "Taḥqīq al-Juz' al-Thānī", I, 57–63; Özen, "Ebû Mansûr el-Mâtürîdî'ninFıkıh Usûlünün Yeniden İnşası," 109–51, 159–60.

50 On this see M. Bedir, "Early Development," Ch. 6.

51 Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 4:169–70; Özen, "Ebû Mansûr el-Mâtürîdî," 124–6.

al-ʿUdda fī uṣūl al-fiqh,[52] and Abū Yaʿlā's grandson relates a story about Jaṣṣāṣ' relations with his grandfather and about Jaṣṣāṣ' virtues.[53] Almost all major traditionalist historians treat al-Jaṣṣāṣ with respect and relate stories about his piety and religiosity. According to one of these stories, in the year 362/973, al-Jaṣṣāṣ and a group of respected Baghdādī scholars urged the Buwayhid ruler ʿIzz al-Dawla Bakhtiyār b. Buwayh to conduct *jihād* against the Byzantines, whose raids were affecting even Baghdad, instead of pursuing personal goals.[54] Among these historians, the only one who mentions al-Jaṣṣāṣ' Muʿtazilī leanings is al-Dhahabī, who hints at this tendency in his writings after making positive remarks about him. The silence of other traditionalist historians about this suggests that they did not take the allegation seriously.

The fact that both Muʿtazilī and traditionalist biographers and historians held a positive opinion of al-Jaṣṣāṣ is an indicator of his sophistication, which seems to have resulted from his efforts and those of his predecessors to reconcile the tension between rationalists and traditionalists. The unqualified assertion that al-Jaṣṣāṣ belonged to the Muʿtazila ignores his involvement in *ḥadīth* discourse. What is more, with regard to the Ḥanafī theological position on 'the commission of a grave sin,' al-Jaṣṣāṣ defends Abū Ḥanifa,[55] whose position is anathema to the Muʿtazila. Conversely, the unqualified assertion that al-Jaṣṣāṣ was a Sunni scholar in the proper sense, who had nothing to do with Muʿtazila, ignores the relations of Iraqi Ḥanafīs, of whom al-Jaṣṣāṣ and his respected master al-Karkhī were prominent representatives, with the Muʿtazila; the assertion also ignores certain theological positions attributed to al-Jaṣṣāṣ that were contrary to the later Ashʿarī-Māturīdī Sunnism. It is more appropriate to situate al-Jaṣṣāṣ between jurists and traditionalists, as O. Spies did,[56] or, more accurately,

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[52] Editor's introduction to al-Farrā', *al-ʿUdda fī uṣūl al-fiqh*, 1:42.

[53] Ibn Abī Yaʿlā al-Farrā', *Ṭabaqāt al-Ḥanābila* (Riyad, 1419/1999), 3:363–4.

[54] Al-Dhahabī, *Siyar Aʿlām al-Nubalā'*, 16:340–1.

[55] *Al-Fuṣūl*, 1:102. This passage, which is about a theological position, is revealing: Jaṣṣāṣ informs us that certain people interpreted Abū Ḥanīfa's postponement of the judgment on "the commission of grave sin" as suspension of judgment (*waqf*) concerning "general terms" (*alfāẓ al-ʿumūm*). This is because a number of Qurʾānic verses clearly state that sinners will be punished. If one takes these passages literally and generalizes, one must conclude that sinners definitely will go to Hell. Since Abū Ḥanīfa did not follow this reasoning, he must have considered "general terms" to be suspended (*mawqūf*). Jaṣṣāṣ does not accept this inference. What is important here is that he does not appear to have felt any need to reconcile his view on the matter (allegedly Muʿtazilī) with that of Abū Ḥanīfa, with whom he does not even think of disagreeing.

[56] *EI*[2], s.v. "D̲jaṣṣāṣ."

between the rationalist and traditionalist tendencies in Islamic intellectual history. He was a respected head of the rationalist jurists (*aṣḥāb al-raʾy*), that is, the Ḥanafīs of his time, and, at the same time, he had good relations with the Muʿtazila and the *ahl al-ḥadīth*. He did this by drawing upon the venerable Ḥanafī hermeneutical tradition.

Translation

Introduction

The following translation is from *al-Fuṣūl fil'l-uṣūl* of al-Jaṣṣāṣ (vol. 4, 295–303, with some omissions). Here al-Jaṣṣāṣ discusses the epistemological status of the outcome of the reasoning of a *mujtahid* (literally the one who exerts himself; technically the Muslim jurist who uses his reasoning to discover the legal assessment of a case for which there is no explicit stipulation in Qur'ān and *Sunna*). The question addressed here is whether God included in His message only a single sign or indication for a newly-arisen case which a *mujtahid* is charged with finding, or whether there are many signs from which each *mujtahid* may choose what he thinks right. In other words, is there a single truth or is truth relative, depending on the assessment of a *mujtahid*? al-Jaṣṣāṣ favors the view that the different views advanced by Muslim jurists are legitimate. In his view, there is no room for the claim that one's view is the ultimate truth, although such a truth does exist.

In classical Islamic legal theory *ijtihād* is defined by and large by various forms of analogy (*qiyās*). For this reason, it is important to keep in mind the four constitutive elements of *qiyās*. These are *aṣl*, precedent in the revealed sources; *ḥaditha*, a newly-arisen case; *ʿillah*, *ratio legis* and *ḥukm*, assessment. Thus, when al-Jaṣṣāṣ speaks of "*ashbah al-uṣūl bi'l-ḥaditha*" he means "the most analogous of the precedents to the new case, whose ruling a *mujtahid* tries to find on the basis of *ratio legis*." Two frequently used terms in the text are *iṣābah* and *khaṭaʾ*, or *muṣīb* and *mukhṭiʾ*. I have translated *iṣābah* (literally "hitting" or "scoring the target") as reaching the truth and *khaṭaʾ* as mistake or error, i.e. missing the target assigned by God to each case.

The translation includes only the section in which the problem is identified and various views are stated. I have not translated the section in which the arguments of the parties are discussed in detail, due to the shortage of space. The chapter is almost 100 pages long in the published version.

The assessment of *mujtahid*s and the disagreement of the people of knowledge over it (*al-qawl fī ḥukm al-mujtahidīn wa-ikhtilāf ahl al-ʿilm fīhi*).

Abū Bakr [al-Jaṣṣāṣ] said: Those who recognize analogical reasoning (*qiyās*) as a legitimate method in the field of legal assessments of acts are of two groups. [I] The first group says that God assigns one sign (*dalīl*) to assessing each case; the case has only one precedent (*aṣl*), to which it [viz., the new case] is to be compared on the basis of a single *ratio legis* (*ʿillah wāḥidah*). The analogist is obliged to find this sign. If he does not obtain that single sign, he is a wrongdoer in the eyes of God Almighty. However, he receives a reward for his endeavor (*ijtihād*) and is excused from wrongdoing. This view was held by al-Aṣamm,[57] Ibn ʿUlayya[58] and Bishr b. Ghiyāth.[59] It is related from Ibn ʿUlayya: "A *mujtahid* might know that, with his *ijtihād*, he has attained the very assessment of God Almighty."

As for al-Shāfiʿī, his followers concede that they disagree among themselves about his views. Some say that his view on this matter is as follows: The truth lies in one [of the various possible *ijtihād*s]; this is the account of those we just mentioned. Other Shāfiʿīs state that his position on this matter is as follows: The truth lies in "all the different views" at the same time.

[II] The other group that recognizes *ijtihād* as a legitimate activity in legal assessments, mentioned at the beginning of the chapter, disagrees among themselves, after agreeing that God Almighty did not assign only one sign for assessing those cases that fall within the purview of *ijtihād*; to the contrary, [they say] that there exist [many] signs that are similar and analogous to the precedents (*ashbāh wa-amthāl min al-uṣūl*). Thus, on the basis of his *ijtihād*, [the *mujtahid*] can relate the case under question to one of these precedents.

Among this group, are [II:1] those who say: "The truth lies in all the differing views." This latter group also disagrees among themselves: [II:1:a] Some say that there exists one single desire/pursuit (*maṭlūb*), namely, the most analogous of the precedents to the case in question. It is therefore incumbent upon a *mujtahid* to try to attain it [viz., the single *maṭlūb*] in his *ijtihād*. However, he is not required to obtain it.

Abū ʿAbd Allāh b. Zayd al-Wāsiṭī[60] said that only one pursuit (*maṭlūb*) should be aimed at, the one that is the most analogous of the precedents to the case in question; this is what we call rectification of the essence of *ijtihād* (*taqwīm dhāt al-ijtihād*). However, he adds that this is not necessary in all cases; the similarity of some of the cases to the precedents to which

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57 Abū Bakr ʿAbd al-Raḥmān b. Kaysān al-Aṣamm (d. 200/816) was a prominent Muʿtazilī theologian, jurist and exegete. See *EI*², suppl. vol., s.v. "al-Asamm."

58 Ibn ʿUlayya, Abū Bishr ʿIsmāʿīl b. Ibrāhim al-Asadī al-Basri (d. 193/809) was a famous *ḥadīth* scholar, a jurist and an exegete. See *DIA*, s.v. "İbn Uleyye."

59 Bishr b. Ghiyāth al-Marīsī (d. 218/833) was a Murjiʿī theologian and an Iraqi jurist. See *EI*², s.v. "Bishr b. Ghiyāth."

60 Abū ʿAbd Allāh Muḥammad b. Zayd al-Wāsiṭī (d. 307/919), a Muʿtazilī theologian and a student of the famous Abū ʿAlī al-Jubbāʾī. See al-Nadīm, *Fihrist* (Cairo, 1991), 172.

they are related may be equal, in the eyes of God; we will—God willing—discuss this in detail below.

[II:1:b] Others say that there is no *maṭlūb* that is the most analogous of the precedents to the case in question (*laysa hunāka maṭlūbᵘⁿ huwa ashbah al-uṣūl bi'l-ḥāditha*). The assessment of the case is given according to what is analogous in the view of the *mujtahid*. The most analogous (*al-ashbah*) is an attribute dependent on the reasoning of the *mujtahid*, not on the precedent (*aṣl*) to which this new case (*farʿ*) is attached.

[II:2] Still others said that the truth in the eyes of God Almighty lies in one of the differing views. This is the assessment sought after, but a *mujtahid* is not obligated to obtain it exactly.

[III] Abū Bakr said: The view of our masters on this matter is what will be explained below—God willing. Several confusing statements were related from them [viz., our masters], the ultimate implications of which, in our view, can be reduced to a single meaning. We will state this after relating, first, the words related from them.

. . . [Here al-Jaṣṣāṣ relates the relevant statements of the founding figures of the Ḥanafī *madhhab* with a view to formulating the Ḥanafī position on this matter. He says: --MB]

Abū Bakr said: According to my understanding of the views of our masters, the true meaning of the statements, "Each *mujtahid* reaches the judgment whose finding he is charged to discover by God Almighty," and "The truth in the view of God lies in one of the differing opinions," is as follows: There exists a truth known by God Almighty, which a *mujtahid* is obligated to try to identify. It is this [truth] that is the most analogous of the precedents to the case in question. A *mujtahid* is not under obligation to reach it [viz., the truth in the view of God] exactly; he is only charged with exerting himself (*ijtihād*) to conclude that it [viz., his finding] is the most analogous [of the precedents to the case in question].

This interpretation is correct. According to Muḥammad [al-Shaybānī], in the statement related from him by al-Kisāʾī, a *mujtahid* is not charged with reaching the truth exactly. He [viz., Abū Bakr] said: If he had been charged with it [viz., reaching the exact the truth], and he erred, he would commit a sin. However, he is only under the obligation to exert himself (*ijtihād*) and to search in order to reach the truth in his opinion. This is why Muḥammad informed [us] that the assessment he pronounces is the one he thinks most likely to be most analogous [to the precedents], not that it is the most analogous in the view of God. What Muḥammad means by the statement, "A *mujtahid* may be mistaken about the truth itself," is that he may be mistaken about what is the most analogous.

Abū Bakr said: This error is not an error of religion (*al-dīn*, probably belief) nor is it an error of judgment (*al-ḥukm*). This is because they [viz., our early masters] said that he [viz, a *mujtahid*] reaches what he is charged to do, and God's judgment about him is delivered on the basis of the fact that the assessment he pronounces is what he thinks to be the most analogous [of the precedents to the new case]. What he is charged to do is to evaluate [the

new case] in a way that is devotionally expected from him (*al-mutaʿabbad bih*). A *mujtahid* is not under an obligation to reach the most analogous [of the precedents] in the eyes of God Almighty; neither is this devotionally expected from him, in case his reasoning does not lead to that. It is impossible for him to be considered as fulfilling what he is charged to do and at the same time as being in error in finding the assessment of God Almighty; for it is not possible that what he is charged to find is something other than the assessment of God Almighty.

It is now clear that the meaning of their expression, "The truth in the view of God is one" is as follows: The most analogous of the precedents to the case in question is but a single one in the eyes of God Almighty, which He knows, but which a *mujtahid* is not charged to reach. From this perspective, it may be compared to the Kaʿba; the Kaʿba towards which Muslims are commanded to turn is one; but they are not required to direct themselves to the Kaʿba exactly. What is expected from a *mujtahid* [in this case, one who exerts himself to determine that direction] is to search for the approximate direction, i.e. what his mind takes it to be after exerting itself to find the exact direction, which is only within the knowledge of God Almighty, which is the Kaʿba itself. ʿIsā b. Abān[61] gives the example of determining the amounts (*al-maqādīr*); we are not charged with [determining] exact amounts or sizes; the assessment we are charged with is what our *ijtihād* and preponderant opinion conclude is the amount [we are] commanded to maintain; [the assessment we are charged with is] not that which God Almighty has in mind.

This makes it clear that the view of our masters is not different from the view we related before, namely that in those cases in which assessments are formed with *ijtihād*, the truth lies in all of the differing views. They [viz., our masters] differ only with those who reject the idea that there exists, among the precedents, a precedent that is the most analogous to the case in question, and that is to be sought according to the opinion of a *mujtahid*, as we have already explained.

. . . .

In addition, some of the precedents may be more analogous to the case in question than others, depending on the reasoning of a *mujtahid*. That is why the most analogous [of the precedents] in the view of God Almighty does not become known to a *mujtahid*; he assesses analogy only on the basis of his own view and according to his preferred opinion. This is the assessment that is devotionally expected from him and which he is entrusted to execute.

Of our masters or others, whoever accepts *ijtihād* and endorses the idea that the truth lies in all of the differing views does not argue that God Almighty gave a single sign that will ensure that a *mujtahid* correctly

[61] Abū Mūsā ʿĪsā b. Abān b. Ṣadaqa (d. 221/836) was a famous Ḥanafī jurist and theologian. On him, see Bedir, "An Early Response to Shāfiʿī," 288–93.

ascertains the most analogous of the precedents to the case in question. What he says is this: God Almighty assigned signs in the form of precedents and examples, to the most analogous of which the new case is joined in accordance with the outcome of his *ijtihād*. Sometimes the reasoning of one *mujtahid* produces a result that goes against that of another, with the result that a number of rules arise on the basis of the reasoning of each *mujtahid*. Such a case shares common features with each one of the precedents that have different assessments (*aḥkām*).

The one who says, "[T]he truth is one, and he who reaches the truth is only one among all the *mujtahid*s, and the remaining ones are mistaken," thinks that God Almighty assigned a single sign for the assessment of a new case; the case contains only a single *ratio legis* (*'illah*) entailing a single ruling, to which, not to another one, the new case is to be analogized. Among them there are those who state that this single sign leads him who executes the analogy and deduction to grasp the desired assessment; those who err, however, are excused. Ibn 'Ulayya and Bishr held this opinion. Some say that this sign will not lead the *mujtahid* to know the assessment he must reach; to the contrary, it is [only] the assessment the *mujtahid* thinks to be indicated by that sign.

Abū Bakr said: The bottom line of this discussion was partially stated above; however, we will repeat it here in order to develop our discussion on the basis of it. Thus, religio-legal assessments (*al-aḥkām*) are of two types:

The first type comprises those rulings in which abrogation and alteration (*al-naskh wa'l-tabdīl*) are not allowed. These are the rulings whose obligations and prohibitions (*wujūbuhū wa-haẓruhū*) are known by means of reason before revelation arrives. The necessity to believe in the oneness of God Almighty, to believe in the Prophets—peace be upon them—to thank a benefactor and to see justice prevail are examples of this type. Examples of acts that are prohibited by reason even before the coming of revelation are disbelief, injustice and so on. The first examples are good in themselves, imposing an obligation on other rational minds. The second examples are evil in themselves, and reason entails their prohibition. In these two categories, abrogation or alteration is not allowed; their assessments do not vary from one responsible person to another, in the sense that some are bound to act this way, and others in the opposite way. These assessments do not change over time or space.

[Although al-Jaṣṣāṣ divides assessments, and hence the acts to which these assessments are attached, into two types, he seems to regard the first one as two types: acts that are good in themselves and acts that are evil in themselves; that is why he calls the second type the "third" type of assessment-MB.]

The third type [sic] is not evil in itself; it is possible for it to be evil on one occasion but good on another occasion. As long as it [viz., an act that falls within this type] entails evil, it becomes an evil act through which worshipping God is not legitimate. If it entails no evil, then it becomes a good act through which worshipping God can be legitimate. In this type of

assessment [hence act], abrogation and alteration are possible; the change of assessment from one place to another or from one time to another is allowed. In this type of assessment one responsible person can be required to do one thing, and another its opposite, depending on God's cognizance of the benefits therein. It is possible for this [type of act] to become religiously prohibited, if He knows that it will lead to evil; it is also possible for it to become obligatory at another time, if He knows that there is benefit in it. In addition, it is possible for it to become permitted without involving a necessity on another occasion, if He thinks it is right. These are all religious injunctions that God Almighty imposed upon us through revelation.

As for the first two types [viz., good and evil in themselves], they do not fall within the purview of *ijtihād*; it is therefore impossible to leave the task of deduction, with regard to these two categories, to the opinions of *mujtahid*s; for God Almighty attached to them those rational signs, about which, if one reflects on them, the *mujtahid* will grasp the truth. The indications were attached to them in a way that allows us to know the obligation, for it is not possible that God Almighty enjoins them [viz., the rules that fall in the first and second categories] upon us in a way that goes against their nature, which is either obligation or prohibition.

As for the third category, they are of two types: The first type is where God Almighty attached an indication to the assessments of the cases, with the result that one can know them by examining the meaning of this indication; this is not subject to *ijtihād*. Consequently, if a *qāḍī* passes a judgment contrary to the truth [contained in the indication], his judgment is to be annulled, in our view.

The other type is where there is no specific assessment of God Almighty; instead, each *mujtahid* identifies the assessment in accordance with his own reasoning (*ijtihād*); thus what each one of these *mujtahid*s settles on and what his mind prefers after exertion of his utmost effort, i.e. after *ijtihād*, become his devotional obligation, in the sense that the coming of a revelation about it is a possibility. This is because He did not attach a specific indication concerning the most analogous [of the precedents to the case,] which a *mujtahid* is required to obtain or aspire to reach through his *ijtihād*. Instead, there are several analogous precedents; knowledge of the most analogous of them is hidden by God to give ease to His servants and as a sign of His compassion for them and of His concern for their welfare. The reason for this is that God did not want to limit His servants only to a single solution for the cases, as the Almighty said: "He has imposed no difficulties on you in religion; it is the religion of your father Abraham."[62] And as the Prophet (peace be upon him) said: "I brought to you a straight and tolerant [religion]."[63]

If God Almighty charged the *ʿulamāʾ* to make an analogy on the basis of a single precedent and not to deviate from this way, and made it obligatory

[62] Qurʾān 22:78.
[63] Ibn Ḥanbal, *Musnad*, no. 21192.

for them to obtain exactly the most analogous precedent, there would have been but a single way to discharge oneself of the duty, from which, if one diverges, he becomes a deviant, hence a sinner. Every reasonable person knows that when there are two or three ways of solving a case, it gives more room for action.

If this is the case, then God did not charge them with reaching the most analogous precedent exactly, nor did he demand reaching the specific solution, for He did not posit only a single indication. Thus, He identified the devotional obligation expected from them as what is the most analogous according to their *ijtihād*, rather than what God Almighty knows as the most analogous.

CHAPTER NINE

AL-SHARĪF AL-MURTAḌĀ (D. 436/1044)

Devin J. Stewart

Life and Times

ʿAlī b. al-Ḥusayn al-Mūsawī, known as al-Sharīf al-Murtaḍā, was born in Rajab 355/June-July 966 to a prominent Alid family. Through his father, Abū Aḥmad al-Ḥusayn b. Mūsā, he was a descendant of the seventh Imam of the Twelvers, Mūsā al-Kāẓim (d. 183/799), whose tomb was a prominent landmark and site of religious devotion in Karkh, the large Shīʿī quarter in Baghdad. Through his mother, Fāṭimah (d. 385/995), he was a descendant of the fourth Imam ʿAlī Zayn al-ʿĀbidīn (d. 95/712); she was the granddaughter of the Zaydī Imam al-Nāṣir li'l-Ḥaqq Abū Muḥammad al-Ḥasan al-Uṭrūsh b. ʿAlī (r. 300–4/913–17), who had succeeded in re-establishing the Zaydi state of Tabaristan that had been founded by al-Ḥasan b. Zayd (r. 250–70/864–84) in the mid-ninth century. Al-Shaykh al-Mufīd (d. 413/1022) is reported to have written his work on the legal obligations regarding women, *Aḥkām al-nisāʾ*, at the request of al-Murtaḍā's mother. Al-Sharīf al-Murtaḍā wrote a commentary, titled *al-Nāṣirīyāt*, on the legal work of his great-great-grandfather on his mother's side, al-Nāṣir the Elder, Abū Muḥammad al-Ḥasan b. ʿAlī. Al-Murtaḍā reports that he knew his grandfather, al-Nāṣir the Younger, and had frequent contact with him before he died in Baghdad in 368/978–79. Al-Murtaḍā's younger brother, al-Sharīf al-Raḍī, was born in 360/970. The two studied in their youth under the tutelage of al-Shaykh al-Mufīd, then the leading Shīʿī scholar in Baghdad. Both would become prominent scholars, and both were accomplished in religious and literary fields: al-Raḍī was widely recognized for his literary skills and famed as one of the greatest poets of the age and as the compiler of *Nahj al-balāghah*, an anthology of sermons, speeches, and aphorisms attributed to ʿAlī b. Abī Ṭālib; al-Murtaḍā was better known for his accomplishments as a jurist and theologian, though he was also a skilled poet, literary critic, and commentator on the Qurʾān.

Al-Sharīf al-Murtaḍā's family dominated the position of Alid *naqīb*, "syndic" or "marshal of the nobility" in the Buyid period. His father,

al-Sharīf Abū Aḥmad al-Ḥusayn b. Mūsā, held the office of *naqīb* from 355/965 intermittently for about forty years, until he died in 400/1009–10. Al-Murtaḍā's maternal grandfather was also appointed *naqīb* of the Alid sayyids in 362/972, during one of the periods when his father had been dismissed. His brother al-Raḍī held the office until he died in 406/1015. On 16 Muḥarram 403/7 August 1012, al-Raḍī was declared *naqīb* of the Ṭālibids—descendants of ʿAlī's father, Abū Ṭālib—throughout the territories under Abbasid sovereignty. He was the first Alid *naqīb* to receive an honorary robe in black, the color of the Abbasid dynasty.[1] Al-Murtaḍā assumed the office of *naqīb* upon his brother's death and held it for thirty years, until his own death in 436/1044. His nephew ʿAdnān b. ʿAlī held the office of *naqīb* from 436/1044 until 450/1058.[2]

Members of the family held positions besides that of *naqīb* as well. In 366/976–77, al-Sharīf Abū Aḥmad led an embassy from ʿIzz al-Dawlah (r. 356–67/967–78) to ʿAḍud al-Dawlah (r. 338–72/949–83).[3] In 380/990–91, he was appointed leader of the pilgrimage caravan to Mecca (*amīr al-ḥājj*) and supervisor of the grievance council (*nāẓir al-maẓālim*), in addition to his duties as Alid *naqīb*; al-Murtaḍā and al-Raḍī were appointed as deputies to their father.[4] They were removed from these offices in Dhū al-Qaʿdah 384/December 994-January 995,[5] but regained them in 394/1003–4.[6] In Rabīʿ II 402/November 1011, when the Caliph al-Qādir had a document drawn up denouncing the Fatimids as illegitimate claimants to the caliphate who had falsified their genealogy, both al-Raḍī and al-Murtaḍā, along with a number of other scholars, were among the signatory witnesses.[7] On 3 Ṣafar 406/23 July 1015, following the death of his brother, al-Sharīf al-Murtaḍā was appointed *naqīb, amīr al-ḥājj*, and supervisor of the grievance council. An official ceremony, attended by the leading judges and jurists, was held at Dār al-Mulk, the Buyid prince's palace, and an official letter of appointment was issued by al-Qādir.[8]

Upon the death of al-Shaykh al-Mufīd in 413/1022, al-Sharīf al-Murtaḍā became the leading Shīʿī jurist in Baghdad as well as an important notable

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1 Ibn al-Jawzī, *al-Muntaẓam*, 15:89.

2 On the office of *naqīb* during this period, see Busse, *Chalif und Grosskönig*, 280–97; Louis Massignon, "Cadis et *naqībs* Baghdadiens," 263–64.

3 Ibn al-Jawzī, *al-Muntaẓam*, 14:248.

4 Ibid., 14:344.

5 Ibid., 14:369.

6 Ibid., 15:43.

7 Ibid., 15:82–3.

8 Ibid., 15:111–12.

and political figure. He often mediated in conflicts between the caliph, the Buyid ruler, the army, organized bands of youths (*ʿayyārūn*), and the inhabitants of al-Karkh. For example, he was entrusted with taking an oath of allegiance to the Buyid ruler Musharraf al-Dawlah (r. 412–16/1021–25) from the Turkish soldiery in 415/1024. Just following ʿĪd al-Aḍḥā 420/23 December 1029, al-Murtaḍā led a delegation of notables to the caliphal palace to apologize for a Shīʿī attack on a Sunni preacher who had been appointed by the caliph to preach at the Shīʿī Burāthā mosque.[9] When the Turkish garrison showed signs of rebellion in 424/1033 and again in 427/1036, Jalāl al-Dawlah (r. 416–35/1025–44) took refuge in al-Murtaḍā's house.[10] On 13 Shawwāl 425/31 August 1034 al-Murtaḍā was requested to summon the leaders of the *ʿayyārūn* to his house and to have them swear to serve the Sultan or else leave the city.[11] He died in Rabīʿ I 436/September–October 1044.[12]

Imami Shiʿism in Buyid Times

Al-Sharīf al-Murtaḍā is one of the three great Twelver jurists of Buyid Baghdad—the others are his teacher al-Shaykh al-Mufīd and his student and colleague al-Shaykh al-Ṭūsī (d. 460/1067)—who established the doctrinal, literary, and institutional basis of the Twelver legal school in the late 4th/10th and early 5th/11th centuries. It would come to be called the Jaʿfari *madhhab*, but they did not use that term themselves. Rather, they claimed allegiance to the Imami *madhhab*, on the logic that the authorities on whose opinions the school was based are all of the Twelve Imams and not Jaʿfar al-Ṣādiq alone—though his transmitted opinions certainly play a prominent role in the tradition. The Buyid period witnessed a burgeoning Shīʿī literature in the religious sciences, the main aim of which was to present Shīʿī doctrine to the general public and to defend it against

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9 Ibid., 15:201.

10 Ibid., 15:235, 254.

11 Ibid., 15: 241.

12 On al-Murtaḍā, see al-Ṭūsī, *Fihrist kutub al-shīʿah*, 125–6; al-Najāshī, *Kitāb al-rijāl*, 206–7; Ibn Shahrāshūb, *Maʿālim al-ʿulamāʾ*, 61–3; al-Ḥillī, *Khulāṣat al-aqwāl*, 94–5; al-Iṣfahānī, *Riyāḍ al-ʿulamāʾ*, 4:14–65; al-Baḥrānī, *Luʾluʾat al-baḥrayn*, 313–22; al-Khwānsārī, *Rawḍāt al-jannāt*, 4: 284–301; Tunkābunī, *Qiṣaṣ al-ʿulamāʾ* (repr. Shiraz, 1964), 406–10; al-Amīn, *Aʿyān al-shīʿāh*, 8: 213–19; al-Thaʿālibī, *Tatimmat al-yatīmah*, vol. 1, 53–6; al-Khaṭīb al-Baghdādī, *Tārīkh Baghdād*, 11:402–3; Ibn al-Jawzī, *al-Muntaẓam*, 15:294–300; al-Ḥamawī, *Muʿjam al-udabāʾ*, 4:76–82; Muḥyī al-Dīn, *Adab al-Murtaḍā*; Devin J. Stewart, *Islamic Legal Orthodoxy*, passim; al-Maʿtūq, *al-Sharīf al-Murtaḍā.*

attack, primarily from the Sunnis, while also engaging in polemics with other Shīʿī groups and other schools of thought. Intense intellectual grappling and debate during the Buyid period led to the selective adoption of theological and juridical doctrines originally developed in Sunni Islam as well as to the formation of innovative doctrines designed to thwart Sunni criticisms. Chief among such developments were the adoption of the rationalist theology of the Muʿtazilīs with some modifications, including the retention of traditional Twelver positions on the Imamate, and the development of the Twelver concept of legal consensus, which allowed them to counter the argument, on the part of Sunnis, that Shīʿīs violated the consensus of the doctors of the law on many discrete issues and were therefore heretics. Al-Sharīf al-Murtaḍā was one of the chief architects of both of these developments, while at the same time playing an important role, as a high official, member of the nobility, and wealthy and influential representative of the Shīʿī community at large, in the socio-political battle over the place of Shīʿīsm in the public sphere that was being waged in the streets of Baghdad and other major Islamic cities.

Little is known of the Shīʿī educational institutions of this period, except that they were somewhat more private and less formal than their Sunni counterparts. Al-Shaykh al-Mufīd taught in a mosque near his house, and his son-in-law Abū Yaʿlā Muḥammad b. al-Ḥasan b. Ḥamzah al-Jaʿfarī (d. 463/1071) is held to have taken over his teaching circle after his death.[13] This may have been a *masjid-khān* complex, a mosque with an adjacent inn to lodge out-of-town students that, Makdisi has argued, is the precursor to the *madrasah* or college of law. Al-Sharīf al-Murtaḍā's wealth was such that his house may have served as the venue for his lessons. He lived first on al-Ṣurāh Canal but, when his house there was burned in 415/1024, moved to Darb Jamīl.[14] It is clear that he provided stipends for students. He is reported to have granted al-Shaykh al-Ṭūsī, who may have served as his assistant, a stipend of twelve dinars per month and ʿAbd al-ʿAzīz b. al-Barrāj (d. 481/1088) a stipend of eight dinars per month.[15] He is also reported to have allocated the annual income from three villages to buy paper for his law students.[16] The system of legal study that developed during this period would, despite its relative informality, survive centuries of Shīʿī exclusion from political rule until substantial support was again

[13] al-Najāshī, *Kitāb al-rijāl*, 206–7.
[14] Ibn al-Jawzī, *al-Muntaẓam*, 15:171.
[15] al-Iṣfahānī, *Riyāḍ al-ʿulamāʾ*, 3:142; 4:23, 30.
[16] Ibid., *Riyāḍ al-ʿulamāʾ*, 4:21–3, 30.

available in the eighth/fourteenth century under the rule of the Ilkhan Öljeytü (r. 703–17/1304–17) and the Sarbadarid (1336–1381), Qaraqoyunlu (1380–1468), and Safavid (1501–1722) dynasties.

The unprecedented presence of Shīʿī thought, doctrine, ritual, and behavior in the public sphere led to a spirited backlash from conservative Sunnis, including not only the populace at large but also scholars and actors with political power who sought to limit the presence of Shīʿī doctrine in public discourse if not entirely remove it. The disputes over the place of Shīʿism—as well as Muʿtazilism—in the public sphere were intense, particularly in Baghdad, and reached all levels, including that of street gangs and even sports; opposing throngs of Shīʿī and Sunni spectators would gather to witness the races of two renowned postal runners, Faḍl and Marʿūsh, a Shīʿī and a Sunni. Contestation over the public presence of Shīʿī Islam was seen in a variety of arenas, including the performance of Islamic ritual in the Shīʿī manner. Distinctive Shīʿī forms of the call to prayer, such as the replacement of *al-ṣalāt*^{u} *khayr*^{un} *min an-nawm* ("Prayer is better than sleep"), held to be a heretical innovation of ʿUmar b. al-Khaṭṭāb, with the phrase *ḥayya ʿalā khayr*^{i} *l-ʿamal* ("Come to the best of works"), were championed by the Shīʿīs and irked many Sunnis. Disputes often broke out over the choice of prayer leader at the Burāthā Mosque, the main mosque in Karkh, the Shīʿī quarter of Baghdad. Riots often broke out in connection with the celebration of the distinctive Shīʿī holy days, ʿĀshūrāʾ on 10 Muḥarram and ʿĪd al-Ghadīr on 18 Dhū al-Ḥijjah, and Sunni groups instituted competing Sunni holy days held one week later. The inhabitants of Karkh would hang up plaques on which appeared the message *Muḥammad wa-ʿAlī khayr al-bashar wa-man ankar fa-qad kafar* ("Muḥammad and ʿAlī are the best of mankind, and whoever denies this is an unbeliever"). In Baghdad the rivalry pitted the Shīʿī inhabitants of the quarter of Karkh on the West Side against neighboring Sunni quarters. The Shīʿīs had the backing of the Buyid rulers and the Daylami soldiers, while the Sunnis had the backing of the Abbasid caliphs, especially the Caliph al-Qādir, and the Turkish soldiers. Each side had its scholars, preachers, and rabble-rousers.

According to an anecdote recorded long after his death, al-Sharīf al-Murtaḍā took part in a financial transaction that would have an enduring effect on the relationship of Twelver Shīʿīsm to Sunni Islam and the fabric of Islamic society. During the time of the Abbasid caliphs the Sunnis were dismayed at the proliferation of schools of Islamic law, a situation that had made legal affairs unmanageable, and sought to limit their number. They determined to recognize only a limited number of schools

of law as legitimate, following the example of the Christians, who had agreed upon the Gospels of Matthew, Mark, Luke, and John, declaring all other gospels invalid, in order to put some order to the confusion of opinions and proliferation of gospels that had occurred after the time of Christ. The Sunni leaders agreed to decide the issue on a financial basis by requesting from each existing legal school the sum of two million *dirham*s.[17] In exchange, they would recognize that particular school as valid. Representatives of the four well-known Sunni legal schools—the Ḥanafīs, Shāfiʿīs, Mālikīs, and Ḥanbalīs—were able to pay the sum because of the large number and wealth of their followers, but the Shīʿīs could not raise the necessary funds. At this point, al-Sharīf al-Murtaḍā offered to pay half the sum himself and asked the rest of the Shīʿī community to pay only the remaining half of the fee. Even so, they were still unable to raise the necessary funds, and, as a result, the four Sunni schools of law were recognized as legitimate and included in the consensus of legal opinion, while the Jaʿfari *madhhab*, the legal school of the Shīʿīs, was excluded.[18]

Though doubtless apocryphal, the account nevertheless brings to the fore issues that al-Sharīf al-Murtaḍā addressed in his life and work as a jurist and leader of the Shīʿī community. This explanation of the historical exclusion of the Jaʿfarī *madhhab* from consensus contains several anachronisms. As noted, use of the term Jaʿfarī to designate the Twelver Shīʿīs' legal school developed after al-Sharīf al-Murtaḍā's time, perhaps centuries later. In addition, according to many jurists of this period, including al-Sharīf al-Murtaḍā, there were not just four extant Sunni *madhhab*s, but rather six, including the Ẓāhirī and Jarīrī *madhhab*s. Nevertheless, the account reflects a number of salient truths about al-Sharīf al-Murtaḍā and

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[17] The text reads *ālāf alf min al-darāhim wa'l-danānīr* or "millions of dirhams and dinars." Since the rest of the story implies that the sum in question is specific and not indeterminate or incalculably large, this must be a copyist's error for *alfay alf* (two million). It remains odd that both dirhams and dinars are mentioned; perhaps the more valuable dinars were originally intended.

[18] al-Iṣfahānī, *Riyāḍ al-ʿulamāʾ*, 4:33–4. A version of this story is presented in the nineteenth-century biographical collection of Muḥammad Tunkābunī, *Qiṣaṣ al-ʿulamāʾ*, 406–7, and the latter is paraphrased in English in Dwight M. Donaldson, *The Shiʿite Religion*, 387. Tunkābunī's account mentions "the sultan of the time" rather than the caliphs or the leaders of the Sunnis, and gives the sum required for admission as 200,000 tomans, of which al-Sharīf al-Murtaḍā offered 100,000. Obviously al-Murtaḍā and his contemporaries in Iraq would not have reckoned in terms of tomans, a Persian measure, but Tunkābunī presumably has converted the sum into tomans using the equation 1 toman = 10 dinars. Tunkābunī's account also suggests that the four Sunni *madhhab*s are already established and that the exorbitant sum is demanded of the Shīʿīs only. It appears that Tunkābunī was not citing *Riyāḍ al-ʿulamāʾ* but some other version of the same story.

the role that he played in the history of Shīʿī Islam. He was an important leader of the Shīʿī community, representing them to the Abbasid caliphs and the Buyid sultans on many occasions. In part through his noble ancestry—through descent from a prominent family of Sayyids on his father's side and from a Zaydī Imam on his mother's—he was also fabulously wealthy, owning vast estates accumulated over many generations. The inclusion of the Imami school of law among the coordinate legal schools that enjoyed mutual acceptance among the Sunnis was indeed a burning issue of his day, and one with which he was intimately involved. Debate with Sunni jurists over this very issue was a crucial feature of his legal thought, and the presentation and justification of Shīʿī legal and theological positions to a Sunni audience was a major concern throughout his career. Thus, while the financial transaction described in the anecdote certainly did not take place, the account is historically insightful in placing the consolidation of the four Sunni legal schools in al-Murtaḍā's era and in stressing his vital role in the demand that the Twelver Shīʿī legal school be accepted by Sunni jurists on a par with the coordinate legal schools recognized by Sunni jurists.

The practical implications of the inclusion of Shīʿīs in the consensus of Muslim jurists may be seen in the events of 394/1003–4, when, in an unprecedented development, an Imami Shīʿī—al-Sharīf al-Murtaḍā's father—nearly became the chief judge of Baghdad and holder of the highest judicial post in the realm. That year, the Buyid sultan Bahāʾ al-Dawlah (r. 379–403/989–1012) appointed Abū Aḥmad al-Mūsawī to a number of positions: marshal of the Alid sayyids, leader of the pilgrimage caravan, overseer of the grievance council, and chief judge (*qāḍī al-quḍāh*). The Sultan had a diploma of investiture drawn up to this effect at his court in Shiraz, granting Abū Aḥmad in addition the honorific title al-Ṭāhir Dhū al-Manāqib ("the Pure One, Possessor of Virtues"). When the diploma was delivered to the Abbasid Caliph al-Qādir (r. 381–422/991–1031) for approval, he recognized all of the appointments except one, refusing to endorse the appointment of Abū Aḥmad as chief judge.[19] The historical sources do not explain the grounds for al-Qādir's refusal to recognize this appointment, but he—and his Sunni advisors—very likely objected that the Twelver Shīʿīs did not have a legitimate legal tradition on a par with

[19] Ibn al-Athīr, *al-Kāmil fī al-tārīkh*, 9:182. Perhaps as a result of a garbled transmission of this account, the modern Shīʿī biographer al-Nūrī reports that al-Sharīf al-Murtaḍā served as *qāḍī al-quḍāh* or chief judge for thirty years. Al-Nūrī, *Mustadrak al-wasāʾil*, 3:516. Neither al-Murtaḍā nor his father served as *qāḍī al-quḍāh*.

the Sunni legal *madhhab*s. Al-Qādir aimed to exclude the Shīʿīs and the Muʿtazilis from participation in the elaboration of Islamic law and theology. The most public demonstration of this was his promulgation of the Qādirī creed, which included statements directed against both the Shīʿīs and the Muʿtazilis, promulgated on several occasions during his long reign as caliph, beginning with 408/1017 and 409/1018, and later by his son and heir al-Qāʾim (r. 422–67/1031–75).[20] While Shīʿīs had made significant strides in improving their status under Buyid rule, systematic discrimination remained with regard to Islamic law. In the more general view, the place of Shīʿism in the public sphere was at stake. Would displays of distinctive Shīʿī religiosity be tolerated and accepted by the government and the public or not? Would Shīʿīs be publicly recognized as having the same rights and status as Sunnis?

Scholarship

Al-Sharīf al-Murtaḍā wrote a number of works devoted to law and legal theory. These include a large number of *fatwā*s—answers to legal and theological questions sent to him from various cities in Syria, Iraq, Iran, and elsewhere; *al-Jumal* (The Propositions, on Law), a concise epitome of the law; *al-Intiṣār* (The Vindication), on distinctive positions of the Twelver Shīʿīs on legal questions; and *al-Nāṣirīyāt* (The Legal Opinions of al-Nāṣir), a commentary on a legal work by one of his maternal ancestors. His works on *uṣūl al-fiqh* include a number of short treatises and the substantial manual *al-Dharīʿah ilā uṣūl al-sharīʿah* (The Path to the Sources of the Sacred Law). One of the main sources for al-Sharīf al-Murtaḍā's bibliography is a catalogue drawn up and included in an *ijāzah* to one of his students, al-Buṣrawī. The importance of al-Buṣrawī's catalogue is that it gives an apparently comprehensive list of al-Murtaḍā's writings at a precise point in time—Shaʿbān 417/17 September-15 October 1026, the date when the *ijāzah* was granted. One may therefore state with some certainty that the legal works listed here were composed before that date, which is of some utility given that few of the works have surviving colopha or can be securely dated otherwise. In addition, one may tentatively assume that the other texts that al-Murtaḍā is known to have authored but which are not mentioned here date to the later years of his life, between Shaʿbān

[20] Makdisi, *The Rise of Humanism*, 8.

417/September–October 1026 and his death in 436/1044. Nevertheless, the catalogue as it has been transmitted presents some textual problems. There are several lacunae, and one can only speculate how they came about. Several of the titles appear to be corrupt. For example, *al-Dhakhīrah fī uṣūl al-fiqh* is not one of al-Murtaḍā's titles, but a jumbled combination of two: he wrote a work on theology with the title *al-Dhakhīrah fī uṣūl al-dīn* (The Treasure, on Theology), as well as *al-Dharīʿah ilā uṣūl al-sharīʿah*, his work on jurisprudence. Al-Buṣrawī must have originally listed the former work, *al-Dhakhīrah fī uṣūl al-dīn*. Al-Sharīf al-Murtaḍā wrote *al-Dharīʿah ilā uṣūl al-sharīʿah* at a later date, in 430/1038–39; it is one of the main works that does not occur in the list.

Debate with Sunni scholars and reactions to Sunni doctrines and ideological attacks had profound effects on the development of Shīʿī Islam in the fields of theology, law, and *ḥadīth* and led to the adoption of many originally Sunni concepts and doctrines, and this is a salient feature of the works of al-Shaykh al-Mufīd, al-Sharīf al-Murtaḍā, and al-Shaykh al-Ṭūsī. All three studied Muʿtazili theology in Baghdad and adopted many of its doctrines. Al-Shaykh al-Mufīd's professor in theology was the Muʿtazilī theologian and Ḥanafī jurist Abū ʿAbd Allāh al-Ḥusayn b. ʿAlī al-Baṣrī, who died in Baghdad in 369/979. Abū ʿAbd Allāh taught many scholars who belonged to different legal schools, and he is said to have instructed al-Qāḍī ʿAbd al-Jabbār (d. 415/1024) to continue studying Shāfiʿī law and not join the Ḥanafīs so that the Muʿtazilis might have a representative in that *madhhab*. This account may not be far from the truth, for Abū ʿAbd Allāh is known to have had Ḥanafī, Zaydi Shīʿī and Twelver Shīʿī students as well. He may have encouraged his students to "infiltrate" the various legal *madhhab*s with Muʿtazili theological views, or intended to spread support—or perhaps protection—for Muʿtazilism by teaching students from various legal backgrounds.[21]

Sunni legal and theological scholarship in general and Muʿtazilism in particular profoundly influenced al-Sharīf al-Murtaḍā in both theology and in legal theory. His important work on theology, *al-Dhakhīrah*, written largely along Muʿtazili lines, includes such fundamental doctrines as the justice of God. He adopted the Muʿtazili position that the Qurʾān is created and not eternal, though he refrained from applying the specific term *makhlūq* to the sacred text on the ground that it has negative

[21] Ibn al-Murtaḍā, *Ṭabaqāt al-Muʿtazilah*, 112; George Makdisi, "The Juridical Theology of Shāfiʿī," 5–47, esp. p. 22.

connotations. He also reports, in the introduction to *al-Dharīʿah ilā uṣūl al-sharīʿah*, that he taught al-Qāḍī ʿAbd al-Jabbār's *al-ʿUmad* many times to his students.[22] *Al-ʿUmad*, unfortunately not extant today, was the standard work of Muʿtazili jurisprudence of his time. Al-Sharīf al-Raḍī reports that he studied *al-ʿUmad* directly with al-Qāḍī ʿAbd al-Jabbār,[23] and his brother may have done so as well. The fact that al-Murtaḍā taught al-Qāḍī ʿAbd al-Jabbār's work, presumably to Shīʿī students, attests to his willingness to draw on other traditions, even in doctrinally marked fields.

In fact, *al-Dharīʿah ilā uṣūl al-sharīʿah*, which al-Murtaḍā completed in 430/1038–39, was in all likelihood based on *al-Muʿtamad* of al-Qāḍī ʿAbd al-Jabbār's student Abū al-Ḥusayn al-Baṣrī (d. 436/1044),[24] while al-Ṭūsī's manual of jurisprudence, *al-ʿUddah fī uṣūl al-fiqh*, which he first published in the 420s/1030s, was probably modeled on *al-ʿUmad*. The close connection between *al-ʿUmad* and *al-ʿUddah* is suggested particularly by comparison of the introductions to *al-Muʿtamad* and *al-Dharīʿah*. Abū al-Ḥusayn al-Baṣrī takes al-Qāḍī ʿAbd al-Jabbār to task for including an introduction to epistemology and other theological topics in his work, which he criticizes on the grounds that they violate the conventions of the *uṣūl al-fiqh* genre. *Al-Dharīʿah* contains a nearly identical statement that must address al-Shaykh al-Ṭūsī's *al-ʿUddah fī uṣūl al-fiqh*, though al-Sharīf al-Murtaḍā refers neither to al-Ṭūsī nor to *al-ʿUddah* explicitly. This gives some idea of the intense contact between the Twelver Shīʿīs and the Muʿtazilis and also the tremendous influence of Muʿtazilism on the development of Shīʿī jurisprudence during this formative period. Al-Sharīf al-Murtaḍā and others were certainly drawn to Muʿtazili thought by its sophisticated rational arguments. In addition, the refusal of many Sunnis to teach Shīʿī students or debate their scholars pushed them toward the Muʿtazilis, who were already marginalized to some extent by the Sunni mainstream and were willing to debate, teach, and interact with Shīʿīs.

At stake in the debates of the late 4th/10th and early 5th/11th centuries was potential exclusion from the interpretive community that defined Islamic orthodoxy in law as well as theology. The Shīʿīs needed to establish their right to membership in the system of legal *madhhab*s that had

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[22] I had earlier suspected that this was a typographical error for *al-ʿUddah*, the title of al-Ṭūsī's manual of *uṣūl al-fiqh*, but I am now convinced that *al-ʿUmad* is the correct reading. Cf. Stewart, *Islamic Legal Orthodoxy*, 134–6.

[23] al-Sharīf al-Raḍī, *al-Majāzāt al-nabawīyah*, 139.

[24] This has been suggested by Marie Bernand, "Les *uṣūl al-fiqh* de l'époque classique: status quaestionis," *Arabica* 39 (1992): 273–86, esp. 283–5.

come into being in the course of the previous century in order to prevent this exclusion. One of the Shīʿīs' main arguments against exclusion was based on the theory of consensus. While the Sunnis claimed that a consensus had arisen to the exclusion of Shīʿī opinions, the Shīʿīs claimed that their opinions were every bit as legitimate as those of the Sunnis, and therefore should be considered to fall within the range of acceptable legal opinions. In other words, the consensus should include them and take their opinions into account. Al-Shaykh al-Mufīd, al-Sharīf al-Murtaḍā, and al-Shaykh al-Ṭūsī developed this argument and tied it to a specifically Twelver theory of consensus. Al-Sharīf al-Murtaḍā was thus one of the chief architects and proponents of this theory, which he explained in some detail in *al-Dharīʿah* as well as in other shorter treatises. It is also the main argument on which the material in *al-Intiṣār* is based, as he explains in the introduction to the work.

Al-Intiṣār (The Vindication)

Al-Murtaḍā probably wrote *al-Intiṣār* at the request of ʿAmīd al-Dawlah Abū Saʿd b. ʿAbd al-Raḥīm, who served as the vizier of Jalāl al-Dawlah Shīrzīl (416–35/1025–44) six times. Al-Murtaḍā mentions him in the introduction as "the Vizierial Presence, al-ʿAmīd." Al-Murtaḍā began the book before 417/1026, because it is included in al-Buṣrawī's catalogue, but he continued to work on it for a number of years, since he mentions *al-Intiṣār* in several other works from this period, including *Jawābāt al-masāʾil al-tabbānīyāt, Jawābāt al-masāʾil al-mawṣilīyāt al-thāniyah, and Jawābāt al-masāʾil al-mawṣilīyāt al-thālithah.* In the latter treatise, which he completed in 420/1029, he prays that God will enable him to complete *al-Intiṣār*. In sum, *al-Intiṣār* dates to approximately 417–420/1026–29, and the fact that he mentions *Jawābāt al-masāʾil al-mawṣilīyāt al-thālithah* in the introduction suggests that he completed it not long after 420/1029.[25]

Attention to the particular juncture at which *al-Intiṣār* was composed may help explain the impetus behind the work: it may have been written in response to specific restrictive measures taken by the Abbasid Caliph al-Qādir (r. 381–422/991–1031). At some point toward the end of his reign, al-Qādir commissioned four leading jurists to write four epitomes of law representing the four Sunni legal schools: the Ḥanafī, Shāfiʿī, Mālikī, and Ḥanbalī *madhhab*s. The Ḥanafī epitome was the *Mukhtaṣar* of al-Qudūrī

[25] Stewart, *Islamic Legal Orthodoxy*, 147–8.

(d. 428/1037); the Shāfiʿī epitome was the *Iqnāʿ* of al-Māwardī (d. 450/1058); and the Mālikī epitome was written by ʿAbd al-Wahhāb b. ʿAlī b. Naṣr al-Thaʿlabī al-Baghdādī (d. 422/1031). The title of the last work is not given, but ʿAbd al-Wahhāb's legal manual was probably his work *al-Talqīn*. Yāqūt al-Ḥamawī (d. 626/1229), who reports the anecdote, did not know who wrote the Ḥanbalī epitome, but Melchert suggests that it was the *Mujarrad* of al-Qāḍī Abū Yaʿlā (d. 458/1065). Al-Qādir must have commissioned these works before 422/1031, the year in which both al-Qādir and ʿAbd al-Wahhāb died. Since ʿAbd al-Wahhāb died in Egypt, having left Baghdad to pursue a more lucrative career there, the commission likely occurred somewhat earlier than 422/1031.[26] Even more than the Qādirī Creed, which included specific language excluding Shīʿīs and Muʿtazilis from the fold of legitimate scholars of the Islamic religious sciences, caliphal endorsement of these four law books served as a public declaration that the legitimate legal *madhhab*s had been limited to four. In contrast, the chapter devoted to law in the *Fihrist* of Ibn al-Nadīm, suggests the existence in 377/987 of eight legal *madhhab*s: Mālikī, Ḥanafī, Shāfiʿī, Dāwūdī or Ẓāhirī, Imami Shīʿī, Traditionalist (pseudo-Ḥanbalī), Khārijī, and Jarīrī.[27]

Al-Sharīf al-Murtaḍā's *al-Intiṣār* likely served as a riposte of sorts, a response to these four legal epitomes and the attempt to limit legitimate discourse on Islamic law to these four Sunni *madhhab*s, countering the message al-Qādir meant to send by commissioning them. Al-Sharīf al-Murtaḍā was probably not acting alone. His dedication, to ʿAmīd al-Dawlah, suggests that the vizier had asked him to pen the work in order to answer al-Qādir, and this may have been at the urging of the Buyid sultan himself. It was thus not simply a matter of an arcane debate among specialists, but part of a political struggle between the caliph and his conservative Sunni supporters, on the one hand, and the Buyid Sultan and his Shīʿī supporters, on the other. While the four epitomes sought to restrict the consensus, al-Sharīf al-Murtaḍā's work sought to widen it—not to do away with the system altogether, but to suggest that the Twelver legal tradition merited a place within the current system. The *Intiṣār* thus serves at the same time as the fifth, parallel legal epitome, representing

[26] It is likely that all four authors were serving as judges at the time al-Qādir commissioned the works. It may be possible, therefore, to set the date of the commission more precisely by determining their tenures as judges.

[27] See Stewart, "The Structure of the *Fihrist*," 369–87.

the Twelver legal *madhhab*, and as a strong rebuttal to the arguments used to exclude the Twelver legal tradition. The introduction to the work thus captures poignantly a particular moment in the history of Twelver Shīʿī thought. Although the Twelver Shīʿīs enjoyed an unprecedented degree of academic, social, and economic success, they nevertheless fell short of unmitigated acceptance, and their scholars felt compelled to put forward vigorous arguments denouncing their exclusion from orthodox Islam and the structures that discriminated against them.

Legal Questions from Mayyāfāriqīn

The *fatwā*s written by al-Sharīf al-Murtaḍā for his unnamed petitioners from Mayyāfāriqīn (now Silvan), west of Āmid (now Diyarbekir in modern Turkey), provide valuable insight into the social and ideological issues with which contemporary Twelver Shīʿīs were grappling. One interesting aspect of the text's introduction is its pointed reference to the border with the Christian Byzantines. The petitioners suggest that, in this outlying area, far from the main centers of Islamic learning and close to the territory of the Christian enemy, it is extraordinarily difficult to gain access to proper guidance regarding Islamic law and theology. In presenting the questions in this manner, the petitioners emphasized the Christian or infidel environment rather than explicitly referring to a Sunni majority, perhaps showing a tendency on the part of the petitioners to avoid stirring up conflict with Sunni neighbors. Nevertheless, Byzantine Christians are not the only group evident in the issues addressed by the *fatwā*s, and relations with Sunni Muslims are alluded to in many questions concerning legal points that distinguish between Sunni and Shīʿī tradition and that display Shīʿī identity in the public sphere. Relations with the Fatimids or Ismāʿīlīs also appear. Other topics of importance include doctrine concerning the status and attributes of the Imams as well contemporary Shīʿī religious authority.

The *fatwā*s are not dated, nor are the petitioners identified. The *ijāzah* of al-Buṣrawī reports a text titled *al-Masāʾil al-Mayyāfāriqiyyah*, so the *fatwā*s presumably date from before 417/1029. Al-Buṣrawī notes that the text included one hundred questions, while the text translated here contains only sixty-six. It is possible that al-Sharīf al-Murtaḍā answered several sets of questions from this town, as he did with questions from Mosul, Aleppo, and other cities, but the introduction to this text suggests that it was an initial set of questions and not an additional petition.

It therefore seems likely that this is the text mentioned by al-Buṣrawī, and either that he was mistaken about the number of questions or that the remaining questions have been lost in the course of textual transmission.

Al-Sharīf al-Murtaḍā wrote many *fatwā* treatises, and they show the extent to which he was a recognized authority in an international network that crossed political borders. He was recognized as an authority for Shīʿīs in Iraq, northern Syria, and Fatimid territory, including Palestine and Egypt. His works include answers to questions not only from cities in Iraq such as Mosul and Wasit, but also from cities in Iran such as Ṭūs, from many cities in Palestine and Syria, including al-Ramlah, Tiberias, Damascus, Tripoli, and Aleppo, and also from Egypt, presumably Fustat. It is interesting to note the number of questions coming from Syria. This may suggest that al-Sharīf al-Murtaḍā had a particularly devoted following there. More significant, though, may be the fact that his students were able to find positions as judges in areas under Fatimid rather than Abbasid rule. It is known, for example, that his students Abū al-Fatḥ al-Karājikī (d. 449/1057) and ʿAbd al-ʿAzīz Ibn al-Barrāj (d. 481/1088) served as judges in al-Ramlah, Tiberias, and Tripoli, and it seems likely that many of the questions to which al-Murtaḍā responded may have been relayed to him from local petitioners by his students.

The *fatwā*s shed some light on the authority of Shīʿī jurists during the Occultation of the Twelfth Imam. This phenomenon posed a doctrinal problem for Shīʿī law and theology: on the one hand, the Imam is held, in very strong and explicit terms, to be the one legitimate authority in the faith; on the other hand, the doctrine of the Occultation, as it had become firmly established by al-Sharīf al-Murtaḍā's time, dictated that it was impossible to contact the Imam directly, as he was circulating in the Muslim community incognito. Of particular interest in this text is the question whether Shīʿī laymen are permitted to consult books of legal rulings in the absence of qualified jurists. In the introduction to the *fatwā*, the petitioners report that answers to most of the questions asked can be found in Shīʿī legal works but that they prefer to have al-Sharīf al-Murtaḍā's answer. The statement suggests flattery but probably reflects the understanding of an obligation to consult a living jurist. In question no. 14, the petitioners ask about three books that the Shīʿīs of Mayyāfāriqīn were apparently already using as legal references, which they call the treatise of Ibn Bābawayh, the book of ʿUbayd Allāh al-Ḥalabī, and the book of al-Shalmaghānī. In several later questions, the petitioners refer to the law book *Kitāb al-Taklīf*; this was evidently al-Shalmaghānī's work.

Muḥammad b. ʿAlī b. Abī al-ʿAzāqir al-Shalmaghānī was an agent of Ḥusayn b. Rawḥ al-Nawbakhtī (d. 326/937–38), the third representative of the occulted Twelfth Imam. When al-Nawbakhtī was jailed, al-Shalmaghānī claimed to be the representative of the Twelfth Imam in his own right. When he was denounced by al-Nawbakhtī for heresy and preaching divine incarnation, he fled. He was subsequently apprehended by Abbasid authorities and executed in 323/934. Because the Twelver authorities had rejected al-Shalmaghānī, al-Sharīf al-Murtaḍā advises against consultation of his book in particular. However, al-Shalmaghānī's work would later be rehabilitated during the Safavid period by suppression of his authorship and replacement of the title *Kitāb al-Taklīf*. Instead, the work was identified as *Fiqh al-Riḍā* and presented as containing the legal opinions of the Eighth Imam.[28]

The Twelver scholar of *ḥadīth* and theology Ibn Bābawayh al-Qummī (d. 381/991), who was active in Iran in the tenth century, is best known for compiling *Man lā yaḥḍuruhu al-faqīh*, one of the four canonical collections of Twelver Shīʿī ḥadīth. The "treatise" discussed here may be *ʿUyūn akhbār al-Riḍā*, a work that contains legal opinions of the eighth Imam.

ʿUbayd Allāh al-Ḥalabī (fl. second/eighth century) was a Twelver jurist and native of Kufa who traded regularly, along with his brothers, in Aleppo. His work is considered one of the earliest systematic law books in the Twelver tradition, and the Ismāʿīlī jurist al-Qāḍī al-Nuʿmān (d. 363/974) drew on the work for his major legal compendium *al-Īḍāḥ*.[29] While al-Ḥalabī's book was certainly a standard reference by the fourth/tenth century, the connection with Aleppo and the very early date suggest that the attribution may be false and that the work may actually date from a later period.

The question about *khums* ('the Fifth'), a tax traditionally paid to the Imam (no. 66), not only represents an issue of contention with the Sunnis, who restrict it to booty and the income from mines and such, but also relates to a crucial issue in the history of Twelver Shīʿī religious authority. After the Occultation of the Imam, it was not clear who had control over *khums* funds, and it eventually became accepted that the jurists could legitimately collect and administer them. Al-Sharīf al-Murtaḍā's answer does not address this question directly, but the fact that he discusses the division of funds without direct reference to the Imam or anyone else

[28] See *al-Fiqh al-mansūb li'l-Imām al-Riḍā wa'l-mushtahir bi-Fiqh al-Riḍā*.
[29] Modarressi, *Tradition and Survival*, 380–2.

leaves one to assume that Twelver jurists are qualified to undertake the responsibility.

Located in the Marches (*al-thughūr*) on the Byzantine frontier, Mayyāfāriqīn was affected by the constant border warfare between Byzantium and various Islamic states and was thus a site of intense contact between Muslims and Christians. The petition reflects this environment in several questions, particularly those regarding the effect of a Christian husband's conversion to Islam on his existing marriage and the permissibility of purchasing Christian women and having intercourse with them as slave-concubines.

Many of the questions treat distinct Shīʿī positions on points of law, particularly those that are polemical issues between Shīʿīs and Sunnis. They do not explicitly name Sunnis as a group, but rather refer to 'our opponents'; it is nevertheless clear that Sunnis are intended, and the questions reveal something about the issues that Shīʿīs grappled with in their daily lives. A number of these have to do with the public display of Shīʿī religiosity, and one assumes that they feature prominently here because of actual societal conflicts over such visible practices. Questions on prayer figure prominently (nos. 1–12, 15–16): the permissibility of praying behind a Sunni prayer leader; holding Friday prayer; combining the noon with the afternoon prayer and the sunset with the evening prayer, a regular Shīʿī practice; the prayer of standing (*qunūt*); the manner and order of ablutions; and the wording of the call to prayer. Shīʿī practices that differed visibly from customs of Sunni Muslims with whom the Shīʿīs were praying raise the issue of dissimulation, the extent to which it should be used, and the manner in which it should be executed. The questions suggest that dissimulation was in fact a common practice among Shīʿīs in this region, and that relations with Sunnis were tense. At least, public displays of Shīʿī religiosity may have been limited or likely to cause friction. Al-Murtaḍā confirms that the statement *al-ṣalātᵘ khayrᵘⁿ min al-nawm* ("prayer is better than sleep") inserted by Sunnis into the call to dawn prayer was a heretical innovation and should not be used (no. 15). The phrase *ḥayya ʿalā khayrⁱ l-ʿamal* ("Come to the best of works") should be included in its place (no. 16). One indication of the salience of this topic in Sunni-Shīʿī relations is the fact that in 543/1148, after capturing Aleppo, the Zengid ruler Nūr al-Dīn (r. 541–69/1146–74) banned the distinctive Shīʿī call to prayer as part of a larger program for the exclusion of overt Shīʿī religiosity from the public sphere. Shīʿīs had apparently developed a custom of inserting as well, after *ḥayya ʿalā khayrⁱ l-ʿamal*, the phrase *Muḥammadᵘⁿ wa-ʿAliyyᵘⁿ khayrᵘ l-bashar*—the rhetorical link being the

word *khayr* 'best'—but al-Murtaḍā answers that while this is theologically correct, it is not part of the call to prayer (no. 16). Public proclamation of this statement would naturally have caused tension with the Sunnis, particularly if it were used in the call to prayer, for it directly contradicted the Sunni doctrine that the merit of the first four Caliphs—Abū Bakr, ʿUmar b. al-Khaṭṭāb, ʿUthmān, and ʿAlī b. Abī Ṭālib—followed the historical order of their tenures. Al-Murtaḍā writes, for example, that prayer behind a Sunni prayer leader does not fulfill one's obligation to worship correctly, with the result that if one is constrained to do so, one must make up the prayer afterward.

Some questions address Sunni-Shīʿī polemics over the status of the Companions, a major polemical crux related to the issue of the Imamate. Since 329/941, the Twelver Shīʿīs' Imam was in Occultation, and thus of little threat to the rule of current Sunni caliphs or sultans. The Imamate and the status of the Companions became historical, theological issues. It was in fact doctrinal infractions in the latter area—blasphemy against the Companions—that most frequently caused Shīʿīs to be publicly accused of heresy, incarcerated, flogged, exiled, or executed. Termed *rafḍ*, literally 'rejection', or *sabb al-ṣaḥābah* ("insulting the Companions"), *laʿn al-ṣaḥābah* ("cursing the Companions"), or *sabb al-shaykhayn* ("insulting the two 'old men' [Abū Bakr and ʿUmar]"), this issue caused continual friction between Sunni and Shīʿī communities, and was especially likely to flare up in connection with the commemoration of ʿĀshūrā', the annual marking of the martyrdom of the Prophet's grandson Ḥusayn, and consequent discussions of the historical oppression of the Prophet's descendants. It is thus surprising neither that the question arises in the *fatwā*s nor that it is couched in oblique terms. One question asks about the status of the commander of the army at the Battle of the Camel (no. 23). The commander mentioned is the Prophet's wife ʿĀ'ishah, but her name is avoided, probably more as a measure of circumspection than an expression of disrespect. Because she battled openly against ʿAlī, the rightful leader of the Muslim community, Shīʿī doctrine labels her an outright unbeliever, a view unacceptable to Sunni Muslims, who revere her as "the Mother of the Believers." A related polemic issue that arises is that of the marriage of ʿAlī's daughter Umm Kulthūm to the second caliph, ʿUmar b. al-Khaṭṭāb (no. 37). One of the strongest pieces of evidence against the Shīʿī claim that ʿAlī's rightful position as successor to the Prophet was usurped by Abū Bakr and ʿUmar b. al-Khaṭṭāb is the fact that ʿAlī married his daughter to ʿUmar. If ʿAlī were indeed the sworn enemy of Abū Bakr and ʿUmar, who had usurped his position, why would he have allowed a marriage

alliance to be concluded between them? It would seem, if the account is genuine, that he accepted ʿUmar's authority and envisaged increasing his chances of succeeding ʿUmar as caliph by cementing this tie.

Dissimulation (*taqiyyah*) has been a major facet of Shīʿī relations with the Sunni majority in many Muslim societies in reaction to regular discrimination and occasional persecution. Al-Sharīf al-Murtaḍā mentions *taqiyyah* explicitly with regard to the wearing of rings, opining that a ring should be worn on the right hand, except out of dissimulation (no. 40). He is referring here to a widespread opinion among the Sunnis that rings should be worn on the left hand, in imitation of the Prophet's *sunna*, for it is reported in Sunni *ḥadīth* that the Prophet wore his signet ring on the little finger of his left hand. Though the Shāfiʿīs apparently preferred the right hand, Ḥanbalī, Mālikī, and Ḥanafī jurists held that the left is preferred, and some Sunni texts state that it is *makrūh* (discouraged) to wear it on the right hand.[30] The wearing of rings on the right hand evidently became associated with Shīʿī identity. The better-known opinion in the Shāfiʿī school, al-Nawawī notes, is that rings should be worn on the left hand; wearing it on the right has become a sign of the *Rāfiḍah.*[31] The high visibility of wearing rings caused them to be subject to dissimulating behavior, like the manner of performing ablutions or prayer.

Topics of legal dispute between Sunnis and Shīʿīs addressed in the *fatwā*s include inheritance, and the answers generally stress the lack of advantage of the agnate group—i.e., the brothers of the deceased—in Shīʿī inheritance law, in contrast to their important role in Sunni inheritance. According to al-Murtaḍā, there is no basis whatsoever in the sources for the Sunni position on the agnates (*ʿaṣabah*). Another disputed topic was that of anal intercourse, which is prohibited by Mālik and other Sunni authorities, but is permitted according to al-Murtaḍā, in keeping with the traditional position of the Shīʿīs (no. 56). The dispute has its origin in the interpretation of Q. 2:62: "Your wives are your tilth; come to your tilth as you will." Those who prohibit anal intercourse understand this to mean that one may engage in vaginal intercourse from behind, but insist that the verse does not endorse anal intercourse. Discussions of the legal status of barley beer (*fuqqāʿ*) (no. 43) presumably reflect debates with Sunni Muslims who cited Ḥanafī legal texts, which accept as permissible

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30 al-Bājī, *al-Muntaqā*, 7:256.

31 al-Nawawī, *al-Majmūʿ* (Cairo, 1925–29), 4:462.

alcoholic drinks not made from grapes, as well as local customs. Shīʿī law concurs with Jewish law in forbidding the consumption of rabbit (no. 42), though it is allowed according to Sunni law.

Questions about praying for Sunni relatives (no. 34), giving alms to Sunnis (no. 35), and contracting temporary marriage (*mutʿah*) with Sunni or *dhimmī* women (no. 44) suggest that local society had witnessed intermarriage between Sunnis and Shīʿīs and conversion of Sunnis to Shīʿīsm. Al-Sharīf al-Murtaḍā's responses hinge on categorizing Sunnis as unbelievers and thus illegitimate recipients of inheritance or alms, and he insists in general that marriages ought to be contracted with "believing" women, meaning Shīʿīs. Nevertheless, in the last instance, in cases of dire need due to a dearth of available Shīʿī women, he does allow marriage to Sunni women. He does not explicitly condone the intermarriage that has evidently occurred in Mayyāfāriqīn, but this response leaves something of a loophole for husbands who have married Sunni wives to claim that their marriages are not in fact adulterous and that their children are legitimate.

The status of the Imams was a matter of considerable controversy in Islamic theology in general and particularly in polemics between the various Shīʿī sects, including Twelvers, Zaydis, Ismāʿīlīs, and "extremists" (*ghulāh*). A number of the questions relating to theology (nos. 17–26) and imamology in particular may be related to debates between Twelvers and Ismāʿīlīs. During this period, the Fatimid Caliphate was a major power in the region: from the 360s/970s on, the Fatimids controlled not only Egypt but also the Hijaz and the Levant, including Palestine and large parts of Syria. In addition, Ismāʿīlī *dāʿīs* were active throughout Syria, Anatolia, Iraq, and Iran. There was tension between the Twelvers, Ismāʿīlīs, and Zaydis regarding the legitimacy of each group's view of the Imamate and regarding specific aspects of each group's legal rulings and points of doctrine, and it is widely believed that the Ismāʿīlīs were more successful at converting other Shīʿīs—both Twelvers and Zaydis—than at converting Sunnis. It was also widely believed that the Ismāʿīlīs entertained extremist views of the Imams, including that they were superior to prophets, divine, or capable of suspending or overriding Islamic law. Questions here regarding the knowledge, powers, and relative status of the Imams resonate with discussions in many Shīʿī works, including the section on the Imamate in *Daʿāʾim al-Islām*, the major legal work penned by al-Qāḍī al-Nuʿmān (d. 363/974) to serve as the fundamental reference work on Ismaʿili law, in which he took pains to answer critical views of the Ismāʿīlīs' Imamology.

There, he insists, against the extremists, that the Imams are neither gods, nor angels, nor prophets, but are mortal believers who are themselves subject to the strictures of Islamic law.[32]

The relative status of Ḥasan and Ḥusayn came up in polemics between Ismāʿīlīs, Twelvers, and Zaydis. The Zaydis recognized as a legitimate Imam any qualified descendant of Ḥasan or Ḥusayn who established a state, and a number of Ḥasanids ruled as the Imams of Zaydi states starting in the ninth century. The Ismāʿīlīs and the Twelvers, however, restricted the Imamate to descendants of Ḥusayn. Ismāʿīlīs accused the Twelvers of condoning an illegitimate or non-existent transfer of authority from Jaʿfar's son Ismāʿīl to his brother Mūsā, and stressed the need for the Imamate to be passed from father to son. The historical example of Ḥasan, however, provided a counter-example that could be used to justify the Twelvers' account of Mūsā's Imamate, for upon his death authority had passed to his brother rather than his sons. Perhaps for this reason, the Ismāʿīlīs tended to downplay Ḥasan's status as an Imam, a view that would culminate, after the Nizārī-Mustaʿlī split in the late fifth/eleventh century, in the Nizārī Ismaʿili claim that al-Ḥasan was not an Imam proper but rather a 'repository' (*mustawdaʿ*) or temporary holder of the position for his brother, Ḥusayn, the actual Imam. That it was a matter of concern when al-Sharīf al-Murtaḍā was writing is evident in al-Qāḍī al-Nuʿmān's discussion in *Daʿāʾim al-islām*, where he argues that although al-Ḥasan has precedence, Ḥusayn became more historically important because the Imamate moved to his descendants.[33] It is thus likely that the question regarding the relative status of Ḥasan and Ḥusayn results from actual debates with Ismāʿīlī *dāʿī*s or converts in the region, or with Zaydis.

Another question that related to Ismāʿīlīs or the Fatimids asks about the sighting of the moon to determine the end of the month of Ramadan. The Fatimids espoused the use of astronomical and mathematical methods for the determination of the beginning and end of Ramadan, as well as reliance on the decree of the Imam. These and other aspects of their celebration of the month of Ramadan and the breaking of the fast resulted in considerable controversy with their Sunni subjects, who insisted that the beginning and end of the month of Ramadan must be

[32] Al-Qāḍī al-Nuʿmān, *Daʿāʾim al-Islām*, 1:45–56.
[33] Ibid., 1:35–8.

based on the physical sighting of the moon.[34] This question suggests that similar debates took place between Ismāʿīlīs and Twelver Shīʿīs.

The questions from al-Mayyāfāriqīn suggest that Twelver Shīʿīs in this relatively remote setting near the border with the Byzantine Empire were engaged in a complex negotiation of their identities and social roles. They interacted not only with the Sunni majority but also with Christians, whose presence was colored by the ongoing warfare between Muslim and Christian powers, and with Zaydi and Ismāʿīlī Muslims. The fact that they sent their questions to al-Murtaḍā, despite their admittedly limited access to Shīʿī authorities, indicates a degree of integration into a long-distance network of Twelver Shīʿī religious authority, linking the periphery with major centers such as Baghdad; this network likely paralleled networks of administration and trade and perhaps coincided with mechanisms for the collection of *khums* funds. Al-Sharīf al-Murtāḍā's responses reflect his concern to support the public display of Twelver Shīʿī identity and religiosity and to defend traditional Twelver legal and theological positions, tempered by an awareness of the potential difficulties Shīʿīs might face from Sunni authorities or the public.

While arguing for the validation of Shīʿī views by the Muslim community at large, and by their scholars and authorities, al-Sharīf al-Murtaḍā is not very accepting of Sunni views, in either the responsa or in his legal work in general. This is particularly the case with theological views. The Companions who opposed ʿAlī b. Abī Ṭālib are unbelievers and destined for hell, despite the reverence in which Sunnis hold them. Sunnis in general are not believers and should not be treated as such, a consequence of their views on the Imamate. For this reason, Twelvers should not intermarry with Sunnis. In his responsa, though, al-Murtāḍā does suggest that this condemnation is not total: He proposes that it is in some cases acceptable to marry Sunni women who are not adamant in their opposition to Shīʿīsm. His views of Sunnis are more tempered when it comes to law, and in *al-Intiṣār* he presents the alternative views of Sunnis on specific legal questions without an outright condemnation. Nevertheless, this is for the sake of argument, in order to convince Sunni jurists that, according to their own rules, Shīʿī legal positions are acceptable. This does not necessarily entail that Sunni legal opinions are acceptable to the Twelver

[34] Rudolf Strothmann, "Recht der Ismailiten," 131–46; Robert Brunschvig, "*Fiqh* fatimide et histoire de l'Ifriqiya," 2:13–20; Daniel De Smet, "Comment determiner le début et la fin du jeune de Ramadan," 2:45–61.

Shīʿīs, though the format of *al-Intiṣār* presents them as *de facto* partners in legal debate on a more or less equal footing. Sunnis are not always wrong, though they are frequently misguided. Rather, they are occasionally correct—when they agree with the Shīʿīs—and often wrong—when they contradict them. Their consensus is valid when it coincides with Shīʿī consensus and wrong when it does not. Although these views seem to be pejorative and tantamount to a condemnation, the rhetorical and social effects of the Shīʿīs' position were often more positive than one might suppose. Despite theoretical condemnations of the majority, Shīʿī communities rarely attempted to break with the Muslim community that was historically dominated by Sunni Islam; they did not reject the Sunnis categorically or strike out on their own, but regularly chose integration into the Muslim community instead, clamoring for fair treatment when they enjoyed a strong social position and quietly avoiding conflict when they did not. Indeed, they saw themselves as the central anchors of the Muslim community that kept it from drifting away from Islam's fundamental truths and principles. Shīʿīs' adherence to this stance over the centuries suggests a fundamental understanding that Sunni Muslims are at least potential believers who may yet be saved by recognition of the Shīʿīs' example within their midst.[35] Al-Sharīf al-Murtaḍā's work as a legal thinker reflects this tension between defense of a minority's rights to acceptance and a conviction that the majority should reverse the historical abandonment and oppression of the Prophet's descendants and actually adopt Shīʿī views.

Translation I: Introduction to al-Intiṣār (The Vindication of Imami Legal Rulings)[36]

Praise be to God for leading us to the truth and for fending off heretical falsehood, for guiding us to proof and for keeping error and ignorance away from us. May He bless the best and the most virtuous and perfect[37] of the prophets, as well as the noble and learned among his family, who pursued his path and followed in his footsteps, preserving his law from substitution or change,[38] specifying its indeterminate points, explaining its difficult

35 On this idea, see Dakake, *The Charismatic Community*.

36 al-Sharīf al-Murtaḍā, *al-Intiṣār*, 1–7.

37 Al-Kharsān notes that the original copy has *akmalihim*, which he emends to *akramihim*. I do not see that this is necessary; the first term fits the context just as well.

38 The rhymed prose of this passage suggests that there is a lacuna at this point, because one would expect the terms *sharīʿah* and *al-taghyīr* to be paired with similar terms in parallel rhyming cola.

problems, erecting its supports, and making its desired goals accessible—and grant him peace and greetings.

Now to the heart of the matter: I am hereby obeying the decree of the Exalted Vizierial Presence, al-ʿAmīd—may God prolong his rule, and ever exalt his worth and station—that I set forth the points of law on account of which the Imami Shīʿīs have been maligned and for which they have been accused of violating consensus.[39] On most of these issues the Shīʿīs agree with others among the ancient and modern scholars and jurists. Regarding those questions on which none of these other scholars concur with them, they have clear evidence and manifest proofs that allow them to forego the concurrence of someone who holds the same opinion, and along with which the opposition of a dissenter does not cause them discomfiture. He decreed that I elucidate this, set it forth in detail, and refute the specious argument that poses an objection to it. So here I begin the task, adopting such concision and brevity that do not harm understanding,[40] while avoiding such prolixity that would lead to boredom and annoyance. My success in this endeavor will be through God and no other; on Him I depend, and from Him I seek assistance and protection.

What must be presented first—and this is the basic principle from which the topic we address here derives and ramifies—is that condemnation is called for regarding the doctrine that has no evidence to support it and for which the professor has no proof, since the false doctrine is that which is bereft of proof and demonstration and devoid of proper evidence. However, the doctrine that is supported by evidence and backed up by proof is certain truth. Difference of opinion over it does not weaken it, nor does the small number of those who profess it, just as the former doctrine is not strengthened by agreement upon it or the great number of those who uphold it. The professor of a particular doctrine should be asked only about his evidence for the validity of his opinion and the proof that leads him to it, and not about who agrees with him or disagrees with him.

Moreover, each of the jurists of the great cities, without exception, professed doctrines regarding which he stood alone, while all of the other jurists professed the opposite view. How then are calumnious attacks allowed against the Shīʿīs for the opinions that they hold uniquely, while every other jurist who professed unique opinions that do not conform with those of the remaining jurists, such as Abū Ḥanīfah, al-Shāfiʿī, Mālik, and their successors, has not been thus condemned? What is the difference between[41] the

[39] Al-Kharsān suggests that the vizier indicated is Abū Naṣr Muḥammad b. Manṣūr, known as ʿAmīd al-Mulk al-Kundurī al-Nīsābūrī (d. 456/1064). However, this figure lived too late to have been al-Murtaḍā's patron, and, furthermore, served as vizier for the Seljuk rulers Tughril Beg and Alp Arslan. The correct figure must be a Buyid vizier, presumably ʿAmīd al-Dawlah Abū Saʿd b. ʿAbd al-Raḥīm, who served as vizier six times during the reign of the Buyid sultan Jalāl al-Dawlah Shīrzīl (416–35/1025–44). Stewart, *Islamic Legal Orthodoxy*, 148.

[40] Reading *lā yukhillu bi-fahm* for *lā yukhillu bihim* in text.

[41] Reading *bayna mā* for *baynamā* in the text.

opinions that the Shīʿīs hold uniquely and with which no one else concurs, and those of Abū Ḥanīfah or al-Shāfiʿī with which no one else concurs?

If they object: The difference between the two matters is that, for every opinion on which Abū Ḥanīfah stood alone, one of the jurists of Kufa or the early forbears concurred with him, and, similarly, for the opinions on which al-Shāfiʿī stood alone, one of the authorities of the Hijaz or the forebears concurred with him regarding them, whereas this is not true for the Shīʿīs.

Then we answer: It is not the case that the authorities of Kufa, the authorities of the Hijaz, or the forebears are known to have professed every legal doctrine Abū Ḥanīfah or al-Shāfiʿī held uniquely. If this is claimed, then it does not rise to the level of that which is known with certainty, generally accepted, and undisputed. The Shīʿīs also claim and transmit that the opinions that they hold uniquely represent the views of Jaʿfar b. Muḥammad al-Ṣādiq [the sixth Imam], Muḥammad b. ʿAlī al-Bāqir [the fifth Imam], and ʿAlī b. al-Ḥusayn Zayn al-ʿĀbidīn [the fourth Imam]. Indeed, they transmit these opinions from the Commander of the Faithful ʿAlī b. Abī Ṭālib [the first Imam], and trace them back to him. You ought, therefore, to grant the Shīʿīs what you have granted Abū Ḥanīfah and al-Shāfiʿī and So-and-so and So-and-so, or at the very least put them down to the status of Ibn Ḥanbal and Muḥammad b. Jarīr al-Ṭabarī regarding that which they profess uniquely, for you allow Ibn Ḥanbal and Ibn Jarīr dissenting opinions regarding that which they profess uniquely, but you do not allow the Shīʿīs dissenting opinions regarding that which they profess uniquely. This is an injustice to the Shīʿīs and a wrong against them.

Moreover, the opinions of Abū Ḥanīfah that he reached by analogical reasoning include some for which it may not be claimed that he has any precursors who professed them among the Companions [of the Prophet] or the Followers [i.e., the generation following that of the Companions]. If we so desired, we could point to many individual legal opinions of Abū Ḥanīfah that fit this description. Why, then, have you not condemned[42] him for professing a view that no one before him had ever professed, when you have condemned the Shīʿīs for the same thing?

If they object: The difference between the two matters is that, even though Abū Ḥanīfah held unique opinions to which he was led by analogy, regarding which he is not known to have had any forerunner, these questions did not arise in the generations of the forebears, and no ruling was proposed for them, nor did the scholars delve into them, so that a consensus or difference of opinion regarding them might have been reached, but the Shīʿīs have professed unique doctrines that contradict what we know to have been the consensus of all of the forebears against their opinions on these questions.

We reply: It has been stated above that your claim of a previous consensus against what the Shīʿīs profess is devoid of proof and that they reliably trace their doctrines back to a group among the forebears, so that their doc-

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[42] Reading *tashnaʿū* for *yashnaʿū* in the text.

trines and dissenting opinions on these matters[43] preclude[44] the possibility that a consensus could have been reached against their doctrines.

Moreover, even if this point were granted to you, despite the possible arguments against it, you would then have to allow the Shīʿīs those dissenting opinions they profess uniquely that go against the opinions Abū Ḥanīfah reached by analogical reasoning, for which he had no precursor and concerning which no consensus preceded him. Yet we do not see you allowing them dissenting opinions on anything that they profess uniquely, and you do not permit[45] this, as the present discussion on this matter has shown would be required. Moreover, you honor the dissenting opinions of Dāwūd, Muḥammad b. Jarīr, and Aḥmad b. Ḥanbal concerning those questions on which they adopt unique rulings, and you debate jurists who profess them, even though, according to you, a preceding consensus had gone into effect against their opinions. Should you not either cease to honor their dissenting opinions and to debate with them on these issues, as you have done with the Shīʿīs, or treat the Shīʿīs as you have treated them with respect to debate and the consideration of dissenting opinions?

If they object: If what the Shīʿīs claim about the doctrines of al-Ṣādiq and al-Bāqir were true, then we would have known it with certainty, as they know it, so that we would no longer contradict them in this, just as the Shīʿīs know of the doctrines of our forebears, including Abū Ḥanīfah, al-Shāfiʿī, and others who preceded them.

We respond: Those who are strangers and outsiders do not necessarily know the doctrines of a scholar as well as his disciples, devotees, constant attendees, and close companions do. For this reason we do not know a large part of the doctrine of Abū Ḥanīfah that is known to his disciples and to those who affiliate themselves with him. Who is more closely associated with al-Bāqir and al-Ṣādiq—peace be upon them—than their disciples? Their supporters (*shīʿah*) are more knowledgeable of their doctrines than those who do not share this relationship with them—peace be upon them. Moreover, we do not know many of the doctrines that our opponents claim are the opinions of the Commander of the Faithful—God's blessings be upon him—while we transmit and relate[46] the opposite of what they transmit and the contrary of what they relate. Their excuse for the fact that we do not know these things is exactly our excuse for the fact that they do not know[47] the doctrines that we claim[48] and relate from the Commander of the Faithful and the scholars among his descendants—God's blessings on them. Let them present excuses as they wish.

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[43] Reading *masāʾil*, as it appears above, for *masʾalah* in the text.

[44] Reading *fa-yakhruju* for *yakhruju* in the text.

[45] Al-Kharsān emends *wa-lā yufarriʿūn* to *wa-lā tusawwighūn* here, an improved reading.

[46] Reading *wa-narwī ʿanhu wa-naḥkī* for *wa-tarwī ʿanhu wa-taḥkī* in the text.

[47] Reading *fī annahum lam yaʿlamū* for *fī an lam yaʿlamū* in the text.

[48] Reading *naddaʿīhā* for *taddaʿīhā* in the text.

Then we should ask them: How can we be certain of the correctness of what you relate[49] as a doctrine of Abū Ḥanīfah and al-Shāfiʿī, when we are not certain regarding all that you claim[50] to be a doctrine of the Commander of the Faithful—God's blessings be on him? Your distinction between the two matters is exactly the same as our distinction between the general knowledge of the legal rulings of Abū Ḥanīfah and his ilk, and the occurrence of confusion regarding many of the legal rulings of our Imams—peace be upon them. Furthermore, the doctrines of someone whose opinion is an incontrovertible proof does not follow[51] the same path regarding being known as the legal rulings of someone whose opinion is not an incontrovertible proof.

For this reason, the doctrines of the Prophet—God bless him and grant him peace—and the People of his Household regarding many rulings of the sacred law are not known, while the doctrines of his Companions regarding them are known, and the doctrines of Abū Ḥanīfah and al-Shāfiʿī on those questions are also known.[52] The cause of this is what we have indicated.

Then one should ask our opponents: If consensus according to you is of two types, the consensus of the scholars regarding matters on which the common people are not taken into consideration, and the other type is the consensus of the Muslim Community, including both scholars and common people, then should you not consider the consensus of Shīʿī scholars in the consensus of the scholars, and the consensus of their commoners in the consensus of the Muslim Community, when they are subsumed under the explicit wording of the scriptural proof texts on which you rely to demonstrate the validity of consensus?

If they object: Their present[53] dissent is known, and there is no doubt about it, but the debate concerns whether the consensus against the doctrines that they have adopted preceded their dissent.

A sufficient response to this point has already been presented.

If they object: They should not be taken into consideration in consensus because they entertain heretical and errant theological doctrines that preclude the one who holds them from being considered in the disputed questions of the law.

We respond: Do not depart from the rules of this debate, on the points of law, and mix it with other topics that require a discussion of theology, when you are always begging to be excused from delving into that science. Most of you, the preponderant group among you, are not men of this field. We will not treat theology in this discussion and have omitted a comprehensive exposition of it in order to treat you with conciliation and indulgence, for you know well that the Imami Shīʿīs believe, regarding those who contradict them on fundamental issues of theology, that which prevents their opinions

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49 Reading *taḥkūnahu* for *yaḥkūnahu* in the text.
50 Reading *taddaʿūnahu* for *yaddaʿūnahu* in the text.
51 Reading *laysa tajrī* for *laysa yajrī* in the text.
52 Reading *tuʿrafu* for *naʿrifu* in the text, three times.
53 Reading the variant *al-ḥāḍir* for *al-khāṣṣ* in the text. *al-Intiṣār*, 5 n.1.

from being considered in the consensus of the Muslims or [their] disputed opinions, and they end up in that at remote ends, which you do not reach concerning them. Yet you, when you reach the utmost extent, believe concerning them that they profess innovated doctrines (*bidaʿ*) and are thereby sinners but do not attain unbelief. The sinner, according to most of those who uphold the validity of consensus, does not depart, on account of his sin, from having his opinion considered as dissent in the sacred law. Leaving aside a thorough exposition of this topic is safer for you and more advantageous to you. The Imami is only too relieved[54] when discussion turns to this topic, for in it he has much more leeway than he does in a discussion of the points of law. Moreover, how can one fail to take into consideration the dissenting opinions of the Imams, whose doctrines the Prophet—may God bless him and grant him peace—and his family made an incontrovertible proof to which one must resort and on which one must depend, on a par with the Scripture that falsehood cannot attain, neither from before it nor from behind it, in his statement—peace be upon him—: "I am leaving among you the two weighty matters. As long as you hold fast to them, you will not go astray: the Book of God and my progeny, the people of my family. They will not part until they arrive at the Pool [before Paradise]."[55] Haven't many Muʿtazili scholars and accomplished authorities adopted the opinion that the consensus of the people of the family in particular, even if they stand alone, apart from the rest of the Muslim community,[56] is an incontrovertible proof that establishes certain knowledge?[57] How can the opinion of those whose consensus is an incontrovertible proof by the testimony of the Prophet—may God bless him and his family and grant him peace—not be[58]

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[54] Reading *faraj* for *kharj* in the text.

[55] This is the famous *ḥadīth* report of *al-thaqalān* ("the two weighty matters"), one of the Shīʿīs' best-known proof texts for the religious authority of the Imams. It is transmitted by Sunnis in slightly different form, with the word *sunnatī* ("my custom") in place of the word *ʿitratī* ("my progeny"), and is taken as a proof text for the authority of *ḥadīth* alongside the Qur'ān.

[56] Al-Kharsān notes that the main MS has *al-a'immah* for *al-ummah* here.

[57] This must be a reference to the Zaydi position on consensus, which is that the consensus of the Prophet's descendants (*ijmāʿ ahl al-bayt* or *ijmāʿ al-ʿitrah*) is an incontrovertible proof (*ḥujjah*). Thus, they espoused a two-tiered concept of consensus, parallel to that of the Twelvers, recognizing not only the consensus of the entire community but also the consensus of the Prophet's Family (*ahl al-bayt*). Al-Sharīf al-Murtaḍā is apparently referring here to Zaydi jurists who were also Muʿtazilis, choosing to stress their allegiance to Muʿtazilism rather than Zaydi Shīʿīsm. One author who holds this view is Abū Ṭālib Yaḥyā b. al-Ḥusayn b. Hārūn al-Nāṭiq bi'l-Ḥaqq (d. 424/1033), in *Kitāb al-Diʿāmah fī tathbīt al-imāmah*, which was probably completed in Rayy before 385/995, as al-Ṣāḥib Ibn ʿAbbād is mentioned in the introduction. The work has been erroneously attributed to al-Ṣāḥib Ibn ʿAbbād in the published edition. The opinion would later become standard in Zaydi jurisprudence. See al-Nāṭiq bi'l-Ḥaqq, *Kitāb al-Diʿāmah fī tathbīt al-imāmah*, published as al-Ṣāḥib Ibn ʿAbbād, *Nuṣrat madhāhib al-Zaydīyah*, ed. Nājī Ḥasan (Beirut: al-Dār al-Muttaḥidah li'l-Nashr, 1981), 175–9; Wilferd Madelung, "Einige Werke des Imamas Abū Ṭālib an-Nāṭiq bi'l-Ḥaqq," 10; Ibn al-Murtaḍā, *Kitāb Miʿyār*, 1:185.

[58] Reading *lā yakūnu* for *lā bi-kawn* in the text.

accepted as an authoritative dissenting opinion, to be treated like those of certain other jurists, as dissent that must be taken into consideration? This is odd indeed.

Among the things that must be known is that the proof of the Imamis for the correctness of all the opinions they hold uniquely or in which they concur with other jurists is their consensus on these questions, because their consensus is a convincing argument and an indication that provides certainty.[59] When one adds to this the *prima facie* text of the Book of God the Exalted or another method that provides certain knowledge and produces certainty, then it is a superabundance, proof upon proof. Otherwise, their [the Shīʿīs'] consensus is sufficient in itself. We state that their consensus is an incontrovertible proof only because the consensus of the Imamis includes the opinion of the Imam, about whom reason has indicated that no time is devoid of him and that he is infallible and error is not permissible for him, either in word or deed. By this manner, their consensus is an incontrovertible proof and convincing evidence.

We have shown the correctness of this method in various passages of our works, especially in the answers to the questions of Abū ʿAbd Allāh al-Tabbān—may God have mercy on him—in the answers to the legal questions of the people of Mosul that arrived in the year 420 [AH = 1029 CE], and in other passages of our works besides those two. We addressed the ramifications of the issue, dealt with them thoroughly and exhaustively, answered every subsidiary question that might be adduced about it, and decisively refuted every specious argument that might be raised in objection to it. We have explained how one may attain certainty that the opinion of the Infallible Imam is found among the totality of the opinions of the Imamis, and how one may arrive at knowledge of his doctrines when we cannot distinguish his person and his identity during the conditions of his Occultation, eliminating cause for astonishment on the part of one who asks, "How can I know the doctrine of someone whom I do not know?" It serves no purpose to explain that here, because the topic with which we are engaged in this debate is something else. Whoever desires to reach the fullest extent in knowing the correctness of this principle should consult the text we have indicated to him, and he will find what fulfills his need and goes beyond the amount that is sufficient for him.

Since the general principle that we have presented is itself the proof of all the doctrines of the Imami Shīʿīs' positions on the points of law, then whoever is skeptical of any of their doctrines or doubts their validity should ask about the validity of that principle. If incontrovertible proof of it is established through the method that we have indicated, his doubt will necessarily be removed, he will attain certainty, and the Shīʿīs will have discharged their responsibility to justify the legal opinions that they have adopted by setting forth the proof and evidence on which they are based. Subsequently, the opposing opinions of those who go against them will not harm them, just

[59] Al-Kharsān notes that one MS has *wa-yatamayyazu l-yaqīn* for *wa-tuthmiru l-yaqīn*.

as the agreement of those who agree with them will not assist them. If we had made do with just this summary discussion in order to attain our goal, it would have sufficed us, and we would not have required any addition to it, nor would we have needed to explain the legal questions in detail and specify them, for the proof of the validity of them all is one. However, we will address the points of law in particular, item by item, explaining those on which other jurists concur with the Imami Shīʿīs, even if their opponents are unaware that this is the case. Then we will set forth what they hold uniquely, without the concurrence of any jurist among their opponents, and we will adduce, in addition to the principle that we have presented above, other evidence as proofs of their validity, including the *prima facie* text of the Book of God or other methods that provide certainty. We will present all that we are able in order to strengthen the argument made in the work, render it more accessible to the reader, and facilitate its purpose, so that, thereby, the benefit might be all the greater and more abundant. We place our trust in God. He is Sufficient for us, and an excellent support is He!

Translation II: Answers to Legal Questions from Mayyāfāriqīn[60]

May God prolong the presence of our Master, the Noble Sharif al-Murtaḍā, the Banner of Guidance, the Owner of the Two Glories, make his days long, and guard his power! May his step be firm, and may his enemies and enviers stumble! We reside in a region adjacent to the Abode of Unbelief, and it is rare that we find someone in whose piety and honesty we have confidence so that we might take the salient points of our religion on his authority, and for this reason we are in the most dire need that our Master—may God protect his bounty!—grant us a legal responsum (*fatwā*) regarding questions that we have recorded here. The answers to most of these questions may be found in the books of our fellows [the Imami Shīʿīs], but we prefer to see his noble script and to adopt it as a support and rely on it. We ask only for the legal opinion without the proof—may God, in His mercy, not deprive us of him!

First Question: Prayer is meant to be performed in a group, and in doing so there is merit. Is it permissible to pray behind a prayer leader whose faith is questionable, or not? *Response*: Group prayer entails great merit and abundant divine reward if we are confident of the doctrine of the man leading prayer, the correctness of his faith, and his moral probity, because, in the view of the People of the House of the Prophet, it is not permissible for a sinner to lead prayer.

Second Question: Is it permissible to perform Friday prayer behind a prayer leader who agrees with us [i.e., a Shīʿī] as well as one who opposes us [i.e., a Sunni]? Should it include two cycles of prayer, along with the sermon, taking the place of four cycles? *Response*: Friday prayer comprises two

[60] Mayyāfāriqīn is Silvan in modern Turkey. The text appears in al-Sharīf al-Murtaḍā, *Jawābāt* [*al-Masāʾil*] *al-Mayyāfāriqīyāt*, in *Rasāʾil al-Sharīf al-Murtaḍā*, 1:271–306.

cycles and no more than that. There is no Friday prayer[61] except with the presence of a just Imam or someone appointed by the just Imam. If that is lacking, then the noon prayer should be prayed in four cycles. Whoever is compelled to pray it, following someone who is not permitted to act as a prayer leader, out of dissimulation, is obligated to pray the noon prayer with four cycles afterwards.

Third Question: Is the prayer for the two Holy Days to be performed with a sermon or without a sermon? In four cycles or two cycles? With one greeting or two? Does the statement "God is great" (*allāhu akbar*) occur in the first two cycles or in all four? If no one who agrees with us [i.e., a Shīʿī] is found to lead prayer, is it permissible to pray behind an opponent [i.e., a Sunni]? *Response*: The prayer for each of the two Holy Days is two cycles. There must be a sermon on the two Holy Days. In the first cycle, one should utter "God is great" five additional times, and one should add to those the phrase "God is great" at the opening of prayer, and the phrase "God is great" when bowing down, to make seven. In the second cycle, one should utter "God is great" three additional times, making five together with the statements "God is great" uttered at the opening and the bowing down. The reading occurs in both cycles before the utterance "God is great."

Fourth Question: Is it permissible to pray both the noon and the afternoon prayer when the sun passes the zenith without separating them except by the prostration and the rosary, for a total of eight cycles of prayer? Is it permissible to call to prayer once for both of them,[62] with two announcements of the beginning of prayer (*iqāmah*), or is this only permissible with two calls to prayer and two announcements of the beginning of prayer? If their prescribed time is one and the same, then why would our Master, the Commander of the Faithful [ʿAlī b. Abī Ṭālib]—peace be upon him—have missed the afternoon prayer had the sun not returned for him?[63] *Response*: When the sun crosses the meridian, the time for the noon prayer in particular begins, and when the period during which one might perform four cycles of prayer has passed, then the two prayer times, those for the noon and afternoon prayer, occur in conjunction, until there remains of the daytime proper only the time required to perform four prayer cycles. At that point, the time for the noon prayer comes to an end, and the time is for afternoon prayer exclusively. Whoever prays the noon prayer at the beginning of the prescribed time, then prays the afternoon prayer just after it, without any separation, has fulfilled both duties together at their appropriate times.[64]

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[61] Reading *jumʿah* for *jamāʿah* in the text.

[62] Reading *fihimā* for *fihā* in the text.

[63] This refers to accounts of a miracle associated with ʿAlī b. Abī Ṭālib, the first Imam. One day, he reportedly became upset upon missing the afternoon prayer. Miraculously, the sun returned on its course in order to allow him to perform the prayer at the proper time. See ʿAbd Allāh b. Jaʿfar al-Ḥimyarī, *Qurb al-isnād*, 175.

[64] Reading *fī waqtihimā* for *fī waqtihā* in the text.

Whoever desires additional merit and a greater reward may pray the traditional supererogatory prayers between the noon and afternoon prayers.

The call to prayer and the announcement of the beginning of prayer are not obligatory, according to the correct reading of our legal doctrine, but they are customary, while the announcement of the beginning of prayer is emphasized and recommended in stronger terms than the call to prayer. Whoever desires additional merit should make the call to prayer and the announcement of the beginning of prayer for each of the two prayers. It is permissible for him to call to prayer and announce the beginning of prayer once for both of them, just as it is permissible to omit the call to prayer and the announcement of the beginning of prayer for both of them. Regarding the Commander of the Faithful—God's blessings and peace be upon him—it cannot be the case that he missed the afternoon prayer because its time had ended, because his perfection—God's blessings be upon him—would not allow for this to occur. Rather, he missed the additional merit of praying at the very beginning of prayer time, and because of this, the sun returned for him, so that he might attain that additional merit. Anything other than that could not have taken place.

Fifth Question: Is any separation necessary between the sunset prayer and the evening prayer except for the four extra cycles of prayer? Does the time for the sunset prayer begin upon the sinking of the disk of the sun beneath the horizon or upon the appearance of three stars that are not visible during the day? *Response*: When the sun sets, the time for the sunset prayer begins, and one need not pay any attention to the appearance of stars. When enough time has passed for the performance of three prayer cycles, then it is simultaneously time for the sunset prayer and the evening prayer. When there remains before midnight the time necessary for the performance of four prayer cycles, the time for the sunset prayer ends and it is exclusively time for the evening prayer. When it reaches midnight, then the time for the evening prayer has passed. It is better for whoever desires additional merit and would like the extra reward to pray the extra prayers for the sunset prayer between the sunset prayer and the required evening prayer, because it is a time-honored tradition.

Sixth Question: [What are] the definition of "the middle prayer" and the evidence for it? *Response*: According to the People of the House (*ahl al-bayt*)—peace be upon them—the middle prayer is the afternoon prayer. The proof of this is the consensus of the Imami Shīʿīs to that effect, and it has also been related in the variant reading of the Qurʾān by Ibn Masʿūd—may God have mercy on him: "Maintain the prayers and [especially] the middle prayer, [that is,] the afternoon prayer." It is designated "the middle" prayer because it is between the two daytime prayers, which come before it, and the two nighttime prayers, which come after it.

Seventh Question: On what is it permitted to prostrate [in prayer]? On what should one avoid prostrating? *Response*: It is permissible to prostrate on the earth itself or on vegetation that grows on the earth only if it is clean. One may not prostrate, however, on vegetation that is edible, such as fruit-bearing plants, or that may be worn, such as cotton or flax, or on what is

made from them. There is no wrong in prostrating on parchment that is free of writing, but prostration on surfaces that bear writing is discouraged, because one's mind becomes occupied with reading it.

Eighth Question: Is the greeting in prayer done once, toward the *qiblah* [the direction of prayer, toward the Kaʿbah in Mecca], or twice, to the right and the left? *Response*: In our opinion the greeting is obligatory, and the performer of prayer, if he is by himself or if he is the prayer leader, should give one greeting, facing the *qiblah* in doing so, while turning his face slightly to his right. If he is following someone else, then he should greet whoever is to his right and to his left, unless there is no one to his left, in which case greeting to the right should suffice.

Ninth Question: Is the prayer of standing (*qunūt*) to be performed in all of the obligatory prayers, or in a specific prayer, and is it before bowing down or after? *Response: Qunūt* is recommended and not obligatory, though it is more recommended in the obligatory prayers, and even more emphasized or recommended than the prayer of reading out loud. One should raise one's hands for *qunūt*, and utter the phrase "God is great!" once for it.

Tenth Question: Are the seven utterances of the phrase "God is great!" said in the obligatory prayers exclusively, or in both the obligatory prayers and the extra prayers? *Response*: The seven utterances of the phrase "God is great!"[65] are performed only in the obligatory prayers and not in the extra prayers, for they are customary and not obligatory. One utterance of the phrase "God is great!" is sufficient for entering into prayer, whether it is obligatory or customary, and it is the "declaration of prohibition," after which those words and deeds that, earlier, were not forbidden now become forbidden.

Eleventh Question: In the two cycles that are performed from a sitting position after the obligatory evening prayer, should one sit cross-legged or sit on one's feet? *Response*: It has been transmitted regarding these two prayer cycles that one should sit cross-legged, but it has also been transmitted that one may do both without specification, without requiring either sitting cross-legged or sitting on one's feet specifically. The performer of prayer is free to choose between sitting cross-legged and sitting on his feet, and whichever of the two he does is permissible.

Twelfth Question: Should one wash one's face in the course of ablutions with the right hand or with both hands? *Response*: The obligation is to make the water reach the face, as when one washes ordinarily, and one understands washing the face with the right hand and not the left to be encompassed by the *prima facie* meaning of the Qurʾānic verse.[66] Doing what is established by tradition is more fitting than doing otherwise.

Thirteenth Question: Should one wipe the head and the feet with the water left over from washing the left hand, or with new water? *Response*: The obli-

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[65] Reading *al-takbīrāt* for *al-takbīr* in the text.

[66] A reference to Q 5:6: "When you set out to pray, wash your faces and your arms up to the elbows. . . .".

gation regarding wiping the head and the feet is that it be done with the moistened hand, without resuming[67] and scooping up new water. Whoever resumes and scoops up new water for them fails to fulfill his obligation and must repeat it. If he finds that his hand does not have the moisture necessary for wiping his head and his feet, then it has been transmitted that he should wipe them using the moistness of the hair of his beard or his brow; if that does not suffice, he should repeat his ablutions from the beginning.

Fourteenth Question: Should we seek the answers to legal questions that are difficult for us from the treatise of ʿAlī b. Mūsā b. Bābawayh al-Qummī [d. 329/941],[68] or from the Book of al-Shalmaghānī [d. 323/934],[69] or from the Book of ʿUbayd Allāh al-Ḥalabī?[70] *Response*: In any case, it is more fitting to consult the book of Ibn Bābawayh and the book of al-Ḥalabī than to consult the Book of al-Shalmaghānī.

Fifteenth Question: Is it necessary, after stating *ḥayya ʿalā khayrⁱ l-ʿamal* ("Come to the best of works!") in the call to prayer, to add the phrase, *Muḥammadᵘⁿ wa-ʿAlīyᵘⁿ khayrᵘ l-bashar* ("Muḥammad and ʿAlī are the best of mankind")? *Response*: If one says, "Muḥammad and ʿAlī are the best of mankind" as a statement on one's part outside the explicit statement of the call to prayer *per se*, it is permissible, for such an attestation is correct. But if one does not say this,[71] one has done nothing wrong.

Sixteenth Question: What is the ruling regarding the call to prayer of our opponents [viz., the Sunnis], which includes the statement, *al-ṣalātᵘ khayrᵘⁿ min an-nawm* ("prayer is better than sleep"), in the call to the dawn prayer. Is it permissible for us to state this or not? *Response*: Whoever states this in the call to the dawn prayer has committed an innovation and has

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67 Reading *istiʾnāf* for *istīnāq* in the text.

68 ʿAlī b. al-Ḥusayn b. Mūsā Ibn Bābawayh al-Qummī, father of the famous Abū Jaʿfar Muḥammad Ibn Bābawayh al-Qummī (d. 381/991), author of *Man lā yaḥḍuruhu faqīh*, one of the four canonical *ḥadīth* collections of the Twelvers. ʿAlī, the father, came to Baghdad in 328/940 and died in 329/941. He wrote a number of legal works, most of which have been lost. See al-Ṭūsī, *Fihrist kutub al-shīʿah*, 119; al-Najāshī, *Kitāb al-rijāl*, 198–9.

69 Muḥammad b. ʿAlī al-Shalmaghānī, who claimed to be a representative of the Twelfth Imam but was rejected by the majority of the Twelvers, including the leading scholar al-Nawbakhtī. The latter is reported to have said, "I have a bald spot on the front of my head, and if he causes hair to grow in it, then I will believe in him." Al-Shalmaghānī was eventually arrested and executed by the Abbasid authorities in 323/934. He wrote eighteen known titles on Shīʿī theology and law, and the sources report that his works were popular. The book intended here must be *Kitāb al-Taklīf*, a legal manual that is mentioned twice later on in this text (questions 26 and 49).

70 ʿUbayd Allāh b. ʿAlī b. Abī Shuʿbah al-Kūfī al-Ḥalabī (fl. 2nd/8th c.), a companion of the sixth Imam, Jaʿfar al-Ṣādiq. Twelver sources refer to this work simply as *al-Kitāb* or *al-Jāmiʿ* and claim that it is the first systematic legal work ever written for the Shīʿīs. He is supposed to have presented the work to Jaʿfar al-Ṣādiq, who praised and corrected it. Although no longer extant in its independent form, it remained an important reference until the fifth/eleventh century and is quoted extensively in the canonical *ḥadīth* collections of the Twelvers and in the Ismaʿili al-Qāḍī al-Nuʿmān's legal work *al-Īḍāḥ*. See Modarressi, *Tradition and Survival*, 380–2.

71 Reading *wa-in lam yaqul for wa-in lam yakun* in the text.

violated the custom [of the Prophet and the Imams] and the consensus of the descendants of the Prophet—peace be upon them—on this issue.

Seventeenth Question: Is Our Master the Commander of the Faithful [ʿAlī b. Abī Ṭālib]—peace be upon him—alive, observing us and hearing what we say, or dead? *Response*: The past Imams—peace be upon them—as well as the believers, are recipients of God's favor and providence. When their tombs are visited or people bless them, God makes this reach them, or informs them of it, and they, by consensus, hear it and witness it.

Eighteenth Question: It has been transmitted that the Messenger of God, our Master the Commander of the Faithful [ʿAlī b. Abī Ṭālib], and their descendants—peace be upon them—are present with every person who is about to die at the moment that his soul is taken, in the East and West of the Earth. We desire certainty on this matter. *Response*: A statement to this effect has been transmitted, and the meaning intended is that if the person about to die belongs to the people of faith, God informs him and grants him good news regarding the share of reward and the benefits he will receive on account of his support for, and loyal adherence to, Muḥammad and ʿAlī. Thus, it is as if the dying person saw Muḥammad and ʿAlī and as if they were present with him, since he is informed in this way. Similarly, if he belongs to the people of enmity, then God informs him of the punishment that will be his due because of his enmity towards them and his having turned away from them. How could two people attend, holding a conversation and being physically present, with every dying person in the East and the West? That is impossible.

Nineteenth Question: Are the Imams equal in merit after our Master the Commander of the Faithful [ʿAlī b. Abī Ṭālib]—peace be upon him—or are some superior to others? *Response*: Merit in faith can be known with certainty only through unassailable transmission by direct audition. It has been related that the Imams—peace be upon them—are equal in merit, and it has also been related that each Imam is superior to the one who follows him, except the One Who Will Rise Up [*al-Qāʾim*, the Hidden Imam]—peace be upon him—for he is superior to those who preceded him. It is most appropriate to suspend judgment on this question, for there is no conclusive proof regarding it.

Twentieth Question: Is there any distinction between al-Ḥasan and al-Ḥusayn in merit, or are they equal? *Response*: The correct opinion is that they are equal in merit. Neither should be considered superior to the other in merit without a proof or *ḥadīth* report to this effect, and no legal obligation should be attached[72] to this. Whoever claims this should present evidence for it.

Twenty-First Question: Are all of the Imams—peace be upon them—capable of predicting something before it occurs, or not? *Response*: The ability to predict something before it happens is not one of the conditions for the Imamate, because that would be miraculous. It is possible for miracles to

[72] Reading *yuʿallaqu* for *tuʿallaqu* in the text.

appear at the hands of the Imams—peace be upon them—or for them not to appear at their hands. However, we know from widespread reports that they—peace be upon them—reported about unseen matters, and we know that God—Exalted be He—informed them of those matters.

Twenty-Second Question: Will the Owner of the Age—peace be upon him—appear on a known day? Does he witness us, or not? *Response*: It is not possible to specify the point in time at which the Owner of the Age—peace be upon him—will appear, but it is known in general that he will appear only when he is safe from fear and when there is no longer a need for him to exercise precautionary dissimulation. He—peace be upon him—witnesses us and knows about us, and none of our conditions are hidden from him.

Twenty-Third Question: What is the correct opinion regarding the commander of the army at Basra? What is the correct belief concerning him and others?[73] What was their status during the time of the Messenger of God—God bless him and his family? *Response*: Waging war against the Commander of the Faithful—peace be upon him—is an act of sedition and unbelief, commensurate with waging war against the Prophet—may God bless him and his family—because of the Prophet's—may God bless him and his family—statement: "O ʿAlī, your war is my war, and your peace is my peace." He meant by this specifically that the legal status of war against either of the two is one and the same. We may therefore state definitively that whoever fought against ʿAlī— peace be upon him—and died without repenting was not at any time a believer, even though he may have given the impression of having accepted faith, because it would not be possible for a true believer at heart to share the characteristics of that group, for reasons that need not be mentioned here.

Twenty-Fourth Question: Which are superior, prophets or angels? *Response*: Prophets are superior to angels. The proof of this is the consensus of the Imami Shīʿīs, and their consensus is an incontrovertible proof, because this consensus is never devoid, in any age, of the infallible Imam, who is included in it.

Twenty-Fifth Question: The group [i.e., Shīʿīs] have adopted the opinion that had God—exalted be He—not created Muḥammad and the People of his House, He would not have created the heavens, the earth, Paradise, Hell, or the rest of creation. *Response*: A *ḥadīth* report to this effect has been transmitted. The meaning conveyed therein is that since God—exalted be He—realized the benefit that would accrue to all other legally responsible people from the mission of the Prophet—may God bless him and his family—and from his delivery to them of the religious laws, and that no one else would take his place in this, and likewise for the Imams—peace be upon them—among the descendants of the Prophet—peace be upon

[73] The question is worded vaguely, it appears, in order to avoid explicit mention of ʿĀ'ishah, the Prophet's wife, who played a leading role in the battle, along with Ṭalḥah and al-Zubayr.

him—who followed him in their sequence, if He had not created them, then there would have been no sense in creating anyone or in imposing any religious obligations on mankind, because of the interpretation we have just mentioned.

Twenty-Sixth Question: It is reported in *Kitāb al-Taklīf*[74] that ʿAlī—peace be upon him—said, "He who worships the name and not the essence has committed unbelief, and he who worships both the name and the essence has worshipped something else along with his worship of God—Exalted be He. Whoever worships the essence with true recognition is truly a believer." *Response*: There is no doubt that whoever worships the name and not the essence is a worshipper of something other than God—exalted be He—and an unbeliever, and that whoever worships the name and the thing named is committing polytheism by worshipping something besides God along with Him. Worship must be pure and devoted to God—exalted be He—alone, and He is the thing named.[75]

Twenty-Seventh Question: It has been related that[76] people fall into three categories with regard to monotheism: those who affirm it, those who deny it, and those who assimilate. The assimilators assign partners to God, the deniers are incorrect, and the affirmers are believers. What is the explanation of this? *Response*: The intended meaning of an affirmer here is one who affirms something as it is and believes it as it is. The one who denies refuses to recognize the truth, because he is the opposite of the one who affirms it. The assimilator is one who believes that Exalted God has a likeness or equal. That person is an idolater, and there is no uncertainty regarding his polytheism.

Twenty-Eighth Question: Does a consanguine sibling inherit along with a uterine sibling, and likewise along with a germane sibling? *Response*: If there are germane siblings along with uterine siblings, then the uterine siblings receive one-third, and the remainder goes to the germane siblings. If there is one uterine brother or sister along with a consanguine brother[77] or a consanguine sister, then the uterine brother or sister gets one-sixth, and the remainder goes to the consanguine brother or sister. If there are consanguine siblings along with germane siblings, then all of the property goes to the germane siblings, and consanguine siblings get no share.

Twenty-Ninth Question: If clothing is soiled, but the place affected is not known, is it permissible to pray in it? *Response*: If the part of the robe that was soiled is known, then that spot should be washed. If it is not known

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[74] This is the legal manual of al-Shalmaghānī mentioned in question no. 14 above.

[75] This passage seems to use the terms *al-maʿnā* ("the essence") and *al-musammā* ("the thing named") interchangeably. It is possible that this is intended, but it is also possible that one is a textual corruption of the other and that they were originally repetitions of the same term.

[76] Reading *anna* for *-n-* in the text.

[77] Reading *akh li-ab* for *akh al-ab* in the text.

specifically, then the entire robe must be washed, and prayer in it is not permissible until it is washed.

Thirtieth Question: If a dry dog touches a robe, is it permissible to pray in it? *Response*: When its skin is dry, the pollution of the dog is not communicated to something touched by it, whether a robe or something else. It is only communicated when one of the two are moistened or wet. When both are dry, pollution is not transferred.

Thirty-First Question: What is the obligation of a man who has intercourse with his wife in the month of Ramadan during the daytime, and what atonement should he make? *Response*: The man who has intercourse during the month of Ramadan during the day must both repeat the fast and make atonement, and there is no difference of opinion on this issue. The atonement set is the liberation of a slave, or fasting of two consecutive months, or feeding sixty poor, providing for each poor person one *mudd* of food. He is entitled to choose whichever he wishes from among the three options.

Thirty-Second Question: If a robe is soiled by wine, is it permissible to pray in it? *Response*: It is not permissible to pray in a robe on which there is wine. The impurity of wine is more severe than other sorts of impurity, because even though blood is polluting, it has been permitted to us to pray in a robe that has on it an amount of blood less than the size of a dirham, and the amount of urine that is splashed during washing after urination, like the heads of needles, has also been exempted. Wine, however, has not been exempted under any circumstance or for any amount.

Thirty-Third Question: What is your opinion regarding the following situation: a man marries a woman, consummates his marriage with her, but then is absent from her for two years. Then she gives birth to a child and claims that it is his. Should her statement about this be accepted, and the child considered the legitimate offspring of the husband, or not? What is her obligation in this situation? *Response*: The child should not be attributed to the absent husband, because "the bed" that the Prophet—may God bless him and his descendants—intended in his statement, "The child belongs to the bed" is nowhere to be found in this case. This is because "the bed" is a way of referring to the place of sexual intercourse, and sexual intercourse here was impossible, so there is no "bed," and the child should not be considered the legitimate offspring of the husband. This applies if his absence is longer than the period of gestation.[78]

Thirty-Fourth Question: Is it permissible for the believer to ask forgiveness and pray for mercy for his parents and relatives if they are opponents [i.e., Sunnis]? *Response*: It is not permissible to ask forgiveness or pray for mercy for infidels, even if they are relatives, because Exalted God stated decisively that infidels will be punished and that there will be no intercession for them, and it is not permissible for us to ask that something be done when we know with certainty that God will not do it.

[78] Generally held by Shīʿī jurists to be ten months at the maximum.

Thirty-Fifth Question: Are the alms for breaking the fast of Ramadan and general alms intended for the destitute among believers especially or for the destitute in general? *Response*: It is not permissible to pay the Ramadan alms, the wealth-tax, or general alms to an opponent whose heresy reaches the degree of unbelief. Whoever pays the wealth-tax or Ramadan alms to someone of this description must repeat it. Some of our fellows [i.e., other Twelver Shīʿī jurists] have gone beyond this and declared it forbidden to pay alms to a sinner, even if he is a believer.

Thirty-Sixth Question: What is your opinion about someone who swears by the Qurʾān to disobey God—mighty be His name—whether to commit murder or similar acts, and would have been able to carry out the act but refrained out of fear of God the Exalted. What is his obligation with regard to the oath he took? *Response*: An oath to commit an act of disobedience to God never takes effect. The oath of someone who swears by God to commit some sin does not come into effect, so it is not necessary for him to make atonement when he does not carry out the act promised, because an oath can be broken only when it has taken effect, and atonement is not necessary in a case in which the oath has not come into effect.

Thirty-Seventh Question: What is your opinion regarding the Commander of the Faithful [ʿAlī b. Abī Ṭālib]'s—peace be upon him—marriage of his daughter [Umm Kulthūm], and what is the proof? Likewise, what of the daughters [Ruqayyah and Umm Kulthūm] of our Master the Messenger of God—may God bless him and his family? *Response*: The Commander of the Faithful married his daughter to the person indicated only by way of dissimulation and compulsion, and not of his own choice and free will. Statements about this have been transmitted widely, and dissimulation permits what would not be permitted otherwise. Regarding the Prophet—may God bless him and his family—he married [his daughters to] the person indicated [i.e., ʿUthmān b. ʿAffān, the third Caliph, r. 644–56] only when he [ʿUthmān] gave the appearance of faith, but then the situation changed. If it is objected: "Do not most of you hold the opinion that whoever dies an infidel cannot possibly have been a believer previously?" We respond: "Yes, this is our opinion. It is possible that the Prophet—may God bless him and his family—married [his daughters] to the person indicated before God the Exalted informed him of what would occur in the future, for we do not know the date on which he was informed or whether it was early or late.

Thirty-Eighth Question: What has been related regarding the heavenly reward for a pilgrimage (*ziyārah*) to the Imams' shrines? *Response*: There is much additional merit in visiting the tombs of the Imams—peace be upon them—and this is attested by transmitted *ḥadīth* reports. The sect has unanimously agreed on this matter, and the transmissions are numerous beyond reckoning. It has been related that whoever visits the Commander of the Faithful—peace be upon him—has earned Paradise. It has been related that whoever visits al-Ḥusayn—peace be upon him—will have his sins washed away like the dirt that water washes from a soiled robe, and that one pilgrimage (*ḥajj*) to Mecca will be credited to him for every step he makes, and a lesser pilgrimage (*ʿumrah*) to Mecca for every time he raises his foot.

Thirty-Ninth Question: Are shortening one's prayers and postponing fasting obligatory for one who travels in obedience to Exalted God, as on the pilgrimage to Mecca, *jihād*, pilgrimage to the Imams' tombs, and so on, or does it apply exclusively to the merchant, the hunter,[79] and every ordinary traveler? *Response*: Shortening prayer is obligatory for everyone whose trip is not an act of disobedience, whether it is simply permissible or an act of religious devotion.[80] He who travels a greater amount of time than he resides in one place is not obligated to shorten prayers, and the hunter is not obligated to shorten prayer.

Fortieth Question: Should one wear rings on both hands or on the right hand only? *Response*: The tradition regarding rings is that they be worn on the right hand, if one is able to choose and not compelled to dissimulate, but if one wears a ring on the left hand in addition to the right hand it is permissible. One may not wear a ring on the left hand alone, unless it be out of dissimulation.

Forty-First Question: The crescent moon is frequently obscured by clouds in our region, with the result that it is hidden from our view. Is there a calculation for it upon which we may rely other than the naked eye? Does the day on which the crescent moon is sighted belong to the new month, or to the preceding month? *Response*: The method that is followed for knowing the beginnings and ends of months is to view the crescent moon and not to calculate. When the moon is seen on the eve of the thirtieth, then the next day is the first of the month. If the moon is obscured by clouds, then the month is thirty days. One may not rely on anything else, against the claims of the Counters.[81] When the crescent moon is seen during the daytime, then that day belongs to the past month and not to the coming month.

Forty-Second Question: Is rabbit meat licit or forbidden? *Response*: Rabbit meat is forbidden according to the People of the House of the Prophet—peace be upon them. Numerous *ḥadīth* reports have been transmitted to this effect, and there is no difference of opinion among the Imami Shīʿīs concerning it. According to them, the rabbit is ritually impure, and its wool may not be used.

Forty-Third Question: [What is the ruling concerning] drinking barley beer? *Response*: According to the Imami Shīʿīs it is forbidden as strictly as other forbidden beverages, even if it does not intoxicate, for the ruling does not depend on intoxication itself. According to them, whoever drinks barley

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[79] Reading *al-mutaṣayyid* or *al-ṣayyād* for *al-jidy* in the text. The term *al-mutaṣayyid* appears explicitly in the response, so it, or a synonym, must have occurred in the original text of the question.

[80] Text repeated in the original.

[81] The "Counters" or "Proponents of Numbers" (*aṣḥāb al-aʿdād*) held that it was possible to use mathematical formulae to predict astrological phenomena and so avoid exclusive reliance on actual sightings of the new moon. This method was widely adopted by the contemporary Fatimids, and their practice is apparently the subtext behind this question.

beer deserves the set punishment (*ḥadd*), in the same manner that it applies to whoever drinks any other[82] intoxicating beverage.

Forty-Fourth Question: Is fixed-duration marriage (*al-mutʿah*) permissible in our time, or not? With whom is it permissible? What are its conditions with a Shīʿī woman, a Sunni woman, or a *dhimmī* [Jewish or Christian] woman? Is the child by such a marriage entitled to the inheritance share due to the other children of the father, or not? *Response*: Fixed-duration marriage has been permitted ever since the time of the Messenger of God—may God bless him and his family—until our present day, and its licitness has not changed to prohibition. One should contract fixed-duration marriage with believing women, and not opponents [Sunnis], but it might be permissible in case of a dearth of believing women to contract a fixed-duration marriage with women in need (*mustaḍʿafāt*) who are not obstinate [in their opposition to Shīʿīsm], and it might be permissible in cases of necessity to contract a fixed-duration marriage with a *dhimmī* woman. Among its indispensable conditions are that the term and the dower be specified and not left undefined. The paternity of the child from this type of marriage is recognized, and he inherits from his father just as the man's children from other marriages do. The *mutʿah*-wife, however, does not receive inheritance if that is specified in the contract, but if it is not specified in the contract, then she does receive inheritance.

Forty-Fifth Question: What is the ruling regarding playing chess or backgammon? *Response*: Playing chess or backgammon is prohibited and forbidden, and playing backgammon is a more serious offense, deserving of a greater punishment. According to the Imami Shīʿīs there is no doubt or confusion regarding playing any such game, under any circumstances.[83]

Forty-Sixth Question: What is the ruling regarding wearing the fur of fox and rabbits and other such animals? Is it permissible to pray in it, or not? *Response*: It is not permissible to wear the skins of foxes or rabbits or clothing made out of their fur, either before they are slaughtered or after. The proof of this is the consensus of the Imami Shīʿīs in particular on this matter.

Forty-Seventh Question: What is the ruling regarding the wearing of hides or raw hides? *Response*: That which is made of the skins of sheep after their being made clean through correct ritual slaughter may permissibly be worn before tanning, if it is free of the pollution of blood, and after tanning. There is no dispute on this point among the Muslims.

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[82] Omitting *wa-* in *wa-sāʾir al-ashribah al-muskirah*.

[83] This sentence appears to be corrupt in the original: *fa-lā qubḥah ʿind al-shīʿah al-imāmīyah fī al-liʿb bi-shayʾ minhā ʿalā wajh wa-lā shayb*. The words *qubḥah* ("evil?") and *shayb* ("grey hair") seem out of place. The translation is based on the possible emendation *fa-lā shubhah/shakk ʿind al-shīʿah al-imāmīyah fī al-liʿb bi-shayʾ minhā ʿalā wajh wa-lā rayb*.

Forty-Eighth Question: What is the ruling regarding wearing silk or sable (*khazz*)? *Response*: Wearing silk and combed silk is forbidden for males, but not females, if the robe is woven of pure silk without any cotton or flax being mixed with it. Sable fur may be worn by both males and females under all circumstances after purification by correct slaughter.

Forty-Ninth Question: What is your opinion regarding "the man who makes licit" (*muḥallil*) and "the woman who makes licit" (*muḥallilah*) who are mentioned in [al-Shalmaghānī's] *Kitāb al-Taklīf*? A man and a woman own a slave girl jointly, and the woman owner makes the slave girl licit [to the man] for an unspecified time, intending to retrieve her from him later on. Is this permissible, or not? *Response*: This has been transmitted. The meaning of this act of making licit (*taḥlīl*) that is mentioned in the transmitted report is that the woman contracts for her slave-girl and the man contracts for his slave-girl a fixed-duration marriage contract, because a woman becomes licit only through a fixed-duration marriage contract. It is permissible to contract a fixed-duration marriage contract using the terms "permitting" or "making licit" (*ibāḥah, taḥlīl*), just as it is permissible using the terms "enjoying" (*istimtāʿ*) and "marriage" (*nikāḥ*).

Fiftieth Question: Are the slave-mothers of a master's children (*ummahāt al-awlād*) divided up in the shares of the inheritance, or not? *Response*: According to us, the slave-mothers of children are included in the sum-total of slaves and do not come out of this state by giving birth to a child, and they are divided up in the inheritance and included in the shares of their children, and are freed at their hands. It is permissible, according to us, to sell the slave-mother after the death of her child.

Fifty-First Question: Is it permissible to acquire ownership of captive women and to have intercourse with them in this age, or not? *Response*: It is permissible to own captured women and to have intercourse with them, even if someone other than the rightful Imam captured them, because our Imams—peace be upon them—gave a dispensation to their followers (*shīʿah*) in this regard, out of kindness towards them and making matters easy for them, because the practice is rendered necessary by sexual hardship,[84] from which they nearly continually suffer in most times, so that it becomes harsh and severe.

Fifty-Second Question: Is the wealth-tax to be paid on the grain harvest after the ruler has taken his share and the provisions of the village are subtracted, or on the original amount? *Response*: The wealth-tax must be paid for wheat, barley, dates, and raisins if the amount that goes to the owner of the land is five camel-loads. A camel-load (*wasq*) is sixty pecks, and a peck (*ṣāʿ*) is nine pounds (*raṭl*).[85] If the harvested crop reaches that amount, one-tenth should be paid if it is irrigated naturally, and one-twentieth should be paid

[84] Reading *li-anna al-ʿanat yaqtaḍī dhālik* for *li-anna al-miḥnah yakhṭur dhālik* in the text. The editor notes the variant *takhtaṭir* for *yakhṭur* in one manuscript.

[85] This would make the camel-load 540 pounds, but the standard weight assigned to the pound varied.

for it if it is irrigated by waterwheels or water-bearing animals. Whatever is above five camel-loads should be figured according to that same calculation. No alms are to be paid for that which is less than five camel loads.

Fifty-Third Question: What is the obligation of someone who swears an oath not to drink wine or not to commit[86] a sin, then does it? *Response*: Someone who does this must feed ten poor people, clothe them, or free a slave as atonement. He is free to choose among these three atonements. Whoever is unable to do any of them must fast three days.

Fifty-Fourth Question: If a *dhimmī* woman is married to a *dhimmī* man, and the man converts to Islam, is her marriage dissolved by his conversion, or does she remain his wife, as she was before? *Response*: The marriage between a *dhimmī* man and his wife is not dissolved by his conversion to Islam. Indeed, the marriage between them remains as it was, and there is no dispute over this question in the Muslim community.

Fifty-Fifth Question: What is the obligation of a believer if he is of Arab stock and marries a woman of Alid, Hāshimī heritage? *Response*: If the Arab is from one of the tribes[87] that are neither despicable[88] nor deficient—for among some of the Arab tribes are those that fit this description—then it is not forbidden for him to marry Hāshimī women. This is discouraged on grounds of custom and social propriety; it is nevertheless not forbidden in the religion.

Fifty-Sixth Question: Should one adopt what is related on the authority of Mālik regarding women [i.e., that anal sex is forbidden]? Who among the Shīʿīs do not concur with him? *Response*: It is permissible for the husband to have intercourse with his wife in either of her two orifices, and no prohibition or reprehensibility attaches to this. The proofs of this are the consensus of the Imamis on this question and God's word, "Come to your tillage from wherever you wish." (Q 2:223). The religious law requires enjoyment of the wife's body entirely, without excluding one place as opposed to another.

Fifty-Seventh Question: Has the Qurʾān been sent down, or created? *Response*: The Qurʾān is the speech of God—exalted be He–which He sent down and originated in order to give credence to the Prophet—may God bless him and his family—so it is "a thing done" (*mafʿūl*). One does not say that it is created (*makhlūq*), because, when applied to speech, this word suggests that it is false. For this reason they say, "This is created [i.e., 'contrived'] speech," and Exalted God said, "This is nothing but contrivance (*ikhtilāq*)" (Q 38:7), meaning that it is certainly a lie.

Fifty-Eighth Question: Which work of devotion is best? *Response*: What we mean when we say that a work of devotion is better is that it entails more reward than other works, and no one knows exactly which work entails more reward than others except the Knower of the Unseen— Exalted be He—or

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86 Reading *yartakib* for *yarkab* in the text.
87 Reading *qabīlah* for *qabīl* in the text.
88 Reading *mardhūlah* for *mardhūl* in the text.

someone whom He has informed of this. One cannot rely upon the solitary *ḥadīth* reports that have been transmitted concerning this question.

Fifty-Ninth Question: Is faith better without works, or works better without faith? *Response*: Works without faith gain no reward and have no benefit, because one who performs prayer but does not believe in the obligation to pray and thereby gain closeness to God—exalted be He—does not count as having prayed, and no good comes of his performance. The combination of faith and works is what has the desired beneficial effect. Having faith is always good in and of itself, even if it is devoid of works, but the same is not true for works when they are devoid of faith.

Sixtieth Question: What is the ruling regarding belief in the Return (*al-Rajʿah*) upon the appearance of the One Who Will Rise Up (*al-Qāʾim*)—peace be upon him? What is entailed in the Return? *Response*: The meaning of the Return is that God—exalted be He—will revive a group of his clients and supporters who died before the appearance of the *Qāʾim*—peace be upon him—in order for them to gain the honor of championing his cause, showing obedience to him, and fighting his enemies, and not to miss the reward of this magnificent status, which others[89] will not attain, and also so that others not accede to this status in their stead. Exalted God is capable of bringing the dead to life, and there are no grounds for our opponents [the Sunnis] to consider this incredible and unlikely.

Sixty-First Question: Does a Muslim inherit from a Christian if he is his relative? *Response*: In our view, the Muslim inherits from an unbeliever, but the unbeliever does not inherit from a Muslim. There is no convincing argument in the *ḥadīth* related by them which states that the people of two religions do not inherit from each other, because inheriting from each other is a mutual act, but when we inherit from them and they do not inherit from us, we do not inherit from each other.

Sixty-Second Question: Does a paternal aunt inherit along with a paternal uncle? *Response*: According to the Imami Shīʿīs, a paternal aunt inherits along with a paternal uncle, and she gets one-half of his share.[90] There is no difference of opinion among the Imami Shīʿīs over this, because she shares with the paternal uncle in his relationship to the deceased and his degree of closeness to him. What our opponents [viz., the Sunnis] say regarding the *ʿaṣabah* [the agnate group] is of no consequence.

Sixty-Third Question: Do the maternal uncle and aunt receive a share of the inheritance along with the paternal uncles? *Response*: With the presence of the paternal uncles, the maternal uncle and aunt inherit the share of the mother, because their relationship to the deceased is through the mother, and the maternal aunt gets half the share of the maternal uncle.

Sixty-Fourth Question: Do the children of a sister of the deceased inherit if they are the closest relatives? *Response*: The children of a sister inherit if there is no one who has a higher claim to the inheritance than they and no

[89] Supplying the word *ghayruhum* in the text.
[90] Reading *naṣīb* for *niṣf* in the text.

one who has a higher degree of closeness to the deceased. If they are the sole heirs, the children of a daughter should be treated with regard to the inheritance like the children of a son when they are the sole heirs.

Sixty-Fifth Question: If seven days have passed, and the vagina[91] is clean of filth, is it permissible for the man to have intercourse with her before she washes her head[92] and her body, or not? *Response*: When the blood of menstruation stops flowing, and the vagina[93] becomes pure of discoloration and cloudy discharge, it is permissible for her husband to have intercourse with her, even if she has not performed a full ablution. There is no difference in this between the flow's stopping at the longest usual extent of menstruation or at the shortest, against the opinion of Abū Ḥanīfah. He agrees with us regarding the permissibility of intercourse when the blood stops flowing even if a full ablution is not performed, but he distinguishes between the flow's stopping at its longest extent or at its shortest extent, holding that intercourse is permissible when the flow stops at its longest extent, but that it is not permissible when it stops at its shortest extent.

Sixty-Sixth Question: Must "the Fifth" be paid to the family of the Messenger—peace be upon them—on booty from the land of unbelief or on all income, trade, real estate, and crops, or is that not necessary to be paid to them in this age? *Response*: The Fifth must be paid for all booty derived through military raids from the property of the people of unbelief, and it also must be paid for that which derives from mines and treasure troves or is extracted from the seas. It must also be paid on all surplus winnings from trade, agriculture, and crafts after the setting aside of yearly provisions and sufficient funds for the span of a year, spending in moderation. The share of God—exalted be He—that He assigned to Himself, and the share of the Messenger—God bless him and his Family—after the passing of the Messenger, these two shares belong to the Imam, who stands in his place—in addition to the share of the Imam, who deserves it by his relation to the Prophet. The remaining shares are for the orphans, poor, and travelers of the descendants of Muḥammad—peace be upon them. It is as if the Fifth were divided into six shares, three of them for the Imam—peace be upon him—and three of them for the Family of the Messenger—peace be upon him and them. This right was granted to them in recompense for alms, but if they are prevented from receiving the Fifth in certain periods, it is licit for them to take alms for as long as they are blocked from this right. God will guide us to the truth.

End of the questions and responses. God is the One Who deserves praise and is capable of granting success.

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[91] Literally, *al-mawḍiʿ* "the place" or "that part," a euphemism for the vagina.

[92] The phrase "washing one's head" is the functional equivalent to "washing one's hair" in English, and it stands here as a euphemism for performing a complete ablution (*ghusl*) for a major pollution such as intercourse.

[93] The text again uses the euphemism *al-mawḍiʿ* "the place".

CHAPTER TEN

IBN ḤAZM AL-QURṬUBĪ (D. 456/1064)

Samir Kaddouri

> Les modernes considèrent tous Ibn Hazm comme un auteur important
>
> *R. Arnaldez*, Grammaire et théologie, 25.

Introduction

The biography of a great scholar such as Ibn Ḥazm is intertwined with a number of significant historical events. However, given the limited space of this volume, we will concentrate on the chronological and geographical parameters of his activities and his travel in al-Andalus between the years 404–56/1013–64. In addition, we will explore some questions about his life and learning, and, in particular, consider his legal thinking and his career as a Ẓāhirī jurist.

Ibn Ḥazm is mentioned in several biographical notes by his contemporaries and compatriots, and by later generations of biographers both in the West and the East. The main authors who provided original information on Ibn Ḥazm are: (1) Abū ʿAbd Allāh al-Ḥumaydī (d. 488/1095),[1] Ṣāʿid al-Andalusī (d. 462/1070),[2] Ibn Ḥayyān (d. 469/1076–7),[3] and ʿĪsā b. Sahl al-Jayyānī (d. 486/1093)[4]—the latter provides invaluable information on the life and the work of his Ẓāhirī opponent;[5] (2) Ibn Bashkuwāl (d. 578/1183),[6] al-Fatḥ b. Khāqān (d. 528/1134),[7] al-Ḍabbī (599/1203),[8] Yāqūt

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[1] Ḥumaydī, *Jadhwat al-Muqtabis*, 2:489–93.

[2] Ṣāʿid al-Andalusī, *Ṭabaqāt al-umam*, 97–9.

[3] Ibn Bassām al-Shantarīnī, *al-Dhakhīra*, 1/1:167–75.

[4] On this scholar see Kaddouri, "Kitāb al-Tanbīh ʿalā shudhūdh Ibn Ḥazm: ta'līf al-qāḍī Abu'l-Aṣbagh ʿĪsā Ibn Sahl al-Jayyānī (m. 486/1093)," 95–108.

[5] See Kaddouri, "Identificación de un manuscrito andalusí anónimo de una obra contra Ibn Ḥazm al-Qurṭubī (m. 456/1064)," 299–320.

[6] Ibn Bashkuwāl, *Kitāb al-ṣila* (Cairo, 1966), 2:415–17.

[7] Ibn Khāqān, *Kitāb tārīkh al-wuzarā'*, 138–40.

[8] Ḍabbī, *Bughyat al-multamis* (Beirut, 1997), no. 1205.

al-Ḥamawī (626/1229),[9] Ibn Khallikān (681/1282),[10] and (3) al-Dhahabī (748/1347),[11] and al-Fayrūzābādī (817/1414).[12]

Ibn Ḥazm was a prolific author who, according to his son, Abū Usāma Yaʿqūb, produced 400 tomes amounting to approximately 80,000 pages.[13] Many scholars have attempted to compile a comprehensive list of all of his writings,[14] based largely on al-Dhahabī's *Siyar aʿlām al-nubalāʾ* and *Tadhkirat al-ḥuffāẓ*. I have recently updated this list, based on a review of the following sources: *Jadhwat al-muqtabis* by al-Ḥumaydī, who mentions seven books by Ibn Ḥazm*; al-Dhakhīra fī maḥāsin ahl al-jazīra* by Ibn Bassām, who preserves a synopsis of Ibn Ḥazm's biography mentioned by Ibn Ḥayyān (this entry includes the titles of eleven books written by Ibn Ḥazm)*; al-Tanbīh ʿalā shudhūdh Ibn Ḥazm* by ʿĪsā b. Sahl, who mentions the names of eleven books written by Ibn Ḥazm; al-Dhahabī's books include seventy-one titles; and in his *al-Bulgha fī tārīkh aʾimmat al-lugha*, al-Fayrūzābādī mentions the titles of fifty-two books written by Ibn Ḥazm. Based upon this information, I have determined that Ibn Ḥazm wrote 110 books and epistles.[15]

It is important to determine when and on what subjects Ibn Ḥazm started writing. To answer these two questions, we used his earliest extant writings. In his epistle, *al-Mīzān fīʾl-taswiya bayna ʿulamāʾ al-Andalus wa-ahl Baghdād waʾl-Qayrawān,*[16] he mentions books that he had completed, those he was close to finishing, and those left in preliminary drafts.[17]

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[9] Ḥamawī, *Irshād al-arīb*, 4:1650–9.

[10] Ibn Khallikān, *Wafayāt al-aʿyān* (Beirut, 1968–77), 3:325–30.

[11] Dhahabī, *Siyar aʿlām al-nubalāʾ*, 18:184–212; idem, *Tārikh al-islām* (ḥawādith 441–60 H), 403–17; idem, *Tadhkirat al-ḥuffāẓ*, 3:1146–55.

[12] Fayrūzābādī, *al-Bulgha*, 146–7. Other sources contain notes about Ibn Ḥazm, but the information quoted in them does not advance our current research in any way. In addition to these classic sources, a great many books and articles have been published in various languages, dedicated to Ibn Ḥazm by contemporary authors. See *Milenario de Ibn Ḥazm*, 147–55.

[13] *al-Iḥkām fī uṣūl al-aḥkām*, colophon of Marrakech manuscript no. 524.

[14] The first successful attempt was that of Muḥammad Ibrāhīm al-Kattānī, "Muʾallafāt Ibn Ḥazm wa rasāʾiluh bayn anṣārih wa khuṣūmih," *Majallat al-thaqāfa al-maghribiyya*, 83–107; cf. Ibn ʿAqīl al-Ẓāhirī, "Muʾallafāt Ibn Ḥazm al-mafqūda kulluhā," 59–62. The latter attempted to compile a list of the lost works of Ibn Ḥazm. Although these lists are exhaustive, several works are mentioned more than once, due to a slight variation in title, both of books that are extant, and books of doubtful authenticity.

[15] The results of our investigation will appear in a subsequent publication. This essay is limited to some of Ibn Ḥazm's legal works.

[16] It concerns *Risāla fī faḍl al-andalus*.

[17] Ibn Ḥazm said: "We undertook a series of works pertaining to issues that we examined closely. Some have been completed; others are close to completion or have at least already been started. We pray that God will help us to carry them through to a successful

Unfortunately, he does not mention either the number or titles of these books. It is clear, however, that he worked on several at a time, which makes it difficult to establish the chronology of his writings. Nevertheless, a careful reading of *Ṭawq al-ḥamāma* and *Kitāb al-faṣl*[18] reveals that Ibn Ḥazm began his life as a poet and man of letters who exchanged poems and literary missives with contemporary writers,[19] such as his cousin Abū'l-Mughīra b. Ḥazm[20] and ʿAbd Allāh b. Muḥammad b. al-Ṭubnī (d. 407/1016).[21] From *al-Faṣl* we also learn that he began writing on theological subjects at an early age. For example, he wrote a detailed letter to Ibn Shuhayd (d. 426/1034–5) about the inimitability of the Qurʾān;[22] a refutation of *ʿUmdat al-abrār*, a "heterodox treatise" written by ʿAṭṭāf b. Dūnās, an Ashʿarī from Qayrawān,[23] and a refutation of the *Kitāb al-ʿilm al-ilāhī* by Muḥammad b. Zakariyyā al-Rāzī (d. 311/923).[24] In time, he would become a prolific jurist who produced at least thirty-six legal works.

Life

The Ḥazmian genealogy goes back to Yazīd al-Fārisī, a slave set free by his master Yazīd b. Abī Sufyān al-Umawī al-Qurashī (d. 19/640).[25] Ibn Ḥazm's grandfather Saʿīd may have been of Persian descent from Labla. We do not know exactly how Ibn Ḥazm acquired Persian origins.[26] He was not

conclusion." Cf. Pellat, "Ibn Ḥazm, Bibliographe et apologiste de l'Espagne musulmane," 91; *Rasā'il Ibn Ḥazm*, 2:186–7.

[18] N.B.: The correct vocalization is *al-Faṣl* not *al-Fiṣal*, as I have demonstrated in my Ph.d Thesis (in progress), Chap 3, pp. 99–100.

[19] See *Ṭawq al-ḥamāma* (in *Rasā'il Ibn Ḥazm* 1:158).

[20] Ibid., 224–6.

[21] See ibid., 260–1, where Ibn Ḥazm states that he frequently exchanged poetry and prose with this friend.

[22] Ibn Ḥazm, *al-Faṣl*, 1:188.

[23] Ibid., 3:246. Ibn Ḥazm's refutation is entitled: *al-Yaqīn fī al-naqḍ ʿalā l-mulḥidīn al-muḥtajjīn ʿan iblīs al-laʿīn wa sā'ir al-kāfirīn*. Cf. Fayrūzābādī, *al-Bulgha*, 146.

[24] Ibn Ḥazm, *al-Faṣl*, 1:38 and 87.

[25] This is the genealogy preserved by Ibn Ḥazm's sons and by his student Ṣāʿid al-Andalusī and other historians: ʿAlī (the Ẓāhirī scholar) b. Aḥmad b. Saʿīd b. Ḥazm b. Ghālib b. Ṣāliḥ b. Khalaf b. Maʿdān b. Sufyān b. Yazīd al-Fārisī. In the colophon of *kitāb al-iḥkām* (manuscript n° 524) in the Ibn Yūsuf Library in Marrakech, a history of Ibn Ḥazm's family directly copied from Ibn Ḥazm's autograph, has been partially preserved.

[26] Ibn Bassām, *al-Dhakhīra*, 1/1, 170. According to Iḥsān ʿAbbās, one must take into account the fact that this Persian genealogy is not a complete fabrication, for the following reasons: (1) As a sincere believer, Ibn Ḥazm would never claim ancestors as his if they were not; (2) such a genealogy contributed nothing significant to the Ḥazmians since it would not have impressed the ʿĀmirids who seized power; (3) the reason for the political

proud, however, of his Persian ancestors, and he himself clearly attributes the first heterodoxies in Islam to plots by Persians who were, in his view, eager to obtain vengeance for the destruction of their dynasty by the Muslims.[27] In any case, he was a product of Andalusian society, which was a blend of various indigenous and immigrant cultures. Those who wish to link Ibn Ḥazm's genius to "the supremacy of the Iberian race" make him a *muwallad*. The objective scholar, however, disregards racial claims based on ideology.

Saʿīd b. Ḥazm was born in Awnaba, in the region of Labla (Niebla), but settled in Cordoba, where his son Abū ʿUmar Aḥmad (327–404/938–1013) rose to the position of minister in 381/991 during the reigns of the chamberlains al-Manṣūr b. Abī ʿĀmir and his successor ʿAbd al-Malik al-Muẓaffar. ʿAlī b. Aḥmad b. Saʿīd b. Ḥazm was born on 30 Ramadan 384/7 November 994. He and his older brother, Abū Bakr,[28] were taught calligraphy, the Qurʾān and poetry by women living in the family house. ʿAlī also studied the Arabic language and grammar under the supervision of Abū ʿUmar Aḥmad b. Muḥammad b. ʿAbd al-Wārith.[29] On 1 Shawwāl 396/1 July 1006, ʿAlī participated in a poetry reading at al-Muẓaffar's palace.[30] Shortly thereafter, he began to study *ḥadīth, fiqh* and *jadal* at several mosques in Cordoba. Between 397/1007 and 403/1012, Ibn Ḥazm studied with the following scholars:[31] ʿAbd Allāh b. Rabīʿ b. Bannūsh al-Tamīmī (d. 415/1024);[32] Aḥmad b. Muḥammad al-Umawī b.

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fidelity (*walāʾ*) of the Ḥazmians to the Umayyads is due to this genealogy; and (4) it is strange that Ibn Ḥayyān did not invoke any Andalusian political or genealogical authority who could report facts contradicting the genealogy claimed by the Ḥazmians. According to Iḥsān ʿAbbās, the version of Ibn Ḥayyān, whose father was a fierce political rival of Ibn Ḥazm's father, is biased. Consequently, Ibn Ḥayyān did nothing more than express this old political rivalry between the Banū Ḥayyān and the Ḥazmians. See I. ʿAbbās, *Tārīkh al-adab al-andalusī*, 304–5.

27 Ibn Ḥazm, *al-Faṣl*, 2:272.

28 Ibn Ḥazm said: "Until my brother died of the plague that swept through Cordoba in Dhū'l-Qaʿda, 401 (June, 1011), he being then but twenty-two years old." Cf. *Ṭawq al-ḥamāma*, 1: 259. This statement implies that his brother was born in 379/989, that is to say five years before Ibn Ḥazm.

29 I. ʿAbbās, *Tārīkh al-adab al-andalusī*, 314.

30 Ibid., 308.

31 Concerning Ibn Ḥazm's masters see: Manūnī, "Shuyūkh Ibn Ḥazm fī maqrūʾātih wa marwiyyātih," 241–61. For a concise biography, see Ibn Bashkuwāl, *al-Ṣila* (Cairo, 1966), 2:617–18.

32 These are the books he studied with this master: *Ṣaḥīḥ al-Bukhārī; Sunan al-Nasāʾī; Sunan Abī Dāwūd; Muṣannaf Ḥammād b. Salama; Muntaqā Ibn al-Jārūd; Ḥadīth al-Faḍl b. al-Ḥubāb al- Jumaḥī; Fiqh al-Zuhrī*, which was compiled by Muḥammad b. Aḥmad b. Faraj. Cf. Manūnī, "Shuyūkh Ibn Ḥazm," 251.

al-Jasūr (d. 401/1010);[33] Yaḥyā b. ʿAbd al-Raḥmān b. Masʿūd (d. 402/1011),[34] and ʿAbd al-Raḥmān b. ʿAbd Allāh b. Khālid al-Hamdānī, known as Ibn al-Kharrāz (d. 411/1020).[35] In 401/1010 Ibn Ḥazm attended Ibn al-Kharrāz's sessions on the *Ṣaḥīḥ* of al-Bukhārī.[36] He also studied the art of polemic and the history of sects and religions with Abu'l-Qāsim ʿAbd al-Raḥmān b. Muḥammad al-Azdī al-Miṣrī (d. 410/1019).[37]

Ibn Ḥazm lived with his family in the eastern part of Cordoba near Madīnat al-Zahrā'. Following the coup d'état staged by Muḥammad b. Hishām (al-Mahdī) in 399/1008–9 and the resulting civil war, the family's possessions were pillaged, and they took refuge in the western part of the city.[38] A few months later, it was rumored that the caliph Hishām al-Mu'ayyad had been assassinated, and ʿAlī and his father attended the "funeral" staged for him.[39] Although al-Mu'ayyad returned to power on 7 Dhū-l-ḥijja 400/22 July 1010, Ibn Ḥazm's father did not regain royal favor and died two years later.[40] In 404/1013, when Berber troops entered the city, Ibn Ḥazm was forced to leave Cordoba.[41]

For a while, Ibn Ḥazm lived in Malaga, where he engaged in a debate[42] with the famous Jewish scholar Samuel Ibn Naghrīla.[43] Next, Ibn Ḥazm went to Almería, which, from Muḥarram 405/ July 1014, had been ruled by Khayrān al-Ṣaqlabī (d. 419/1028).[44] But Khayrān, who suspected that Ibn Ḥazm harbored sympathy for the Umayyads, first jailed him for a few months and then deported him. Accompanied by his friend Muḥammad b. Isḥāq, the two exiles found refuge in Ḥiṣn al-Qaṣr,[45] where they spent several months under the hospitality of Abu'l-Qāsim ʿAbd Allāh b. Hudhayl

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[33] Ibn Ḥazm studied the following books with Ibn al-Jasūr: *Muwaṭṭaʾ Mālik*; *Mudawwanat Saḥnūn*; *Fiqh al-Qāsim b. Sallām*; *Musnad ʿAbd b. Ḥumayd; Musnad Abī Bakr b. Abī Shayba*. Ibid., 247.

[34] He taught Ibn Ḥazm the following books: *Musnad Aḥmad b. Ḥanbal*; *Sunan Ismāʿīl b. Isḥāq al-Qāḍī; Qiṭʿat Wakīʿ b. al-Jarrāḥ*. Ibid., 251.

[35] Ibn Bashkuwāl, *al-Ṣila* (Cairo, 1966), no. 690.

[36] Manūnī, "Shuyūkh Ibn Ḥazm," 248.

[37] *Ṭawq al-ḥamāma* (in *Rasāʾil Ibn Ḥazm*), 1:260.

[38] Ibid., 260–1.

[39] Ibn Ḥazm, *al-Faṣl*, 1:124–5.

[40] *Ṭawq al-ḥamāma* (in *Rasāʾil Ibn Ḥazm*), 1:252.

[41] Ibid.

[42] Ibn Ḥazm, *al-Faṣl*, 1:245. The subject of the debate was the authenticity of the Bible. Ibid., 1:225.

[43] On Ibn Naghrīla, see Wasserstein, "Samuel Ibn Naghrīla ha-Nagīd and Islamic historiography in al-Andalus," 109–25.

[44] Ibn al-Khaṭīb, *Aʿmāl al-aʿlām*, 2:199–201.

[45] According to Garcia Gomez, this location was not what is today Aznalcacar near Sanlucar, but rather, a place in the Malaga or Murcia region. *EI*[2], s.v. "Ibn Ḥazm" (R. Arnaldez).

al-Tujībī.[46] Upon hearing the news of the attempt by the amir ʿAbd al-Raḥmān IV al-Murtaḍā to restore the Umayyad regime, the two friends sailed to meet him in Valencia in 407/1016.[47] But they were disappointed to learn that the prince had been assassinated. Ibn Ḥazm now decided to suspend his political activities in order to pursue his studies under the supervision of ʿAbd Allāh b. ʿAbd al-Raḥmān al-Maʿāfirī b. Jaḥḥāf (d. 417/1026)[48] and Aḥmad b. Muḥammad al-Ṭalamankī (d. Dhū al-ḥijja 429/September 1038).[49]

In 409/1018, during the reign of the Ḥammūdid ruler al-Qāsim al-Maʾmūn,[50] Ibn Ḥazm returned to Cordoba, where he participated in study sessions on *ḥadīth* and *fiqh* under the supervision of scholars who had survived the civil war. These included Muḥammad b. Saʿīd b. Nabāt al-Umawī (d. 429/1037–8),[51] Yūnus b. ʿAbd Allāh b. Mughīth (d. 429/1037–8),[52] Khalaf al-Fatā al-Jaʿfarī (d. 425/1033),[53] Aḥmad b. Qāsim b. Aṣbagh al-Bayyānī (d. 430/1038),[54] al-Muhallab b. Aḥmad b. Abī Ṣufra (d. 436/1044),[55] and Ḥumām b. Aḥmad b. ʿAbd Allāh (d. 421/1030), a Shāfiʿī jurist who probably played an instrumental role in Ibn Ḥazm's endorsement of Shāfiʿism.[56] In 414/1023, ʿAbd al-Raḥmān V al-Mustaẓhir overthrew al-Qāsim and, upon becoming caliph, he appointed Ibn Ḥazm as his minister. But his caliphate lasted only forty-seven days, and his successor, Muḥammad III al-Mustakfī, incarcerated Ibn Ḥazm for a few months, and then released him.

It was no doubt during his time in Cordoba that Ibn Ḥazm became a Shāfiʿī. His adoption of Shāfiʿism despite the overwhelming dominance of

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46 *Ṭawq al-ḥamāma* (in *Rasāʾil Ibn Ḥazm*), 1:261.

47 Ibid., 262.

48 Ibid., 272. Ibn Ḥazm praised this scholar, who transmitted to him a book by Bakr b. al-ʿAlāʾ al-Qushayrī entitled *Kitāb aḥkām al-Qurʾān*.

49 He transmitted the following books to Ibn Ḥazm: *Musnad al-Bazzār* and *Muṣannaf Saʿīd b. Manṣūr*. Cf. Manūnī, "Shuyūkh Ibn Ḥazm," 257.

50 On this ruler, see Ibn al-Khaṭīb, *Aʿmāl al-aʿlām,* 2:123–4.

51 He transmitted the following books to Ibn Ḥazm: *al-Mujtabā li-Qāsim b. Aṣbagh; kutub Aḥmad b. Ḥanbal; Muṣannaf ʿAbd al-Razzāq.* Cf. Manūnī, "Shuyūkh Ibn Ḥazm," 252.

52 He transmitted the following books to Ibn Ḥazm: *Sunan al-Nasāʾī; Musnad Ibn Abī Shayba; Maʿānī al-āthār liʾl-Ṭaḥāwī; Gharīb al-ḥadīth li-Qāsim b. Thābit al-Saraqusṭī; Fiqh al-Qāsim b. Sallām*. Cf. ibid., 253.

53 He taught Ibn Ḥazm the following books: *Sunan al-Nasāʾī; Muṣannaf ʿAbd al-Razzāq al-Ṣanʿānī; Muʿallaqat Ṭarafa Ibn al-ʿAbd.* Cf. ibid., 248.

54 Aḥmad b. Qāsim b. Aṣbagh transmitted the following text to Ibn Ḥazm: *Muṣannaf Qāsim b. Aṣbagh*. See Ibid., 253.

55 Ibn Abī Ṣufra transmitted the following text to Ibn Ḥazm: *Muwaṭṭaʾ Ibn Wahb.* See Ibid., 260.

56 He transmitted the following texts to Ibn Ḥazm: Shāfiʿī's *Risāla*; the *Muṣannaf* of Ibn Ayman; the *Muṣannaf* of *Baqī b. Makhlad; Ṣaḥīḥ al-Bukhārī.* See ibid., 261.

Mālikism may explain why he left Cordoba for Almería, where he studied logic and perhaps philosophy with Muḥammad b. al-Ḥasan al-Madhḥijī, also known as Ibn al-Kittānī (d. 422/1030–1).[57] Next, he moved to Jativa where, in all likelihood, he wrote *Ṭawq al-ḥamāma* ca. 417/1026.

From Jativa, Ibn Ḥazm returned in 418/1027 to Cordoba, where he was harassed by Mālikī scholars. However, with his new polemical skills, he engaged in a public debate with al-Layth b. Ḥarīsh al-ʿAbdarī (d. 428/1036–7) on the necessity of adhering to the doctrines of Mālik b. Anas. The debate, which took place in the presence of Ibn Bishr, chief judge of Cordoba, was won by Ibn Ḥazm.[58] This unprecedented victory over Cordoban Mālikism gained Ibn Ḥazm the sympathy of several influential inhabitants of the city who protected him in difficult times.[59] But when he began to teach publicly with the Ẓāhirī grammarian, Abu'l-Khiyār Masʿūd b. Sulaymān b. Muflit (d. 426/1035), each man disclosing his Shāfiʿī or Ẓāhirī views, their violation of the Andalusian Mālikī consensus met with strong disapproval. The Cordoban chief of police[60] sent a complaint against the two scholars to the new caliph al-Muʿtadd bi-llāh, who ordered them to stop teaching and threatened to punish any students who tried to visit the two jurists in the great mosque of Cordoba. Eventually, both men ceased promulgating their views in public.

Ibn Ḥazm's friend, Abū Bakr Muḥammad b. Aḥmad b. Isḥāq,[61] must have invited him to join him in Alpuente, where he was part of the entourage of the ruler Muḥammad b. ʿAbd Allāh Yumn al-Dawla b. Qāsim al-Fihrī.[62] Several years earlier, Ibn al-Rabīb al-Qayrawānī (d. 420/1029)[63]

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57 I. ʿAbbās, *Rasā'il Ibn Ḥazm*, 3:33.

58 ʿAbd al-Raḥmān b. Aḥmad b. Saʿīd b. Bishr (d. 422/1030–1) was appointed chief judge of Cordoba in 409/1018 by the caliph al-Qāsim b. Ḥammūd; he held this position until 419/1028. *Al-Ṣila*, no. 698. Cf. Kaddouri, "al-Rudūd ʿalā Ibn Ḥazm bi'l-andalus wa'l-maghrib min khilāl mu'allafāt ʿulamā' al-mālikiyya," *al-Aḥmadīyah*, 271–346, at 282–9; and idem, "Refutations of Ibn Ḥazm by Mālikī Authors from al-Andalus and North-Africa," 539–99.

59 On this theme, see Kaddouri, "al-mu'allafāt al-andalusiyya wa-l-maghribiyya fī al-radd ʿalā Ibn Ḥazm al-Ẓāhirī," 166–205, at 171.

60 *Ṣāḥib aḥkām al-shurṭa wa-l-sūq*, Muḥammad b. Muḥammad b. Ibrāhīm al-Qaysī (d. 431/1039–40), known as Ibn Abī'l-Qarāmīd. Cf. Kaddouri, "al-Rudūd ʿalā Ibn Ḥazm," 281.

61 Ibn al-Abbār, *al-Takmila* (Casablanca, 1994), 1:315.

62 Yumn al-Dawla was prince of Ḥiṣn al-Bunt, north of Valencia, between 421/1030 and 434/1042–3. See his biography in *al-Bayān al-Mughrib*, 3:215; Ibn al-Khaṭīb, *Aʿmāl al-aʿlām*, 2:196; Ibn al-Abbār, *al-Takmila* (Casablanca, 1994), 1:313.

63 Ibn al-Rabīb is al-Ḥasan b. Muḥammad al-Tamīmī al-Tāhartī (known as Ibn al-Rabīb), a poet, man of letters, genealogist and linguist. A native of Tāhart, he lived in Qayrawān, where he was a judge. He died in 420/1029. Cf. Suyūtī, *Bughyat al-Wuʿāt*, 230; ʿĀdil Nuwayhiḍ, *Tārīkh aʿlām al-Jazā'ir*, 69. I thank Professor Van Koningsveld for drawing my attention to this reference.

had written an epistle in which he accused the Andalusians of failing to preserve the intellectual heritage of their scholars. At the behest of Yumn al-Dawla, Ibn Ḥazm refuted this epistle in his *Risālat al-mīzān fī'l-taswiya bayna 'ulamā' al-Andalus wa ahl Baghdād wa ahl al-Qayrawān.*[64]

In 426/1034–5, Ibn Ḥazm traveled to Cordoba to attend Ibn Muflit's funeral.[65] He then made his way to Almería, where Aḥmad b. ʿAbbās al-Qurṭubī (d. 429/1037)—likely a friend of his from childhood[66]—was serving as minister. Al-Qurṭubī protected Ibn Ḥazm. According to ʿĪsā b. Sahl, Ibn Ḥazm opted to pray facing the East, but at an angle that differed from the one adopted by the majority of jurists in Almería. Sometimes, he did so in the presence of the qāḍī Ibn Sahar al-Qurṭubī (d. 435/1043).[67] This disturbed several scholars, who approached Ibn Sahar and gave him two choices: "Either Ibn Ḥazm conforms to the orientation of our *qibla* or you send him away for fear that, one day, he will make you a witness against us." Ibn Sahar responded by issuing a warning to Ibn Ḥazm, who immediately left Almería for Denia.[68] Upon his arrival in Denia, he enjoyed the protection of Abu'l-ʿAbbās Aḥmad b. Rashīq, governor of Sharq al-Andalus. Ibn Ḥazm now 'converted' from Shāfiʿism to Ẓāhirism and wrote books arguing for Ẓāhirī supremacy. During the last years of the reign of Mujāhid al-ʿĀmirī of Denia, that is to say, some time before 436/1044, Ibn Rashīq sent Ibn Ḥazm to the island of Majorca.[69]

According to Ibn al-Abbār, Ibn Ḥazm arrived in Majorca after the death of the most highly regarded jurist on the island, Abū ʿAbd Allāh Muḥammad b. ʿAbd al-Raḥmān b. ʿAwf, in 434/1042.[70] Ibn Ḥazm settled down on the island and taught Mālikī *fiqh* to young students. This activity

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[64] This letter is better known under the abridged title *Risāla fī faḍl al-Andalus wa dhikr rijālihā*. See *Rasā'il Ibn Ḥazm*, 2:171–88.

[65] Ibn Ḥazm reported: "Our master Abū'l-Khiyār Masʿūd b. Sulaymān b. Muflit, may God bless him, remarried one week before his death, as he was seriously ill and depressed. A wedding night ensued to revive the *sunna* (of the Prophet that had been abandoned by the Mālikīs)." This is further proof of Ibn Muflit's Ẓāhirism, since the Andalusian Mālikīs forbade a dying man to marry or issue a final and irrevocable divorce. For details, see Ibn Ḥazm, *al-Muḥallā* (Beirut, 1989), 9:155, no. 1868.

[66] *Rasā'il Ibn Ḥazm*, 3:189.

[67] Mukhtār b. ʿAbd al-Raḥmān b. Mukhtār b. Sahar, judge of Almeria between 428/1036 and 435/1043. See Ṣāʿid al-Andalusī, *Ṭabaqāt al-umam*, 96; ʿIyāḍ, *Tartīb al-madārik*, 8:89; *al-Ṣila*, no. 1374.

[68] These events confirm that Ibn Ḥazm went to Almeria before 428/1036 and departed before 434/1042.

[69] On Mujāhid al-ʿĀmirī, see Ḥumaydī, *Jadhwat al-muqtabis*, 2:564–6.

[70] Ibn al-Abbār, *al-Takmila* (Casablanca, 1994), 2:301; Ḥumaydī, *Jadhwat al-muqtabis*, 1:116, no. 97.

may explain why he wrote (1) *Tasmiyat shuyūkh Mālik*;[71] and (2) *Sharḥ kitāb al-Muwaṭṭa' wa'l-kalām ʿalā masā'ilih*. Ibn Ḥazm no doubt took advantage of his position to write a commentary criticizing the *Muwaṭṭa'* and attacking Mālik for not following some of the *ḥadīth* found in the *Muwaṭṭa'*, supporting instead Medinese practice. It was no doubt the composition of these two texts that motivated Abū'l-Walīd b. al-Bāriya[72] to confront Ibn Ḥazm in a public debate that ended with Ibn al-Bāriya's defeat and imprisonment. Ibn Ḥazm was now the leading scholar of Majorca,[73] and he began to spread his Ẓāhirī principles among young jurists.[74] According to Ibn Sahl, Ibn Ḥazm used cunning to spread Ẓāhirism on the island.[75] Abū'l-Walīd al-Bājī (d. 474/1081) was the only Mālikī capable of responding to Ibn Ḥazm's attacks. The circumstances leading to a confrontation between Ibn Ḥazm and al-Bājī, which took place in Majorca in 440/1048, are well-described by Ibn al-Abbār and Qāḍī ʿIyāḍ.[76]

Next, Ibn Ḥazm returned by sailboat to Denia, where he quarreled with Abū ʿAmr ʿUthmān b. Saʿīd b. ʿUthmān al-Dānī (d. 444/1052). The

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[71] Dhahabī, *Siyar aʿlām al-nubalā'*, 18:197.

[72] See his biography in ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (1983), 8:158; Ibn al-Abbār, *al-Takmila*, 4:154.

[73] This is the description of him given by ʿIyāḍ in *Tartīb al-madārik*, 8:122.

[74] Among these were Ḥumaydī (d. 488/1095) and ʿAlī b. Saʿīd b. ʿAbd al-Raḥmān al-ʿAbdarī (d. 493/1099–1100), whose biography appears in Ibn Bashkuwāl, *al-Ṣila* (Cairo, 1966), no. 906; Subkī, *Ṭabaqāt al-Shāfiʿiyya* (1965), 5:257–8.

[75] This is Ibn Sahl's account: "Ibn Ḥazm incited his companions to lure young students to his *majlis*. Once a student was before Ibn Hazm, he warmly welcomed him while inviting him to become one of his followers. Then he said: 'You possess, thanks be to God, an intelligence that will allow you to acquire *fiqh* without the slightest difficulty. These people [viz., the Mālikīs] study like fools and are forever wearing themselves out without understanding anything. It is better to study only one [legal] issue and to understand its [textual] foundation than to learn 100 issues [without any understanding]. And then you can reach the same status as that of Mālik or other jurists.' Then he instructed his disciples: 'Test him then by asking him a question.' The disciples would pose a question by asking him: 'Tell us how you would judge this issue?' The question asked was always so new that it would puzzle the young student who would not know the answer. Ibn Ḥazm would then intervene to encourage the young man: 'Go on! Do not worry. Do not be afraid to tell us your opinion.' The disciples would also encourage him. At last, when the young man expressed his views, Ibn Ḥazm would reply: '*Allāhu akbar*! My intuition was right. You are more knowledgeable on this issue than Mālik.' He would shore up the young man's opinion based on other arguments and, in return weaken the opinion attributed to Mālik. (…) Dazzled by Ibn Ḥazm, the young man would express himself in front of his parents as follows: 'I am more knowledgeable than Mālik. And who is Mālik except a mortal." Ibn Sahl concluded: "This is how Ibn Ḥazm lured naive and ignorant persons to his abominable doctrine and his clear heterodoxy." See Kaddouri "Identificación de un manuscrito andalusí," 299–320.

[76] See Turkī, "Polémiques entre Ibn Ḥazm et Bāgī sur les principes de la loi musulmane," 51–3.

two scholars exchanged insults in the form of invective poetry.[77] When complaints against Ibn Ḥazm were lodged with the qāḍī of Denia, Aḥmad b. al-Ḥasan b. ʿUthmān al-Ghassānī,[78] he decided to move on. We find him next in Valencia, where he debated a Mālikī jurist.[79] He also visited Saragossa,[80] Ṭurṭūsha (Tortosa)[81] and Talavera.[82] He then made his way to Almería, where he owned a house in Baǧǧāna (Pechina).[83] Here, he wrote *Risāla al-ṣumādihiyya fī' l-waʿd wa'l-waʿīd* for the court of Maʿn b. Ṣumādih al-Tujībī (d. 443/1051).[84] His presence in the city alarmed the jurists, headed by Abū ʿUmar Aḥmad b. Rashīq al-Thaghlibī (d. 446/1054), who wrote a letter to the eminent Cordoban jurist, Muḥammad b. ʿAttāb (d. 462/1069–70), in which he complained about Ibn Ḥazm's strange opinions.[85]

In 449/1057 Ibn Ḥazm returned to Seville.[86] Although historians have held that the ʿAbbādid ruler, Abū ʿAmr ʿAbbād b. Muḥammad b. ʿAbbād (433–60/1041–67) was Ibn Ḥazm's worst enemy, three manuscripts of his *Kitāb al-faṣl* show clearly that he himself added to the introduction (of the second version) of this book a dedication in honor of Ibn ʿAbbād, who wanted a copy for his own private library.[87] This dedication suggests that some of Ibn Ḥazm's enemies may have plotted to turn Ibn ʿAbbād against him. It is conceivable that they showed Ibn ʿAbbād the passage in *Kitāb naqṭ al-ʿArūs* in which Ibn Ḥazm sarcastically criticizes the fabricated story of Khalaf al-Ḥuṣurī, who is the pseudo-Hishām al-Muʾayyad invented by

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[77] Dhahabī, *Tadhkirat al-ḥuffāẓ*, 3:1120–1; idem, *Siyar aʿlām al-nubalāʾ*, 18:77–83. We also know that Ibn Ḥazm attacked and refuted al-Dānī's arguments in a work entitled *Bayān ghalaṭ Abī ʿAmr al-muqriʾ fī kitābih al-musnad wa'l-mursal*.

[78] See Kaddouri, "Identificación de un manuscrito andalusí ," 305, n. 31.

[79] Dhahabī, *Siyar aʿlām al-nubalāʾ*, 18:191.

[80] Ibn Ḥazm, *al-Muḥallā* (Beirut, 1989), 8:415; 9:465.

[81] Ibid., 3:182.

[82] Ibn Ḥazm, *al-Faṣl*, 5:37.

[83] Ibid., 4:138.

[84] Dhahabī, *Siyar aʿlām al-nubalāʾ*, 18:196.

[85] See Kaddouri, "Identificación de un manuscrito andalusí," 304–5.

[86] Ḥamawī preserves the account of Abū Muḥammad b. al-ʿArabī, a Sevillian who studied under the supervision of Ibn Ḥazm for seven years: "I accompanied al-Shaykh al-Imām Abū Muḥammad b. Ḥazm for seven years. I read and received from him an authorization to transmit all of his books, except for the last volume of *Kitāb al-Faṣl* which consisted of six volumes. I thus missed reading the sixth volume [of the original]. In 456/1064 we also read before the master [viz., Ibn Ḥazm] four volumes of his *Kitāb al-Īṣāl*. I failed to study only the parts of his books I have mentioned (. . .) Imām Abū Muḥammad may have written other books outside of Seville when he was traveling in Sharq al-Andalus, which he did not share with me." Ḥamawī, *Irshād al-arīb*, 4:1653.

[87] Ḥimāya, *Ibn Ḥazm wa manhajuhu fī dirāsat al-adyān*, 112. See my Ph.D. Thesis (in progress), Chap. 3, p. 176.

the ʿAbbadids to seize Cordoba.[88] Ibn ʿAbbād then ordered the burning of Ibn Ḥazm's books and put him under house arrest in Awnaba, his ancestral village.[89] It was in Awnaba that the Ẓāhirī scholar died at the age of seventy-two on Monday 28 Shaʿbān 456/15 August 1064.

Ẓāhirism in Andalusia

The early Andalusian veneration for the Mālikī *madhhab* was an integral part of a comprehensive Umayyad political program. The Umayyads wanted to set up an independent caliphate in al-Andalus that would rival the Abbasid system in the East both politically and religiously. This explains why the Andalusian Umayyad regime chose to foster the Mālikī school.[90] Thus, we read in a letter by the Umayyad caliph in al-Andalus, al-Ḥakam al-Mustanṣir bi'llāh (350–66/961–76):

> Whoever wishes to deviate from the legal doctrine of Mālik b. Anas, as promulgated in a *fatwā* or in any other way, will receive from me the deserved punishment. In fact, I have examined the truth and superiority of Mālik's school, which follows the *sunna* and the *jamāʿa*. Therefore, we must limit ourselves to observing its doctrine.[91]

The veneration of Mālikism entailed giving greater preference to the ideas of Ibn al-Qāsim over those of Mālik's other disciples. Andalusian jurists were incredibly intolerant of any Mālikī legal opinion expressed outside of the framework of the *Mudawwana* (which contains Mālik's opinions according to Ibn al-Qāsim).[92] Members of other law schools encountered increasing hostility. Al-Qāḍī ʿIyāḍ wrote:

> The Andalusian elders adopted al-Awzāʿī's doctrine. Following ʿAbd al-Raḥmān al-Dākhil's arrival, the adoption of legal doctrines other than Mālikism was condemned out of hand, as the new caliphs imposed Mālikism as official doctrine. Shāfiʿism, Ḥanafism, Ḥanbalism or Ẓāhirism were introduced in al-Andalus by travelers; they were doctrines proclaimed by a few solitary jurists.[93]

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88 Ibn Ḥazm, *Naqṭ al-ʿarūs*, 97 (incorporated in *Rasā'il Ibn Ḥazm*, vol. 2).
89 Kaddouri, "Identificación de un manuscrito andalusí," 313.
90 Abū Bakr b. al-ʿArabī, *al-ʿAwāṣim min al-qawāṣim*, 365–8.
91 Kaddouri, "al-Rudūd ʿalā Ibn Ḥazm," 283.
92 ʿIyāḍ, *Tartīb al-Madārik*, 5:222–3.
93 Ibid., 1:26–7; Ibn Ḥazm, *al-Iḥkām*, 1:54.

One example of Andalusian Mālikī hostility to Andalusian scholars who were not Mālikīs is the case of the traditionalist Baqī b. Makhlad (d. 276/988–9),[94] who worked in relative obscurity during his lifetime because his ideas did not reflect any particular legal doctrine.[95]

On occasion, hostility toward non-Mālikī Andalusians manifests itself in the written history of Andalusian Ẓāhirism. Ibn Khaldūn devotes one paragraph of his *Muqaddima* to the identification of schools supported by Muslim jurists, including the Ẓāhirī school founded by Dāwūd b. ʿAlī al-Iṣfahānī (d. 272/885).[96] In this paragraph, Ibn Khaldūn attempts to minimize the impact of Ẓāhirism in the Muslim West. Obviously, the Maghribī historian ignored historical facts that point to the early introduction of Ẓāhirism in al-Andalus by ʿAbd Allāh b. Muḥammad b. Qāsim b. Hilāl al-Qurṭubī (d. 292/904–5), who studied with Dāwūd and introduced his books into al-Andalus.[97] Ibn Khaldūn also ignored the second great Andalusian Ẓāhirī: Mundhir b. Saʿīd al-Ballūṭī (d. 355/966),[98] who fiercely opposed adherence to Mālikism.[99] According to Ibn Khaldūn, "Ibn Ḥazm must have been a solitary self-taught Ẓāhirī, who devoted himself to an intensive study of the works of the Ẓāhirīs without the supervision of a master. In short, he attempted to expound Ẓāhirism according to his own independent interpretation (*ijtihād*)."[100]

It is unlikely that an historian of the caliber of Ibn Khaldūn would have been unaware of the name of Masʿūd b. Sulaymān b. Muflit (d. 426/1034–5), Ibn Ḥazm's Ẓāhirī master.[101] We are now able to link Ibn Ḥazm to Mundhir b. Saʿīd through an unbroken chain of Ẓāhirī scholars. Mundhir b. Saʿīd transmitted Ẓāhirī doctrine to Ibn Ḥazm with the help of his son, Ḥakam b. Mundhir b. Saʿīd (d. 420/1029) and two other disciples,

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[94] Ibn al-Faraḍī, *Tārīkh al-ʿulamāʾ wa'l-ruwāt li'l-ʿilm bi'l-Andalus*, 1:107–9, no. 283. See also Nūrī Muʿammar, *al-Imām Abū ʿAbd al-Raḥmān Baqī b. Makhlad: shaykh al-ḥuffāẓ bi-al-Andalus* (Casablanca: Manshūrāt ʿUkāẓ, 1988).

[95] Abū Bakr b. al-ʿArabī, *al-ʿAwāṣim min al-qawāṣim*, 366.

[96] Cf. Subkī, *Ṭabaqāt al-Shāfiʿiyya*, 2:284–93.

[97] Khushanī, *Akhbār al-fuqahāʾ*, no. 278, 161–2. Ibn al-Faraḍī, *Tārīkh al-ʿulamāʾ wa'l-ruwāt*, 1:257–8 (where the death date—272/885—is incorrect and must be corrected to: 292/904); Ḥumaydī, *Jadhwat al-muqtabis*, 2:418 (where the name of Ibn Hilāl's father [Muḥammad] is missing).

[98] Cf. Ibn Khāqān, *Tārīkh al-Wuzarāʾ wa'l-kuttāb*, 112–23.

[99] See further Tawfīq al-Ghalbzūrī, "*al-Madrasa al-ẓāhiriyya bi'l-maghrib wa'l-andalus*," doctoral thesis, University of Tetuan, 1999, Chapter 1, Section 3. pp. 192–213.

[100] Ibn Khaldūn, *The Muqaddimah: an Introduction to History*, trans. Franz Rosenthal, 3:5–6.

[101] Adang, "From Mālikism to Shāfiʿīsm to Ẓāhirism: the 'conversion' of Ibn Ḥazm," 82.

Aḥmad b. Qāsim al-Tāhartī al-Bazzāz and Ibn al-Jasūr, both teachers of Ibn Ḥazm's.[102]

It is in the context of intolerance towards unofficial legal doctrines that we must understand the hostility of Andalusian Mālikīs towards Ibn Ḥazm, who, in turn, responded by using an aggressive literary style, often accompanied by scathing sarcasm. A formidable opponent of Mālikism, his critique targeted two fundamental Mālikī principles: (1) the Mālikī view that the legal practice of Medina (*ʿamal ahl al-madīna*) qualified as consensus (*ijmāʿ*); and (2) the unthinking adoption of Mālikism, which Andalusian authorities regarded as indispensable. As Arnaldez observed:

> [T]he vast majority of Mālikī jurists devoted themselves more to commenting on their master's *Muwaṭṭaʾ* than to pondering the Qurʾān and the Traditions during Ibn Ḥazm's era in al-Andalus. These two fundamental features of Mālikism clearly aroused a strong reaction from Ibn Ḥazm, who preferred logical systematization and devotion to obeying the revealed texts. Nothing was more unpleasant to him than an exclusive concern with *furūʿ* [legal practice] supported by *taqlīd* [imitation].[103]

Ibn Ḥazm: Second Founder of Ẓāhirism

The Arabic word *ẓāhir* signifies the clear, immediate and obvious meaning of a Qurʾānic text or prophetic tradition. Ẓāhirī jurists maintain that they do not go beyond the obvious meaning of the revealed texts. The Ẓāhirī *madhhab* was founded in the 3rd/9th century by Dāwūd b. ʿAlī al-Iṣfahānī, a Shāfiʿī jurist from Baghdad who subsequently rejected analogy (*qiyās*), limited the sources of Islamic law to Qurʾān, *ḥadīth* and consensus (*ijmāʿ*), and condemned subjective opinion (*raʾy*) and juristic preference (*istiḥsān*). His works and those of his disciples were harshly criticized by their opponents, and it is thanks to Ibn Ḥazm that the founding ideas of Ẓāhirism survive to this day. The Andalusian author devoted his life to establishing

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[102] On Ẓāhirism in Andalusia prior to Ibn Ḥazm, see Adang, "The beginnings of the Ẓāhirī *madhhab* in al-Andalus," 117–25.

[103] See Arnaldez, *Grammaire et théologie chez Ibn Ḥazm de Cordoue*, 218: "le grand nombre de *fuquhāʾ* mālékites qui, de son temps, en Espagne, s'ètaient consacrés à commenter le *Muwaṭṭaʾ* de leur maître plus qu'à méditer le Coran et les Traditions. Ces deux caractères fondamentaux du Mālékisme devaient exciter la plus vive réaction chez Ibn Hazm qui a le goût de la systématisation logique, et le culte de l'obéissance aux textes révèlés. Rien ne pouvait lui être plus antipathique qu'une recherche exclusive des *furūʿ*, appuyée sur un *taqlīd*."

the rules of a coherent Ẓāhirī legal system that covered all aspects of Islamic law and provided answers to the objections of his opponents.

Legal Works

The fundamental principles of Ẓāhirism can be inferred from two of Ibn Ḥazm's works: *al-Iḥkām* (a work of *uṣūl*) and *al-Muḥallā* (a work of *furūʿ*).

1. *al-Iḥkām fī uṣūl al-aḥkām*

This work contains eight sections in which Ibn Ḥazm sets out the foundations for the rules of legal deduction according to the Ẓāhirī school. He attempts to justify every element of Ẓāhirī doctrine and to refute the rules of other schools. He divides the book into forty chapters.[104]

According to *al-Iḥkām*, the fundamental principles of Zāhirism are as follows:

1. The right to legislate is held exclusively by God, whose words were proclaimed by His Prophet, that is to say, the origins of the law are the Qur'an and sound Tradition (*al-ḥadīth al-ṣaḥīḥ*). According to Ibn Ḥazm, this is shown by Q 4:59: "If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination."
2. The solutions to all legal matters are inherent in the revealed texts because religion has been declared complete and perfect. Here, Ibn Ḥazm refers to Q 5:3: "I have perfected your religion for you, completed My favor upon you, and have chosen for you Islam as your religion," and to Q 6:38: "Nothing have We omitted from the Book."
3. All jurists agree on the legal value of consensus, as God said, "If anyone contends with the Messenger even after guidance has been plainly conveyed to him, and follows a path other than that becoming to men of Faith, We shall leave him in the path he has chosen, and land him in Hell, what an evil refuge" (Q 4:115). And He said, "And hold fast, all together, by the rope[105] which Allah (stretches out for you), and be not divided among yourselves" (Q 3:103).

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[104] Ibn Ḥazm worked on this book for at least seven years, from 431/1039 until after 437/1045–6, that is, he began writing the book in Almeria and finished it in Majorca. See Kaddouri, "Identificación de un manuscrito andalusí," 309, notes 47–8.

[105] The word rope (*ḥabl*), figuratively, refers to the link between God and His creatures.

Ibn Ḥazm discusses two types of consensus: (1) that of every generation from the beginning of Islam until the end of the world; and (2) that of a particular generation. In his view, the first type of consensus is inconceivable. God did not enjoin the believers to follow a consensus that will never exist, as another consensus will inevitably arise in every subsequent generation, and so forth. As for the second type of consensus—that of a particular generation, he analyzes three possible understandings of it:

1. The correct consensus is that of the generation following (*al-tābiʿīn*) the Companions of the Prophet. This understanding is invalid, according to Ibn Ḥazm, for two reasons: (a): no jurist accepts it; and (b) it is pure thesis without any argument. Moreover, its opponents could say that it should be the consensus of this particular generation and not that one.
2. The only consensus to consider is that of the Companions of the Prophet. It is certain that their agreement on a legal matter is based on a tradition that they received from the Prophet. As the law has been declared complete, it is impossible to add or remove anything from it.
3. Following the consensus of the Companions, that of a later generation is also accepted.

Ibn Ḥazm refutes this last doctrine as follows:

1. If the later consensus is identical to that of the Companions, then the result is a tautology.
2. If this consensus concerns a legal matter about which the Companions of the Prophet disagreed, it is automatically invalid. It is impossible to reconcile diversity and consensus. Moreover, any later generation makes up only one group of the believers, whereas the accepted consensus is that of all believers. Let us not forget that some Companions disagreed with the text of the so-called consensus.
3. When this subsequent consensus concerns a legal issue about which there is neither agreement nor disagreement among the Companions of the Prophet, but one group of Companions holds an opinion, or there is nothing regarding this matter, Ibn Ḥazm points out that there is always one group of believers whose accord can be a true consensus. In fact, the only believers who existed at the time of the Companions were the Companions themselves. Consequently, their consensus is the only true one.

4. The principle of the presumption of the continuity of the initial legal situation (*istiṣḥāb al-ḥāl*): if the community agrees to permit, prohibit or require a specific thing, and someone claims that this permission, prohibition or requirement is wrong, his argument is rejected until he can prove it by means of a text or a sound tradition. To illustrate this principle, Ibn Ḥazm uses the case of the husband who is impotent: "Given that his marriage is valid, it remains so as long as neither a text nor consensus permits the separation of husband and wife."[106]
5. One must limit oneself to the narrowest possible interpretation (*aqallu mā qīl*). For instance, if a text prohibits certain matters and consensus excludes a fixed number of these from this prohibition, there is no ground for anyone to exclude either one or all of the remaining matters.
6. Any text is considered non-abrogated and generally applicable so long as no other text points to abrogation or restriction of the general application.
7. It is necessary to preserve the obvious (literal) sense of a text unless: (a) another text sheds light on the tacit sense of the first text that was not immediately obvious; (b) clear sensory or rational evidence indicates that neither God nor his Prophet intended the literal sense. This is because God said: "We sent not a messenger except [to teach] in the language of his [own] people, in order to make [things] clear to them" Q 14:4), and He said: "[the Qur'ān is revealed] in a perspicuous Arabic tongue" (Q 26:195).
8. When a text contains a homonym, all possible meanings of the consensus are valid. Excluding one meaning to the detriment of others is valid only when using either another text or a consensus.
9. God's commandments must be applied immediately, as He says: "Be quick in the race for forgiveness from your Lord" (Q 3:133).
10. Using an unambiguous textual indicant (*dalīl*) is mandatory.

Here Ibn Ḥazm does not acknowledge, strictly speaking, reasoning based on or extrapolated from texts. The indicant (*dalīl*) is found in the text itself. It is sufficient to see it, explain it where it is summarized, and emphasize it where it is obvious. Thus, textual evidence in itself guides understanding—no more, no less.

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[106] Ibn Ḥazm, *al-Nubadh al-kāfiya*, 43–4.

Ibn Ḥazm distinguishes seven types of indicant. The first consists of two premises that yield a conclusion not specified in a text . The example he gives is that since every fermented drink is *khamr* and the Qurʾān forbids *khamr*, all fermented drinks are forbidden. The second is a condition linked to a quality that, wherever it is found, makes what is connected to that condition obligatory. For example, His saying, "If they cease [from persecuting the believers], then that which is past will be forgiven them" (Q 8:38) makes it clear that whoever ceases will be forgiven. The third is a statement (*lafẓ*) from which is understood a particular meaning that leads to another statement. One example given by Ibn Ḥazm is God's saying, "Indeed Abraham was compassionate and forbearing" (Q 11:75). One must understand from this statement that Abraham was not deficient in understanding (*safīh*). The fourth consists of legal categories all of which are inapplicable except for one. For example, a particular thing may be either forbidden and thus the rules of whatever is *ḥarām* apply to it, or it is obligatory (*wājib*) and therefore the rules that apply to whatever is obligatory apply to it (i.e., no act or thing can be thought of in more than one category). The fifth is an indicant of logical order. For example, if one were to say that Abū Bakr was superior to ʿUmar and ʿUmar to ʿUthmān, then there would be no doubt that Abū Bakr was superior to ʿUthmān. The sixth: If one says that "all intoxicating drinks are forbidden," it follows that some forbidden things are intoxicating. The seventh is a statement that encompasses a number of meanings. For example, from the statement "Zayd is writing," it can be inferred that Zayd is alive and capable of writing.[107]

These fundamental principles accepted by Ẓāhirī scholars may be contrasted with the following legal rules rejected by Ẓāhirī scholars:

1. Indicant by apophasis (*dalīl al-khiṭāb*): Ibn Ḥazm rejects this method, which implies that the text itself may be used to argue in favor of a conclusion beyond its scope. Three divisions of *dalīl al-khiṭāb* can be distinguished: (a) it is understood that what is not mentioned must be equated with what is mentioned; (b) it is not understood that what is not mentioned must be judged otherwise than that which is mentioned,

[107] See Ibn Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām* (Beirut, 1980), 5:106–07 for the full text of these seven. See also the translation by Arnaldez, *Grammaire et théologie*, 158–9.

or (c) it is not understood that what is not mentioned is in agreement with what is mentioned.[108]

2. Legal analogy (*al-qiyās al-fiqhī*): The refutation of *qiyās* is the negative element of Ibn Ḥazm's system. The basis of the entire Ḥazmian critique is that "analogical reasoning [or *qiyās*] is employed to go beyond the texts, and judge where neither Qur'ān, nor *ḥadīth*, nor consensus provides a basis for a particular outcome."[109] Ibn Ḥazm begins by recalling the circumstances in which *qiyās* appeared. He then demonstrates that "... it does not apply to a syllogism in general, which is labeled *qiyās* by the logicians, but rather applies to analogical reasoning based on either the identification of a common principle justifying the formulation of a ruling based on a common *ratio*, or on some resemblance.[110]

Qiyās had been defined by Abū Bakr al-Bāqillānī as follows: "*Qiyās* consists of relating one of two known matters to the other by rendering mandatory certain rulings applying to both of them; or by canceling the obligation after reconciling the two matters; or by reconciling the matters based on any principle or form of reconciliation."[111] This definition was rejected by Ibn Ḥazm, as follows: "... These are the words of a quick-tempered person. What are these 'two known matters' doing here? And who knows them? He speaks of rendering something mandatory and canceling obligation: these are conflicting processes that result in uncertainty. And, finally, what is the meaning of this 'reconciliation of the two matters'? There is only mumbling, stuttering and confusion here."[112]

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[108] See Arnaldez, *Grammaire et théologie*, 162: "Ou bien on comprend que ce qui est passé sous silence doit être jugé autrement que ce qui est prononcé. Ou enfin on ne comprend pas que ce qui est passé sous silence soit concordant avec ce qui est prononcé."

[109] See ibid., 165: "Le fondement de toute sa critique est que ce raisonnement consiste essentiellement à sortir des textes, a juger là où ni le Coran, ni la tradition, ni le consensus ne fournissent la base d'un jugement."

[110] Ibid., 166: "Il s'agit donc bien ici non du syllogisme en général, appelé techniquement *qiyās* par les logiciens, mais du raisonnement par analogie, fondé soit sur l'identité d'un principe commun qui motive la formulation d'un jugement sur le patron de l'autre (*'illa*), soit sur une ressemblance quelconque."

[111] Ibn Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām*, 7:53. See also Arnaldez, 166: "Avec quelle ironie, il [Ibn Ḥazm] rejette la définition de Bāqillānī! 'Le *qiyās* consiste à rapporter l'une de deux choses connues à l'autre en rendant obligatoires certains des jugements qui les concernent toutes deux, ou bien en faisant tomber l'obligation, par suite d'un rapprochement de ces deux choses, que ce soit un rapprochement fondé sur un principe ou une forme quelconque de rapprochement."

[112] Ibn Ḥazm, *al-Iḥkām*, 7:53 and see again Arnaldez, *Grammaire et théologie* 166: "C'est là, dit-il, le discours d'un colérique plus que de tout autre. Et que font là ces 'deux choses connues'? Et qui est-ce qui les connaît? Il parle de rendre obligatoire et de supprimer

In his critique of *qiyās* Ibn Ḥazm emphasizes that proponents of this type of reasoning divide it into three types. "The first subdivision consists of the likeliest and the most appropriate reasoning [*al-qiyās bi'l-awlā*], which we call *a fortiori* reasoning. Its general form is as follows: If we judge a particular thing by a certain judgment, that thing is worthy of that judgment." The second is based on the comparability of cases. For instance, if it is mandatory to purify a container by washing it seven times after a dog has rendered it impure, the same obligation applies in the case of a pig. The third consists of reasoning by means of closely related cases, which differs only a little from the previous [subdivision]."[113]

2. *Kitāb al-Muḥallā*

Al-Muḥallā bi'l-ḥujaj wa'l-āthār fī sharḥ al-mujallā bi'l-ikhtiṣār is at present the largest extant source of Ẓāhirī legal practice. At the same time, it is an encyclopedia of comparative Islamic law, in which the author discusses matters relating to the most important legal questions by closely examining and citing relevant Qur'ānic texts and prophetic traditions. *Fatwās* are carefully sorted so that only firmly grounded opinions remain. The concision evident in the *Muḥallā* reflects Ibn Ḥazm's response to his disciples, who implored him to produce a manual that would give them access to Ẓāhirī legal arguments. Ibn Ḥazm determined to write a commentary on *al-Mujallā*,[114] a project that he undertook in Seville in the last ten years of his life, although he died before completing his commentary on the last sections.[115] Before his death, Ibn Ḥazm instructed his eldest son, Abū Rāfiʿ al-Faḍl, to complete the unfinished portions.[116]

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l'obligation: ce sont là deux opérations contraires, qui laissent dans l'incertitude. Et enfin, que signifie ce 'rapprochement de deux choses . . .'? Il n'y a là que bredouillage, bégaiement et confusion."

[113] See Arnaldez, *Grammaire et théologie*, 168: "La première subdivision est celle du raisonnement par 'le plus vraisemblable et le plus digne'; c'est ce que nous appellerions un raisonnement *a fortiori*. En voici la forme générale: si on juge telle chose par tel jugement, telle chose est plus digne de ce jugement. . . . En second lieu vient le raisonnement fondé sur la comparabilité des cas. Par exemple, s'il est obligatoire de purifier sept fois par lavage un récipient où a bu un chien, ce sera obligatoire de même dans le cas du porc. La troisième subdivision est celle du raisonnement par les cas voisins, elle se distingue peu de la précédente."

[114] Ibn Ḥazm's *Kitāb al-mujallā* was originally a book in one volume. It was the author's multi-volume commentary on this book that resulted in *Kitāb al-Muḥallā*.

[115] The author commented on 2028 questions.

[116] Abū Rāfiʿ would have abridged 284 questions from the book *al-Īṣāl* (the more detailed of Ibn Hazm's books on *fiqh*) and added these questions at the end of the *Muḥallā*. See

According to Professor Rawwās Qalʿajī, *al-Muḥallā* preserves a significant number of legal opinions from jurists living in the first four centuries AH. Ibn Ḥazm cites 12,903 legal opinions attributed to 546 scholars. Among them are scholars to whom Ibn Ḥazm attributed more than 600 opinions and others to whom only one opinion is attributed. Also included are 250 legal opinions that were never contested (*lam yuʿraf lahum fīhā mukhālif*).[117]

Translations of Selections from *al-Muḥallā*

We will now present four texts selected from *al-Muḥallā* that illustrate the Ẓāhirī legal methodology used by Ibn Ḥazm.

1. *Missing a prayer, deliberately*

This question relates to the problem of performing the prescribed prayers within the time period determined by God and the Prophet.

Ibn Ḥazm, who had an unconditional adherence to textual prescriptions, rejects the judgments expressed by Abū Ḥanīfa, Mālik and al-Shāfiʿī, who declared that a believer may perform the missed prayer after the expiration of its time period. Our Ẓāhirī author rejects this declaration, which, in his view, has no textual foundation and transgresses the limits fixed by God. For each prescribed prayer, God defined a time limit at both extremes that constitutes the legal time period for the prayer. According to Ibn Ḥazm, there is no difference between the person who prays before or after the correct time; both perform the prayer outside of the prescribed time period. If prayer after the time determined by God's Messenger were allowed, then the establishment of a time limit would make no sense. Each action relegated to a specific time period is unrecompensed outside this time period. What is the purpose of a time limit that is specifically selected for an action if performance of the action is valid outside of this limit? The author asks: "Where did these people obtain permission to perform a prayer they deliberately neglected after the expiration of its time limit and how does this suffice for whoever neglects it? None of this derives from the Qurʾān, the *Sunna*, the opinion of one of the Prophet's

further, M. Ibrāhīm al-Kattānī, "Ḥawla kitābayn hāmmayn: Al-Mawrid al-aḥlā fī ikhtiṣār al-Muḥallā l'ibn Ḥazm wa-l-Qidḥ al-Muʿallā fi ikmāl al-Muḥallā li-bn Khalīl," 309–46.

[117] Cf. ʿUways, *Ibn Ḥazm al-Andalusī wa juhūd-uh fī-l-baḥth al-tārīkhī wa-l-ḥaḍārī*, 95.

Companions, or even analogical reasoning (*qiyās*)." Ibn Ḥazm then presents textual and rational arguments that support his position.

> *Question 279*: A person who deliberately fails to perform one of the prescribed prayers before its time expires may not make it up at any time. He must, therefore, compensate for his misdeed by contributing to charity and increasing his supererogatory prayers (*nawāfil*), so that his balance overflows on the Day of the Resurrection. May this negligent person repent and ask God's forgiveness! By contrast, Abū Ḥanīfa, Mālik and al-Shāfiʿī declared that such a person may perform the omitted prayer after the expiration of its time period. Mālik and Abū Ḥanīfa went so far as to declare that whoever deliberately misses one or several prayers must always perform it before the next obligatory prayer for the time of day. If the number of prayers deliberately missed was five in a row or fewer, it does not matter whether the time for the current prayer has or has not ended. They also claim that if more than five prayers in a row are missed, one must begin by performing the one relevant to that specific time of the day.
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> Ibn Ḥazm says again: The proof [of the soundness] of our position is based on the very words of God, the Almighty: "So woe to the worshippers who are neglectful of [and delay] their prayers" (Q 107:4–5). And God also said: "But after them there followed a posterity who missed prayers and followed after lusts. Soon, then, will they face Destruction" (Q 19:59). If a person who deliberately misses a prayer were able to make up for it after the time for it has passed, he would deserve neither hardship nor perdition!
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> For each obligatory prayer, God defined a time with two specific limits that constitute the legal period for prayer; thus, the prayer takes place inside or outside of the two limits, depending on the timing of its performance. In addition to that, viewed from the rational angle, there is no difference between a person who prays before or a person who prays after the appropriate time; this is because, in practice, both have performed their prayer outside of the prescribed time. There is by no means an analogy (*qiyās*) between the one and the other: both exceed the limits established by God, who said : "Anyone who transgresses the limits of Allah, does verily wrong his [own] soul" (Q 65:1).
>
> Moreover, the performance of a prayer that has deliberately been omitted would require a new law. But God alone legislates [what we receive] through His Prophet. We would ask those people who say that a person who deliberately misses a prayer can make up for it: "Tell us about this prayer whose performance you imposed on that person; is it the same prayer that God commanded him to perform or is it a different one?" If they claim that it is the same prayer, then we can say to them: "Therefore, whoever deliberately misses it is not guilty of disobedience to God, because he did what God had ordered him to do. According to you, he did not sin and the person who deliberately delays a prayer until its time has expired should not be blamed." But this opinion is completely rejected by any Muslim. If they say: "It is not the prayer that God commanded," we reply: "You spoke the truth." And their affirmation is satisfactory.

> Then we would ask them: "Tell us about the person who deliberately abandons the prayer until its time frame has expired: does this constitute obedience or disobedience to God?" If they say: "It is obedience," they oppose without doubt the indisputable consensus of all Muslims, the Qurʾān and the well-attested Tradition (*al-sunna al-thābita*). If they say: "It is disobedience," they speak the truth. It is unacceptable that an act of disobedience should take the place of an act of obedience.
>
> In addition, God established the times of prayer through His Messenger, so that each prayer has a starting time that cannot be advanced and an ending time that cannot be exceeded. Members of the Muslim community do not contest this point. If, however, we allow prayers after the hour set by God's Messenger, then his setting of a time limit is senseless. May God save us from such an opinion. Any action linked to a specific time is unacceptable outside of that time. If it were valid outside of that time, what would be the point of establishing a specific time for this action? Our argument is clear.[118]

Ibn Ḥazm now discusses this matter in-depth. He says:

> If making up [the prayer] is mandatory for whoever abandons it until its time has expired, why did God and His Messenger choose not to mention this fact since they certainly did not forget it: "And thy Lord never doth forget" (Q 19:64). Any law not based on the Qurʾān or the *Sunna* is invalid. It has been reliably related that the Prophet said: "Missing the middle prayer (*ṣalāt al-ʿaṣr*) is like losing one's family and possessions." It is thus correct to say that if we overlook an action, it cannot be compensated for; if it were compensated for, or if it were possible to compensate for it, the action would not be overlooked. The entire Muslim community agrees with these words and believes that if the period established for the prayer has ended, the prayer has surely been 'missed'. But if one agrees with the invalid opinion that one can make up for it, the [following] sentence: 'The prayer has been missed' becomes false. It follows that there is no way to compensate for the missed prayer. Among those who agree with us are: ʿUmar b. al-Khaṭṭāb, his son ʿAbd Allāh, Saʿd b. Abī Waqqāṣ, Salmān [al-Fārisī], Ibn Masʿūd, al-Qāsim b. Muḥammad b. Abī Bakr, Budayl al-ʿUqaylī, Muḥammad b. Sīrīn, Muṭarrif b. ʿAbd Allāh, ʿUmar b. ʿAbd al-ʿAzīz and others.[119]

Two pages later Ibn Ḥazm adds:

> God did not provide any excuse for whoever wishes to perform the prayer, to delay it beyond its appropriate time for any reason, even in periods of combat, fear, extreme illness or travel. God says: "When thou [O Messenger] art with them, and standest to lead them in prayer, let one party of them stand up [in prayer] with thee" (Q 4:102). And He said: "Guard strictly your

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[118] Ibn Ḥazm, *al-Muḥallā* (Beirut, 1989), 2:10–11.
[119] Ibid., 2:12–13.

> [habit of] prayers, especially the middle prayer; and stand before Allah in a devout [frame of mind]. If ye fear (an enemy), pray on foot, or riding" (Q 2:238–39).
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> God in no way permits an extremely ill person to postpone prayer. In fact, if standing is impossible, such a person is ordered to pray sitting; if he cannot pray sitting, then he may pray resting on his side. Furthermore, if a person cannot perform his ablutions with water, he may perform them with sand (*al-tayammum*). And if he cannot find suitably pure sand with which to perform his ablutions, he may pray. Thus, from where did these people obtain the permission to perform a prayer that has been deliberately neglected, after the time for it has expired? And how would this be sufficient for those who have neglected it? Nothing of this is based on the Qurʾān, the *Sunna*, the opinion of the Companions of the Prophet, or even on analogical reasoning (*qiyās*).[120]

2. *The interdiction of singing and playing music*

The author deals with this question in passing in the section on sale (*kitāb al-buyūʿ*) where he refutes the opinion of jurists who prohibit trade in musical instruments under the guise of their previous opinion on the prohibition of singing and music. Here again, Ibn Ḥazm thinks that their opinions are weak, sometimes based on weak texts and other times, on strong texts, which, upon analysis, do not support their contention.

> Question 1566: Buying and selling chess pieces, woodwinds, lutes, stringed instruments, and drums—all are licit. Whoever breaks these instruments must compensate their owner—except in the case of statues—as these objects are among the possessions of their owner (. . .). God said: "It is He Who hath created for you all things that are on earth" (Q 2:29). And He said: "Allah hath permitted trade" (Q 2:275). And He also said: "He hath explained to you in detail what is forbidden to you" (Q 6:119).
>
> Moreover, there are no authentic texts prohibiting buying and selling these things. In addition, according to Abū Ḥanīfa: "Whoever breaks one of those (aforesaid) instruments must compensate [their owner]." As for those who said: "These sales are illicit," the evidence they have to support this statement consists of weak texts or some strong ones which—upon analysis—do not support that opinion.[121]

Following this introduction Ibn Ḥazm discusses the authenticity of twenty-one *ḥadīth*s and the meaning of one specific verse used by his opponents

[120] Ibid., 2:15.

[121] Ibid., 7:559. See further Elías Terés Sádaba, "La epístola sobre el canto con música instrumental de Ibn Ḥazm de Córdoba," *al-Andalus* 36 (1971), 203–14.

to support the prohibition on singing and music.[122] He concludes as follows:

> Whatever they have mentioned proves nothing for the following reasons: (1) No one but God's Prophet has the authority [to prohibit]. (2) Their interpretation of the Qurʾānic verse conflicts with that of other Companions and Successors. (3) The text of this very verse contradicts their interpretation, because it says: "But there are, among men, those who purchase idle tales, without knowledge [or meaning], to mislead [men] from the Path of Allah and throw ridicule (on the Path): for such there will be a Humiliating Penalty" (Q 31:6). The verse mentions a characteristic which, if present in a person, automatically makes him a non-believer. This concerns whoever mocks God's path. Therefore, whoever buys a Qurʾān codex (*muṣḥaf*) to lead people astray from God's path and to mock Him is without doubt a non-believer. God chastises this kind of person in this verse. He does not in any way denigrate whoever purchases idle tales as a means of entertainment and relaxation for his soul, as opposed to purchasing them as a means to mislead people from God's Path. This suffices to refute their interpretation.
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> They also ask: "Is singing part of the right truth or not?" And they say: "God said: 'Apart from truth, what is there but error?' " (10: 32). To which Ibn Ḥazm replies:
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> God's Messenger says: "Actions are judged according to intentions"; every man's action will be taken into consideration insofar as his intentions are concerned. Thus whoever intends to listen to songs the better to disobey God leads a debauched life (*fāsiq*)—and this is not specific only to singing. Whoever intends to relax his soul the better to obey God and renew his capacity to perform acts of piety is obedient and beneficent. Thus, what he accomplishes falls within the province of truth. Whoever intends neither to obey God nor to disobey Him gives himself over to small things that God forgives. Therefore, that person's status is the same as that of one who strolls in his garden, sits on his doorstep to watch passers-by, or indeed dyes his clothing sky blue or green, and so forth. Thus their whole argumentation about this matter has become invalid.[123]

3. *Women and slaves may serve as judges*

This section introduces the question of whether women and slaves are qualified to serve as judges. The Mālikīs categorically forbid this.[124]

> [Ibn Ḥazm says that no text forbids women or slaves from serving as judges. Then he shows the restricted sense of the general meaning of the following *ḥadīth*: "Those who entrust a woman with the management of their affairs

[122] Ibid., 7:559–67.
[123] Ibid., 7:567.
[124] The Ḥanafīs forbade slaves from holding judgeships.

never succeed." Ibn Ḥazm adds:] "We would say that these words from the Prophet apply exclusively to the question of the caliphate (*khilāfa*); that is to say, women cannot accede to the rank of 'Commander of the Faithful' (*martabat al-imāma al-ʿuẓmā*)."[125] He then attempts to contradict his Mālikī opponents by referring to legislative acts adopted by the Caliph ʿUmar b. al-Khaṭṭāb, who nominated a woman, al-Shifāʾ bt. ʿAbdallāh al-Qurashiyya, to oversee the markets (i.e., as inspector of the market).[126] Ibn Ḥazm recalls that all believers without exception are bound by the divine prescription requiring them to command the right and forbid the wrong, as the Law is the same for all believers, with the exception of a few special and very limited cases. He then provides proofs derived from the obedience of the Companions[127] to the text of the Prophet, who advised them to hear and obey even a slave [commander]. Ibn Ḥazm concludes: "This is a clear text which concerns the permissibility of nominating a slave to the status of commander (*wilāyat al-ʿabd*)."

Question 1804: "A woman can serve as a judge, and this is Abū Ḥanīfa's view. It has been transmitted to us that ʿUmar b. al-Khaṭṭāb appointed al-Shifāʾ, a female neighbor of his, as market inspector."

If someone objects that God's Messenger said: "Those who entrust the management of their affairs to a woman never succeed," then we would say: "These words from the Prophet apply to the general question of the caliphate (*khilāfa*). The following words from the Prophet provide the evidence for our view: "A woman is responsible for her husband's possessions and is accountable for this." The Mālikīs allowed her to be a guardian (*waṣiyya*) and also to act as a legal representative (*wakīla*). Moreover, there are no other texts preventing her from taking on certain matters.[128]

Question 1805: "A slave is permitted to serve as a judge because he too is charged with the [divine] prescription requiring any believer to command the right and forbid the wrong."

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[125] The position adopted by Ibn Ḥazm seems contradictory at first. How could he have argued in his *Faṣl* 5: 119–21 in favor of "women who were prophetesses (*nubuwwat al-nisāʾ*)" while rejecting the notion that a woman can become head of state? In fact, it is Ibn Ḥazm's literalism that reveals itself in a strange way even though it is in complete harmony with his Ẓāhirī theological system. Ibn Ḥazm says that, in a few cases, women were prophetesses (*nabiyyāt*, but not God's Messengers) according to the literal Ẓāhirī interpretation of a few Qurʾānic texts (for example, the mothers of both the Prophet Isaac and of Mary, mother of Jesus, received Divine *waḥy* by means of the Angels, cf. Q 11:71–3 and 19:19), and he is willing to say that women cannot become heads of state based on a text from the *ḥadīth* mentioned above. See Turki, "Femmes privilégiées et privilèges féminins dans le système théologique et juridique d' Ibn Ḥazm," *Studia Islamica* 47 (1978), 25–82.

[126] For one possible source of Ibn Ḥazm's statement, see Ibn ʿAbd al-Barr, *Kitāb al-istiʿāb fī maʿrifat al-aṣḥāb*, 4:1868–9.

[127] Ibn Ḥazm mentions as examples Abū Dharr al-Ghifārī, ʿUthmān b. ʿAffān and Suwayd b. Ghafla (who transmitted the same text through ʿUmar b. al-Khaṭṭāb).

[128] Ibn Ḥazm, *al-Muḥalla* (1989), 8:527–8.

> God said: "Allah commands you to render back your Trusts to those to whom they are due; And when ye judge between man and man, that ye judge with justice" (4:58).[129] This text is generally intended for men and women, the free person and the slave, since religion is for all, except in cases in which the sacred text(s) specify differences between a woman and a man, and between a free person and a slave. In these cases, the general meanings of the texts do not apply. Mālik and Abū Ḥanīfa both say: "Appointing a slave as judge is not permitted."
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> To this, Ibn Ḥazm replies: We are not aware of any argument [in their possession] that would support this opinion which is based on any sound *ḥadīth*. When Abū Dharr arrived at a place called al-Rabadha, exactly at prayer time, someone said to the imam, who had been a slave: "This is Abū Dharr." The imam wanted to give up his place, but Abū Dharr refused, saying: "The Prophet advised me to hear and obey even a slave with severed limbs." This is a clear text indicating that it is permissible to elevate a slave to the status of a sovereign (*wilāyat al-ʿabd*). Indeed, this was current practice for ʿUthmān, without the Companions raising any objection. Finally, it has been transmitted to us that Suwayd b. Ghafla recalled: "'Umar b. al-Khaṭṭāb said to me: 'Obey the Commander [of the Muslims] even if he be a slave with severed limbs.' "[130]

4. *Child Custody*

In the following cases, Ibn Ḥazm rejects as unjust certain constraints established by the jurists regarding the custody of children by their mother: (1) if the mother is a slave; (2) if she subsequently marries a man other than the father of her children, or (3) if the father moves out of the city in which his former wife (the mother of his children) lives.

Ibn Ḥazm reviews the entire issue of child custody based on his Ẓāhirī perspective. He argues that the constraints established by the jurists are not valid so long as they are not supported by textual evidence. In addition, he grants the non-Muslim mother the right of child custody for two years, the length of time allowed for breastfeeding, as established in Q 2:233. Ibn Ḥazm gives priority to a mother's custody of her children based on the revealed texts, unlike the jurists, who set conditions for custody that are not supported by these texts. He also insists on the purpose of the law, which is to seek the protection of the child in question. Thus custodial priority should be given to the person who can best fulfill this purpose.

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[129] Here, the word "trusts" (*al-amānāt*) is used in a general sense. It means everything that belongs to others and is held in trust for them.

[130] Ibn Ḥazm, *Muḥallā* (Beirut, 1989), 8:528.

Question 2010: The custody of children, male and female, belongs first to their mother, until they reach puberty, and are sound in mind and body. This applies in all instances, irrespective of whether the mother is a slave or free, remarried or not, and irrespective of whether the father of the children has left the country or not. Note that the grandmother is considered a mother.

However, if the mother [of the children] is not qualified [to exercise custody] because she is not trustworthy in either worldly or spiritual matters, we must act in this case in accordance with the best interests of the child, that is to say in the interests of his upbringing. Therefore, it is essential to entrust the child to a person who can satisfy this purpose, whether it is the father, brother, sister, maternal aunt or uncle, paternal aunt or uncle, and, generally speaking, the neighbor, whose qualification [to exercise custody] is greater than that of a stranger. There is no doubt that religious concerns prevail over worldly ones (*al-dīn mughallab ʿalā al-dunyā*).

If the persons specified above are equally sincere and pious, then we must entrust the child to the following persons, in this order: mother/grandmother; father/grandfather; brother/sister; the person who is most closely related to the child. A non-Muslim (*al-kāfira*) mother[131] has a greater right than anyone else to raise her children during the period allotted for breastfeeding [which may last up to two years]. As for a mother who is an unbeliever and a sinner (*fāsiqa*), her right to exercise child custody is suspended when the children reach the age of discretion, if they can dispense with her care and support themselves. Textual support for this view is found in God's words: "But kindred by blood have prior rights against each other in the Book of Allah" (Q 8:75).

As for the mother, her child is entrusted to her by nature [viz., automatically] when she is pregnant and during breastfeeding, thanks to the words of the Almighty: "Mothers shall give suck to [i.e., breastfeed] their offspring for two full years" (Q 2:233).

Therefore, a child must not be removed from the place in which God has put it without the support of a sound text (i.e., Qurʾān or *ḥadīth*) that decrees the removal of the child from a mother who has remarried. Moreover, there is no sound text that requires suspending the mother's rights to custody of her child when the father [of this child] moves far away from the mother's residence. We report that on the authority of Muslim from Qutayba b. Saʿīd and Zuhayr b. Ḥarb both of whom say, on the authority of Jarīr b. Ḥāzim, ʿUmāra b. al-Qaʿqāʿ, Abū Zurʿa and Abū Hurayra: "A man asked: 'Oh! Messenger of God, who is most deserving of my closest companionship?' The Prophet said: 'Your mother.' 'Then who?' 'Your mother.' I said, 'Then who?' 'Your mother, again.' 'Then who?' 'Then your father . . .' " About this text Ibn Ḥazm observes: "We have here a precise text requiring the custody of the children, as it is also a [form of] companionship."

[131] By a "non-Muslim mother," Ibn Ḥazm implies a Jewish or Christian mother.

As for putting religion first, it is inferred from God's words: "Help ye one another in righteousness and piety, but help ye not one another in sin and rancor" (Q 5:2), and: "Stand out firmly for justice" (Q 4:135), and "Eschew all sin, open or secret." (Q 6:120).

Thus whoever leaves a boy or girl among those who practice infidelity (*al-kufr*) and are prepared to deny the prophecy of the Messenger of God, to neglect prayer, to transgress the rules relating to Ramadan and wine drinking (. . .), this person has encouraged sin and transgression rather than godliness and piety. Indeed, this is forbidden and is a sin (*ḥarām wa-maʿṣiya*).

By contrast, whoever removes a child from this evil influence in order to take him to a place in which he will become accustomed to pray and fast, to learn the Qurʾān and Islamic laws, where he can know of the prophecy of the Messenger of God, and hate wine and sinful behavior (*al-fawāḥish*), such a person, who helps both himself and a child perform good deeds and act piously, thereby avoiding sin and transgression, has acted with justice and avoided error.

As for the custody of the child by his non-believing mother during breastfeeding, we are not concerned, because God said: "Mothers shall breastfeed their babies for two full years (Q 2:233)." In addition, small children of that age—indeed, until the age of three or four—do not comprehend anything and do not understand anything of what they observe in their surroundings. Therefore, they are not in [doctrinal] danger [from being in the presence of their non-believing mother].

When the mother is a sincere believer (*maʾmūna fī dīnihā*) and the father as well, she is given priority over him, on account of the previous tradition [reported by Muslim]. After the mother comes the grandmother. But if neither is sincere, or if the mother has been remarried to an insincere man, whereas the father is sincere, then priority goes, first, to the father and then to the grandfather [of the child].

When none of the aforesaid persons are worthy of confidence, and the child has an [older] brother or sister, the most capable of the two has priority over the other in taking custody of the child. The same priority must be followed with regard to other relatives besides a child's siblings.[132]

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[132] Ibn Ḥazm, *Muḥallā* (Beirut, 1989), 10:143–5.

CHAPTER ELEVEN

AL-SARAKHSĪ (D. 483/1090)*

Osman Taştan

Life

Shams al-A'imma al-Sarakhsī[1] was born *ca.* 400/1010[2] to a merchant family,[3] probably in Sarakhs,[4] a city between Mashhad and Marw (currently in Turkmenistan, near the border with Iran).[5] Sarakshī studied in Bukhara under Shams al-A'imma ʿAbd al-ʿAzīz al-Ḥalwānī (d. 448/1056), from whom he inherited the *laqab* Shams al-A'imma.[6] He also studied under Shaykh al-Islām ʿAlī b. al-Ḥusayn b. Muḥammad al-Sughdī.[7] After completing his studies, Sarakhsī went to Uzjand, near Farghāna in

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* This essay is based on chapter one ("Life and Works of Sarakhsī") of my PhD thesis (*The Jurisprudence of Sarakhsī with particular reference to war and peace: a comparative study in Islamic law*), supervised by Aziz al-Azmeh and Ian R. Netton, University of Exeter, 1993). I am grateful to the Turkish Academy of Sciences/Türkiye Bilimler Akademisi for financing my studies in the Near Eastern Studies Department at Cornell University as visiting scholar in the first half of 2004, at which time I wrote this essay.

1 His full name was Muḥammad b. Aḥmad b. Abī Sahl Abū Bakr Shams al-A'imma al-Sarakhsī.

2 M. Hamidullah, "Serahsinin Devletler Umumi Hukukundaki Hissesi," 15–25, at 16.

3 M. Hamidullah, "Serahsi'nin Devletler," 16; idem, "Avant-Propos Du Traducteur," vol. 1, p. XXXII. The exact relationship between Shaybānī's *al-Siyar al-kabīr* and Sarakhsī's commentary, which is problematic, will be analyzed below.

4 *EI*[1], s.v. "al-Sarakhsī, Shams al-A'imma Abū Bakr Muḥammad b. Aḥmad b. Abī Sahl" (Heffening).

5 See *EI*[1], s.v. "Sarakhsī" (Heffening); M. Hamidullah, "Serahsin'nin Devletler," 16; Ṣalaḥ al-Dīn al-Munajjid, "al-Muqaddimah," in Sarakhsī's *Sharḥ al-siyar al-kabīr*, 1: 5–29, at 15–18; Abū al-Wafāʾ al-Afghānī, ["al-Muqaddimah"], in Sarakhsī's *Uṣūl* (Hyderabad, 1372 AH), 1:3–8, at 4–8.

6 Al-Qurashī, *al-Jawāhir al-muḍiyya fī Ṭabaqāt al-ḥanafiyya* (Cairo, 1398–99/1978–79), 3:78; Ibn Qutlūbughā, *Tāj al-tarājim fī ṭabaqāt al-ḥanafiyya*, 35, 52; J. Schacht, "Notes on Sarakhsī's Life and Works," 1–6, at 1; M. Hamidullah, "Serahsi'nin Devletler," 16; *EI*[1], s.v. "al-Sarakhsī"; Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–8; Abū al-Wafāʾ al-Afghānī ["al-Muqaddimah"], 4–8; idem, "Muqaddimat al-kitāb" in Sarakhsī's *al-Nukat: sharḥ ziyādāt al-ziyādāt*, 1–12, at 10–12. On Sarakhsī's study under al-Ḥalwānī, see also ʿAbd al-Ḥayy al-Laknawī, *al-Fawā'id al-bahiyya fi tarājim al-ḥanafiyya* (Beirut, n.d.), 158; Tashkāprizadeh, *Ṭabaqāt al-Fuqahā'*, 76; idem, *Mawsūʿat muṣṭalaḥāt miftāḥ al-saʿādah wa miṣbāḥ al-siyādah fi mawdūʿāt al-ʿulūm*, 235, 645.

7 Ibn Qutlūbughā, *Tāj al-tarājim*, 43; J. Schacht, "Notes," 1.

Transoxania, which was controlled by the Qarakhanids.[8] Sarakhsī's students included Abū Bakr Muḥammad b. Ibrāhīm al-Ḥaṣīrī;[9] Abū Ḥafṣ ʿUmar b. Ḥabīb, the maternal grandfather of Marghīnānī, author of the famous *al-Hidāya: Sharḥ Bidāyat al-Mubtadī*;[10] Abū ʿAmr ʿUthmān b. ʿAlī b. Muḥammad al-Baykandī;[11] Burhān al-A'imma ʿAbd al-ʿAzīz ʿUmar b. Māzah; Maḥmud b. ʿAbd al-ʿAzīz al-Uzjandī;[12] and Rukn al-Dīn Masʿūd b. al-Ḥasan.[13] Although the sources mention the names of Sarakhsī's students, they do not establish the details of their relationship with him.

Some confusion regarding Sarakhsī's identity and whereabouts has been caused by Ya'akov Meron, who writes as follows:[14]

> The three later Ḥanafī classical authors Sarakhsī, Samarqandī and Kāsānī, lived not in Baghdad, but in the neighbouring country of Syria . . .
>
> It is not surprising to learn therefore that Sarakhsī lectured at the Ḥalawiyya in Aleppo, and later, towards the end of his life, found himself in his native country Farghāna, a province in Transoxania, in Central Asia, where he underwent his legendary sojourn in prison.
>
> Two generations later Kāsānī held until his death (4) the same professorship at Ḥalawiyya (5) in the same city of Aleppo, where Sarakhsī had taught beforehand. Besides this geographical link between the second and the fourth great classical authors, there is also a family tie between the third, namely Samarqandī and the fourth, his son-in-law Kāsānī.[15]

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[8] Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–18; *EI*[1], s.v. "al-Sarakhsī".

[9] al-Qurashī, *al-Jawāhir* (Cairo, 1398–99/1978–79), 3:81; J. Schacht, "Notes," 1; Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–18; Abū al-Wafā', "Muqaddimat al-Kitāb," 10–12; idem, ["al-Muqaddimah"], 4–8.

[10] al-Qurashī, *al-Jawāhir* (Cairo, 1398–99/1978–79), 3:81; J. Schacht, "Notes," 1; Abū al-Wafā', "Muqaddimat al-kitāb," 10–12; idem, ["al-Muqaddimah"], 4–8.

[11] al-Qurashī, *al-Jawāhir* (Cairo, 1398–99/1978–79), 3:81; al-Laknawī, *al-Fawā'id* (Beirut, n.d.), 158; J. Schacht, "Notes," 1; Abū al-Wafā', "Muqaddimat al-Kitāb," 10–12; idem, ["al-Muqaddimah"], 4–8; *EI*[1], s.v. "al-Sarakhsī".

[12] al-Laknawī, *al-Fawā'id* (Beirut, n.d.), 158; J. Schacht, "Notes," 1; Abū al-Wafā', "Muqaddimat al-Kitāb," 10–2; *EI*[1], s.v. "al-Sarakhsī".

[13] al-Laknawī, *al-Fawā'id* (Beirut, n.d.), 158; Abū al-Wafā', "Muqaddimat al-Kitāb," 10–12.

[14] Ya'akov Meron, "The Development of Legal Thought in Hanafi Texts," *Studia Islamica*, XXX (1969), 73–118.

[15] The numbers (4) and (5) in the above quoted passage refer to footnotes in Meron's article, which are as follows: "(4) Ibn Qutlūbughā, *Tāj-u'l-tarājim fi ṭabaqāt-i'l-Ḥanafiyya*, 84–5. (5) C. Brockelmann, *GAL*, I, 375." For the quotation and references, see Meron "Development," 86–7.

According to Meron, the classical period of Ḥanafī law begins with Qudūrī (d. 428/1037). He identifies Sarakhsī (d. 483/1090) as the second, Samarqandī (d. 539/1144) as the third, and Kāsānī (d. 587/1191) as the fourth jurist of the Ḥanafī classical period. In an attempt to establish strong ties between these jurists, he treats Aleppo as a geographical link between Sarakhsī and Kāsānī.[16] However, Meron's interpretation is based upon incorrect information. He confuses two Sarakhsīs: Shams al-A'imma al-Sarakhsī who lived in the 5th/11th century and Raḍī al-Dīn al-Sarakhsī who lived in the 6th/12th century. The latter taught in the Ḥalawiyya *madrasa* in Aleppo.[17] Meron's mistake is not limited to confusing two different Sarakhsīs who lived in different times and places. He compounds the error by attributing facts related to the later Sarakhsī to the earlier one. Consider the following points:

1. When Nūr al-Dīn took control of Aleppo in 541/1147, the city was dominated by the Shāfiʿī school. Nūr al-Dīn founded the Ḥalawiyya in 543/1149 to support the Ḥanafī school against Shāfiʿī domination.[18] Shams al-A'imma al-Sarakhsī, who died in 483/1090, had nothing to do with the Ḥalawiyya, which was established sixty years *after* his death.
2. Both Ibn Qutlūbughā and Brockelman mention that Kāsānī (d. 587/1191) succeeded Raḍī al-Dīn al-Sarakhsī (d. 544/1150) as professor of Ḥanafī law in Aleppo under the regime of Nūr al-Dīn. But they do not mention anything that would connect Shams al-A'imma al-Sarakhsī (d. 483/1090) to the Ḥalawiyya *madrasa.*[19]
3. None of Sarakhsī's biographers mention that he ever visited Aleppo or Syria.

After Sarakhsī settled in Uzjand, the Khan, Shams al-Mulk had him arrested, and he was detained in jail for fourteen years, from 466/1074 until about 480/1088.[20] The biographers mention a number of reasons for

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[16] Meron, "Development," 78, 86–7.

[17] See al-Qurashī, *al-Jawāhir* (Cairo, 1398–99/1978–79), 3:357; see also Dominique Sourdel, "Les professeurs de Madrasa à Alep aux XII^{e}–XIII^{e} Siécles d'Après Ibn Šaddād," 85–115, at 93.

[18] Nikita Elisséeff, Nur ad-Din un grand prince musulman de Syrie au temps des Croisades (511–569H./1118–1174), 2:429–30, 3:756–7.

[19] See Ibn Qutlūbughā, *Tāj al-tarājim*, 84–5; C. Brockelman, *GAL*^{2}, 1:463, 465.

[20] M. Hamidullah, "Serahsi'nin Devletler," 16; J. Schacht, "Notes," 3; *EI*^{1}, s.v. "al-Sarakhsi"; Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–18; Abū al-Wafā', "Muqaddimat al-Kitāb," 10–12.

Sarakhsī's imprisonment. (1) Many say that he was jailed because of his blunt criticism of the Khan (*bi-sabab kalima naṣaḥa bihā* or *bi-sabab kalima kāna fīhā min al-nāṣiḥīn*),[21] who allowed his officers to marry his *umm al-walad*s before their waiting-periods (*'idda*s) had expired[22] (although some sources state that Sarakhsī did not criticize the Khan's policy on this point until after he was released from prison).[23] (2) Some say that the Qarakhanids imposed heavy taxes upon their subjects, and that Sarakhsī encouraged them to refuse to pay those taxes.[24] This claim, however, is unsubstantiated. (3) Other sources point to a theological dispute between Sarakhsī and the ruler relating to a conflict over "heresy" and "orthodoxy" between the *'ulamā'* and the government.[25] This point is also unsubstantiated. However, Schacht notes that Sarakhsī referred to his enemies as *zindīq*s (heretics) and *al-sayyi' al-tadbīr* (person[s] of bad management), to his ordeals as *ayyām al-miḥna* (the days of the inquisition), to those who helped secure his release from prison as *ahl al-ḥaqq wa'l-yaqīn* (people of truth and certainty), and to himself as *al-mutakallim bi'l-ḥaqq al-munīr* (speaker of the enlightening truth).[26] This language, according to Schacht, suggests that Sarakhsī was imprisoned for theological reasons. However, this view is not supported by the sources.[27]

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[21] al-Qurashī, *al-Jawāhir* (Cairo, 1398–99/1978–79), 3:78–9; Ibn Qutlūbughā, *Tāj al-tarājim*, 52–3; al-Laknawī, *al-Fawā'id* (Beirut, n.d.), 158; Tashkoprizadeh, *Ṭabaqāt al-fuqahā'*, 75; idem, *Mawsū'at muṣṭalaḥāt miftāḥ al-sa'ādah,* 235; Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–18; Abū al-Wafā', "Muqaddimat al-Kitāb," 10–12; idem, "al-Muqaddimah," 4–8; see also Salih Tuğ, "Eserlerinde Raslanan İfadelerine Göre İmam Serahsi'nin Hapis Hayatı," 43–60, at 43–5.

[22] Ibn Qutlūbughā, *Tāj al-tarājim*, 52–3; Tashköprizadeh, *Ṭabaqāt al-fuqahā'*, 76; Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–18; *EI*[1], s.v. "al-Sarakhsī"; J. Schacht, "Notes," 3.

[23] Abū al-Wafā', "al-Muqaddimah," 4–8; J. Schacht, "Notes," 3.

[24] M. Hamidullah, "Serahsi'nin Devletler," 16; see also Salih Tug, "Eserlerinde Raslanan," 43–5.

[25] J. Schacht, "Notes," 3–4; see also Salih Tuğ, "Eserlerinde Raslanan," 43–5.

[26] J. Schacht, "Notes," 3–4.

[27] Schacht's bibliographic citation concerning Sarakhsi's imprisonment is inaccurate. He bases his interpretation on a quotation from an Arabic text which he identifies as Sarakhsī's concluding remarks in his *Sharḥ al-siyar al-kabīr*. Schacht does not, however, identify the volume, page or edition of the *Sharḥ* in his citation. The passage Schacht quotes is not found in the 1971–72 Cairo edition of the *Sharḥ* used in the present study. However, some statements similar to the passage quoted by Schacht are found in the *Kashf al-ẓunūn* of Ḥajjī Khalīfa and identified as Sarakhsī's concluding remarks about his *Sharḥ al-siyar al-kabīr*. See Ḥajjī Khalīfa, *Kashf al-ẓunūn* (Tehran, 1947), 2:1014. In addition, another statement quoted by Schacht from Sarakhsī's *Mabsūṭ* (Cairo, 1324 AH), 10:50 with regard to the issue under discussion is not found in the place indicated. This statement is found in *Mabsūṭ* (Cairo, 1324 AH), 7:59. Other references by Schacht to the *Mabsūṭ* (Cairo,

Although Sarakhsī's biographers use the term *jubb*[28] or underground dungeon to describe the place in which he was imprisoned, Sarakhsī himself does not say anything in his works about an underground dungeon.[29] He complains of isolation from his family, son, and book(s),[30] but he does not describe in detail the place in which he was confined, beyond confirming that he was in captivity and experienced hardship.

There is no information about the location in which Sarakhsī was kept between 466/1074 and 479/1087. However, in the introduction to his *Uṣūl*, written in 479/1087, he does mention that he was being held in the castle of Uzjand.[31] In 480/1088, at the age of approximately eighty, he was released after fourteen years of captivity.[32] He then left for either Marghīnān or Farghāna. Upon his arrival, the Imām Sayf al-Dīn (or al-Amīr Ḥasan)[33] offered him hospitality, enabling him to complete the composition of *Sharḥ al-siyar al-kabīr* (which had been partly written but left incomplete during his captivity).[34] After three years of freedom in Marghīnān (or Farghāna), Sarakhsī died in 483/1090.[35]

1324 AH, 10:144 and 12:108) in relation to the issue at hand are found in the places indicated (see J. Schacht, "Notes," 3–4).

[28] Ibn Qutlūbughā, *Tāj al-tarājim*, 52–3; al-Laknawī, *al-Fawā'id* (Beirut, n.d.), 158; Tashkāprizadeh, *Mawsū'at musṭalaḥāt miftāḥ al-sa'ādah,* 235; Abū al-Wafā', "al-Muqaddimah," 4–8.

[29] J. Schacht, "Notes," 4.

[30] Sarakhsī, *Mabsūṭ* (Cairo, 1324 AH), 12:108; Salih Tuğ, "Eserlerinde Raslanan," 54–5.

[31] Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:9.

[32] Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–18; Abū al-Wafā', "Muqaddimat al-Kitāb," 10–2; J. Schacht, "Notes," 5; *EI*[1], s.v. "al-Sarakhsī"; Salih Tuğ, "Eserlerinde Raslanan," 46.

[33] On Farhghānā and Amīr Ḥasan, see Tashkāprizadeh, *Ṭabaqāt al-fuqahā'*, 75–6.

[34] Ibn Qutlūbughā, *Tāj al-tarājim*, 52–3; Abū al-Wafā', "Muqaddimat al-Kitāb," 10–2; J. Schacht, "Notes," 5–6; *EI*[1], s.v. "al-Sarakhsī"; Salih Tuğ, "Eserlerinde Raslanan," 49.

[35] Abū al-Wafā', ["al-Muqaddimah"], 4–8; M. Hamidullah, "Serahsi'nin Devletler," 16; J. Schacht, "Notes," 1; some biographers mention that he died ca. 490/1097 (see al-Qurashī, *al-Jawāhir* (Cairo, 1398–99/1978–79), 3:82; Abū al-Wafā', "Muqaddimat al-Kitāb," 10–12; Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–18).

Scholarship

Sarakhs's writings include: *al-Mabsūṭ*,[36] *al-Uṣūl*,[37] *Sharḥ al-siyar al-kabīr*,[38] *al-Nukat: Sharḥ ziyādāt al-ziyādāt*,[39] *Sharḥ mukhtaṣar al-Ṭaḥāwī*,[40] and *Ashrāṭ al-sāʿa*.[41] Most of these books are systematic commentaries on early Ḥanafī writings.[42]

According to his biographers, Sarakhsī dictated to his pupils from memory the *Mabsūṭ*,[43] *Uṣūl*,[44] and a large part of *Sharḥ al-siyar al-kabīr*,[45] while he was a prisoner and without access to references. Schacht disputes this point, arguing that it is implausible that Sarakhsī could have

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[36] al-Qurashī, *al-Jawāhir* (Cairo, 1398–99/1978–79), 3:82; Ibn Qutlūbughā, *Tāj al-tarājim*, 52–3; Ḥajjī Khalīfa, *Kashf al-ẓunūn* (Tehran, 1947), 2:1580; Tashkāprizadeh, *Ṭabaqāt al-fuqahāʾ*, 75–6; idem, *Mawsūʿat muṣṭalahāt miftāḥ al-saʿādah,* 235; Abū al-Wafāʾ, "Muqaddimat al-Kitāb," 10–12; Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–18; *EI*[1], s.v. "al-Sarakhsī". The printed title of the edition of the *Mabsūṭ* used for this study (Cairo, 1324 AH) is *Kitāb al-mabsūṭ li Shams al-Dīn al-Sarakhsī*; however, the *laqab* "*Shams al-Din*" is not used by Sarakhsī's biographers, with the exception of Tashkāprizadeh, who refers to Sarakhsī as both *Shams al-Dīn* and *Shams al-Aʾimma*. See Tashkāprizadeh, *Ṭabaqāt al-fuqahāʾ*, 75.

[37] Ibn Qutlūbughā, *Tāj al-tarājim*, 52–3; Tashkoprizadeh, *Ṭabaqāt al-fuqahāʾ*, 75–6; idem, *Mawsūʿat muṣṭalaḥāt miftāḥ al-saʿāda*, 235; Abū al-Wafāʾ, "Muqaddimat al-kitāb," 10–2; J. Schacht, "Notes," 1; *EI*[1], s.v. "al-Sarakhsī."

[38] Ibn Qutlūbughā, *Tāj al-Tarājim*, 52–3; Ḥajjī Khalīfa, *Kashf al-ẓunūn* (Tehran, 1947), 2:1014; Tashkāprizadeh, *Ṭabaqāt al-fuqahāʾ*, 75–6; idem, *Mawsūʿat muṣṭalaḥāt miftāḥ al-saʿādah,* 235; Abū al-Wafāʾ, "Muqaddimat al-kitāb," 10–2; J. Schacht, "Notes," 1; Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–8; *EI*[1], s.v. "al-Sarakhsī". Norman Calder identifies the *Mabsūṭ, Sharḥ al-siyar al-kabīr* and *Uṣūl* as al-Sarakhsī's three most important works. See *EI*[2], s.v. "al-Sarakhsī" (Calder).

[39] Abū al-Wafāʾ, "Muqaddimat al-Kitāb," 10–12; J. Schacht, "Notes," 1.

[40] Ibn Qutlūbughā, *Tāj al-tarājim*, 52–3; Ḥajjī Khalīfa, *Kashf al-ẓunūn* (Tehran, 1947), 2:1628; Tashkāprizadeh, *Mawsūʿat muṣṭalaḥāt miftaḥ al-saʿādah,* 235; see also Brockelmann, *GAL, S*[1], 1:294. According to Brockelmann, the Suleymaniye has a copy of *Sharḥ mukhtaṣar* al-Ṭaḥāwī (*Suleym. 595*). This is incorrect, as demonstrated by Fuat Sezgin in *GAS*[1], 1:441. The manuscript of *Sharḥ Mukhtaṣar al-Ṭaḥāwī*, as Ibn Qutlūbughā (*Tāj al-Tarājim*, 52–3) also suggests, is not available in complete form. The second volume of the manuscript is in the Chester Beatty Library. Its details are quoted by Arberry as follows: "Foll. 339. 25.7x16.5 cm. Clear scholar's naskh. Undated, 7th/13th century. Brockelmann suppl, 1, 294". See Arthur J. Arberry, *A Handlist of the Arabic Manuscripts*, vol. 4, Mss. 3751 to 4000, p. 60, entry no. 3923; Abū al-Wafāʾ, "Muqaddimat al-Kitāb," 10–12; J. Schacht, "Notes," 1.

[41] Bibliothèque Nationale, Arabe/2800; see de Slane, *Catalogue des manuscripts Arabes de la Bibliothèque Nationale*, 2:504; see also Brockelmann, *GAL*, 1:460–1; T. Okic, "Önsöz," (no page number given); Abū al-Wafāʾ, "Muqaddimat al-kitāb," 10–12.

[42] Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:10.

[43] Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–18; Abū al-Wafāʾ, "Muqaddimat al-kitāb," 10–12; *EI*[1], s.v. "al-Sarakhsī".

[44] Abū al-Wafāʾ, "Muqaddimat al-Kitāb," 10–12; *EI*[1], s.v. "al-Sarakhsi."

[45] Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 15–18; Abū al-Wafāʾ, "*Muqaddimat al-Kitāb*," 10–12; *EI*[1], "al-Sarakhsi."

dictated his works over the fourteen years of his imprisonment, using no sources but his memory; for this reason, Schacht suggests that Sarakhsī must have received significant assistance from his pupils, including access to sources. This is plausible, especially since we know that Sarakhsī's students cooperated with him in the composition of his works.[46]

Sarakhsī worked on several treatises simultaneously. He produced some parts of the *Mabsūṭ* before, and some after, his work on parts of *Sharḥ al-siyar al-kabīr*. The fact that he frequently refers to the chapters of the *Mabsūṭ* in his *Uṣūl* suggests that he composed the *Uṣūl* after completing the *Mabsūṭ*. The present state of our knowledge makes it impossible to establish a full and exact chronology of his works.

Al-Mabsūṭ

Arguably Sarakhsī's most important work,[47] the *Mabsūṭ*, is one of the most comprehensive Ḥanafī legal texts. It is based largely on the works of Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805).

Another Ḥanafī scholar, al-Ḥakīm al-Shahīd al-Marwazī (d. 334/946), abridged the works of Shaybānī in order to make them easier for students to study, and, hence, his abridgement is called *al-Mukhtaṣar*.[48] Approximately 150 years later, Sarakhsī sensed that students were avoiding *fiqh* and he determined that it was time to produce a thorough formulation of the law. He committed himself to the compilation of the *Mabsūṭ* in order to justify and elaborate upon the Ḥanafī law contained in al-Marwazī's *al-Mukhtaṣar*.[49] Sarakhsī offered three main reasons why students were not learning *fiqh*: (1) lack of enthusiasm; (2) the sterile pedagogy of teachers who used irrelevant and lengthy arguments (*al-nikāt al-ṭardiyyah*) that were of no legal import; and (3) the fact that some scholars had made legal studies too complex by introducing philosophical terms into legal

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[46] J. Schacht, "Notes," 5.

[47] *EI*[1], s.v. "al-Sarakhsī."

[48] The *Mukhtaṣar* (abridgement) of al-Marwazī is also known as *al-Kāfī* (see J. Schacht, "Notes," 2; Chafik Chehata, *Études de droit musulman*, 22. According to Meron, Marwazī's work is a commentary, not an abridgement, on the works of Shaybānī. On this point, Meron disagrees with J. Schacht and Chafik Chehata, and, indeed, with Sarakhsī himself, who identifies al-Marwazī's treatise as an abridgement. Credit for this point should go to Schacht and Chehata, who concur with Sarakhsī. Cf. Sarakhsī, *Mabsūṭ* (Cairo, 1324 AH), 1:2–4; J. Schacht, "Notes," 2; Chafik Chehata, *Études*, 22; Meron, "The Development of Legal Thought in Hanafi Texts," 80.

[49] *Al-Mukhtaṣar* was the channel through which Sarakhsī sought links between his law and that of early Ḥanafī jurists.

definitions.[50] After giving his assessment of the problem, Sarakhsī outlines his response as follows:

> I saw that the best thing to do in this case was to compose a commentary on *al-Mukhtaṣar* and not to go beyond the meaning that has the principal effect [in law] in explaining each case, contenting myself by indicating what the reliable (*muʿtamad*) judgment is on each subject. Subsequently, when, in addition to my intention [to compose a commentary], some of my special friends, who comforted me with their company during my imprisonment, asked me to dictate such a work to them, I agreed to do so. I ask God to grant me success in [being] truth[ful] and protect me from any error and from anything that may cause punishment in the Hereafter. May God accept what I intended in my composition as a reason for my release [from captivity] in this world and my happiness in the Hereafter.[51]

The current order of chapters in the *Mabsūṭ* is probably not the order established by the author.[52] The beginning of *Kitāb al-maʿāqil* (vol. 27) is dated 14 Rabīʿ II 466,[53] and the beginning of *Kitāb al-raḍāʿ* (vol. 30) is dated 12 Jumādā II, 477. As Schacht has observed, it is unlikely that Sarakhsī would have taken eleven years to complete about one-tenth of his enormous work.[54] He probably composed different parts of the *Mabsūṭ* without following the current order of its chapters, and then placed the chapters in their current sequence after the composition of the book had been completed.

The printed version of the *Mabsūṭ*, in thirty volumes, contains more than fifty main chapters, each with a large number of subdivisions. It starts with *Kitāb al-ṣalāt* and moves from themes related to worship (*ʿibādāt*) to more substantive legal issues. Volume ten contains *Kitāb al-siyar*, which deals with the law of war and peace, both international and domestic, and *Kitāb al-istiḥsān*, which concentrates on issues relating to women. Volume thirty includes *Kitāb ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*, and *Kitāb al-kasb*. Each of these chapters, with the exception of *Kitāb al-istiḥsān,* is the equivalent of a separate treatise in its own right. *Kitāb al-kasb* is unique in that it deals almost entirely with asceticism, rather than with standard legal issues.

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50 Sarakhsī, *Mabsūṭ* (Cairo, 1324 AH), 1:2–4; J. Schacht, "Notes," 1–2.
51 Sarakhsī, *Mabsūṭ* (Cairo, 1324 AH), 1:4.
52 J. Schacht, "Notes," 1.
53 Sarakhsī, *Mabsūṭ* (Cairo, 1324 AH), 17:124; J. Schacht, "Notes," 1.
54 J. Schacht, "Notes," 1.

In the *Mabsūṭ*, Sarakhsī frequently says that his method in interpreting the law is to pursue the *aṣl,* the principal cause or meaning, in a case.[55] In his introduction to his *Uṣūl*, he says that he seeks clarity and conciseness in his works.[56] Sarakhsī's main concern, however, was to establish a coherent justification of Ḥanafī legal doctrine.[57] Schacht describes Sarakhsī's *Mabsūṭ* as follows:

> The *Mabsūṭ* is, in fact, the first of those great treatises which are concerned not with establishing the accepted doctrine of the school and to prove that it is "right," but with impartially analyzing the systematic implication of each opinion. In other words, their approach is, as it were, "philosophical," and Sarakhsī is the originator of this approach in the Ḥanafī school.[58]

Sharḥ al-siyar al-kabīr

Sharḥ al-siyar al-kabīr is Sarakhsī's commentary on *al-Siyar al-kabīr*, Shaybānī's elaborate work on Islamic international law.[59] The *Sharḥ* is devoted almost exclusively to the themes of war, peace and international relations.

Sarakhsī wrote his commentary shortly before and shortly after his release from prison in 480/1088.[60] The text was translated into Turkish by Muḥammed Munīb ʿAyntābī (d. 1238/1822)[61] and published in 1241/1825.[62] The original Arabic version was published nearly a century later in 1916–17 in four volumes in Hyderabad.[63] The most widely used Arabic edition is that of Ṣalāḥ al-Dīn al-Munajjid and ʿAbd al-ʿAzīz Aḥmad, published in Cairo in 1971–72.[64] This edition has five volumes, 218 sections, 4,573 paragraphs,

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[55] Sarakhsī, *Mabsūṭ* (Cairo, 1324 AH), 1:4, 7:59, 10:144, 12:108, and 30:244.

[56] Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:10.

[57] See Sarakhsī, *Mabsūṭ* (Cairo, 1324 AH), 1:120, 122, 2:61, 64, 152, 3:83, 103, 10:146–7, 157, 161–2.

[58] J. Schacht, "Notes," 2.

[59] M. Khadduri, "Translator's Introduction," in Shaybānī's *The Islamic Law of Nations: Shaybānī's Siyar*, 42.

[60] M. Hamidullah, "Serahsi'nin Devletler," 21–2; J. Schacht, "Notes," 5.

[61] Muhammed Munīb ʿAyntābī translated this work in 1796–97. See M. Hamidullah, "Serahsi'nin Devletler," 20.

[62] Tayyib Okic, "Şemsu'l-Eimme es-Serahsi'nin 'Şerhu's-Siyeri'l-Kebir'inin Türkce Tercemesi ve Mütercim Muhammed Munib Ayintabi'nin Diğer Eserleri," 27–42, at 30; M. Hamidullah, "Avant-Propos," LI; M. Khadduri, "Translator's Intro," 56.

[63] M. Hamidullah, "Avant-Propos," L; M. Khadduri, "Translator's Intro," 56; T. Okic, "Şemsu'l-Eimme es-Serahsi'nin," 27.

[64] The first, second and third volumes were edited by Ṣalāḥ al-Dīn al-Munajjid, the fourth and fifth by ʿAbd al-ʿAzīz Aḥmad (Cairo: Maṭbaʿat Shirkat al-Iʿlānāt al-Sharqiyya, 1971–72).

and 2,312 pages.[65] The most recently published Arabic edition is that of Abū ʿAbdallāh Muḥammad Ḥasan Muḥammad Ḥasan Ismāʿīl al-Shafiʿī, published in Beirut, in five volumes.[66] A French translation by Muhammad Hamidullah, entitled *Le grand livre de la conduite de l'etat*, was published by the Türkiye Diyanet Vakfi in Ankara between 1989 and 1991.[67] In this article, all references are to the Cairo edition of al-Munajjid and Aḥmad.

Volume one [1971–72 Cairo edition], devoted to the law of war, contains material concerning preparations for war, its legitimacy, and the use of armed forces. Topics covered range from the preparation of fighting horses to war weaponry, with an emphasis on the legitimacy of war, which, predictably, results in victory in the name of Islam. Attention is also given to the organization and leadership of the armed forces, and to details on the problem of *amān* (safety), which is an issue for the law of peace. Volume two develops the law of *amān* in detail, although its main focus is on the laws concerning spoils (*anfāl*) recovered by Muslim forces. Volume three is devoted entirely to the laws concerning spoils and booty (*al-ghanīma*) acquired by Muslim forces. Volume four deals with prisoners of war, and, in addition, with legal provisions relating to defense treaties and military co-operation, as well as other issues relating to the law of war and peace. Volume five focuses on peace-making and issues relating to co-existence between Muslims and non-Muslims, including the formulation of peace treaties. It also deals with problems concerning the *murtadd* (apostate), *dhimmī* (permanent non-Muslim resident of Muslim territory), *musta'min* (temporary non-Muslim resident of Muslim territory) and *ḥarbī* (permanent non-Muslim resident of non-Muslim territory).

The exact relationship between Shaybānī's *al-Siyar al-kabīr* and Sarakhsī's commentary is not clear.[68] It is extremely difficult to isolate Shaybānī's text from Sarakhsī's commentary, and to distinguish Shaybānī's opinions from Sarakhsī's statements, unless Sarakhsī himself attributes an opinion, directly or indirectly, to Shaybānī.

The relationship between Shaybānī's text and Sarakhsī's commentary has caused some confusion among scholars. In 1827, Joseph Hammer von Purgstall studied the Turkish translation of Sarakhsī's *Sharḥ al-siyar al-kabīr* (only two years after it was first published) and declared Shaybānī

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[65] See also M. Hamidullah, "Avant-Propos," L.

[66] Dār al-Kutub al-ʿIlmiyya, 1997.

[67] *Le grand livre de la conduite de l'État* [text by] ach-Chaibani, commenté par as-Sarakhsi, traduit par M. Hamidullah, 4 vols. (Ankara: Turkiye Diyanet Vakfi, 1989–91).

[68] M. Khadduri, "Translator's Introduction," 43.

(not Sarakhsī) the Hugo Grotious of Islam.[69] Subsequently, in 1955, Hans Kruse attempted to secure Shaybānī's place as the Hugo Grotius of Islam by establishing the Shaybānī Society of International Law.[70] Kruse comments on Sarakhsī's commentary as follows:

> . . . It is almost impossible to undertake an incontestable separation of the basic text (*matn*), originating from al-Shaybānī, from the commenting additions of al-Sarakhsī. The parentheses added to the text by the editors seem to give a hint only as to which parts of the text are to be attributed to al-Shaybānī according to their opinion.[71]

Majid Khadduri came to a similar conclusion:

> . . . Sarakhsī's commentary amounts virtually to a new book; he failed to reproduce Shaybānī's original text, to which access was denied him in the prison, although it may be regarded as an exposition of Shaybānī's doctrines on the *siyar* as he understood them. Shaybānī's text, despite efforts by modern editors to distinguish it from the commentary, may well be regarded as lost. Sarakhsī's commentary represents Ḥanafī doctrines as they were understood in the fifth century of the Islamic era (eleventh century A.D.), and not in the second century (eighth century A.D.) when Shaybānī was alive.[72]

In his *War and Peace in the Law of Islam*, Khadduri attributes some parts of *Sharḥ al-siyar al-kabīr* to Shaybānī,[73] and he compounds the confusion in his bibliographies: in *War and Peace in the Law of Islam*, he lists Sarakhsī's *Sharḥ al-siyar al-kabīr* under Shaybānī's name;[74] in *The Islamic Law of Nations*, he lists the same work under Sarakhsī's name.[75]

Sarakhsī tells us that he studied Shaybānī's *al-Siyar al-kabīr* under his teacher al-Ḥalwānī.[76] It should be borne in mind, however, that Shaybānī's text was copied and re-copied many times during the two and one-half centuries before it became available to Sarakhsī,[77] and that it may have undergone alteration in its many redactions prior to Sarakhsī's receipt of it from al-Ḥalwāni. From this we may derive two conclusions: (1) no

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[69] H. Kruse, "The Foundation of Islamic International Jurisprudence," 231–67, at 238; M. Khadduri, "Translator's Introduction," 56–7.

[70] Khadduri, "Translator's Introduction," 56–7.

[71] H. Kruse, "Foundation," 237. For similar remarks, see idem, "Islamic Doctrine of International Treaties," 152–8, at 154.

[72] M. Khadduri, "Translator's Introduction," 44.

[73] M. Khadduri, *War and Peace in the Law of Islam*, 56, 62, 82, 84–85, 104, 106–08, 113–15.

[74] Ibid., 304.

[75] M. Khadduri [ed.], *The Islamic Law of Nations: Shaybani's Siyar*, 304.

[76] Sarakhsī, *Sharḥ al-siyar al-kabīr*, 1:5.

[77] For details, see Sarakhsī, *Sharḥ al-siyar al-kabīr*, 1:4–5; H. Kruse, "Foundation," 238–9; M. Khadduri, "Translator's Introduction," 43.

statement from *Sharḥ al-siyar al-kabīr* can be attributed with any certainty to Shaybānī unless confirmed by another source or indicated by Sarakhsī himself; (2) although *Sharḥ al-siyar al-kabīr* is based on Shaybānī's *al-Siyar al-kabīr*, the *Sharḥ* should be considered as Sarakshī's own work.[78]

Joseph Hammer von Purgstall, Hans Kruse and Majid Khadduri are justified in emphasizing Shaybānī's formidable contribution to the theory of Islamic international law, since Sarakhsī could not have compiled *Sharḥ al-siyar al-kabīr* had he not received Shaybānī's text from al-Ḥalwāni. However, they are wrong to attribute some parts of *Sharḥ al-siyar al-kabīr* to Shaybānī, since the passages in question were put into brackets or bold font by the editors, based upon guesswork. Indeed, one of the editors, Ṣalaḥ al-Dīn al-Munajjid, says: "We distinguished what looked like Shaybānī's words from Sarakhsī's words. We established the former's [words] in large and the latter's [words] in small script. In the Indian edition of the work, Shaybānī's words were put into brackets."[79]

[*al-*]*Uṣūl*

As noted, Sarakhsī began to write the *Uṣūl* in Uzjand in 479/1087,[80] although we do not know when he completed the project. The most widely used edition of the *Uṣūl* is that of Abū al-Wafāʾ al-Afghānī, published in Hyderabad[81] in two volumes of 416 and 387 pages, respectively. However, the most recent edition of the *Uṣūl* is that of Rafīq al-ʿAjam, published in Beirut[82] in two volumes of 393 and 327 pages, respectively.[83]

Sarakhsī describes the *Uṣūl* as a justification of methods or procedures applied in his interpretation of positive law(s): (1) his interpretation of positive laws is in the form of a commentary upon earlier Ḥanafī law from

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78 Sarakhsī's work may, nevertheless, contain Shaybānī's notions of international law or, at some points, sections of Shaybānī's text that have been camouflaged by the commentary.

79 Ṣalāḥ al-Dīn al-Munajjid, "al-Muqaddimah," 27.

80 Sarakhsī, *Uṣūl al-Sarakhsī* (Hyderabad, 1372 AH), 1:9.

81 Maṭbaʿat Lajnat Iḥyāʾ al-Maʿārif al-Nuʿmāniyya, 1372 AH.

82 Dār al-Maʿrifa, 1998.

83 The *Uṣūl* used in this article is the 1372 AH Hyderabad edition by al-Afghānī. In addition to this edition and that of Rafīq al-ʿAjam, there is an edition by Abū ʿAbd al-Raḥmān Ṣalāḥ Ibn Muḥammad ʿArīḍa, published in 1996 by Dār al-Kutub al-ʿIlmiyya, Beirut, in two volumes (of 288 and 256 pages respectively), with the title *al-Muḥarrar fī uṣūl al-fiqh*. This title is not mentioned by any of Sarakhsī's biographers. Abū al-Wafāʾ al-Afghānī, editor of the Hyderabad edition, states that the initial title of the *Uṣūl* was *Tamhīd al-fuṣūl fī al-Uṣūl*; subsequently, it came to be known as *Uṣūl al-Sarakhsī*. *See* Abū al-Wafāʾ al-Afghānī, ["al-Muqaddimah"], in Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:3–8, at 4.

Shaybānī's texts, and (2) his *Uṣūl* is the later systematic defense of methods he used in his legal commentaries.[84] In his introduction, Sarakhsī explains that it is important to understand the methodology of Ḥanafī law as well as positive law itself. The problems of law, he suggests, are many, but its principles (*uṣūl*) are few in number. It was not his intention, he says, to add anything new to the law, as previous Ḥanafī jurists had already compiled numerous books (*majmūʿāt*). Rather, he continues, he preferred to be one of those who follow (*muqtadūn*) [the path established by the predecessors].[85] With its rich content and rational justifications of legal interpretation, the *Uṣūl* makes a significant contribution to Ḥanafī jurisprudence.

Sarakhsī's *Uṣūl* offers a coherent explanation of the relationship between methods of legal interpretation (*uṣūl*) and positive laws (*furūʿ*). This point is clearly expressed by Wael B. Hallaq:

> A close examination of his [viz., Sarakhsī's] *Uṣūl* reveals its careful and constant attention to positive law and legal practice. The book is almost single-mindedly legalistic, and the persistent reference to *furūʿ* cases betrays the affinity between the positive rulings of Sarakhsī and his methodology and theory of legal interpretation.[86]

In this respect, Sarakhsī's *Uṣūl*, as Hallaq observes,[87] is comparable to the *Uṣūl* of his contemporary Pazdawī. Both Sarakhsī and Pazdawī refer principally to Abū Ḥanīfa, Abū Yūsuf and Shaybānī to establish the Ḥanafī methodology of legal interpretation. And they refer to Shāfiʿī in order to distinguish his approach from that of early Ḥanafī jurists. However, compared to Pazdawī, Sarakhsī more frequently makes references to positive law (*furūʿ*) in order to establish the methodology of law. It is to Sarakhsī's credit that his references to positive law in his *Uṣūl* are often traceable to his previous works on positive law.[88]

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[84] Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:10.

[85] Ibid.

[86] Wael B. Hallaq, "*Uṣūl al-fiqh*: beyond tradition," 172–202, at 182.

[87] Ibid., 82.

[88] For Pazdawī's references to Abū Ḥanīfa, Abū Yūsuf and Shaybānī, see Pazdawī, *Uṣūl*, on the margins of ʿAbd al-ʿAzīz al-Bukhārī's *Kashf al-asrār*, 4 vols. ([Istanbul]: Maktab al-ṣanāyiʿ, 1307 AH), 1:4–11, 2:336, 342, 377, 468, 559; 3:764–5, 866; 4:1472, 1483. For Pazdawī's references to Shāfiʿī, see Pazdawī, *Uṣūl*, 2:591, 623, 632; 3:963, 1013–14, 1098; 4:1270; for Sarakhsī's references to Abū Ḥanīfa, Abū Yūsuf and Shaybānī, see Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:36, 73, 125, 230; 2:113, 133, 213, 231, 295, 337, 348. For Sarakhsī's references to Shāfiʿī, see Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:119, 315; 2:106, 207; for positive laws mentioned by Sarakhsī that show connections between his interpretation of positive law (*furūʿ al-fiqh*) and his methodology of interpretation (*uṣūl-al-fiqh*), see Sarakhsī, *Uṣūl* (Hydera-

Translation and Discussion

As reflected in some passages from the *Uṣūl* quoted below, Sarakhsī had an immense capacity and eagerness to justify Ḥanafī law on the basis of moving between Abū Ḥanīfa, Shaybānī and Abū Yūsuf. For Sarakhsī, the study of *fiqh* is the most virtuous form of worship in the religion of Islam. He says:

> *Fiqh* is not complete without the combination of three elements: (1) knowledge of religio-legal rules (*mashrūʿāt*), (2) proficiency (*itqān*) in understanding these rules by careful attention (*wuqūf*) to the texts (*nuṣūṣ*) with their meanings, and mastery of the roots [together] with their branches [viz., derived rules], and (3) acting in accordance with that. This goal is incomplete without the application (*ʿamal*) of knowledge. The person who memorizes the religio-legal rules (*mashrūʿāt*) without having any proficiency in properly understanding them is [considered one] of the narrators (*ruwāt*) [of these rules]. After acquiring [this] proficiency, if he does not apply what he has learned, then he is a jurist (*faqīh*) in one respect to the exclusion of others. If, however, he applies his knowledge in practice, then he is the absolute jurist (*al-faqīh al-muṭlaq*) to whom the Messenger of God was referring when he said: "He is stronger against Satan than a thousand pious men (*ʿābid*)." Such was the status of our leading jurists (*mutaqaddimūn*): Abū Ḥanīfa, Abū Yūsuf and Muḥammad—may God be pleased with them.[89]

Sarakhsī states that it was the excellence of these leading jurists that motivated him to write his commentary on the works of Shaybānī.[90] Sarakhsī's attempt to justify Ḥanafī law, based principally on the legal views of its three leading jurists, reveals his capacity to develop arguments that were both rational and workable, while holding the line between the differing views of the leading Ḥanafī jurists.

For example, while commenting on the disagreement between Abū Ḥanīfa and his two disciples Abū Yūsuf and Shaybānī on the issue of the recitation (*qirāʾa*) of the Qurʾān during prayer, Sarakhsī defends Abū Ḥanīfa's view about the inimitability (*iʿjāz*) of the Qurʾān. According to Abū Ḥanīfa, the recitation of the Qurʾānic verses in Persian (rather than in the original Arabic) served to fulfill the obligation of recitation of the Qurān (*qirāʾa*) during prayer, but Abū Yūsuf and Shaybānī disagreed with his opinion, and it was their view that prevailed in established Ḥanafī

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bad, 1372 AH), 1:351; cf. *Mabsūṭ* (Cairo, 1324 AH), 16:121; *Uṣūl*, 2:48–9; cf. *Mabsūṭ*, 11:169 ff.; *Uṣūl*, 2:133; cf. *Mabsūṭ*, 16:60–3 ff.; *Uṣūl*, 2:201; cf. *Mabsūṭ*, 9:61–2; *Uṣūl*, 2:201; cf. *Mabsūṭ*, 9:147–8; *Uṣūl*, 2:204; cf. *Mabsūṭ*, 2:8; *Uṣūl*, 2:205; cf. *Mabsūṭ*, 12:161 ff.

89 Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:10.

90 Ibid., 1:10.

thought. Sarakhsī first mentions the established view on this point, which differs from Abū Ḥanīfa's position, and then proceeds creatively to bridge the gap between Abū Ḥanīfa and his two disciples:

> Many of our *shaykhs* say: the inimitability (*iʿjāz*) of the Qurʾān lies in the combination of both its *naẓm* (style) and its meaning, especially according to the opinion of Abū Yūsuf and Muḥammad—may God have mercy on them—where they say: recitation (*qirāʾa*) [of the Qurʾān] in the Persian language does not satisfy the obligation of recitation during prayer, even if it is certain that the purpose of such a recitation is to fulfill this obligation; because the obligation is to recite [from that which is] inimitable (*muʿjiz*), and inimitability lies in the combination of the *naẓm* (style) and meaning.[91]
>
> What becomes clear to me is that they [viz., Abū Yūsuf and Shaybānī] did not mean by this that meaning without *naẓm* is not inimitable (*muʿjiz*). The indicators (*adilla*) showing that the meaning [itself] is inimitable (*muʿjiz*) are manifest. One of them is that the *muʿjiz* is the word of God, [and the word of God] is neither time-bound (*muḥdath*) nor created (*makhlūq*), whereas all languages—Arabic, Persian and others—are time-bound. Thus, he who says that inimitability (*iʿjāz*) cannot be realized without the [original] language cannot avoid saying [in conclusion] that the *muʿjiz* is time-bound; but this is one of the things [that] it is not permissible to say. Secondly, the Prophet—peace be upon him—was sent to all people. The sign of his prophecy is the Qurʾān, which is inimitable; there is no avoiding the view that it is a decisive argument (*ḥujja*) for his [prophecy] against all people. It is known that the inability of a non-Arab to produce something similar to the Qurʾān in the Arabic language does not constitute a decisive argument [for verifying the inimitability of the Qurʾān] against him, for he is also unable to produce something similar to the poetry of Imruʾu'l-Qays and other [poets] in the Arabic language. Hence, inimitability is verifiable only by his inability to produce something similar to the Qurʾān in his own language. This is a clear indicator showing that the meaning of [the word] "*iʿjāz*" is full[y realized] in the meaning [alone of the Qurʾān]: This is why Abū Ḥanīfa—may God have mercy on him—permitted recitation (*qirāʾa*) [of the Qurʾān] in the Persian language during prayer; but they [viz., Abū Yūsuf and al-Shaybānī] made the same [point, in terms of permissibility,] in the case of someone who is unable to recite [the Qurʾān] in Arabic. This is an indicator showing that the meaning [of the Qurʾān], in their view [too], is inimitable, since, in principle, the obligation to recite [the Qurʾān] is waived for the person who is unable to recite the *muʿjiz*; but the obligation itself [in case of the person who is unable to recite the Qurʾān in the Arabic original] is not waived. Rather, he [viz., the person who is unable to recite the Qurʾān in the original Arabic] fulfills the obligation by reciting [the Qurʾān] in Persian. As for the case in which such a person is able to recite [it] in

[91] Ibid., 1:281–2.

> Arabic, he does not fulfill his obligation by reciting it in Persian, according to both [Abū Yūsuf and Shaybānī], not because of the fact that recitation [in Persian] is not inimitable (*muʿjiz*), but, rather, because following [the example of] the Messenger—may God bless him and grant him peace—and the first generation (*salaf*) in fulfilling this obligation [of recitation] during the prayer is obligatory upon whomever is capable of doing so. And following [the example of the Messenger and that of the *salaf*] in the matter of recitation (*qirāʾa*) [of the Qurʾān during prayer] is [possible only by reciting it] in the Arabic language.[92]

Another example of Sarakhsī's dexterity in moving between the differing positions of the three leading Ḥanafī jurists is the issue of the transmission of the Qurʾān by the way of *tawātur* and its inimitability (*iʿjāz*). Sarakhsī says:

> . . . There is no disagreement with respect to the fact that what is less than a verse is not *muʿjiz*; and the same holds for a short verse. This is why Abū Yūsuf and Muḥammad [al-Shaybānī]—may God have mercy on them—did not allow the performance of prayer except with the recitation (*qirāʾa*) of three short verses or one long verse; because the *muʿjiz* is [one] *sūra* (chapter) and the shortest *sūra*, i.e. al-Kawthar, is three verses [in length]. But Abū Ḥanīfa—may God have mercy on him—said: "That which is obligatory according to the *naṣṣ* (authoritative *sharʿī* text) is the recitation of what is easy from the Qurʾān, and by means of [the recitation of] a short verse, one accomplishes this, and, as a result, the obligation of recitation (*qirāʾa*) is satisfied even if satisfaction with this [minimum amount] is reprehensible (*yukrah*)". It follows from what we have mentioned that neither what is less than a verse nor a short verse is *muʿjiz*; but it remains as Qurʾān[ic text] by means of which knowledge can be established with certainty. Thus, it is clear that the way [to verify the Qurʾān] is [its quality of being] the *naql mutawātir* [transmission along multiple paths continuously from generation to generation]. However, its quality of being *muʿjiz* is an indicator of the truthfulness of the Messenger—may God bless him and grant him peace—with regard to [messages] that he conveys; but it [viz., the quality of being *muʿjiz*] is not itself an indicator of the word of God, because it is possible for God—may He be exalted—to empower His Messenger with a[ny] word (speech) that humanity is incapable of producing . . . Hence, we know that the way [to verification of the Qurʾān] is [available in its] quality of being *naql mutawātir*. And we trust in the verification of the Qurʾān only by [the content of] its bound codices (*daffāt al-maṣāḥif*), because the Companions—may God be pleased with them—verified the Qurʾān only in the form of bound codices (*daffāt al-maṣāḥif*) in order to ensure that *naql mutawātir* took place.[93]

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92 Ibid., 1:281–2.

93 Ibid., 1:280.

Another indicator of Sarakhsī's faithful defense of Abū Ḥanīfa is found in his comment concerning Abū Ḥanīfa's limited reliance upon *ḥadīth* reports. According to Sarakhsī, for a transmission (*riwāya*) to be acceptable, the transmitter (*rāwī*) must possess four conditions: *ʿaql* (reason), *ḍabṭ* (accuracy), *ʿadāla* (justice), and Islam (being a Muslim).[94] In the course of a lengthy discussion of the transmitter's capacity to preserve and transmit the message intact (*ḍabṭ*), Sarakhsī links Abū Ḥanīfa's cautious attitude towards the narration of *ḥadīth* to the policy of Abū Bakr and ʿUmar on the narration of *ḥadīth* from the Prophet. Sarakhsī asserts that Abū Bakr, who was a close Companion of the Prophet, is not known to have narrated many *ḥadīth*s; and that ʿUmar used to encourage people to refrain from narrating too many *ḥadīth*s. For Sarakhsī, the reason for this policy was sensitivity to *ḍabṭ*: it was not always possible to be precise in transmitting the message of the Prophet exactly as he had conveyed it. Abū Ḥanīfa's position was in line with that of senior Companions who knew more *ḥadith*s than many but narrated fewer, in order to ensure that the message of the Prophet was not distorted.[95] Sarakhsī says:

> One of those who [sought to] defame [Abū Ḥanīfa] went so far as to say that he did not know *ḥadīth*. However, he was mistaken. Indeed, [Abū Ḥanīfa] was the person who was most knowledgeable about *ḥadīth* in his time. However, in order to comply with the condition of full *ḍabṭ* [of the transmitter], he [himself] narrated few [*ḥadīth*s].[96]

Sarakhsī explains the rationale for this cautious policy as follows:

> . . . In narrative reports (*akhbār*), what is taken into consideration is the intended meaning of the statement. The full level of *ḍabṭ* can be attained only by comprehending what is meant. This is why Abū Ḥanīfa and Muḥammad [al-Shaybānī]—may God have mercy on them—said: Testimony regarding a [particular] document (*kitāb*) and a [particular] seal (*khatam*) is not valid if the witness does not know the content of the document; because *ḍabṭ* in [the context of] testimony is a [required] condition for its realization (*adāʾ*), and what is meant [here] is the content of the document, not the [form of the] document itself. Thus, the *ḍabṭ* concerning the document is not complete unless [the witness has] knowledge of its content.[97]

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[94] Ibid., 1:345.
[95] Ibid., 1:349–50.
[96] Ibid., 1:350.
[97] Ibid., 1:349–50.

In response to the objection, "How can the transmission of the Qur'ān be valid when it is made by someone who does not understand it?" Sarakhsī comments as follows:

> The origin of the transmission (*naql*) of the Qur'ān is from the rightly guided leaders (*a'immat al-hudā*) who were the best of the created [people] (*khayr al-warā*) after the Messenger of God—may God bless him and grant him peace; but they transmitted the Qur'ān only after a fully established *ḍabṭ*. Then those who followed them transmitted it only after exerting a great effort, including learning, memorization, and continual recitation. If it were the case that something like this existed in a narrative report (*khabar*), we would not hesitate to accept its transmission as valid. Moreover, God—the exalted—promised to protect the Qur'ān from the alterations of falsifiers (*taḥrīf al-mubṭilīn*) in His—may He be exalted—statement: "It is We who sent down the *dhikr* (message) and it is We who protect it".[98] On the basis of this Qur'ānic text we understand that the interest of malevolent people (*mulḥid*s) in [targeting] the Qur'ān is ended. Thus, we validate the transmission [of the Qur'ān] by the person who is *ḍābiṭ*, literally, even if he does not understand its meaning. These conditions are not, however, found in the case of narrative reports (*akhbār*), for which reason, complete ḍabṭ remains [necessary], as we have mentioned [earlier].[99]

Sarakhsī's comparison of the Qur'ān with *akhbār* points to his desire to maintain a balance between rationalism and traditionalism in legal thought. In theory, he reasons that both the Qur'ān and *akhbār* may be exposed to changes in wording during the process of narration by a chain of transmitters. In practice, he emphasizes that the Qur'ān is protected from change by special measures taken by the Companions, and that the risk of the Qur'ān's being exposed to alteration is very low, since God promised to thwart the intentions of falsifiers (*mubṭilīn*) of the text and to protect it. Sarakhsī nevertheless suggests that the text of the Qur'ān, in theory, is as vulnerable to alteration as are *akhbār*, and its lasting authenticity is tied to the adoption of logical and rational measures. However, he combines this rationalist approach with his traditionalist commitment to the established scholastic doctrine, referring to a Qur'ānic verse to support the idea that the Qur'ān is not exposed to the threat of alteration, i.e. the protection of the Qur'ān is guaranteed by the Qur'ān itself. [100] What is it that principally distinguishes the text of the Qur'ān from other texts? To this question Sarakhsī responds:

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[98] Q. 15:9.
[99] Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:349.
[100] Ibid.

> Know that the Book is the Qurʾān that was sent down to the Messenger of God—may God bless him and grant him peace—[and that it] is written [and preserved] in the bound codices (*daffāt al-maṣāḥif*), [and that it] has been transmitted to us in accordance with the seven famous modes [of recitation] by way of *tawātur*.[101]

This statement defines the limits by which the text of the Qurʾān is fixed. However, this definition is arguable in light of certain points in the established Ḥanafī legal interpretation. In the Ḥanafī school, the imām recites *bismi'l-lāh al-raḥmān al-raḥīm* in private before he begins to recite the opening chapter of the Qurʾān (*al-Fātiḥa*) in public while leading certain prayers, as if *bismi'l-lāh al-raḥmān al-raḥīm* is not a part of the Qurʾānic text; otherwise it would deserve to be recited publicly as the introductory verse of *al-Fātiḥa*. On the other hand, based upon Ibn Masʿūd's solitary recitation of the Qurʾānic verse concerning the penance for a broken oath, the Ḥanafī school holds that the three-day fasting for penance in such cases must be consecutive, despite the fact that the same verse in the present text of the Qurʾān transmitted by way of *tawātur*, unlike the *qirāʾa* of Ibn Masʿūd, does not include the word *mutatābiʿāt* (consecutive). Sarakhsī responds to such arguable points. For him, the words '*bismi'l-lāh al-raḥmān al-raḥīm*' in the Qurān are for the purpose of marking the beginnings of chapters, and thus, *bismi'l-lāh al-raḥmān al-raḥīm* does not serve the purpose of recitation of the Qurʾān (*qirāʾa*) during prayer.[102] Sarakhsī says:

> Abū Bakr al-Rāzī—may God have mercy on him—mentioned that the sound position of the *madhhab* in our opinion is that the *tasmiya* [*bismi'l-lāh al-raḥmān al-raḥīm*] is a verse sent down (*munazzala*) from the Qurʾān, neither as the first nor the last verse of a particular chapter. For this reason, it is written on a separate line to distinguish between the chapters in the *muṣḥaf*, so that the way in which the revelation is documented indicates that it [viz., the *tasmiya*] was sent down in order to distinguish [between the chapters]; and the fact that it is written on a separate line indicates that it is not the first [verse] of the chapter . . .[103]
>
> . . . the obligation to recite the Qurʾān during prayer (*rakʿah*) cannot be fulfilled by [reciting] it [viz., the *tasmiya*], according to Abū Ḥanīfa—may God have mercy on him.[104]

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101 Ibid., 1:279.
102 Ibid., 1:279–82.
103 Ibid., 1:280–1.
104 Ibid., 1:281.

Sarakhsī adds that Abū Ḥanīfa held this view not because the verse in question was not a part of the Qurʾān, but because of the scholarly disagreement as to whether or not it is a full verse. In this case, he adds, something questionable may not be considered valid to fulfill the obligation of reciting the Qurʾān during prayer. Sarakhsī resolutely affirms that the disagreement is not about whether or not *bismi'l-lāh al-raḥmān al-raḥīm* is part of the Qurʾān. There is no disagreement on this point, for the phrase is included in Q. 27:30 (*al-Naml*) which reads:[105] "it is from Solomon and it is *bismil-lāh al-raḥmān al-raḥīm.*"[106]

According to Sarakhsī, the form and content of different recitations of the Qurʾān which fall outside the *muṣḥaf* that has been transmitted by the way of *tawātur*—such as the words recited only by Ibn Masʿūd in his capacity as an individual—may not be recited in order to fulfill the obligation of reciting the Qurʾān during prayer. Sarakhsī insists that such isolated recitations may not be accepted as part of the Qurʾān, since the Qurʾānic text, in his opinion, can be verified only by its transmission by way of *tawātur*. However, Sarakhsī faces the challenge of the word *mutatābiʿāt* (consecutive), which is the basis for the Ḥanafī rule that requires three consecutive days of fasting as penance for breaking an oath, despite the fact that the word *mutatābiʿāt* was recited by Ibn Masʿūd alone and that it is not included in the text of the Qurʾān that has been transmitted in the form of a *muṣḥaf* by way of *tawātur*. In defense of Ḥanafī theory, Sarakhsī asserts:

> We did not establish on the basis of the recitation of Ibn Masʿūd the fact that the addition is part of the Qurʾān. Rather, we considered it [merely] as a report (*khabar*) that he transmitted from the Messenger of God—may God bless him and grant him peace—because we know that he did not recite it without hearing it from the Messenger of God—may God bless him and grant him peace—and his narration is acceptable in terms of [bearing the authority] requiring the practice accordingly.[107]

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[105] Q. 27:30.

[106] Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:281. For an extensive discussion of *tasmiya* and its relation to the Qurʾān in the context of prayer, see Sarakhsī, *Mabsūṭ* (Cairo, 1324 AH), 1:13 ff.

[107] Sarakhsī, *Uṣūl* (Hyderabad, 1372 AH), 1:281. For the Ḥanafī view that the three days of fasting as a form of penance for breaking an oath must be consecutive, see also Sarakhsī, *Mabsūṭ* (Cairo, 1324 AH), 8:155.

Conclusion

This chapter on the life and works of Sarakhsī constitutes an introduction to Sarakhsī's place in Ḥanafī law. Sarakhsī's lengthy ordeal under Qarakhanid rule reflects his uneasy relations with the ruling class. The works that he produced during the period of his incarceration—especially his commentary on Shaybānī's works—contributed to the revival of Ḥanafī law. Sarakhsī was eager to demonstrate that his understanding of law is based upon the legal thought of the three leading Ḥanafī jurists, Abū Ḥanīfa, Abū Yūsuf and Shaybānī, and that the fundamental harmony between these three jurists is the basis of Ḥanafī legal doctrine.

Writing at the outset of the classical era, Sarakhsī occupies a key position in the development of Ḥanafī legal thought. Using Shaybānī's texts as his foundation, he produced a coherent and fully-developed interpretation of Ḥanafī law. His *Uṣūl* confirms the traditional Ḥanafī method of relating principles of *uṣūl* to positive law (*furūʿ*). He accomplished this by adducing numerous examples of the continuity between theory (*uṣūl*) and practice (*furūʿ*) in the interpretation of law. His *Mabsūṭ* is a monumental collection of Ḥanafī positive law and his *Sharḥ al-siyar al-kabīr* represents the most comprehensive work of its genre on war and peace in classical Islamic law.

CHAPTER TWELVE

ABŪ ḤĀMID AL-GHAZĀLĪ (D. 505/1111)*

Ebrahim Moosa

Introduction

One of Islamdom's most gifted writers and influential thinkers, Muḥammad b. Muḥammad al-Ghazālī (450–505/1058–1111) has attained extraordinary visibility and is enshrined in scholarly and popular circles in the Muslim world and beyond. Widely known as the "Proof of Islam" (*Ḥujjat al-Islām*), Ghazālī left his imprint on intellectual traditions both inside and outside of Islamdom. His towering role parallels that of, say, Rabbi Akiba or Maimonides in Judaism, that of Origen, Augustine or Aquinas in Christianity, and that of Nagarjuna in Buddhism. In the classical Islamicate world, Jewish and Christian thinkers viewed Ghazālī as an intellectual interlocutor in a manner equaled by few other Muslim thinkers.

Nietzsche's claim that all philosophy is autobiography applies to Ghazālī. Biographers note that when Ghazālī retired to his home in Ṭūs, he built a lovely house, next to a Sufi convent and a *madrasa*, where he spent his time training a select group of students and tending to a garden.[1] Ghazālī's life, including his writings on law and moral philosophy, I shall argue, was shaped and shared by the world around him; and his diverse writings give us many clues about his worldliness and connection to his environment.[2] Ghazālī was one of the few classical Muslim thinkers who acknowledged how his engagement with the world shaped his inner life.

Ghazālī's labors in the garden and meditations in the Sufi convent subtly percolated into his writings. One of his last writings on legal theory provides a glimpse of how his experiences, along with aesthetic and moral

* I would like to thank Mohamed Fadel and Ahmed El Shamsy, who read and commented on earlier drafts of this chapter. Ali Altaf Mian, as always, gave unstinting research support. All remaining errors are mine alone.

[1] al-Jawzī, *al-Muntaẓam*, 10:115.

[2] Marcia Cavell points out that the 'mind' exists in an interpersonal field in relation to the material world. This also holds for Ghazālī. See Marcia Cavell, *Becoming a Subject: Reflections in Philosophy and Psychoanalysis* (Oxford & New York: Clarendon Press, 2006), 1.

considerations, shaped his thinking. In *al-Mustaṣfā* (*The Quintessence*) Ghazālī employs several images to make his point. The book is structured around the geometrical image of four axes (*quṭb* pl. *aqṭāb*). Although these axes are literally the pivots around which he framed his arguments, the term also suggests that we are in the presence of a transformed Ghazālī. The *double entendre* points not only to the mundane structure of organizing interlocking chapters of his book but also to the *quṭb*, a central figure in a mystical hierarchy.

A second image is arboreal. In the Qur'ān, a "good word" is described as a "beautiful tree with firm roots and branches reaching out to the heavens" (Q. 14:24). Ghazālī's use of these images was intentional: these figures of speech were part of his experience. Like other jurists, Ghazālī described the foundations or theory of law as "roots" (*uṣūl*) and their applications or positive law as "branches" (*furūʿ*). He elaborated on the arboreal image, saying that the first axis treats the "harvest" or "fruit" (*thamara*) of the juridical enterprise, the all-important moral assessment, rule or value (*ḥukm*) that a jurist seeks to ascertain. The second axis treats the "bearer of the fruit" (*al-muthmir*), i.e., the sources that the jurist must examine. The third axis treats the "methods of growing fruit" (*ṭuruq al-istithmār*), i.e., methodology, especially language and hermeneutics. Finally, the fourth axis treats the "farmer" or "grower" (*al-mustathmir*), how one becomes a jurist and what the task entailed. These thoughts, clearly those of a person invested in gardening as a hobby, are evidence of the translation of his life experiences into his reflections.

Trained in his early years as a jurist-theologian (*faqīh*), Ghazālī's significant juristic contributions are often overshadowed by other dimensions of his protean persona. He is frequently remembered as a theologian, an amateur philosopher and an ethicist who developed a strong mystical predisposition. In the eyes of many, if not most of his admirers, Ghazālī was a saint. Although some dispute his sanctity, he certainly was considered one of the most learned of the pious of his time. In addition, Ghazālī was frequently hailed as a 'renewer' (*mujaddid*), i.e., someone who renewed aspects of the Muslim tradition in the fifth Islamic century.[3]

Ghazālī's intellectual pursuits in law, theology, philosophy and mysticism closely tracked his personal and existential struggles. Thus biography

[3] Ṣaʿīdī, *al-Mujaddidūn fī al-Islām* (Cairo, 1962), 181–4. Ṣaʿīdī includes Ghazālī in the list of 'renewers,' albeit reluctantly, and he blames him for a good many of the ills of Islamdom.

and writing, knowledge and identity were intimately intertwined in his life. He not only left traces of his personal struggles in his writings, but also bequeathed to posterity a testimonial of his intellectual and spiritual itinerary in the form of *al-Munqidh min al-ḍalāl* (*Rescuer from Error*).

Ghazālī's search for certainty stands out as a marked theme. This was no search for the certainty of facts but rather a quest to understand the meaning of life. This quest, in turn, caused him to question the authority and meaning of tradition. Throughout Ghazālī's career, he was occupied by a concern about conforming to authority (*taqlīd*), by the personal responsibility to investigate (*naẓar*), and by the obligation to undertake intellectual effort (*ijtihād*) in order to arrive at moral and theological truths. From a very early age, he tells us, he was puzzled about how one chooses religion. Is this choice a result of will, socialization, or providential grace?[4] These questions put Ghazālī on a lifelong quest and produced in him agonistic encounters with different bodies of knowledge and experiences. His scholarly pursuits, in turn, opened another set of questions: What is the role of reason? Can reason lead one to the truth or do humans need a revelatory supplement? And can reason detect the purpose of the moral teachings of revelation? If so, what kind of agency and autonomy do individuals possess to make moral choices, both as laypersons and scholars?

Early Years: Education and Scholarly Path

Ghazālī was born in 450/1058–9 near Mashhad in modern day Iran, in a region called Ṭūs.[5] Ṭūs was divided into two towns or suburbs: Ṭābarān, where Ghazālī resided, and Nūqān. Ṭūs was an important stop on the Khurāsān highway, the main arterial road that connected Baghdad with the fertile regions of Transoxiana. Eventually one reached Bukhārā and Samarqand, along what is today known as the Silk Route.[6] Towns and cities on this route housed some of Islamdom's most impressive scholars, institutions and intellectual treasures.

Ghazālī died in his birthplace at the age of approximately fifty-two solar years or fifty-five lunar years. Reports say he was buried in a cemetery in the village of Sanābād—the original name of Mashhad—near Ṭūs.

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[4] Moosa, *Ghazali and the Poetics of Imagination*, 175–8.

[5] According to Griffel, Ghazālī was born in 448/1056, not in 450/1058. See Griffel, *al-Ghazālī's Philosophical Theology*, 23–5.

[6] Le Strange, *The Lands of the Eastern Caliphate* (Lahore ed.).

Most of Ghazālī's elementary and primary education took place in Ṭūs. One of his first teachers was Aḥmad b. Muḥammad al-Rādhakānī. *Circa* 469 AH, when he was perhaps nineteen years old, Ghazālī went to study in Jurjān (Gorgan), approximately 372 miles from Ṭūs. Aside from its inhospitable weather, Jurjān's intellectual and sectarian environment was heterogeneous. The city was dominated by followers of the Ḥanafī school from whose number the preacher (*khaṭīb*) was appointed. Adherents of the Shāfiʿī school, including some patrician figures, were also present in the city, but they were outnumbered by the Ḥanafīs. Non-Sunnī communities affiliated to the Shīʿa and Karrāmīya also lived in Jurjān. Despite the social diversity, sectarian rivalry always threatened conflict.

Leadership of the Shāfiʿī community of Jurjān was largely in the hands of one close-knit unit, the influential Ismāʿīlīs, who enjoyed extensive wealth through trade and who produced some of the leading scholars of the city, including Abū Naṣr al-Ismāʿīlī (d. 405/1014), who died at least forty-five years before Ghazālī was born (although this did not prevent some scholars from claiming that Ghazālī studied with him).[7] According to Farid Jabre, Abū al-Qāsim Ismāʿīl b. Misʿada al-Ismāʿīlī (d. 477/1084), also known as Ibn Saʿda, was one of the leading Shāfiʿī scholars of Jurjān.[8] These Jurjānī Ismāʿīlī jurists specialized in legal disputations and polemics (*khilāf*) between and among the various Sunnī schools of law.[9] Ghazālī most likely studied with at least one member of this family, from whom he may have learned the Shāfiʿī polemics evident in his early legal writings. Subkī notes that it was characteristic of the Ismāʿīlī jurists to dictate lessons, especially prophetic traditions (*ḥadīth*), but perhaps other subjects too.[10]

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[7] al-Subkī, *Ṭabaqāt al-Shāfiʿīya al-kubrā*, 4:92.

[8] Jabre, "La biographie et l'oeuvre de Ghazālī reconsiderée à la lumière des Ṭabaqāt de Sobkī"; al-Yāfī, "Sīrat al-imām Abī Ḥāmid al-Ghazālī wa-makānatuhu," 11; Shams al-Dīn, "Muqaddima," in *Majmūʿat rasāʾil al-imām al-Ghazālī*, 5. ʿĀrif Tāmir identifies this teacher as Ibn Saʿda, not Ibn Misʿada, as stated by al-Yāfī and Aḥmad Shams al-Dīn. In a bizarre misreading of the historical materials on the status of Ghazālī's relationship with this Ismāʿīlī family, Tāmir insists, without foundation, that Ibn Saʿda belonged to the Ismāʿīlī sect. Indeed, he accuses Ghazālī's biographers, both ancient and modern, of bad faith and intentional amnesia. According to Tāmir, the purpose of the omission was to suppress embarrassing information that confirmed Ghazālī's links to Ismāʿīlī teachers, (whom he mistakenly identifies as Shīʿa). Crucial information that confirms Ghazālī as a closet Ismāʿīlī, according to Tāmir, is found in the authoritative biographical treatise of the Shāfiʿī bio-biographer Tāj al-Dīn al-Subkī. See ʿĀrif Tāmir, *al-Ghazālī bayna al-falsafa wa al-dīn*, 41, 81 esp. fn 23.

[9] Tāmir, *al-Ghazālī bayna al-falsafa wa al-dīn*, 41.

[10] al-Subkī, *Ṭabaqāt*, 4:92.

It is said that Ghazālī lost his prized notebook (*taʿlīqa*) to brigands who seized it while he was returning home from Jurjān. This story may not be as implausible as some assume it to be.[11] The chief robber reportedly scoffed at Ghazālī for carrying his learning in notebooks of which he could be easily dispossessed. The incident, which features prominently in narratives about Ghazālī's scholarly and pious persona, became a thread in several accounts of his biography. Back in Ṭūs, Ghazālī reflected on the temporary loss of his notes. He treated the encounter with the brigands as an oracle instructing him to spend the next two or three years (470–473/1077–1080) at home, where he memorized the formal knowledge he had acquired to that point, so that no one could dispossess him of it again.[12] Although some modern scholars are inclined to discount the anecdote on the grounds of incredulity or the reliability of the sources, there is no good reason to doubt that Ghazālī studied in Jurjān.[13]

At the age of about twenty, Ghazālī headed for the Niẓāmīya College in Nīsābūr, one in a network of colleges built by the Saljūq minister, Niẓām al-Mulk.[14] The highpoint of his student life occurred in Nīsābūr, where he took advanced classes in law (*fiqh*), dialectical theology (*ʿilm al-kalām*), legal theory (*uṣūl al-fiqh*), juro-theological polemics (*khilāf*) and mysticism (*taṣawwuf*). In Nīsābūr, Abū al-Maʿālī al-Juwaynī (d. 478/1085), who held the celebrated chair in Shāfiʿī law, inspired Ghazālī and shaped his thinking; and Abū ʿAlī al-Fārmadhī (d. 477/1084–5) initiated him into the academic study of mysticism. In Nīsābūr, Ghazālī quickly became Juwaynī's energetic and ambitious teaching assistant, although Juwaynī reportedly was wary, if not jealous, of his prodigy's graphomaniacal ambitions. Contrary to convention, Ghazālī wrote a book of his own—while his teacher was still alive—in an attempt to upstage his master. Irritated by the audacity of his understudy, Juwaynī protested: "You have buried me while I am still alive. Could you not wait until I was dead?"[15]

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[11] Ibid., 6:195; Makdisi, *The Rise of Colleges*, 120–44.

[12] al-Aʿsam, *al-Faylasūf al-Ghazzālī*, 33.

[13] ʿAbd al-Ghāfir al-Fārisī does not mention that Ghazālī studied in Jurjān. For this reason Griffel doubts this point and dismisses as a fiction the story of Ghazālī's encounter with the brigands. Griffel gives short shrift to Ghazālī's widely recorded trip to Jurjān. See Griffel, *Ghazālī's Philosophical Theology*, 21–8.

[14] Ghazālī was twenty when he completed his studies in Ṭūs and Jurjān. See Bījū, "al-Taʿrīf bi al-muʾallif waʾl-kitāb," 7.

[15] al-Jawzī, *Muntaẓam*, 114.

Postgraduate Milieu

For approximately six years, notably after Juwaynī's death in 478/1085, Ghazālī was an intern or fellow in the mobile secretariat and entourage of Niẓām al-Mulk (d. 485/1092), the *wazīr* and kingmaker of the Saljūq sultans. Niẓām al-Mulk effectively managed the territories of the Baghdad-based ʿAbbāsid caliphate. In the *wazīr's* retinue, Ghazālī rubbed shoulders with numerous scholars and ideologues, as well as parvenus. The *wazīr* was a fox whose interference in the workings of the caliphate and sultanate are now the stuff of legend. At one point Niẓām al-Mulk scrutinized every decision that the caliph took in Baghdad, and he always served the interests of his Saljūq patrons (not to mention his own personal interests).

Even if Ghazālī was not part of the inner circle of the *wazīr's* bureaucracy, he was no doubt close to people in power who had access to the decision-making chambers. Ghazālī was neither politically naive nor lacking in political skills. His proximity to the *wazīr*, the Saljūqs and the ʿAbbāsid caliph must have had a significant influence on his thinking about governance and political matters.

Ghazālī's scholarly accomplishments and credentials impressed Niẓām al-Mulk, who appointed him to the prestigious chair of Shāfiʿī jurisprudence at the Baghdad Niẓāmīya. In 484/1091, as Ghazālī's contemporaries report, he entered the capital amid great fanfare, pomp and ceremony. His meteoric rise brought him great renown in social and political circles in which he was admired as a brilliant and versatile intellectual. Whereas it took other scholars decades to burnish their reputations, it took the thirty-four year-old scholar from Ṭūs just over one year to acquire a stellar reputation in the capital. Niẓām al-Mulk boosted Ghazālī's celebrity, showing off his new protégé, whose reputation had set the intellectual circles of Baghdad abuzz. By the time Niẓām al-Mulk was killed in 1092, Ghazālī's induction into the politics of the empire was already complete.

Legacy

Ghazālī's legacy is not without controversy. While he is generally held in high esteem in the Muslim tradition, he has elicited a fair share of criticism. The Ḥanbalī moralist ʿAbd al-Raḥmān Ibn al-Jawzī (d. 597/1200) was scandalized by Ghazālī's preoccupation with aspects of mysticism that

on occasion bordered on antinomianism.[16] Ibn al-Jawzī was outraged by Ghazālī's apparent tolerance of self-humiliation as spiritual therapy. One such practice involved a novice entering a public bath-house and 'stealing' the clothes of clients, with the express purpose of being apprehended and subjected to abuse by the patrons. Such humiliation, according to some Sufis, was salutary in so far as it shattered the novice's pride. Ibn al-Jawzī reasoned that Ghazālī's refusal to condemn such a practice signaled his own "... deviation from the standard of proper understanding because of his association with the Sufis. He viewed their lifestyle as the ideal."[17] Unable to control his outrage, Ibn al-Jawzī exclaimed: "Glory be to the One who expelled Abū Ḥāmid from the circle of law with his compilation of *Resuscitation* (*Iḥyā*)."[18]

It was no doubt in order to counter such charges that the biographical sources showcase Ghazālī's juristic persona as much as they do. Promoting Ghazālī's merits as an outstanding Shāfiʿī jurist not only burnished his scholarly credentials but also legitimized him in the prevailing web of a traditional authority. His reputation as a jurist boosted his credibility. Even though some later Shāfiʿī figures viewed the study of philosophy, logic and theology with a good dose of skepticism, if not outright reproach, Ghazālī's study of these subjects did not undermine his credibility as a scholar.

The Shāfiʿīs were deeply invested in monopolizing the office of the centennial renewer (*mujaddid*) of the faith. There was also rivalry among the schools, over which one would produce the centennial renewer of each century.[19] Ghazālī himself fully understood that some of his contemporaries wanted to proclaim him as the spiritual renewer of the fifth century AH. In the *Rescuer,* he noted that numerous pious people had counseled him to end his self-imposed isolation and return to teaching, since they sensed that a renewer of the faith was about to make an appearance and that he was an appropriate candidate for such a role.[20]

Some modern Muslim critics have traced every conceivable flaw in Muslim civilization to Ghazālī's legacy. His ideas, they claim, introduced

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[16] Ibid.

[17] Ibid., 115.

[18] al-Zabīdī, *Itḥāf al-sādah al-muttaqīn bi-sharḥ iḥyā' ʿulūm al-dīn*, 1:52; al-Jawzī, *Muntaẓam*, 115 (*subḥāna man akhraja Abā Ḥāmid min dā'irat al-fiqh bi-taṣnīf al-iḥyā'*.)

[19] Melchert, *Formation,* 108. Landau-Tasseron, "The 'Cyclical Reform': A Study of the *Mujaddid* Tradition."

[20] al-Ghazālī, *al-Munqidh min al-ḍalāl*, 76.

certain viruses into Muslim religious thought and practice that were difficult, if not impossible, to eradicate. Most of these critics traffic, in what I call 'scapegoat historiography'. They erroneously attribute Islamdom's dwindling fortunes as a civilization and polity during the past several centuries to single causes. Some charge that Ghazālī had undermined the use of reason in Islamdom, thanks to his trenchant critiques of certain philosophical propositions held by Muslim philosophers. Others claim that over time Ghazālī's promotion of mystical discourse at the expense of philosophy turned large swaths of the Muslim intellectual tradition into an irrational husk. Moreover, his labors, they claim, justified a retrograde version of mysticism that inclined the laity to superstition and irrationality. Cumulatively, these intellectual pathologies, critics claim, thwarted Islamdom's potential to produce a renaissance and subsequent enlightenment that might have paralleled or eclipsed that of Europe![21]

At the other extreme Ghazālī's admirers uncritically defend his legacy. Many admire him for his critique of philosophy. In his detailed biographical entry on Ghazālī, Tāj al-Dīn al-Subkī (771/1370), waxed lyrical: "He [Ghazālī] arrived at a time when people were in need of the refutation of the falsehoods of the philosophers just as a pitch-dark night requires the illumination of the heavenly lights . . . and he continued to defend the true faith with the lash of his speech . . ."[22] Indeed, some modern defenders excoriate anyone who comments critically on Ghazālī's ideas.[23] Not only have these self-righteous defenders abandoned Ghazālī's critical stance towards ideas, but they have also undermined his kaleidoscopic legacy. Suffice it to say, that Ghazālī's legacy has provided grist for the scholarly mill to churn out as many learned discourses as it can generate polemics.

We can divide Ghazālī's life and scholarship into three overlapping phases: (1) his student years followed by a protracted postgraduate period during which he wrote several legal treatises; (2) a four-year professorship in Baghdad, during which he was productively preoccupied with philosophy and theology but also experienced a debilitating spiritual crisis; (3) his mystical phase which coincided with a period of extended introspection and insightful writings.[24] Ghazālī never abandoned his interest in *fiqh*,

[21] Ḥanafī, "al-Juẓūr al-ta'rīkhīya li-'azmat al-ḥurrīya wa'l-dīmuqrāṭīya fī wijdāninā al-mu'āṣir," 170–88; al-Jābirī, *Naqd al-'aql al-'arabī*.

[22] al-Subkī, *Ṭabaqāt*, #694.

[23] This brings to mind the reaction to the criticism of Zakī Mubārak. See Moosa, *Ghazālī*, 19–20.

[24] al-Ghazālī, *al-Munqidh*.

moral rules and their legal applications or in *uṣūl al-fiqh,* a unique discipline that combines epistemology, language and moral philosophy. A few years before his death, Ghazālī completed *al-Mustaṣfā* an impressive treatise on *uṣūl al-fiqh*, which updated his earlier writings on this subject.[25]

The twists and turns of Ghazālī's intellectual and spiritual itineraries are reflected in his lifelong pursuit of intellectual and spiritual certainty, a pursuit that was closely related to his personal existential struggles. Although Ghazālī played within the mainstream of Islamic thought, he often leaned towards threshold positions, such as his fascination with philosophy, his deep interest in mysticism and his trenchant critiques of the jurists. In order to follow the pathways to which his knowledge and labors guided him, he frequently ventured into the frontiers of thought. The spatial metaphor the *dihlīz*—an intermediate portal that separates the Persian home from its exterior—perhaps best describes his preferred spatial location.[26] Just as occupants of a dwelling frequently crisscross the *dihlīz* as they enter and exit the home, Ghazālī repeatedly crossed multiple thresholds of intellectual currents, political conflicts and cultural intersections. During certain robust stages of his youthful years, he was not reluctant to charge his political adversaries with heresy and zealously championed the cause of the Shāfiʿī school against the claims of rivals.

In later life, not only did Ghazālī moderate his adversarial stance towards those with whom he disagreed, but also imagined and theorized all thought and practice to be a continuous dialogical movement between the inner and the outer; between the esoteric and exoteric; and between body and spirit. He imagined the dialogic as a complex force field, within which the religious subject constructively connected with the multiple needs of both matter and spirit.

Despite his vocal criticisms of philosophy, Ghazālī was charmed by it. He also found the harmony and precision of logic irresistible. In later centuries, many of his puritan critics were chagrined by his misplaced admiration for and use of both logic and philosophy. A popular anecdote, circulated by one of his students, Abū Bakr b. al-ʿArabī, encapsulates that view. Ghazālī, Ibn al-ʿArabī claimed, had ingested philosophy but regrettably could not find an emetic to expurgate it.

In his thirties, Ghazālī was an insatiable polymath who espoused a cosmopolitan vision. Undeterred by orthodoxy, he explored the alpha and

[25] Griffel, "The Relationship between Averroes and al-Ghazali," 51–63.
[26] On Ghazālī's location in a *dihlīz*ian space, see Moosa, *Ghazālī*, 45–9.

omega of every problem. It was this attitude that precipitated his *annus horribilis* late in the third year of his stay in Baghdad. We do not know the exact reason for the deterioration of his health. From cryptic clues in *Rescuer* one gets the sense that he developed all the major symptoms of depression and intellectual fatigue. Some suspect that his forays into philosophy and his engagement with theology, logic and law may have induced a debilitating skepticism. His illness, according to Ghazālī's own account, impeded his ability to speak and prevented him from teaching.

Others suggest that Ghazālī's anxieties were exacerbated by his Saljūq political partisanship, which put him at risk from the daggers of Ismāʿīlī political assassins. In 487/1094, three years after his arrival in Baghdad, the caliph al-Muqtadī died, and was succeeded by his sixteen-year old son, al-Mustaẓhir. Ghazālī and other scholars participated in the inauguration ceremony in order to administer the oath of office. Ghazālī dedicated his *Faḍāʾiḥ al-Bāṭinīya* (*Obscenities of the Esoterists*) to Mustaẓhir, and fawned over the virtues of the young caliph. Tottering on his throne, the young caliph's polity was held together by a phalanx of shrewd parvenu *wazīrs*, power-managers, scholars and panegyrists. For many of these people, the accession of the inexperienced prince was an opportunity for self-aggrandizement, self-interest and the accumulation of personal wealth. It was in such company that Ghazālī now found himself. One suspects that at some point the political circus contributed to his psychic dilemmas. Instead of expressing his political dissent and risking sedition, he contemplated leaving the entire system.

On the pretext of making the pilgrimage to Makka in the year 1095, Ghazālī embarked on a journey that marked a radical turn in his life. In search of a hermetic life and life-changing events, he traveled to the holy shrines in Makka and Madīna. Along the way, he spent long stretches of time incognito in the Dome of the Rock in Jerusalem and the ʿUmayyad Mosque in Damascus. During this extensive liminal period of travel and seclusion, Ghazālī reinvented himself as a mystic. The mystical path quelled his nagging doubts and skepticism. In Sufi practices, he declared, he found the greatest satisfaction. Through rigorous exercises of self-fashioning and experimentation, he aspired to spirituality, which he regarded as the essence of prophecy. In pursuit of these mystical truths he decided to pursue a life of maximum isolation, contemplation and reflection.

Re-Visioning the Law

In Ghazālī's juristic biography one discerns at least five distinct discursive registers. First, the youthful Ghazālī was a robust pro-Shāfiʿī polemicist. Second, his discourse played a pivotal role in transmitting the Shāfiʿī canon and enabling it during a crucial period in that school's history. Third, Ghazālī was an ethicist whose insights into the law were tinged by his mystical experiences and aspirations. Fourth, Ghazālī attempted to grasp the essence of the revealed law by critiquing the mechanistic reasoning of the law schools, and elucidated the five normative purposes of the revelation (*maqāṣid al-sharīʿa*); in the doctrine of public interest (*maṣlaḥa*), he found a means to understand the function and ends of the moral law. Finally, Ghazali was a moralist whose lifelong struggle with the truth resulted in strong advocacy of moral autonomy, resistance to authority, and opposition to *taqlīd*. In his view, even a layperson who conforms to school authority (*taqlīd*) must have some idea as to why he or she accepts such authority.

1. *The pro-Shāfiʿī Polemicist*

During his apprenticeship with al-Juwaynī and his postgraduate fellowship in the entourage of Niẓām al-Mulk, Ghazālī wrote some of his early compositions on moral law (*fiqh*) and legal theory (*uṣūl al-fiqh*). At that time, mastering the law was the default mode for any scholar seeking upward mobility or a career in the state bureaucracy. In his early writings, he adopted a pro-Shāfiʿī polemical style, flaunting his mastery of legal forensics, but demonstrating little originality. His polemics were directed against the older, rival Sunni legal school, the more established Ḥanafīs. The status and authority of the aristocratic Ḥanafīs was challenged by the more scripture-centered and mystically-tinged interpretations of the Shāfiʿīs. Occasionally these polemics led to tensions and conflict.[27]

Ghazālī's pronouncements certainly added to these tensions. In his earliest treatise on legal theory, *al-Mankhūl* (*The Sifted*), he sniffed at Abū Ḥanīfa, the putative founder of the Ḥanafī school.[28] Abū Ḥanīfa, Ghazālī wrote, was not a master-jurist (*mujtahid*). Why? Because he lacked good skills in Arabic. And what was the evidence for such a charge? Abū Ḥanīfa, according to Ghazālī, used grammatically incorrect language, by saying:

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[27] Bulliet, *The Patricians of Nishapur*, 45–6.
[28] al-Ghazālī, *al-Mankhūl min taʿlīqāt uṣūl*, 581.

"*wa law ramāhu bi Abū Qubays*" instead of "*bi Abī Qubays*."[29] Ghazālī continued relentlessly: "Nor was he [Abū Ḥanīfa] skilled in prophetic traditions, and therefore he was content to accept weak narrations while rejecting sound ones. Nor was he a 'discerner of the self' (*faqīh al-nafs*). In fact he only pretended to be smart and that too inappropriately and incongruously in dealing with the sources [of law]. That becomes evident in the proliferation of his viewpoints . . .". Ghazālī goes on to catalogue Abū Ḥanīfa's errors. His assessment was scathing: Abū Ḥanīfa was bent on "destroying" (*hadm*) as well as "tearing" (*kharm*) the revelation of the Prophet Muḥammad.[30] This statement is ironic. Incompetence in grasping prophetic traditions was a charge frequently hurled at Ghazālī himself by his detractors, as were allegations that he had been seduced by Sufi discourses to the detriment of the integrity of the law.

For a man who in his early career professed expertise in logic, philosophy and rational discourse, it was odd for Ghazālī to claim that

> Abū Ḥanīfa drained the contents of his mind in order to speculatively design legal questions (*taṣwīr al-masā'il*) and [formulaically] reduced his viewpoints to comply to certain [axiomatic] maxims (*taqlīd al-madhāhib*), thereby producing numerous errors. That is the reason why his two disciples, Abū Yūsuf and Muḥammad, abandoned two-thirds of his [viz., Abū Ḥanīfa's] teachings when they detected copious errors, confusion and contradictions in his teachings.[31]

It is evident that Ghazālī recycled a good number of the anti-Ḥanafī views held by his teacher al-Juwaynī. Whether his views about Abū Ḥanīfa were the imprudent prattle of an immature student or the earnestly held convictions of a mature scholar remains moot. In later writings he spoke in a respectful and reverential tone about Abū Ḥanīfa. In *Shifā' al-ghalīl*, he compares Abū Ḥanīfa's opinions to those of al-Shāfiʿī, occasionally disagreeing but often using the Kufan scholar's views as grist for his forensic accounts of theoretical details.

There is something instructive in al-Juwaynī's and Ghazālī's bruising attacks on Abū Ḥanīfa. The Shāfiʿī's were either reckless in their criticism or perhaps advocates of robust intellectual exchange. Later in life

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[29] Ibid., note 2, p. 581, where Hītū, the editor, says that the statement attributed to Abū Ḥanīfa specified "Abā Qubays" and not "Abū Qubays," as Ghazālī reported, and that Abū Ḥanīfa's formulation is legitimate according to some grammarians. Hītū adduces a line of poetry as a proof text.

[30] Ibid., 616–17.

[31] Ibid., 608.

Ghazālī's impetuous scribbling would come to haunt him, as some Ḥanafīs attempted to have him reprimanded, if not punished, by the Saljūq sultan Sanjar for making offensive comments against a figure who was revered by the Ḥanafī Saljūqs.[32]

Lurking in the background was the shadow of the larger sectarian milieu. Many Ḥanafīs followed the rationalist Māturīdī school of theology while others adhered to the controversial Muʿtazilī creed for which Ghazālī had a mild dislike. By contrast, the Shāfiʿī's were aligned with the tradition-blended rationalism of the Ashʿarī school. Rivalries between Sunnīs and Shīʿīs produced sufficient theological tinder to stoke several sectarian fires. While Ghazālī partook in such sectarian temptations during his early career, in later life he regretted his youthful indulgences and manifested a particular loathing for theological polemics and disputation (*munāẓara*).[33]

2. *Transmitter of the Canon*

One puzzling aspect of Ghazālī's biography is that his reputation as a Sufi eclipsed his standing as a jurist.[34] One possible explanation is that Ghazālī had such an extraordinary passion for mysticism and theology that his labors in these realms dwarfed his considerable contributions to the discipline of juristic theory, law and ethics. It is well-documented that Ghazālī was a pivotal figure in the transmission of seminal texts that later became an important part of the authoritative canon of the Shāfiʿī school of law. All biographical accounts of Ghazālī manifest admiration for and praise of his juristic skills and contributions to this discipline.

Ghazālī's student, Muḥammad b. Yaḥyā b. Manṣūr (d. 543/1153), described him as the "second Shāfiʿī."[35] The chronicler Ibn ʿAsākir eulogized him as an imām or "authority" in both the applied rules of the Shāfiʿī school and in legal polemics.[36] These quotes suggest that he was sufficiently invested in the school to defend its positions against attacks and

[32] al-Ghazālī, *Faḍā'il al-anām min rasā'il ḥujjat al-Islām*.

[33] Makdisi, "The Non-Ashʿarite Shāfiʿism of Abū Ḥāmid al-Ghazzālī," 250–1.

[34] Amīn, *al-Ghazālī faqīh wa-faylasūf wa-mutaṣawwif*.

[35] al-Subkī, *Ṭabaqāt*, 6:202. Muḥammad b. Yaḥyā wrote a commentary on Ghazālī's *al-Wasīṭ fi al-furūʿ*, called *al-Muḥīṭ*. See Kâtip Çelebi, *Kashf al-ẓunūn*, 2:633.

[36] Al-Subkī, *Ṭabaqāt*, 6:214 (*kāna imām^{an} fī al-fiqh madhhab^{an} wa khilāf^{an}*). I have translated *khilāf* here as 'polemics' or 'disputed law'. The term *khilāf* is opposed to *madhhab*, i.e. settled doctrines supported by the main scholars of a school. *Khilāf* deals with disputed questions of law, in one or more schools of law. See Makdisi, *The Rise of Colleges*, 109.

criticisms from rivals.[37] For example, Ghazālī is credited by Subkī with the renewal of the Shāfiʿī *madhhab* (*jaddada al-madhhab fī al-fiqh*), although he did not elaborate on how Ghazālī accomplished this task.[38]

A chronological study of Shāfiʿī school manuals shows where Ghazālī fits in the picture of the transmission of texts about applied rules (*furūʿ*), the most frequently consulted area of Islamic law. Al-Shāfiʿī (d. 204/820), the "founder" of one of the major Sunnī legal schools, wrote at least part of his famous *Kitāb al-umm (The Mother Book).* While speculation is inconclusive about who finally completed the text, it is known that this major text was abridged by al-Shāfiʿī's Egyptian disciple, al-Muzanī (d. 264/878), and circulated as *Mukhtaṣar al-Muzanī*. Nearly 150 years later, in the eleventh century, Ghazālī's teacher al-Juwaynī compiled an important work circulated as *Nihāyat al-maṭlab fī dirāyat al-madhhab (The End of the Search in Comprehending the Law School)*.[39] The Egyptian scholar, Muḥammad Ibrāhīm al-Ḥifnāwī points out that, according to later Shāfiʿī authorities, the *Nihāya* is an abridgement of several works of al-Shāfiʿī's, especially *al-Umm* and *al-Imlā';* in addition, the *Nihāya* draws from abridgements of al-Buwayṭī (d. 231/846) and al-Muzanī, respectively.[40] Some early authorities report that the *Nihāya* was only an abridgement of the work of al-Muzanī.[41]

As Mohammed Fadel has demonstrated, the genre of abridgements served to formalize the "doctrine of the legal schools, an effort that culminated in the attempt to form unequivocal rules within each *madhhab*."[42] Following this line of reasoning, al-Juwaynī would have been one of the prominent fifth/eleventh century Shāfiʿī figures who attempted to formalize the school's doctrine after the celebrated eras of al-Buwayṭī and al-Muzanī came to a close.

Ghazālī in turn, relied on the *Nihāya* of al-Juwaynī in order to produce multiple abridgements. It was as if he were taking apart the composite unit produced by al-Juwaynī in order to once again elucidate the doctrines of the Shāfiʿī school. One such abridgement is his *al-Basīṭ* (*The Plain*). Ghazālī also used the *Nihāya* to generate three other abridgments: *al-Wasīṭ* (*The Median*), *al-Wajīz* (*The Concise*) and *al-Khulāṣa* (*The Synopsis*).

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37 Tāshkāprizādah, *Mawsūʿat muṣṭalaḥāt miftāḥ al-saʿāda*, 402.
38 al-Subkī, *Ṭabaqāt*, 6:205–14; al-Zuḥaylī, "Ghazālī al-faqīh wa kitābuhu *al-Wajīz*."
39 al-Juwaynī, *Nihāyat al-maṭlab fī dirāyat al-madhhab*.
40 al-Ḥifnāwī, *al-Fatḥ al-mubīn fī taʿrīf muṣṭalaḥāt al-fuqahāʾ waʾl-uṣūliyyīn*, 146–7.
41 Ibid.
42 Fadel, "The Social Logic of *Taqlīd*," 215.

Whether al-Ghazālī intended to systematize the doctrine of the Shāfiʿī school is not clear. One may speculate that a younger Ghazālī acquired scholarly texts and dictations from his teachers, and then used them as teaching manuals or notes for his students. Ghazālī's service to the Shāfiʿī school of law has long been acknowledged and immortalized in rhyme by ʿUmar al-Trabulūsī:

> A learned man refined school opinion, may God offer him salvation
> For penning the *Plain*, the *Median*, the *Concise* and the *Synopsis*[43]

There is more evidence of Ghazālī's pivotal role in the lineage of Shāfiʿī jurisprudence. The use later scholars made of his writings supports the claim of his role in the transmission of Shāfiʿī texts. For example, ʿAbd al-Karīm b. Muḥammad al-Qazwīnī al-Rāfiʿī (d. 623/1226), an important figure in the Shāfiʿī school, wrote a manual called *al-Muḥarrar (The Written)*, which was used as a reference and a teaching text in the Shāfiʿī tradition. Clearly, al-Rāfiʿī relied on Ghazālī's text, *al-Khulāṣa* in order to compose his *al-Muḥarrar*.[44] The same al-Rāfiʿī also produced a commentary on Ghazālī's *al-Wajīz*, titled *Fatḥ al-ʿazīz: Sharḥ al-wajīz (Opening of the Most Powerful: A Commentary on the Concise)*.[45]

Another prominent figure in the Shāfiʿī school was the Syrian jurist and *ḥadīth* scholar, Yaḥyā b. Sharaf b. Murī al-Nawawī (d. 676/1278).[46] Al-Nawawī relied on Rāfiʿī's *al-Muḥarrar*, which, it will be recalled, is based on Ghazālī's *al-Khulāṣa*. Al-Nawawī produced an abridgement, the *Minhāj al-ṭālibīn* (*Path for Seekers* [*or Students*]), an authoritative pedagogical text and source for juridical *responsa* (*fatāwā*) in Shāfiʿī jurisprudence.[47] Thus, one cannot ignore Ghazālī's indispensable role in the transmission of the Shafiʿī school texts between the eleventh and thirteenth centuries.[48]

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[43] al-Subkī, *Ṭabaqāt*, 6:223.

[44] al-Zuḥaylī, "Ghazālī al-faqīh," 85.

[45] al-Fāsī, *Fikr al-sāmī fī tārīkh al-fiqh al-Islāmī*, 2:338.

[46] al-Nawawī, *Kitāb al-Majmūʿ,* (Riyad, 2006), 1:16.

[47] al-Zuḥaylī, "Ghazālī al-faqīh," 85; al-Fāsī, *Fikr al-sāmī,* 2:341. Fāsī says the *Minhāj* is an abridgement of al-Rāfiʿī's *al-Rawḍa*.

[48] Commentaries on al-Nawawī's *Minhāj al-ṭālibīn* include the following: *Sharḥ minhāj al-ṭālibīn* by Jalāl al-Dīn al-Maḥallī (d. 864/1459); *Ḥāshiya ʿalā Sharḥ al-Maḥallī ʿalā Minhāj al-Ṭālibīn* by Shihāb al-Dīn al-Qalyūbī; *Mughnī al-muḥtāj* by al-Khaṭīb al-Shirbīnī (d. 994/1586); *Tuḥfat al-muḥtāj* by Ibn Ḥajar al-Haythamī (d. 973/1565); *Ḥāshiya* by ʿAbd al-Ḥamīd al-Shirwānī; *Nihāyat al-muḥtāj li sharḥ al-minhāj* by al-Shihāb al-Ramlī (d. 1004/1596); *Ḥāshiya ʿalā sharḥ al-minhāj* by Nūr al-Dīn al-Shabramallīsī (d. 1087/1677).

Ghazālī's seminal work *al-Mustaṣfā* ranks as one of the top three texts in juristic-theory in the genre classified as that of the 'dialectical theologians'.[49] The only antecedents to Ghazālī's text are the *Muʿtamad* (*The Reliable*) of Abū 'l-Ḥusayn al-Baṣrī (d. 413/1022) and the *Burhān* (*Book of Demonstrative Proof*) of his teacher al-Juwaynī.[50]

Later scholars frequently cited Ghazālī's opinions and over time his own texts came to be viewed as reliable resources (*muftā bihi*) that might be cited when issuing juridical *responsa* (*fatwās*). No less an authority than al-Nawawī points out that the discursive tradition affiliated with the ancient jurist, al-Shāfiʿī, relied on five primary texts: (1) the *Mukhtaṣar* of al-Muzanī, (2) *al-Muhadhdhab* and (3) *al-Tanbīh*—both by al-Shīrāzī (4) *al-Wasīṭ* and (5) *al-Wajīz*—both by Ghazālī. "These five book are popular among our fellow schoolmen and they frequently use them," al-Nawawī wrote. "They are also available in all the geographical regions," he continued "and are known to the experts as well as to students in all regions, especially in the absence of a useful [comprehensive] compilation that could replace all of these books."[51]

3. *Ethicist*

During his Sufi phase Ghazālī began to re-think many aspects of his acquired learning, most importantly the place of applied moral rules (*fiqh*). All religious teachings, Ghazālī argued, have ethical outcome as their ends. Religious practices have as their goal the inculcation of virtues and the manipulation of the sentiments of the religious subject. To punctiliously and routinely observe religious rituals and practices is meaningless, he said, if these do not transform the self into a virtuous subject. Only individuals endowed with excellent virtues will gain proximity to the Divine and only their souls will receive the divine light and inspiration.

It was in writing that Ghazālī found balm for his soul; this was also the medium of communicating his experiences and insights to others. His best known tome, a classic in religious history is called *Iḥyāʾ ʿulūm al-dīn*

[49] According to the traditional distinction, juristic theory texts were written either in the style of the dialectical theologians (*mutakallimūn*) or that of the Ḥanafī scholars. This distinction is not useful. Ghazālī's text on juristic theory has a strong theological bent. See A. Kevin Reinhart, " 'Like the Difference between Heaven and Earth'," 231.

[50] Abū Zahra, "al-Ghazālī al-Faqīh," 531.

[51] al-Nawawī, *Tahdhīb al-asmāʾ wa'l-lughāt*, 1:3.

(*Resuscitation of the Sciences of Religion*).[52] *Resuscitation* is a marvel of elegant style and modulated thought with a characteristically Ghazālian economy of words. Centered around a quartet of themes, "Devotions," "Practices," "Calamities" and "Salvific" acts, it contains a gallery of religious ideas, prescriptions and practices. Insightful Qurʾānic exegeses and prophetic *ḥadīth*s are skillfully interwoven with the stories and exploits of saints, mystics and pious jurists, interspersed with aphorisms derived from the cultural lore and humanistic traditions of the Arabs, Persians and other neighboring civilizations. For good reason *Resuscitation* has been hailed as an encyclopedia of religious ethics.

In *Resuscitation*, Ghazālī attempts to recover Islam's prophetic sensibility. Scholarly integrity was a pre-condition for regaining this prophetic spirit. Ghazālī begins with fierce hectoring of the jurists (*fuqahāʾ* sg. *faqīh*) for their slavish loyalty to political authority and brazen materialism.[53] In his view, intellectuals had abdicated their assigned role as repositories of knowledge and as the living conscience and prophetic voice of society. In ominous jeremiads, Ghazālī placed the blame for the ossification of thought and the decay of life squarely on the learned; their dousing of the prophetic spirit produced nonsense in thought and monstrous behavior in practice. Dead religious teachings were the product of dogmatically adhering to a lifeless moral framework.

Every discipline—law, theology and ethics—must change its character and transform into something new; only then, Ghazālī argued, would learning revive the human soul. Over time, he claimed, unnecessary cultural sedimentation had obscured and distorted the meanings and effects of key terms in the Islamic lexicon of religiosity. He refurbished the meanings of five key concepts, namely, (1) the word "understanding" or "discernment," used metonymically for law (*fiqh*), (2) "knowledge" (*ʿilm*), (3) "the unity of God" (*tawḥīd*), (4) "remembrance and reminders about God" (*dhikr* and *tadhkīr*), and (5) "wisdom" (*ḥikma*).[54] It is a grievous mistake, he claimed, to hold the view that "law" (*fiqh*) is only about the minutiae of intricate and hairsplitting arguments. Among the first community of Muslims, he reminded his readers, the meaning of *fiqh* was introspective self-understanding and the pursuit of knowledge that illuminated the path to salvation.

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[52] I gloss *dīn* as 'salvation' because the early usage of the term inflects salvation practices.

[53] al-Ghazālī, *Iḥyāʾ ʿulūm al-dīn*, 1:37–8.

[54] Ibid., 1:39–40.

Fiqh, Ghazālī insisted, is about works performed in order to merit salvation. For him, *fiqh* as a legalistic enterprise is secondary to the piety it is supposed to inculcate. If the law does not advance piety then it is bereft of its transcendent and heteronymous element. It then regresses to being a mere secular science that fails to advance the self-transformation of the Muslim subject. Ghazālī's signature theme of "resuscitation" is both a normative endeavor and a work in progress. While *Resuscitation* is comprehensive in both its diagnosis and remedies, a lingering shadow of contingency suggests that an ethical narrative must by necessity be open to renewal.

The distinction maintained by Ghazālī between juridical and ethical discourses is a matter of convention and formality. In practical terms, there is no such distinction. Identifying the heart as the center of ethical and moral practices, Ghazālī was deeply aware that the ideal jurist must meet the criterion of being a *faqīh al-nafs*, "a discerner of the self." If the diagnostic center of the ethical subject is the heart, he believed, it follows that all remedies must begin by addressing the diseases afflicting the heart.

4. *Essence of the* Sharīʿa

Ghazālī was the first classical scholar to talk about the purposes or intentions (*maqāṣid*) of the *sharīʿa* in a synoptic manner, amplifying the ideas of al-Juwaynī. Cautious about venting this idea too loudly, he artfully discusses it in a section entitled "suspect sources." There he shows how the purpose of the law is linked to the utilitarian doctrine of *maṣlaḥa*, i.e. public interest or social good.[55] One may speak of a pedestrian notion of *maṣlaḥa*, Ghazālī states, meaning that one should "optimize benefit and repel harm." Self-interest, in his view, is a general human trait.[56] However, he also articulates a more radical understanding of *maṣlaḥa*: "preserving the purpose or intent of the revealed law (*sharʿ*)."[57]

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[55] al-Ghazālī, *al-Mustaṣfā min ʿilm al-uṣūl*, 2:478. The translated section below, "*al-taqlīd wa'l-istiftā' wa-ḥukm al-ʿawāmm fihi*" is from *al-Mustaṣfā* (ed. Ḥamza b. Zuhayr Ḥāfiẓ), 4:139–56; the helpful subheadings in the translation were taken from another edition of *al-Mustaṣfā* edited by Muḥammad Sulaymān al-Ashqar, 2:462–70. Unless otherwise indicated, all citations of *al-Mustaṣfā* are from the Ḥāfiẓ edition. Qur'ān translations are from *The Qur'an: A New Translation* by Thomas Cleary, with amendments.

[56] Ibid., 2:481.

[57] Ibid., 2:482.

Ghazālī identifies five intentions or values that are embedded in revelation: to preserve religion, life, rationality, posterity, and wealth. "Everything that secures these five values (*uṣūl*)," he explains, "is tantamount to a public good (*maṣlaḥa*); and everything that undermines these values is harmful. Thus, to repel [such harm] is a public good."[58] In a hierarchy of moral and public goods, Ghazālī provides this list of five values as "necessary" or "self-evident" to human well-being. He regards these values as unassailable, warning that any violation of the purposes of the revealed law is proscribed (*ḥarām*).[59] It is egregious, Ghazālī claims, to violate *sharīʿa* objectives that are derived from the principal sources, such as the Qurʾān, the authentic prophetic tradition (*sunna*) and the consensus reached by the learned community (*ijmāʿ*). In countless illustrations, he explains how these values fit into his understanding of the juro-moral philosophy of Islam.

Despite his passionate advocacy of the advantages of purposive (*maqāṣidī*) reasoning, Ghazālī's insecurity was evident. He performed rhetorical pirouettes in order to soften some of his bold assertions about the connection between *maṣlaḥa* and the *maqāṣid.* For example, he says: "whoever thinks that it [viz., *maṣlaḥa*] is a fifth source is in error;" "whoever turns to idiosyncratic forms of public interest that do not comply with the practices of the revealed law . . . is surely engaged in [unsanctioned] legislation or norm making (*sharaʿa*), just as someone who indulges in considerations of juristic preference (*istaḥsana*) engages in [unsanctioned] norm making."[60] Only under strict conditions, he claims, is "the adoption of public interest permissible."And it is evident," he continues, "that it [viz., *maṣlaḥa*] is not the fifth source, and whoever legislates on the grounds of public interest has indeed engaged in [illicit] norm making (*man istaṣlaḥa fa qad sharaʿa*)!"[61]

Clearly, Ghazālī only affirms a doctrine of *maṣlaḥa* that is bound to the purposes of the Sharīʿa and that renders it an incontrovertible evidentiary source.[62] He writes:

> Every public interest (*maṣlaḥa*) that aims to preserve the purpose of the revelation (*maqṣūd sharʿī*), a purpose derived from the Book (Qurʾān), Sunna and Consensus, surely is not extraneous to any of these sources . . . If we

[58] Ibid.
[59] Ibid., 2:504.
[60] Ibid., 2:502–3.
[61] Ibid., 2:506.
[62] al-Turkī, "Naẓarīyat al-istiṣlāḥ ʿinda al-Ghazālī," 275–90.

> explain public interest as the preservation of the purpose of the revelation, then there is no reason to dispute one's adherence to public interest. In fact, it is mandatory to be categorical about its being an evidentiary authority (*ḥujja*).[63]

5. *Advocate of Intelligible Authority*

In the section of *al-Mustaṣfā* translated below, as in his other writings, Ghazālī rejects conformism in moral teachings. Even a layperson, Ghazālī demands, should display a modicum of intelligibility as to how and why he or she relies on arguments from tradition and authority. This claim requires explanation.

Muslims are required to live according to norms devised by experts qualified in deducing rules from a complex web of authoritative sources. An expert who discovers rules by following his own interpretative theory is called a master-jurist (*mujtahid*), i.e., someone who exercises his intellectual effort (*ijtihād*) independently. For this reason, *ijtihād* is shorthand for independent reasoning, an expression that hides a complex web of activities. Most people are not experts. If one cannot engage in independent rule-finding, then one is required to follow a qualified authority in matters dealing with moral teachings and law. This 'following' is signified by the term *taqlīd,* literally "to put something around the neck as an adornment or harness." In this sense, the word means to be harnessed to the authority of a master-jurist. Scholars debated the extent and nature of such conformity. One central concern was whether one should conform unquestioningly or act on the basis of some understanding of the activity in which one is engaged.

For Ghazālī, authority is related to the search for truth. Given his lifelong pursuit of truth, he found arguments in favor of authority troublesome. *Taqlīd* or conformance with authority, in his view, means to accept a statement without knowing the argument supporting it. Ghazālī protested against blind conformity to moral authority. Thus, he framed *taqlīd* as "blind conformity or ignorant compliance with authority."[64] His reaction to *taqlīd* was prompted by what he heard as echoes of similar claims made by his adversaries, the literalists and the ultra-esoteric Shīʿa Ismāʿīlīs. Both parties, he alleged, demanded that their followers comply with their authority without providing any compelling reason for such loyalty.

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[63] al-Ghazālī, *al-Mustaṣfā,* 2:503.
[64] Ibid., 2:503.

According to Ghazālī, *taqlīd* differs substantially from *ittibāʿ* or reenactment. The latter has two senses: (1) assimilative reenactment, and (2) conviction-based compliance (epistemic security). In the Muslim tradition, believers reenact the model behavior of their exemplars through mimesis or imitation. Muslims attempt to model their own conduct on the example provided by the Prophet. In Ghazālī's view, however, serious reenactment cannot take place without intellectual effort on the part of the believer in order to shoulder moral responsibility. That is to say, compliance with any kind of moral authority must be conviction-based, no matter how thin the conviction.

In distinguishing *ittibāʿ* from *taqlīd*, Ghazālī was clearly following a minority opinion in Muslim moral philosophy.[65] He supported the minority because he had a flexible understanding of the doctrine of *ijtihād*. While most scholars used this term in the technical sense of independent rule finding, Ghazālī used it in an expanded semantic sense. Although he would not disagree with the technical meaning of the term, he often used it to convey the sense that someone had made an informed decision.[66] In other words, even a layperson, according to Ghazālī, in matters of moral teachings, must exercise a certain kind of low-intensity intellectual effort in order to reach an informed decision about his/her moral practice. At a minimum s/he should know why s/he accepted the authority of a learned person and why s/he chose to follow x instead of y.

This concern for truth and moral responsibility was very close to Ghazālī's personal experiences. It therefore comes as no surprise that he repeatedly returns to this issue in his scholarly work. In a stirring conclusion to his *Mīzān al-ʿamal* (*Balance of Deeds*), Ghazālī writes:[67]

> Avoid the [subjective] authority of [discredited] discursive traditions or collectivities (*madhāhib*). Seek instead the truth by way of inquiry so that you yourself become one who holds an authoritative viewpoint (*ṣāḥib madhhab*). And do not be in a position where you follow a guide like a blind person, who ostensibly directs you on a path, whereas you are surrounded by a thousand guides similar to yours; each warns that your guide will lead you

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65 al-Zarkashī, *al-Baḥr al-muḥīṭ fī uṣūl al-fiqh*, 557.

66 al-Ghazālī, *Iḥyāʾ*, 2:61, 285. In *Kitāb al-kasb waʾl-maʿāsh,* Ghazālī says that an "individual is required to make an informed decision" (*bal huwa mawkūl ilā al-ijtihād*), the gist of which is repeated in his discussion on commanding the good and prohibiting evil.

67 al-Ghazālī, *Mīzān al-ʿamal*, 165. Before this quote Ghazālī debates whether *madhhab* is an unequivocal term signifying conviction or an equivocal term signifying a range of meanings, including conviction, but also signifying a source of teaching, cultural and social prejudice.

> to peril and mislead you! Only at the end [when you act on your decision to follow your guide], will you realize the error of your guide. Therefore, there is no salvation except in independence (*istiqlāl*) [of thought].
>
> Forget all you've heard and clutch what you see
> At sunrise what use is Saturn to thee?
>
> If writing these words yields no other outcome save to make you doubt your inherited beliefs, compelling you to inquire, then it was worth it. Doubt transports [you] to the truth. Who does not doubt fails to inquire. Who does not inquire fails to gain insight. Without insight, you remain blind and perplexed. We therefore seek God's protection from such a [wretched] result.

Conclusion

Despite Ghazālī's ambivalence towards jurists and their practices, he never attempted to free himself entirely from the discourse of the moral law. In fact, he was enthralled by it to the end of his life, albeit in a revisionist mode. Iterations of his personal quest for certainty, his encounters with mysticism, the role of moral autonomy and the social purposes of revelation all manifest themselves in one form or another in his writings on moral law and ethics. Can we seriously entertain the idea that a scholar who not only underwent dramatic changes in his life, but also self-consciously reconstructed himself, was not untouched by his life experiences? Ghazālī profited from the Sufis with whom he came into contact and was transformed by his exposure to their narratives and experiences. His Sufi persona is a well-attested dimension of his biography, albeit with disagreement on minor details.

Ghazālī's biographical profile served as a lens through which the past was mediated. He transformed our view of those early scholars and mystics who preceded him and whom he admired. How? As the historian Daniel Boorstin has taught us in another context, it is the *way* in which Ghazālī engages with the legacies of his predecessors that he transforms them for posterity. Ghazālī may be compared to the Japanese painter Sesshu, who learned from his interaction with Ming Dynasty painters; or to Durer, who learned from the Venetian painters. We no longer view Ming and Venetian painters except through the gaze of Sesshu and Durer. Like the Ming and Venetian painters, Ghazālī "does more than translate," in the words of Boorstin. "He transforms his predecessors."[68]

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[68] Boorstin, *Cleopatra's Nose: Essays on the Unexpected*, 33.

At an early stage in his career, Ghazālī realized that blind adherence to the discursive tradition is morally, spiritually and theologically vacuous. He struggled to carve out a space for moral autonomy by pushing back at the dominant tradition in the debate about conforming to authority. He not only strove to make moral authority intelligible, so that individuals could shoulder responsibility, but also expanded the notion of intelligibility in order to construct a paradigm for grasping the purpose of revelation. Drawing upon threads in the work of his teacher al-Juwaynī, he opened a door for a more reasonable understanding of the moral teachings of revelation. The purpose of revelation is reasonable, in his view, aimed at advancing the public interest. Even if God determines what is good and what is detestable, Ghazālī nevertheless opened a door to understanding the good on reasonable grounds. This is the genius of Ghazālī, a genius that was admired by subsequent generations of scholars, who built upon his work in order to renovate the edifice of Islamic law. Attention to the purpose of revelation is much in vogue in contemporary Muslim moral thinking. In this sense, Ghazālī transformed not only his predecessors but also transformed the intellectual tradition of Islam in ways yet to be fully explained.

Translation[69]

Part Two of this Axis (*Quṭb*) regarding conforming to authority without evidence (*taqlīd*), seeking a learned opinion (*istiftā'*) and the status of the (*ʿawāmm*) multitude in all this.[70] This involves four questions (*masā'il*).

Question: [Can the truth be known by following authority (*taqlīd*)?]

Taqlīd means to accept a statement without seeking any supportive evidentiary authority (*ḥujja*). It [*taqlīd*] is not a means leading to knowledge, either in matters of legal theory (*uṣūl*) or in derivative rules (*furūʿ*). The Ḥashawīya [anthropomorphists] and Taʿlīmīs [Ismāʿīlīs] both claim that the path to knowing the truth is by means of conforming to authority without evidence (*taqlīd*). They insist that *taqlīd* is obligatory and that inquiry and investigation are unlawful (*ḥarām*). Several arguments (*masālik*)[71] demonstrate the falsity of their claim.[72]

First [Argument]:

The *bona fides* of a person to whose authority one conforms (*muqallad*) are not self-evident. Proof (*dalīl*) [of his authority] is imperative. A miracle performed is an indicator of integrity. It is by his miracle that the veracity of the Messenger, on whom be peace, was established. The authenticity of the speech of God is derived from the information provided by the Messenger based on his honesty. The truthfulness of the people who make up the college of consensus regarding the Messenger's communications is premised on their [collective] immunity from error (*ʿiṣma*). Similarly, it is imperative for a judge to give a verdict based on the testimony delivered by persons of integrity (*ʿudūl*)—not in the sense of accepting their *bona fides*—but rather on the grounds that revelatory authority (*samʿ*) compelled judges to accept the dominant probability of evidence, notwithstanding the fact that the witnesses might be testifying truthfully or falsely. A layperson has to comply (*ittibāʿ*) with the teachings of the jurisconsult (*muftī*). The force of consensus indicates that the multitude (*ʿawāmm*) is obligated to follow that [*muftī's*] authority, notwithstanding the fact that the jurisconsult might be deceptive or truthful, mistaken or correct.

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[69] See note 55 for source of translation.

[70] Ghazālī uses synonyms like *ʿawāmm* (multitude or laypersons), *ʿāmmī* (layperson), and *khalq* (people or humankind) in order to signify the masses-*vulgus*.

[71] *Maslak*, pl. *masālik*, translated as 'argument,' also means a 'perspective' or 'point of view'. Sometimes scholars also use the term to refer to a particular normative or ideological position within a legal or creedal school.

[72] In a note al-Ashqar, editor of *al-Mustaṣfā*, offers the following gratuitous counsel to Ghazālī: "The author ought to have refuted the charges of the adversaries with the verses of the glorious Qur'ān that reproach imitators and render their views foolish, as in the statement of the most High: "Instead they replied: 'we found our ancestors following a certain way of life, and we follow their traditions' " [Q. 43:22]. And as in His word: "For they found their fathers astray, and they hasten to follow their footsteps." [Q. 37:69–70]. al-Ghazālī, *al-Mustaṣfā*, ed. al-Ashqar, 2:463, fn 1.

Therefore, we hold (*fa naqūlu*): The statement of a jurisconsult and a witness is binding by the epistemic authority (*ḥujja*) of consensus, which is to accept a statement based solely on evidentiary authority. In such cases, complying with evidentiary authority will not amount to conforming to authority (*taqlīd*). Indeed, by *taqlīd* we mean the ability to subscribe to a statement without seeking the appropriate epistemic authority. So whenever epistemic authority is absent and if one cannot by rational necessity or by way of an indicant (*dalīl*) verify [a teaching], then compliance (*ittibāʿ*) in such a situation would amount to relying on ignorance.

Second Argument:

We ask: Do you all absolve from error the person to whose authority you conform or is he liable to commit error? If it is the case that he is liable to commit error, then you are yourselves skeptical about the soundness of your point of view (*madhhab*). If it is the case that he is absolved from error, then how did you come to know of this impossibility? [Did you come to know of this] on the basis of rational necessity (*ḍarūra*), by inquiry (*naẓar*), or by conformity to authority (*taqlīd*)? For surely there is no rational necessity or indicant (*dalīl*) [to support such a claim]. If you follow him because he claims that 'his point of view is true,' then by what criterion do you measure his truthfulness in his self-authentication? And, if you follow him on the say-so of another authority, then by what standard do you assess the veracity of this other authority (*al-muqallad al-ākhar*)? If it is the case that you followed him based on your personal conviction [of his authority], then by what criteria do you distinguish between what you hold as a personal conviction and the personal conviction held by Christians and Jews? Or what standard do you use in order to distinguish between your own authority by means of which you claim, "I am truthful and right" and a [similar] claim made by your adversary?

With regard to the obligation to conform to authority, they will be asked: Do you have knowledge about the grounds of the obligation to conform to authority or not? If you do not have knowledge [about this issue], then why do you conform to authority? And if you do have knowledge about it, then was your knowledge based on grounds of rationally necessary truth, premised on investigation or based on blind conformity? Their answer to the question will [in all probability] be blind conformity, since they have no recourse to investigation or any indicant in support as evidence. As a consequence, their claim that conformity to authority is an obligation is purely arbitrary.

If someone objects: We know the soundness of the person to whose authority we conform (*muqallad*) because it is the viewpoint held by the majority, and therefore that person is more deserving of being followed.

We reply: Then on what grounds would you counter the claim of those who retort: 'Well, the truth is complex and obscure and only a minority of people can grasp it, while the majority are incapable of knowing it, since [to grasp it] requires many prerequisites, among them experience, time to conduct inquiry, talent, and freedom from distractions'?

What sheds further light on this line of argument is that the Prophet, upon whom be peace, adhered to the truth at the very beginning of his prophecy as

part of a significantly small group of people who were opposed to the claims made by the overwhelming majority of the people. God the Sublime said: *Were you to obey most of those on earth, they would divert you from the way of God* (Q. 6:116). Imagine! And, are the unbelievers in our time not the majority?

If you concede this point, then you will be compelled to suspend your judgment until you travel the whole world over in order to empirically survey all those adversaries who hold a view opposed to yours. If it turns out that the majority in favor is equal in number to the adversaries, then judgment will be suspended; and if the majority outnumbers their adversaries, the former will prevail. But how can this [last scenario] be realized when such a proposition [viz., the majority being favorable to the truth] was ruled out by an explicit verse of the Qur'ān? God the Sublime says: *But few are the thankful among my servants* (Q. 34:13); and He continues: *though most of them do not know* (Q. 7:131); *even if most of them hate the truth* (Q. 28:70).

If people responded to this claim by retorting: Well, the Prophet, upon whom be peace said: "*Stick to the great majority*," then they should remember that he also said: "*Whoever is pleased to enjoy the prosperity of paradise should stick with the community*." And he also said: "*Satan accompanies the solitary person, but he stays far away from a group of two*."

We reply: Well, how do you prove these prophetic reports to be sound when they are not even ranked to be of the standard mode of recurrent transmission (*tawātur*)? If you accept these reports on the basis of blind conformism (*taqlīd*), on what grounds will you then be able to adjudicate the claims made by an authority to whom you submit (*muqallad*) who suspects that these reports might be corrupted? But let's assume [for argument's sake] that these reports are sound. Clearly [in such a case] the one who sides with the views propounded by the great majority cannot be deemed to be merely blindly conforming to authority. Rather, [such a person demonstrates knowledge of] the statement of the Prophet and understands the obligation to abide by [his knowledge] of the teaching. In such an instance one is accepting a statement on the grounds of its authoritative proof, and not on the grounds of blind imitation (*taqlīd*). In fact, as we had explained in the chapter dealing with consensus, the above-cited prophetic reports served very different purposes. These [reports urging one to follow the majority] were addressed to those who planned to rebel against the political leader or those who refused to comply with the decisions reached by consensus.

[Evidence of Proponents Mandating Blind Conformity]

[Proponents of this viewpoint] pose several specious arguments.

The first specious claim is to say that the one who investigates becomes entangled in many doubts since it is now legend that investigators have a propensity to deviate from the norm. Therefore, they reasoned, it is preferable to avoid risk and opt for caution.

We reply: The deviance of blind conformers is indubitably legend among the Jews and the Christians. By what measure are you going to distinguish between your notion of blind conformity and the blind conformity perpetrated by unbelievers, especially, when it is known that the [latter defended their position] by saying [according to the Qur'ān]: *We found our ancestors following a certain way*

of life (Q. 43:23)? We then ask: If learning is an obligation, then surely blind conformism would amount to nothing but ignorance and deviance. It is as if you ignored this [latter] truth and due to your caution to avoid doubt [you preferred blind conformism]. This move is comparable to a person who preemptively committed suicide at the mere apprehension of thirst and hunger because he morbidly feared he might choke [to death] if he ate a morsel of food or that he would gag if he drank liquids! Or, it is akin to a paranoid patient who abandons treatment altogether because he fears the remedy is wrong. Actually, it is like someone who is paranoid about poverty and as a result abandons his trade and agriculture [since he is terrorized by the prospect of a catastrophic thunderbolt and thus preemptively opts for poverty][73] out of fear of becoming destitute [in the future].

The second specious objection they raise is to offer the statement of God the Sublime: *No one disputes the signs of God but those who are ungrateful* (Q. 40:4), suggesting that disputation (*jidāl*) was prohibited in discussions relating to destiny; and they also allege that investigation opens the door to disputation.

We reply: What is forbidden is disputation that advances falsehood (*bāṭil*). For as God the Sublime said: *And they strove to nullify the truth with falsehood* (Q. 40:5). [This is further supported] by an indicant from His speech: *And dispute with others in the most dignified manner* (Q. 16:125). And [it is reiterated in] His words: *They said: Noah, you have argued with us, and multiplied your argument against us* (Q. 11:32). *And do not contest with the people of scripture unless it is with what is better* (Q. 29:46).

What God forbade was to engage in disputes regarding predestination. [One explanation for the prohibition on disputes about predestination is that] God guided people to the truth by way of an explicit text (*naṣṣ*) and therefore He discouraged them from quarreling over the explicit text. [Another explanation] is that the prohibition was imposed at the beginning of Islam [for Muslims not to publicize their disputes], so that the opponents [of the Prophet] not overhear their disputes, which could invite taunts like: 'These folks are still shaky in their faith.' [Another explanation] is that the early Muslims were encouraged to participate in war (*jihād*), which takes priority over disputation.

Further, we will refute them with the words of the Sublime: *And do not occupy yourself with what you have no knowledge of* (Q. 17:36); *And your saying of God what you do not know* (Q. 7:33); *We only bore witness to what we knew* (Q. 12:81); *Say: Produce your proof'. . .* (Q. 2:111). All of these verses forbid blind conformity and command the acquisition of learning. For this reason God elevated the status of the learned. The Sublime said: *God will raise in ranks the believers among you, and those to whom knowledge has been given* (Q. 58:11). The Prophet, on whom be peace, said: "People of integrity will be the carriers of this learning in every successive generation. They will repudiate the distortion of the extremists, the interpretation of the ignorant and the forgery of purveyors of falsehood."[74] This goal is not attained by blind following, but by learning. Ibn Masʿūd said: "Do

[73] This parenthesis occurs in the text of *al-Mustaṣfā* and is not mine.

[74] al-Hindī, *Kanz al-ʿummāl*, 10:176, attributes this report to Ibn ʿAsākir.

not be irresolute (*immaʿa*). He was asked: What is *immaʿa*? It is when a person says: "I am always with the [majority of] people. If they are misguided, then I am misguided too; and if they are guided, then I am guided too. Beware, do not put yourself into such a situation that you turn to unbelief when the [majority of] people turn to unbelief."[75]

Question: Is a layperson obliged to solicit a learned opinion (*istiftāʾ*) and then follow the teachings of the learned scholars (*ittibāʿ*)?

A group from among the Qadaris claim: [laypersons] should either be compelled to make inquiries in order to find evidence or they must imitate an infallible leader.

This is void (*bāṭil*) on the basis of two arguments (*maslakān*):

The first argument draws on the consensus of the Companions. The Companions were accustomed to providing learned opinions to laypersons but they never expected the laity to reach a standard of competence so that they could personally and independently determine norms (*ijtihād*). That is a fact known by rational necessity, which is supported by the recurrent testimony of both the learned and laypersons among the Companions.

If a spokesman from the Imāmīs objects, saying: Well, it was obligatory on them [the laity at the time of the Companions] to follow the authority (*ittibāʿ*) of ʿAlī, may God dignify his face, since he was infallible; [they say] the reason he [ʿAlī] did not reproach the Companions [for not following him] was because ʿAlī concealed his true identity (*taqiyyat*^{an}) [as imām] and out of fear (*khawf*^{an}) that it might spark civil discord.

We reply: These are the words of an ignoramus who has lost all credibility because of his claims about ʿAlī and others among the political leaders, regarding his right to govern till the end of his life. For [the ignoramus] continues to remain confused about his [ʿAlī's] matter. [If it is as you allege, then] why just not claim that everything he [ʿAlī] said was a violation of the truth out of fear and precautionary dissimulation!

The second argument (*maslak*): Consensus establishes that a layperson is morally responsible (*mukallaf*) to comply with the authority of moral assessments (*aḥkām*). Clearly, it is inconceivable that the level of competence this moral obligation demands of a layperson is to be qualified to independently determine norms (*ijtihād*). For if such a burden [were placed on laypersons,] it would result in the cessation of agriculture and human procreation, and render professions and technology useless—if it would not lead to the ruin of the planet—for everyone would became engrossed in the acquisition of learning [in order to qualify to engage in independent rule-finding]. For [under such dire circumstances] the learned would [in turn be forced] to earn their livelihood, with the result that learning would become obliterated. In fact, the net result would be that the

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[75] *Immaʿa* signifies a person who is irresolute in his views and his dealings with others. Variants of this word are recorded in *Lisān al-ʿArab* on the authority of Ibn Masʿūd without any reference to sources.

learned too would perish and the world be ruined. Since this result is so absurd, there is no other option but to direct inquiries to the learned (*ʿulamāʾ*).

If someone objects: You [might think] you have invalidated conformity to authority, but what you have just proposed is the essence of blind imitation.

We reply: Blind imitation is to accept an opinion without [knowing] its authoritative evidence (*ḥujja*). It is obligatory for laypersons to follow the rulings offered by a jurisconsult, which is a position supported by consensus. It is similar to the obligation of a judge to accept the testimony of witnesses [in a trial]. It is also obligatory for us to accept the solitary report (*khabar al-wāḥid*) when it is offered in good faith (*ẓann al-ṣidq*). The [epistemological status] of probability (*ẓann*) is known. [Know that] the mandatory nature of a norm/assessment (*ḥukm*) premised on probability (*ẓann*) is decided by a categorical revelatory indicant (*dalīl samʿī qāṭiʿ*). Therefore, this ruling [viz., that laypersons should seek a learned opinion] is categorical; conforming to authority is sheer ignorance.

If someone objects: Well, you have totally eliminated conformity to authority in matters of religion, whereas al-Shāfiʿī, may God have mercy on him, said: "It is not permissible to blindly imitate any person except the Prophet, on whom be peace." Thus, al-Shāfiʿī clearly validated [the permissibility] of conformity to authority.

We reply: He [al-Shāfiʿī] explicitly nullified conformity to authority, with some exceptions. It is evident that he [al-Shāfiʿī] did not count the solicitation of a learned opinion (*istiftāʾ*), accepting [the authority of] a solitary report and consenting to the testimony of people of integrity (*ʿudūl*) to be acts that amounted to conformism. Yes, of course, in an expanded sense or figurative sense (*tawassuʿ*^{an}) one concedes that accepting the statement of the Messenger amounts to conformism, especially if one exempts the word from its generic sense. This figurative sense of [the term *taqlīd*] means that one accepts [the Prophet's] statement on the grounds of an authoritative proof, which had already indicated his truthfulness as a whole. Thus, no other authoritative proof would be required of him except that which related to the question [of his truthfulness]. This is analogous to an affirmation (*taṣdīq*) without demanding a special authoritative proof. It is thus permissible to figuratively (*majāz*^{an}) call this blind conformity (*taqlīd*).

Question: [From whom should a layperson solicit opinions?]

A layperson should not solicit a learned opinion from anyone other than one whom he knows to possess learning (*ʿilm*) and integrity (*ʿadāla*). If he has verified that someone is not learned, then under no circumstances should he solicit an opinion from such a person. But what if he asks someone whose knowledge [or ignorance] he is unable to assess? One group says: It is permissible [to ask such a learned person] and the layperson is no longer obliged to search further [for another learned person]. But this is an invalid position. The reason [for it being invalid is] that anyone who is obligated to accept the view of another person is therefore also obligated to know the status of his authority. For [the same reason] it is also obligatory on the ecumenical community-at-large (*umma*) to know the status of a Messenger by investigating his miracles. Thus, one does not affirm every unknown person who claims to be the Messenger of God. Similarly, a judge must know the [credibility] status of the witness in terms of integrity (*ʿadāla*). A

jurisconsult must know the [credibility] status of an informant (*rāwī*) [in a prophetic report that he will employ in his argument]. And similarly, the multitude must know the [credibility] status of the ruler and the judge. As a general rule, [keep in mind the following:] How can one inquire of a person who is himself more ignorant than the questioner?

If someone objects: If the integrity of the jurisconsult is unknown, is one then compelled to continuously search [for one with the right credentials]? If you reply [in the affirmative] that it is mandatory to continue searching, then you have indeed violated the custom (*ʿāda*). For whoever enters a [new] place will certainly ask the learned person of that place, but surely he will not ask for any evidence to substantiate the integrity [of the learned one]. And if you agree not to query further when a jurisconsult lacks learning, then *a fortiori* you should do the same when he [viz., the one asked] is a person of learning.

We reply: Whoever is known to be a sinner is not asked [to issue a learned opinion]; but one whose integrity is known, such a person will be asked to give a learned opinion. As for the one whose status [in terms of integrity] is unknown, however, there are several possible answers. One could say: Do not rush. First, inquire about his integrity because one is not sure about his inclination to be dishonest and deceitful. It could also be said: The *prima facie* [credibility] status of a learned person is to assume that he is a person of integrity, especially if he is well known for issuing learned opinions.

However, it is not possible to assume and say: "The *prima facie* status of humankind (*al-khalq*) is that they are learned and competent to issue a learned opinion (*fatwā*)." Ignorance is more prevalent among humankind [as laypersons]. People in towns are generally assumed to have acquired the multitude's (*ʿawāmm*) [level of knowledge,] except for a few [learned] individuals. Nor is it reasonable to assume and say: "All master-jurists and learned scholars are sinful, except for a handful of individuals." Rather, it is correct to presume that all learned persons possess integrity, except for a few individuals.

If someone objects: If searching [for a jurisconsult] is mandatory in order to establish the integrity or status of his learning, then what standard is required for the strength of evidence: reports of recurrent testimony, or will the report of a single person of integrity or the testimony of two persons of integrity suffice?

We reply: It is absolutely necessary to have real knowledge by way of recurrent testimony because it is eminently possible to find knowledge of such quality. And it is plausible to say: Reaching the [epistemic] standard of dominant probability (*ghālib al-ẓann*) based on the testimony of one or two persons of integrity would be sufficient. In fact, claiming to rely on a view supported by consensus, one school of thought has gone so far as to permit a practice to be enforced based only on the information provided by a single person of integrity. The latter comes close to the position elaborated above, in some aspects.

Question: [How does the one who solicits an opinion choose when there are multiple jurisconsults?]

If a community has only one jurisconsult, then the layperson is obliged to consult him. If a group of juristic authorities are available, then the layperson is free to pick an authority of his choice. He is not obliged to select the most

learned one, which was also the case during the era of the Companions [of the Prophet Muḥammad], for even at that time the layperson directed [questions to] the most virtuous as well as the less virtuous persons. People (*al-khalq*) [at the time] were not prevented from asking persons other than Abū Bakr, ʿUmar and the rightly-guided caliphs.

One group claims: It is mandatory to consult the most virtuous jurisconsult. If they are all identical in virtue, then one can pick one from among them. This viewpoint, however, flies in the face of the consensus reached by the Companions. In their time the practice was that the presence of a virtuous figure did not hinder one's ability to obtain a learned opinion from a less virtuous person. In fact, the only obligation was to consult someone who had a reputation for being knowledgeable and a person of integrity. All of the Companions were known to possess these qualifications.

Question: [What does the one who solicits a learned opinion do when the jurisconsults disagree?]

If two jurisconsults disagree about an assessment (*ḥukm*) and if they are of equal status, one should consult each of them for a second time and say to them: "Your rulings are contradictory and you are both equal in my eyes, so what will be binding on me?" If they both offer him a choice, then he is free to exercise his option. If they both agree to err on the side of caution, or if they reach a conclusion on a specific aspect of the question, he again has the option to choose. If, however, they both are intransigent in their disagreement, then the layperson has no option but to choose, since he has no justification for ignoring the assessment, since neither of the two jurisconsults is better than the other. Religious leaders are like stars: Whichever one you follow, you will thus be guided.

If the layperson believes that one of the two jurisconsults is more virtuous and more learned, then, in the view of Qāḍī [Abū Bakr al-Bāqillānī,] he has the option to choose, since even the less virtuous is considered to be among the persons who qualify to make a finding in law independently (*ahl al-ijtihād*), even if his is the only opinion. The same holds if there is more than one jurisconsult, for having an edge over the other in virtue does not have any consequence.

In my view, however, it is preferable that the layperson finds it compelling to follow (*ittibāʿ*) the more virtuous one. Thus, if someone believes that al-Shāfiʿī, may God have mercy on him, is the most learned, and that his school of thought is more correct, then such a person has no right to resort to the viewpoint of al-Shāfiʿī's adversary on a whim (*al-tashahhī*).

[Followers of authority should pursue the easiest of viewpoints available in the law schools]

A layperson is not permitted to select the answers he likes from the various schools of thought (*madhāhib*) and indulge in such liberties (*yatawassaʿ*). Rather, when a layperson weighs different viewpoints, then his move is analogous to that of a jurisconsult who weighs two conflicting proofs, and then follows his supposition (*ẓann*) at the time of making the evaluation. Something similar happens here—even though we have declared every master-jurist (*mujtahid*) to be infallible—for error is nevertheless still possible, especially when one might be inattentive to a definitive indicant, or might reach a verdict before exerting his

optimal intellectual effort. Error on the part of the one who is more learned, however, is quite improbable.

This certainty derives from our belief that God the Sublime has a secret in making His servants rely on their probable convictions (*ẓunūnihim*), so that they do not become negligent by following their desires and live as free roaming animals without being harnessed by the bridle of moral obligation. Thus, He guides them from one side [to be as free as animals] to the other side [of moral obligation] (*min jānib*^{in} *ilā jānib*^{in}), so that they can remember servitude (*fa yatadhakkarūn al-ʿubūdīya*). And thus the effect of the rule of God among them, in every active and quiet moment, actually protects them from the one side [viz., animal-like freedom] and takes them to the other side [viz., moral responsibility]. So long as we are capable of regulating them with a standard, then that is preferable to giving them limitless choices and allowing them to roam around aimlessly like animals and children.

However, if we are incapable of making a decision when two jurisconsults of equal status are locked in conflict, or when two indicants contradict each other, this is so by necessity.

If possible, the proof could be expressed like this: "Every question in which God the Sublime did not decide on a specific assessment or, when the answer of every master-jurist is deemed infallible, under such circumstances it is not obligatory for a master-jurist to investigate [further]; rather, he is allowed to exercise a choice and act as he wishes.[76] In fact, any one side of the argument is allowed to become the dominant probable position of the master-jurist." [Furthermore], the authority of an existing consensus makes it incumbent on the master-jurist, firstly, to acquire probable knowledge and then [secondly], to follow [the consequences] of probable knowledge. Similarly, probable knowledge attained by a layperson ought to be a basis for action.

Objection: The master-jurist is not allowed to yield to his supposition prior to acquiring the methodology by which he searches for indicants. And a layperson will at times reach a decision based on fancy and be deceived by superficial meanings, sometimes even preferring the inferior to the superior. If the layperson is allowed to make decisions without any insight, then he is only required to investigate the question at hand and decide in accordance with his supposition. But [we know that] complex standards are involved in order to know the levels of excellence, standards that are not within the ken of laypersons.

This is a factual question.

But we say: If a person medicates his seriously ill child according to his own opinion, and he himself is not a physician, surely he will be regarded as transgressing, and he will be regarded as derelict and liable. If, however, he consulted a physician [prior to medicating the child,] he would not be regarded as negligent. [Let us assume that] there are two physicians in a community but they disagree about the remedy. If [the parent] disagrees with the advice offered by

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[76] According to what is known as the *infallibility position*, every opinion arrived at by a master-jurist is correct, whereas, according to the fallibility position, only one opinion is correct.

the superior physician, then the parent is still regarded as derelict. The better of two physicians is known through reports of recurring testimony and evidentiary indicants that rise to the level of preponderance of probability in so far as the less successful physician defers to the superior one. It is similar in the case of scholars [of law]. Reputation and other indicators identify the best scholar without it being necessary to probe the status of his knowledge. The layperson is capable of identifying who is the best [scholar]. Knowledge based on dominant probability cannot be trumped by whim (*al-tashahhī*). In our view this is the most accurate position and in the more universal sense of tying people to the twin bridles of God-consciousness (*taqwā*) and moral obligation (*taklīf*). And God knows best.

CHAPTER THIRTEEN

IBN RUSHD AL-JADD (D. 520/1126)

Delfina Serrano Ruano

Introduction

Ibn Rushd al-Jadd is one of the most important and influential Mālikī jurists of all times. Together with Abū l-Walīd al-Bājī, Ibn ʿAbd al-Barr, Abū Bakr Ibn al-ʿArabī, and his own grandson, Ibn Rushd al-Ḥafīd, he represents the peak of Mālikism in the Islamic West. Ibn Rushd's period of training coincided with the fall of the petty kingdoms (*ṭawā'if*) into which al-Andalus split after the collapse of the Umayyad caliphate of Cordova. However, the decisive period of his career as *qāḍī, muftī* and teacher took place during the rule of the North African Berber dynasty of the Almoravids (last quarter of the 11th, first half of the 12th century CE), under whom al-Andalus was reunified. Their rulers adopted the title of *amīr al-muslimīn* and sought political and religious legitimacy by paying allegiance to the Abbasid caliph, by supporting the Mālikī school of law and by waging *jihād* against the Christians of the North of the Iberian Peninsula.

Ibn Rushd cannot be credited with having introduced the science of the fundamentals of the law (*uṣūl al-fiqh*) in al-Andalus,[1] a merit that belongs to jurists of the generation of his teachers (e.g. al-Bājī). Ibn Rushd's contribution lies in his having carried out a systematic re-examination of early Mālikī jurisprudence contained in the *Mudawwana* of Saḥnūn and the *ʿUtbiyya* of the Cordovan Muḥammad al-ʿUtbī. His aim was to adapt the structure and contents of the aforementioned compilations to methodological criteria corresponding to those established in the discipline of *uṣūl al-fiqh.* The result of this process was a re-elaboration of early Mālikī jurisprudence which, in the case of the *ʿUtbiyya*, led to its falling into disuse. Ibn Rushd's intelligence and deep knowledge of Islamic law earned him the esteem of the Almoravid rulers, which enabled him to exert

[1] In al-Andalus the study of *uṣul al-fiqh* was closely connected with the study of *kalām.* See D. Urvoy, *Pensers d'al-Andalus*, 165.

considerable influence on the most relevant political and religious issues of his time. Sources mention the titles of seventeen of his works, all of them dedicated to Islamic law, with the exception of an *ʿaqīda* (tenets of belief). His most important books are the *Muqaddamāt*, a commentary on the *Mudawwana* of Saḥnūn, the *al-Bayān wa-l-taḥṣīl*, a commentary on the *ʿUtbiyya* of Muḥammad al-ʿUtbī, and the *Fatāwā*, in which, for the first time in al-Andalus, the legal methodology established by experts in *uṣūl al-fiqh* was applied to the art of providing legal advice on specific problems (*iftāʾ*).

Sources for his Biography

This essay draws mainly on biographical literature and historical chronicles, Ibn Rushd's own writings and the collection of legal responsa of Aḥmad al-Wansharīsī (d. 914/1508), *al-Miʿyār al-muʿrib*.

The most trustworthy sources for Ibn Rushd's biography, given the closeness of their authors to our jurist and the credibility accorded to them by later generations of scholars, are the "Catalogue of teachers" (*al-Ghunya*) of his disciple Qāḍī ʿIyāḍ (d. 543/1149) and the *Kitāb al-ṣila* of Ibn Bashkuwāl (d. 578/1183). Although later biographers like Ibn Farḥūn (d. 799/1397) or al-Maqqarī (d. 1041/1632) mostly repeat the information provided by Qāḍī ʿIyāḍ and by Ibn Bashkuwāl, the details they add are significant because, apart from completing the picture of Ibn Rushd, they reflect the image of him bequeathed to posterity. On the other hand, the entry on Ibn Rushd al-Jadd provided by al-Bunnāhī (d. by the end of the 8th/14th century) in his history of Andalusī *qāḍī*s (*al-Marqaba al-ʿulyā*) is exceptional not for its novelty but for bringing together information supplied by different historical and biographical sources.

Al-Bunnāhī draws on Qāḍī ʿIyāḍ and Ibn Bashkuwāl. From the *Muʿjam* and *Takmila of* Ibn al-Abbār (595–658/1199–1260) he transmits some anecdotes preserved in the biography of Ibn al-Wazzān, a disciple of Ibn Rushd who oversaw the compilation of his *Fatāwā*, in which Ibn Rushd's good mood and sense of humor are emphasized. For his treatment of Ibn Rushd's political activities, al-Bunnāhī resorts to the anonymous chronicle of the Almoravid and Almohad periods (5th/11th–7th/13th centuries) entitled *al-Ḥulal al-mawshiyya*.

Accounts of historical events in which Ibn Rushd was involved can be found in *al-Kāmil fī l-taʾrīkh* of Ibn al-Athīr (555–630/1160–1233) and in a series of chronicles of the 8th/14th century, e.g. *al-Rawḍ bi-l-qirṭās*

of Ibn Abī Zarʿ (d. after 726/1326), the *Bayān al-Mughrib* of Ibn ʿIdhārī al-Marrākushī (8th/14th century), the anonymous compiler of *Mafākhir al-barbar*, and the *Iḥāṭa fī akhbār Gharnāṭa* of Ibn al-Khaṭīb (d. 776/1374).

Family Background and Social Milieu

Abū l-Walīd Muḥammad b. Aḥmad b. Aḥmad b. Rushd al-Qurṭubī was nicknamed "the Grandfather" (al-Jadd) to differentiate him from his grandson, the famous jurist, philosopher and physician Ibn Rushd al-Ḥafīd, better known in the Latin West as Averroes.

Ibn Rushd al-Jadd was born in Cordova in Shawwāl 450/December 1058. Little is known about the origins and activities of his family. To judge by the short genealogy provided by early biographers, it seems that he was the first member of his family to gain renown. It is not until Ibn ʿAbd al-Malik al-Marrākushī (d. 703/1303) that we find a short entry on Ibn Rushd's father included in a biographical dictionary: "Aḥmad b. Aḥmad b. Muḥammad b. Aḥmad b. ʿAbd Allāh b. Rushd, a man of science, excellence and integrity (*ʿadāla*), was still alive in 482/1089."[2] Subsequently, the Maghribī historian al-Maqqarī provided what appears to be the complete genealogy of Ibn Rushd al-Jadd: Abū l-Walīd Muḥammad b. Aḥmad b. Aḥmad b. Aḥmad b. Muḥammad b. Aḥmad b. ʿAbd Allāh b. Rushd.[3] This suggests that it was the grandfather of Ibn Rushd's great-grandfather (ʿAbd Allāh) who converted to Islam. Assuming that the average lifespan in al-Andalus was forty lunar years,[4] and that twenty-five was the average age of conversion,[5] Ibn Rushd's ancestors would have converted to Islam about the middle of the 3rd/9th century, approximately two centuries after the Muslims arrived in the Iberian Peninsula.

In my view, both al-Marrākushī and al-Maqqarī were concerned with the suspicion that the Banū Rushd were Jews whose conversion to Islam was only superficial. This assumption, which must have been common knowledge already during Ibn Rushd's lifetime, became explicit when

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[2] Ibn ʿAbd al-Malik al-Marrākushī, *al-Dhayl wa'l-takmila*, I-1:28, no. 11.

[3] Al-Maqqarī, *Azhār al-riyāḍ*, 3:59–61.

[4] M. Penelas, "Some remarks on Conversion to Islam in al-Andalus," 196–7, drawing on the calculations obtained by L. Molina.

[5] As assumed by R. Bulliet, *apud* M. Penelas, "Some remarks on Conversion to Islam in al-Andalus," 194.

his grandson fell into disgrace with the Almohad prince Abū Yaʿqūb al-Manṣūr. In 591/1195 Averroes was formally accused of heresy; his books were banned and, treated like a crypto-Jew, he was exiled to Lucena, a city near Cordova with a large Jewish population that was renowned for its Rabbinic school.[6]

Intellectual Formation

In Cordova, Ibn Rushd studied *fiqh* under Abū Jaʿfar Aḥmad b. Muḥammad b. Rizq al-Umawī al-Qurṭubī,[7] who provided the primary influence on his scholarly development. According to his own testimony, Ibn Rizq taught Ibn Rushd the principles of law (*uṣūl al-fiqh*), as well as those of theology (*uṣūl al-dīn*) which "cannot be ignored nor can any legal rule be established without first reflecting on them" (*lā yasaʿ juhlu-hā wa-lā yastaqīm al-tafaqquh fī ḥukm min aḥkām al-sharʿ qabla-hā*)[8]. He also attended the lessons of Muḥammad b. Faraj Ibn al-Ṭallāʿ,[9] and Abū ʿAbd Allāh

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[6] On Ibn Rushd's genealogy and social origins, see further D. Serrano Ruano, "Explicit cruelty, implicit compassion: Judaism, forced conversions and the genealogy of the Banū Rushd."

[7] Ibn Rizq was a Cordovan jurist (427–77/1035–84) who studied *fiqh* with Abū ʿUmar Ibn al-Qaṭṭān, Abū ʿAbd Allāh Muḥammad b. ʿAttāb (whose daughter was married to Ibn Rizq) and Abū ʿUmar Ibn ʿAbd al-Barr. He transmitted *ḥadīth* from the famous traditionist Abū l-ʿAbbās al-ʿUdhrī and from the Sicilian jurist ʿAbd al-Ḥaqq b. Muḥammad. He was an expert in *raʾy* (personal opinion), *masāʾil* (legal questions), *nawāzil* (actual legal cases), *futyā* (legal assessment) and Prophetic tradition. Ibn Rizq was a member of Cordova's legal council (*shūrā*) and an esteemed teacher. Those who studied with him are said to have become an excellent generation of scholars. Among them, Qāḍī ʿIyāḍ and Ibn Bashkuwāl mention Abū ʿAbd Allāh Ibn al-Ḥājj, but they make no reference to Ibn Rushd; only Ibn Farḥūn adds his name to the list of Ibn Rizq's most important disciples. See Qāḍī ʿIyāḍ, *Tartīb al-madārik* (Rabat, 1981–3), 8:181–2, Ibn Bashkuwāl, *Ṣila* (Madrid, 1882–83), 1:68–9, no. 138 and Ibn Farḥūn, *Dībāj* (Cairo, 1972–6), 1:182–3, no. 58.

[8] See Ibn Rushd, *Bayān*, 1:31. The text has been translated into Spanish by A. Fernández Félix, *Cuestiones legales del Islam temprano*, 273. Ibn Rushd's remark is important because, as we have seen, Ibn Rizq's biographers make no reference to his knowledge of *uṣūl al-fiqh wa'l-dīn*.

[9] Ibn al-Ṭallāʾ was a Cordovan jurist and traditionist (404/1013–497/1103) and an esteemed teacher, who was regarded as the leader of the *muftī*s of his time. He was also an expert in the art of writing legal documents and in their (viz. the documents') legal causes (*ʿilal*). Among many others, he transmitted religious knowledge from Qāḍī Yūnus b. ʿAbd Allāh b. Mugīth, from the famous Andalusī Qurʾān reader Makkī b. Abī Ṭālib and from Abū ʿUmar Ibn al-Qaṭṭān. He occupied the office of *ṣāḥib al-ṣalāt* in Cordova's main mosque, where he also gave lessons and issued *fatwā*s. After Ibn al-Qaṭṭān's death, he was appointed to the *shūrā*. He compiled stories (*akhbār*) and *fatwā*s from the masters of his country (most probably in his *Fahrasa*, on which see M. Fierro, "La *Fahrasa* de Ibn al-Ṭallāʿ," a work on the Prophet's legal assessments (*Aḥkām al-nabī*) and a work on legal

Muḥammad b. Khayra b. Abī l-ʿĀfiya al-Umawī al-Jawharī,[10] very probably on *fiqh*. Under Abū ʿAlī al-Ghassānī al-Jayyānī[11] and Abū Marwān ʿAbd al-Malik b. Sirāj,[12] he learned Arabic grammar, lexicography and *adab.* Abū l-ʿAbbās Aḥmad b. ʿUmar b. Anas Ibn al-Dalāʾī al-ʿUdhrī[13] gave Ibn Rushd an authorization (*ijāza*) to transmit his books.

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documents (*Kitāb al-shurūṭ*). Qāḍī Iyāḍ describes him as a strict opponent of innovators (*ahl al-bidaʿ*) who was not afraid of rulers (*ghayr hayūb lil-umarāʾ*). He also reports that Ibn al-Ṭallāʿs "word was implemented (*nufidha qawlu-hu*) until the Almoravids entered Cordova, at which time he was dismissed from the *shūrā* and was never again consulted until his death. This was because he sided with the former rulers of the city, i.e. the Abbādids, against the Almoravids. Among his most important disciples, the biographers mention the famous traditionist Abū ʿAlī al-Ṣadafī but not Ibn Rushd. See Qāḍī ʿIyāḍ, *Tartīb*, 8:180–1, Ibn Bashkuwāl, *Ṣila* (Madrid, 1882–83), 2:506–7, no. 1123, Ibn Farḥūn, *Dībāj* (Cairo, 1972–6), 2:242–3, no. 69. On Ibn al-Ṭallāʿs life and works, see further M. Fierro, "La *Fahrasa* de Ibn al-Ṭallāʿ."

[10] Abū ʿAbd Allāh Muḥammad b. Aḥmad b. Khayra b. al-ʿĀfiya al-Umawī al-Jawharī was born in Almeria but spent most of his life in Cordova where he died in 478/1085. He transmitted religious knowledge from Abū l-Qāsim b. Dīnār, Abū l-Qāsim Ḥātim b. Muḥammad and others. He became a member of the Cordovan judicial council (*shūwira fī l-aḥkām*). Ibn Bashkuwāl, whose biographical dictionary is our only source on Ibn Khayra, mentions the name of Ibn Rushd al-Jadd among his disciples. See Ibn Bashkuwāl, *Ṣila* (Madrid, 1882–83), 2:497, no. 1099.

[11] Al-Ḥusayn b. Muḥammad b. Aḥmad al-Ghassānī, the "chief" of Cordovan traditionists (427–98/1035–1104), was also an expert on language and lexicography, poetry and genealogy. Among others, he transmitted religious knowledge from Abū ʿUmar Ibn ʿAbd al-Barr, Abū ʿAbd Allāh Muḥammad b. ʿAttāb, Abū Umar Ibn al-Ḥadhdhāʾ al-Qāḍī, Abū Marwān al-Ṭubnī, the *qāḍī* Sirāj b. ʿAbd Allāh and his son Abū Marwān, Abū l-Walīd al-Bājī and Abū l-ʿAbbās al-ʿUdhrī. He is the author of a compilation of the authorities who appear in the chains of the reports contained in the *Saḥīḥ*s of Bukhārī and Muslim, respectively (*Taqyīd al-muhmal wa-tamyīz al-mushkil fī rijāl al-Ṣaḥīḥayn*). See Ibn Bashkuwāl, *Ṣila* (Madrid, 1882–83), 1:144–5, no. 326 and Ibn Farḥūn, *Dībāj* (Cairo, 1972–6), 1:332–3, no. 3. On his importance as a traditionist see M. Marín, "La actividad intellectual," 515.

[12] Abū Marwān ʿAbd al-Malik b. Sirāj b. Abd Allāh b. Sirāj was the most important scholar of the Arabic language and lexicography (*imām al-lugha bi'l-Andalus*) of his time (400–89/1009–95). He was also an expert on poetry, *adab*, Qurʾān exegesis, *ḥadīth*, history and genealogy. He transmitted from his father and from Qāḍī Yūnus b. ʿAbd Allāh, from Abū ʿAmr al-Safāqusī, from Abū Marwān b. Ḥayyān and others. His most famous disciples include Abū ʿAlī al-Sadafī, Abū ʿAlī al-Ghassānī al-Jayyānī and Abū ʿAbd Allāh Ibn al-Ḥājj. See Qāḍī ʿIyāḍ, *Tartīb*, 8:141, Ibn Bashkuwāl, *Ṣila* (Madrid, 1882–83), 2:357–8, no. 771, Ibn Farḥūn, *Dībāj* (Cairo, 1972–6), 2:17, no. 4.

[13] Abū l-ʿAbbās Aḥmad b. ʿUmar b. Anas Ibn al-Dalāʾī l-ʿUdhrī was an expert in Prophetic tradition, better known for his geographical work, *Kitāb tarṣīʿ al-akhbār* (Almeria, 393–478/1002–1085). In 408/1017 he travelled to the East with his father. They stayed in Mecca for sixteen years, during which al-ʿUdhrī studied with several masters and became a companion (*ṣaḥaba*) of Abū Dharr ʿAbd b. Aḥmad al-Harawī. In al-Andalus he transmitted *ḥadīth* to Abū ʿUmar Ibn ʿAbd al-Barr, Abū Muḥammad Ibn Ḥazm, Abū l-Walīd al-Waqqashī, Ṭāhir b. Mufawwiz and Abū ʿAlī al-Ghassānī. Al-Ḥumaydī, a disciple of the Ẓāhirī Ibn Ḥazm who wrote a biographial dictionary of Andalusī scholars, *Jadhwat al-muqtabis*, studied directly with al-ʿUdhrī. See Ibn Bashkuwāl, *Ṣila* (Madrid, 1882–83), 1: 69–70, no. 139, al-Ḥumaydī, *Jadhwa*, 1:213–17, no. 237.

Although the list of Ibn Rushd's masters is not long and he never traveled to the East, he is credited with acquiring a deep knowledge of Islamic law in both its theoretical and practical aspects, as well as proficiency in the other religious sciences. Ibn Bashkuwāl emphasizes his specialization in matters of legal consensus and disagreement (*ʿārif*^{an} *bi-l-fatwā ʿalā madhhab Mālik wa-aṣḥābi-hi baṣīr*^{an} *bi-aqwāli-him wa-ittifāqi-him wa-ikhtilāfi-him*) as well as in inheritance law.[14] Qāḍī ʿIyāḍ describes him as a man in whom the "knowledge he mastered personally (*al-dirāya*) prevailed over the knowledge received from others (*al-riwāya*)."

Personality

One of Ibn Rushd's chief disciples, Qāḍī ʿIyāḍ,[15] portrays him as a pious, modest, upright and quiet man, to which Ibn Bashkuwāl adds that he was very pleasant, "of great profit" to friends and colleagues whose company he frequented, and that he kept his promises. Ibn Bashkuwāl quotes Abū Marwān ʿAbd al-Malik b. Masarra, another disciple of Ibn Rushd, who said that the master fasted every Friday, both when he was in Cordova and when he was away.[16]

Judge, *Muftī*, and Teacher

Ibn Rushd's personal and intellectual abilities earned him renown as a jurist. According to Qāḍī ʿIyāḍ, he was the leader (*zaʿīm*) of the *fuqahāʾ* of his time and the most outstanding among them, both in al-Andalus and in the Maghrib. Ibn Farḥūn (d. 799/1397) considered him part of a bygone generation of *mujtahid*s. A similar idea is conveyed by Ibn al-Zubayr, who said that "with Abū l-Qāsim b. Ward and Abū Bakr b. al-ʿArabī the output of the Mālikī school in al-Andalus reached its peak; after the death of Abū l-Walīd Ibn Rushd no other jurist was able to dislodge them from this position."[17]

Ibn Rushd's career included qāḍīship, legal advice in public and private affairs (*iftāʾ*), teaching, and the composition of a number of important

[14] Ibn Farḥūn, *Dībāj* (Cairo, 1972–6), 2:248.
[15] Qāḍī ʿIyāḍ, *Ghunya*, 54–7.
[16] Ibn Bashkuwāl, *Ṣila* (Madrid, 1882–83), 2: 518–19, no. 1154.
[17] Ibn al-Zubayr, *Ṣilat al-ṣila*, V, no. 71 (biography of Abū l-Qāsim Ibn Ward).

legal works. Through these activities, he acquired a considerable degree of political and social influence.

Qadi ʿIyāḍ asserts that the Almoravid amir ʿAlī b. Yūsuf b. Tāshufīn held Ibn Rushd in high esteem and consulted him on political issues. Testimonies to this relationship as well as answers to queries formulated by other Almoravid authorities are recorded in Ibn Rushd's *Fatāwā*,[18] most of which, however, were issued not at the request of the political authorities but of other judges, jurists, students of *fiqh* and individuals who sought his opinion on a wide variety of private legal and religious matters. As Ibn Bashkuwāl put it, "The people entrusted to him their relevant concerns (*wa-kāna al-nās yulji'ūn ilay-hi wa-yuʿawwilūn fī muhimmāti-him ʿalay-hi*)".[19]

In 511/1117 the Almoravid amir ʿAlī b. Yūsuf b. Tāshufīn appointed Ibn Rushd chief *qāḍī* (*qāḍī l-jamāʿa*) of Cordova, a position he held until 515/1121 when he resigned with the prince's consent. Ibn Rushd was replaced by Abū l-Qāsim Aḥmad b. Muḥammad b. Ḥamdīn, who had filled the post previously and had been dismissed to be replaced by Ibn Rushd. Ibn Ḥamdīn remained in his post until his death in 521/1127. According to Ibn Rushd's own testimony, during the four years he served as *qāḍī*, he managed to write only four or five chapters of his commentary on the *ʿUtbiyya*, the *Kitāb al-bayān*.[20] Realizing that at this pace he would never be able to finish the book, he "plunged into fear and sorrow" and decided to ask the amir to accept his resignation. The amir consented only after Ibn Rushd assured him that the completion of the *Bayān* was a meritorious deed for which both he and the prince would be rewarded in the hereafter.[21] According to Qāḍī ʿIyāḍ, however, Ibn Rushd left the qāḍīship in 515/1121 as a result of the uprising (*hayj*) of the Cordovan populace (*ithra al-hayj al-kā'in bi-hā min al-ʿāmma*).

It seems that the uprising mentioned by ʿIyāḍ is the one that, according to the anonymous author of *al-Ḥulal al-mawshiyya* and Ibn al-Athīr, motivated ʿAlī b. Yūsuf's fourth trip to al-Andalus.[22] In Ibn ʿIdhārī's account, when the amir arrived in al-Andalus in Rabīʿ I, 515/May–June, 1121, he

[18] Available in two editions (see Appendix, no. 5).

[19] For additional details and samples of Ibn Rushd's *fatwā*s, see below. See also Appendix, no. 5.

[20] The book has been edited in 22 vols. by M. Ḥajjī. See Appendix, no. 2.

[21] *Bayān*, 1:30–1; cf. A. Fernández Féliz, *Cuestiones legales del Islam temprano*, 271–2.

[22] Ibn al-Athīr is not sure whether the revolt took place in 513/1119–20 or in 514/ 1120–21. However, there seems to be no uncertainty regarding the date of ʿAlī b. Yūsuf's fourth crossing from Morocco to al-Andalus: 515/1122. See Ibn ʿIdhārī, *al-Bayān al-mughrib*, 4: 64.

dismissed Ibn Rushd from the qāḍīship and gave it to Abū l-Qāsim b. Ḥamdīn. The historian Ibn Abī Zarʿ (d. after 726/1326), who was probably familiar with the aforementioned text of the *Bayān*, adds that the amir's decision resulted from Ibn Rushd's complaint that he was busy with the composition of *al-Bayān wa-l-taḥṣīl* (*wa-ʿazala Ibn Rushd ʿan qaḍāʾ Qurṭuba li-ajl ishtikāʾ Ibn Rushd ʿalay-hi li-anna-hu ishtaghala bi-taʾlīf al-Bayān wa-l-taḥsīl*).[23]

According to the chronicles,[24] the people of Cordova revolted against the Almoravid governor of the town, Abū Yaḥyā b. Rawāda, because he refused to punish one of his slaves, a certain Abū Bakr Yaḥyā, who had abducted a Cordovan woman on the day of the feast of the sacrifice (*ʿīd al-aḍḥā*: 10 Dhū l-ḥijja).[25] In the course of the revolt, the Cordovans, led by their jurists and notables, plundered the dwellings of the Almoravid garrison. When the amir saw that the events were serious, he decided to cross the Straits of Gibraltar to suppress the revolt. The Cordovans asked their *fuqahāʾ* to issue a *fatwā*. Very likely Ibn Rushd was one of the jurists who responded, although the historians who narrate these events do not mention his name.[26] According to the *fatwā* issued by the *fuqahāʾ*, the inhabitants of Cordova had revolted in order to defend their families and safeguard their lives and properties, and, for this reason, their revolt was legitimate. When the Cordovans realized that the siege was lasting too long, they charged some of their notables to negotiate with the amir, who spared their lives, but required that they compensate the Almoravid garrison for the destruction they had caused.[27]

For his part, Ibn Bashkuwāl, who tends to avoid politically sensitive subjects, does not mention the episode. He limits himself to praising Ibn Rushd's conduct during the time he held office.

In my view, the aforementioned accounts do not necessarily contradict each other, rather, put together, they yield the following conclusion: Ibn

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[23] Ibn Abī Zarʿ, *Qirṭās*, 164.

[24] See *al-Ḥulal*, 86–7 and Ibn al-Athīr, *Kāmil*, 10:558. For an English account of the events, drawing on Ibn al-Athīr, see Kennedy, *Muslim Spain and Portugal*, 182–3.

[25] The author of the *al-Ḥulal* does not mention that the Cordovan woman's abduction was the reason having sparked off the uprising.

[26] According to Kennedy, *Muslim Spain and Portugal*, 183, "We know from other sources (i.e. other than Ibn al-Athīr's *Kāmil*) that the *qāḍī* Abū l-Walīd b. Rushd played an important part in negotiating the settlement". Kennedy, who does not identify these other sources, may be following V. Lagardère, "La Haute judicature à l'époque almoravide en al-Andalus," 150, who assumes that Ibn Rushd was one of the authors of the *fatwā*.

[27] I have analyzed this episode in the light of Islamic legal doctrine on rebellion in my "Doctrina legal sobre la rebelión en juristas andalusíes," 278–81.

Rushd was dismissed from the qāḍīship at his own request and not in retaliation for his involvement in the uprising. His wish to devote himself to the completion of the *Bayān* was the polite—although not necessarily untrue—excuse he gave to explain his resignation. However, it seems likely that during the uprising he experienced a certain disappointment that made the idea of further serving the Almoravids unpleasant for him, at least at that moment. In fact, Ibn Rushd refers to his distress at not finding time to complete the *Bayān* as the main reason why he wished to resign, but not as the only one (*wa-dhakartu dhālika li-amīr al-muslimīn . . . fī jumlat al-ʿidhār allatī istaʿfaytu bi-sababi-hā*).[28]

Ibn Rushd was involved in another uprising of the Cordovan population, traces of which are found in a number of *fatwā*s,[29] although they do not provide dates and other information we can use to restore their historical context.[30] These *fatwā*s suggest that during ʿAlī b. Yūsuf's rule (500–37/1108–42), a number of Andalusī jurists were consulted about the legal status of the sale of properties that had been usurped or acquired by illicit means. From other sources we learn that governors nominated by the Almoravids after their conquest of al-Andalus had carried out sales of this kind in the name of the public treasury (*bayt al-māl*).[31] In all likelihood, landowners connected by blood, patronage or other ties with the former taifa rulers,[32] and whose properties had been usurped or confiscated by the Almoravids, demanded from ʿAlī b. Yūsuf that their properties be returned to them. However, if the *amir* were to agree, those who had purchased the confiscated properties from the public treasury would suffer harm. Alternatively, returning the properties to their original owners entailed an acknowledgment that the sale of usurped and illicitly acquired property is unlawful and consequently should be declared null and void. This amounted to opening Pandora's box since the former taifa rulers of al-Andalus (e.g. the Banū ʿAbbād of Seville, the Banū Ṣumādiḥ of Almería and the Banū ʿĀmir of Cordova) had also usurped private property when

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[28] Ibn ʿIdhārī, *Bayān*, 1:30–1.

[29] The *fatwā*s are preserved in vol. 6:97–8 of the *Miʿyār al-Mughrib*, a large collection of *fatwā*s from the Islamic West compiled by al-Wansharīsī, a Mālikī jurist active in Tlemcen and Fez, where he died in 914/1508.

[30] V. Lagardére, "La Haute judicature à l'époque almoravide en al-Andalus," 150, suggests that this uprising might have precipitated the 514/1121 revolt and Ibn Rushd's subsequent resignation.

[31] E. Molina, "Economía, propiedad, impuestos y sectores productivos," 228–31.

[32] Recall, for example, what happened to Ibn al-Ṭallāʿ, Ibn Rushd's teacher, who opposed the Almoravids when they conquered Cordova and was dismissed from the judicial council of the city. See above, note 9.

they took power over al-Andalus and the sale of this property would now be declared null and void as well.

Several jurists issued *fatwā*s on different aspects of the case. Ibn al-Ḥājj, chief *qāḍī* of Cordova between 520/1127 and 529/1135, issued a *fatwā* in which he endorsed the sales carried out by the Sevillian Banū ʿAbbād, so long as it could be established that their price had been deposited in the public treasury. In the case of the sales carried out by Almoravid governors, they were valid so long as the governor had been nominated directly by the amir and it had been established that he had acted appropriately, especially when a long time had passed since a certain sale was carried out without anyone raising an objection to it. Al-Burjīnī issued a similar *fatwā* concerning the properties of the former taifa kings of Almeria, the Banū Ṣumādiḥ.

Al-Wansharīsī links these two *fatwā*s with a third one "mentioned by al-ʿUqaylī and Ibn al-Ṣayrafī, who said that Ibn Rushd and other jurists were consulted by the amir about the Mālikī legal doctrine on sales carried out by the Banū ʿĀmir (i.e. the rulers of the taifa of Cordova), and the Banū Ṣumādiḥ."[33] Presumably they answered that the sales must be declared null and void. Al-Wansharīsī points out that Abū l-Qāsim Aḥmad b. Muḥammad b. Ḥamdīn (the jurist who had preceded and later replaced Ibn Rushd as *qāḍī* of Cordova) contradicted Ibn Rushd and those who shared his opinion, and held for endorsing the sales and maintaining the *status quo*. In support of his position, Ibn Ḥamdīn argued that the contrary opinion (i.e. the one held by Ibn Rushd) would seriously damage the interests of the people. Indeed, the populace of Cordova rose against Ibn Rushd and the other jurists, but Ibn Ḥamdīn (who might have been the real instigator of the uprising) "took those [who rose] away from them (i.e. the *muftī*s), and the former were put down by the *amīr al-muslimīn*. Subsequently, it became clear that they (i.e. the *muftī*s) were innocent, but this is a long story."

Al-Wansharīsī observes, "It is better not to question the validity of the sale of properties that belong to the public treasury, even if the sellers were governors [viz., and not *qāḍī*s or officials in charge of the administra-

[33] This remark suggests that al-Wansharīsī had heard about the *fatwā* but had not seen it. A copy of the *fatwā* is preserved in *Fatāwā Ibn Rushd*, 1: 631–49; see also Appendix, no. 9. A cursory reading of this long *fatwā* (to which I intend to dedicate a detailed study) shows that Ibn Rushd opposed endorsing the sales of usurped or illegally acquired property. However, details that may help us to recover the context of the *fatwā* appear to have been removed.

tion of the public treasury], regardless of whether the properties were sold voluntarily or under pressure, and even if the governors who carried out the sales were unjust. Starting a systematic investigation into the origin of people's properties (*amwāl al-nās*) would end in discord, since many properties have been acquired in the same manner (i.e. they have been usurped)."[34]

Several conclusions can be drawn from this obscure episode: (1) In al-Wansharīsī's account, only the *fatwā* of Ibn Rushd is presented as the outcome of a formal petition from the Almoravid prince, who apparently asked Ibn Rushd about the Mālikī legal doctrine on the sale of usurped or illegally acquired property, not about the eventual consequences of the implementation of this doctrine. (2) Ibn Rushd's *fatwā* is presented by al-Wansharīsī as a drastic and harmful change to the *status quo*, in contrast to the *fatwā*s of Ibn al-Ḥājj, al-Burjīnī and Ibn Ḥamdīn, who reportedly favored social stability and local interest over legal coherence. (3) In al-Wansharīsī's account, Ibn Rushd appears as the enabler of ʿAlī b. Yūsuf's commitment to give preference to the requirements of the law over local interests.[35] Was it perhaps this episode that determined Ibn Ḥamdīn's dismissal as *qāḍī* and the nomination of Ibn Rushd in his place, the revolt having occurred sometime prior to 511/1117? (4) To judge by the position taken by al-Wansharīsī, Ibn Ḥamdīn used the concern stirred up by Ibn Rushd's *fatwā* to enhance his own authority. As we will see, this was not the only occasion on which a member of the Banū Ḥamdīn was able to capitalize on the dissatisfaction of the Cordovans to discredit the Banū Rushd in order to pursue his political ambitions. Both families seem to have competed for the qāḍīship in Cordova.[36] In fact, for some authors,

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[34] *Miʿyār*, 6:98.

[35] Such a characterization of Ibn Rushd's relationship with the Almoravid amir supports the view of the Banū Rushd as a family whose rise to prominence was tied to the arrival of the Almoravids in al-Andalus. See D. Urvoy, *Averroes*, 15–30. The Banū Ḥamdīn, for their part, seem to have derived their power from their claim to Arab descent and from their ties to Cordovan and other local Andalusian elites. See M. Fierro, "The *Qāḍī* as ruler," 88–93. Ibn Rushd's commitment to the Almoravids is particularly evident in his doctrine on mineral resources, which he accords almost exclusively to the ruler. Compare this to the position of his contemporary, Ibn al-Ḥājj, who openly held in favor of the right of individuals to own mines, on the grounds of need (*ḍarūra*) and Cordovan established custom (*ʿurf*). See D. Serrano Ruano, "Minas en colecciones de fetuas y casos jurídicos del Occidente islámico"—drawing on several *fatwā*s issued by Ibn Rushd and Ibn al-Ḥājj.

[36] M. Fierro, "The *Qāḍī* as ruler," 88–93. On the relationship between the Almoravids and their *qāḍī*s, see now D. Serrano Ruano, "Chief Qadi (Qadi l-jamaʿa,) Non-Qadi Judges, Almoravid Rulers and the limits of Adjudication in Matters of *Hudud* Punishments." See further, Rachid El Hour, "Córdoba frente a los Almorávides: familias de cadies y poder local

the rivalry between the Banū Rushd and the Banū Ḥamdīn was decisive in Cordova's loss of political supremacy in al-Andalus.[37] (5) Also, there seems to have existed a certain—this time merely intellectual—rivalry between Ibn Rushd and Ibn al-Ḥājj. In Muḥammad b. ʿIyāḍ's collection of *fatwā*s entitled *Madhāhib al-ḥukkām*,[38] rather frequently one finds the two contradicting each other when they are asked the same legal question.[39] Their disagreement further attracts our attention when we take into account that Ibn al-Ḥājj was the only *muftī* of Ibn Rushd's generation who could compete with him in knowledge and prestige.[40] This we can infer, for example, from the biographies of Ibn Rushd's teachers,[41] in which Ibn al-Ḥājj is mentioned as one of their most important disciples.

Although Ibn Rushd resigned in order to devote himself to the completion of *al-Bayān wa-l-taḥṣīl*, he did not withdraw completely from the public arena. He continued to serve as a member of the judicial council (*shūrā*) of Cordova, and for a while he was also in charge of leading the prayer and delivering the Friday sermon in Cordova's main mosque, an activity which, in the view of his biographers, increased his prestige. According to Qāḍī ʿIyāḍ, he became one of the most sought after teachers of *fiqh* in al-Andalus. Be that as it may, in D. Urvoy's general ranking of Andalusī teachers of the Almoravid and Almohad periods,[42] Ibn Rushd is not one of those teachers with the highest number of disciples, but rather one who occupies a middle position.

Of all his public actions, the most relevant was his intervention before the Almoravid prince following the campaign against al-Andalus carried

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en al-Andalus," 182–210; idem, *La administration judicial almorávide en al-Andalus: elites, negociaciones y enfrentamientos*.

[37] Ibn al-Abbār, *Takmila* (Madrid, 1887–89), 1:38–9, no. 111, quoting Abū l-Ḥusayn Ibn Sirāj.

[38] A collection of legal cases relating to ʿIyāḍ's activities as a judge and as a *muftī*, and compiled by his son, Muḥammad b. ʿIyāḍ. See D. Serrano Ruano, "Legal practice in an Andalusī-Maghribi Source from the Twelfth Century CE: The *Madhāhib al-Ḥukkām fī Nawāzil al-Aḥkām*."

[39] See, for example *Madhāhib al-ḥukkām*, Beyrut, 1990, 47–51, 62–5, 92–3, 116–7, 120–2, 132–3. See also D. Serrano Ruano, "Minas en colecciones de fetuas y casos jurídicos del Occidente islámico."

[40] In my view, Ibn Rushd's *fatwā*s are clearer, more precise and more systematic than those of Ibn al-Ḥājj. Apart from the *fatwā*s of Ibn al-Ḥājj preserved in *Madhāhib al-ḥukkām* and in al-Wansharīsī's *Miʿyār*, there is a collection of *fatwā*s issued by Ibn al-Ḥājj (see M.J. Viguera, "En torno a las fuentes jurídicas de al-Andalus,"), which has not been edited yet. Some scholars, e.g. I.Q. Būtshīsh in his *al-Maghrib wa'l-Andalus fī ʿaṣr al-murābiṭīn*, have used Ibn al-Ḥājj's *fatwā*s as a source for the history of the Almoravid period.

[41] See above section, *Intellectual Formation*.

[42] D. Urvoy, *Le monde des Ulémas andalous*, 172–5.

out by Alfonso I, the Christian king of Aragon. During this campaign, areas around Cordova and Granada were raided.[43] The suspicion spread that Alfonso had received the aid of groups of Christian tributaries, who, in this manner, would have expressed their dissatisfaction with the Almoravids' policy towards their non-Muslim subjects. Although the Aragonese king did not achieve his main objective, the conquest of the city of Granada, his incursion exposed the weakness of Almoravid military defenses and their inability to perform *jihād*, one of the pillars of their political legitimacy. According to the author of *al-Ḥulal al-mawshiyya*,[44] Ibn Rushd saw fit to travel to the Almoravid capital, Marrakech, to explain to ʿAlī b. Yūsuf what had happened in al-Andalus. His was a speedy reaction, since the campaign had taken place in the fall of 519/1125 and Ibn Rushd announced his intention to set off in the spring of 520/1126.

According to the narrative transmitted in *al-Ḥulal al-mawshiyya*, Ibn Rushd was received with great honor and allowed to explain the reasons for his trip to Marrakech, namely, "to show the prince the harm (*ʿayth*) produced in al-Andalus by its tributaries (*muʿāhidū-hum*) and the crime they had committed thereby." Given that the tributaries had encouraged Alfonso (lit. Ibn Rudhmīr) to attack the Muslims and had assisted him in his military campaign against the Muslims, Ibn Rushd said the treaty under which they lived in al-Andalus and the protection due to them should be considered broken. Subsequently Ibn Rushd issued a *fatwā* according to which the tributaries must be expelled from their lands. This, according to the chronicler, was the lightest possible punishment. Ibn Rushd's *fatwā* (to which cursory reference is made in *Masāʾil Abī l-Walīd Ibn Rushd*, 2:134 and 1346) was accepted by the amir, who issued a decree that was sent to all the regions of al-Andalus with the order to deport the tributaries to Miknāsa, Salé and other areas in northern Morocco. Again, according to the *Ḥulal*, another aim of Ibn Rushd's visit was to argue for the dismissal of the former Almoravid governor of Seville, Abū Ṭāhir Tamīm; the amir complied with this request, sending his son Tāshufīn as his replacement. However, A. Huici Miranda, the translator of the *Ḥulal* into Spanish, points out that Tamīm died in the same year, 520/1126, and Tāshufīn was

[43] On this episode, see V. Lagardère, "Communautés mozarabes et pouvoir almoravide en 519h/1125 en al-Andalus" and D. Serrano Ruano, "Dos fetuas sobre la expulsión de mozárabes al Magreb en 1126."

[44] *Ḥulal*, ar. 76–81, trans. 108–16.

entrusted with the government of Granada and Almería, but not of Seville; thus this was more of a replacement than a dismissal.[45]

The amir took advantage of Ibn Rushd's stay in Marrakech to consult with him about the growing menace posed by Ibn Tūmart, leader of the incipient Almohad movement. Ibn Rushd advised the amir to rebuild and reinforce the walls of the city, advice that was taken by the prince. Also it may have been on this occasion that Ibn Rushd issued a *fatwā* about a group of self-defined Ashʿarīs—surely Ibn Tūmart and his followers—who held that "faith is not perfect without knowledge of the science of the fundamentals [of religion and law] and that lack thereof renders Islam not correct." Ibn Rushd sharply rejected this idea and denied its being in conformity with Ashʿarī doctrine. He established a clear-cut distinction between experts and laymen: The obligation to know and understand the arguments that underlie the fundamentals of the Islamic faith is incumbent only upon experts while laymen should be dissuaded from theological speculation and reading books on *kalām* with the threat of punishment.[46]

From most of the reports of these events[47] it is clear that it was Ibn Rushd himself who initiated the trip to Marrakech, "in the belief that he was performing a meritorious deed (*istajāra*)." According to the author of *Mafākhir al-barbar*, however, it was the amir who summoned Ibn Rushd to Marrakech so that he might swear allegiance to his son and heir (*istawfada-hu min Qurṭuba li-ʿaqd al-bayʿa li-ibni-hi Tāshufīn b. ʿAlī*).[48] In an official record of the visit preserved in a document written in the name of the amir by his secretary Abū ʿAbd Allāh Muḥammad b. Masʿūd b. Abī l-Khiṣāl al-Ghāfiqī al-Shaqūrī (d. 540/1147),[49] Ibn Rushd's trip to Marrakech is called "arrival as an envoy" (*wufūd*), although neither the identity of the commissioners nor a specific motive for the journey are mentioned.

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[45] *Ḥulal* (Spanish trans.), 116, note 2.

[46] *Fatāwā Ibn Rushd*, 2:966–972. For a detailed examination of this text and its contribution to our understanding of Almohad theology, see Serrano, "¿Es perfecta la fe sin el conocimiento de los fundamentos de la religión? Ibn Rušd al-Ŷadd y los límites del *kalām*."

[47] In addition to the account in *Ḥulal*, see Ibn al-Abbār, *Muʿjam*, 155, no. 136 and al-Bunnāhī, *Marqaba*, 98–9.

[48] *Mafākhir al-barbar*, 193–4.

[49] Ed. M.ʿA. Makkī, "Wathāʾiq taʾrīkhiyya jadīda," 127.

Death

By the end of Jumādā I 520/ the middle of June 1126, Ibn Rushd had returned to Cordova. The journey had left him tired and weak and shortly thereafter, in Jumāda II/July, he fell ill. He died four months later, on 11 Dhū l-qaʿda 520/28 November 1126. He was buried in the cemetery of [Ibn] ʿAbbās, in the eastern part of Cordova, where, according to al-Maqqarī, Ibn Rushd's ancestors had been buried. The biographers mention that a multitude (*jamʿ ʿaẓīm min al-nās*) took part in his funeral and that many elegies were dedicated to him. In the opinion of al-Maqqarī, "They did him justice!"

Disciples

The list of Ibn Rushd's disciples includes Qāḍī ʿIyāḍ, Abū l-Ḥasan Muḥammad b. Abī l-Ḥusayn, known as Ibn al-Wazzān, and Abū Bakr b. al-ʿArabī. ʿIyāḍ, who was the author of one of the most important sources for the history of Mālikism, the biographical dictionary *Tartīb al-madārik*, was himself a charismatic jurist who, during his tenure as *qāḍī* of Ceuta and Granada, sent Ibn Rushd a number of queries that have been preserved in Ibn Rushd's *Fatāwā* and as part of *Madhāhib al-ḥukkām*. Ibn al-Wazzān compiled the *fatwā*s of Ibn Rushd that have been preserved until today and, as mentioned above, we owe to him some anecdotes about his master's relationship with his students. Abū Bakr Ibn al-ʿArabī may be considered Ibn Rushd's successor in the effort to renew Mālikī legal doctrine and reform its practice.

To the names of the aforementioned disciples the biographers add those of al-Zāhid Abū l-ʿAbbās Aḥmad Ibn ʿAbd al-Malik b. ʿAmīra, Abū Jaʿfar Aḥmad b. Aḥmad b. Aḥmad al-Azdī, Abū l-Ḥajjāj al-Thaghrī, Ibn Saʿīd al-Awsī, known as al-Qantirāl, Abū l-Walīd Ibn al-Dabbāgh, according to whom Ibn Rushd was the best jurist of al-Andalus (*afqah ahl al-Andalus*), Muḥammad b. Saʿāda, who transmitted the books of Ibn Rushd in Fez, Abū l-Walīd b. Khayra, Abū Bakr b. Maymūn, ʿUmar b. Wājib, Abū l-Ḥasan b. al-Niʿma, Muḥammad b. Aṣbagh al-Azdī, and others.[50]

Muḥammad b. Aṣbagh al-Azdī performed as Ibn Rushd's *ṣāḥib al-maẓālim* (the judge of complaints) in Cordova. When Ibn Rushd abandoned the

[50] The *Takmila* of Ibn al-Abbār contains a list of about thirty disciples of Ibn Rushd. See V. Lagardère, "La Haute judicature à l'époque almoravide en al-Andalus," 149, note 45.

qāḍīship, al-Azdī kept his position, until he was nominated *qāḍī* of Seville in 524/1129.

The main transmitter of Ibn Rushd's works was probably his son, Abū l-Qāsim Aḥmad b. Muḥammad (d. 563/1167), the father of Averroes. It was he who pronounced the funeral prayers for his father[51] and, like him, served as *qāḍī* of Cordova, to which he was appointed in 532/1137, after Ḥamdīn b. Muḥammad b. ʿAlī b. Muḥammad b. ʿAbd al-ʿAzīz, another member of the Banū Ḥamdīn family, was dismissed from the office. In 535/1140–1, the population of Cordova rose against Abū l-Qāsim Ibn Rushd on the grounds that he was weak. He had to resign and flee the city. In retaliation, the amir refused to nominate a new *qāḍī*, but one year later, in 536/1141, he awarded the Cordovans the right to decide who would fill the position. This was how Ḥamdīn recovered the qāḍīship. He remained in office until 5 Ramaḍān 539/1 March 1145, when he declared himself independent of the Almoravids and adopted the title of *Amīr al-Muslimīn al-Manṣūr bi-Llāh*.[52]

Juristic Thought

The fact that Ibn Rushd's most important works, the *Bayān*, the *Muqaddamāt*, and the collection of his *fatwā*s, have been edited, allows us to analyze his legal method and thinking and to provide several illustrative examples of it.

As noted, the *Bayān* is a commentary on the *Mustakhraja*, an early compilation of Mālikī jurisprudence, also known as *al-ʿUtbiyya*, after its author, the Cordovan al-ʿUtbī (d. 255/868). The large number of manuscripts of the *Bayān* that have been preserved, as well as the numerous references to it in later legal works, are clear indications of its success. Indeed, according to Ibn al-Qāḍī al-Miknāsī, not even Mālik b. Anas produced something similar to the *Bayān*, an assessment that he extends also to the *Muqaddamāt*.[53] By preserving almost completely the text of the *ʿUtbiyya*, the *Bayān* made use of the original source unnecessary, which may explain why it has not survived independently.[54]

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[51] Ibn Bahskuwāl, *Ṣila*, 2:518–9, no. 1154.

[52] Ibn al-Abbār, *Takmila* (Madrid, 1887–89), 1:38–9, no. 111 (biography of Ḥamdīn b. Muḥammad b. ʿAlī).

[53] Al-Ḥumaydī, *Jadhwa*, 1:254–5, no. 259.

[54] A. Fernández Félix, *Cuestiones legales del Islam temprano*, 270–1.

In his *Muqaddamāt*, Ibn Rushd comments on the sources and the content of the *Mudawwana* of Saḥnūn, including an opening chapter on the fundamentals of religion and law. The *Bayān* and the *Muqaddamāt* were written to complement each other;[55] they were taught together and respond to one and the same plan, namely to review earlier Mālikī jurisprudence according to the methodology of the science of the principles of Islamic law (*uṣūl al-fiqh*).[56] As a result of this effort, Ibn Rushd clarified formal contradictions between different legal opinions applying to a single case, provided textual arguments in support of opinions that drew on the personal view (*raʾy*) of early jurists, and corrected errors, inconsistencies and ambiguities that previously could not be easily explained.

Ibn Rushd's method in commenting on both the *ʿUtbiyya* and the *Mudawwana* is illustrated in the following passage from the *Bayān*:[57]

> Saḥnūn was asked about a man who denied being the father of the child his wife was expecting (*yantafī min ḥaml imraʾati-hi*) and he swore the *liʿān* oath[58] against her. However, she refused to swear it [i.e. the *liʿān* oath to counterbalance her husband's accusation. Therefore she became guilty of *zinā* and incurred the punishment of stoning]. However she could not be stoned until she gave birth. Subsequently the husband retracted his word, before she had given birth but after she had refused to swear the *liʿān* oath. Does he have a right to take her back [as his wife]? And can the spouses inherit from each other?
>
> Saḥnūn answered: The *liʿān* oath sworn by him against her and her refusal to swear [in order to refute his accusation] breaks the marital bond (*ʿiṣma*). Therefore, he cannot inherit from her and she cannot inherit from him. Also, when she gives birth, she must be stoned." [end of the quotation from the *ʿUtbiyya*].

Ibn Rushd commented on this text as follows:

> This answer, which has no basis in the sources (*laysat ʿalā l-uṣūl*), cannot be assimilated to the opinion according to which the marital bond is broken when the husband has finished swearing the *liʿān* oath, whether or not she refuses to swear the *liʿān* oath, and [once the marital bond is broken] they

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[55] Ibid.

[56] See also C.A. Nallino, "Intorno al *Kitāb al-bayān* del giurista Ibn Rushd" and M. Ḥajjī, "al-Mustakhraja li'l-ʿUtbī wa'l-Bayān wa'l-taḥṣīl wa'l-Muqaddamāt li-bn Rushd."

[57] Ibn Rushd, *Bayān*, 6:425–6. For additional examples from the same source, see D. Serrano, "La lapidación como castigo de las relaciones sexuales no legales (*zinā*)," 460–9.

[58] "An oath which gives a husband the possibility of accusing his wife of adultery without legal proof and without his becoming liable to the punishment prescribed for this, and the possibility also of denying the paternity of a child borne by the wife." See *EI*[2], *s.v.* [J. Schacht]

> cannot inherit from each other. What is correct (*al-ṣaḥīḥ*) here is the precedent set (*mā maḍā*) in the section, "he was hungry".[59] This precedent comes from [Mālik's] dicta, collected by (*min samāʿ*) Yaḥyā [b. Yaḥyā al-Laythī], according to which the marital bond between the spouses remains and they can inherit from each other; [therefore if the husband retracts his claim, the punishment must not be implemented]. Saḥnūn's assertion that her refusal to swear after he swore the *liʿān* oath breaks the marital bond between them diverges from the sources (*khārij ʿan al-uṣūl*).

Ibn Rushd's *fatwā*s were the vehicle for the transmission of his intellectual achievements in the *Bayān* and the *Muqaddamāt* to the domain of practice and for their implementation in actual legal disputes. These *fatwā*s can be considered prototypes of their genre, manifesting both Ibn Rushd's theoretical and practical command of law. They are written in clear Arabic and organized in a systematic way which, as in the *Bayān* and the *Muqaddamāt*, includes an examination of the textual and rational evidence for a specific legal topic and an investigation of the reasons for juristic disagreement about this topic. These characteristics sharply distinguish Ibn Rushd from many of his predecessors and contemporaries (e.g. Qāḍī ʿIyāḍ). The relevance of the problems submitted to his consideration reflects both the authority and respect with which he was held. For this reason, the *fatwā*s were highly valued by later generations of jurists.

A particularly interesting example is a *fatwā* issued by Ibn Rushd in response to a query from ʿAlī b. Yūsuf concerning the status of Ashʿarī theologians *vis-à-vis* Mālikī jurists:[60] The very terms in which the petition was formulated betray the amir's—not very favorable—position towards opponents of the Ashʿarīs and anticipate the *muftī*'s answer.[61]

> The [Almoravid] prince consulted Ibn Rushd al-Jadd about the imāms Abū l-Ḥasan al-Ashʿarī, Abū Isḥāq al-Isfarāʾīnī, Abū Bakr al-Bāqillānī, Abū Bakr Ibn Fūrak, Abū l-Maʿālī [al-Juwaynī], Abū l-Walīd al-Bājī and others who, like the aforementioned scholars, profess discursive theology (*kalām*), argue about the principles of religious beliefs (*uṣūl al-diyānāt*) and write books refuting the heretics (*ahl al-ahwāʾ*). Are they religious authorities (*aʾimma*) who lead to the right path or do they lead to confusion and blindness"?

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[59] Ibn Rushd refers here to *Bayān*, 16:324–5: section "he was hungry and sold his wife's sexual services]" (*kitāb jāʾa fa-bāʿa imraʾata-hu*) in the chapter on statutory punishments and calumny (*kitāb al-ḥudūd waʾl-qadhf*).

[60] V. Lagardère, "Une théologie dogmatique de la frontière en al-Andalus"; D. Urvoy, *Averroes*, 24–6; D. Serrano Ruano, "Los almorávides y la teología aš'arí."

[61] This fact apparently was not taken into consideration by Lagardère, "Une théologie dogmatique de la frontière en al-Andalus."

And what is your opinion about those who say evil things about them [i.e. the above-mentioned scholars], insult them and those scholars who are inclined towards the science of the Ashʿarīs, declare them infidels (*yukaffirūna-hum*), consider themselves exempt from [following] them, don't recognize in them any authority (*wilāya*) and believe that they [i.e. the Ashʿarīs] are immersed in perdition and ignorance?

What is to be said to them [i.e. those who oppose the Ashʿarīs]? How can one proceed with them? Which of their [arguments] is one entitled to believe and [which not]? Must they be left to their whims (*ahwāʾ*) or must they be diverted from their excesses? Does their attitude entail a fault (*jurḥa*) in their religious beliefs and a flaw (*dakhal*) in their faith? Is it licit to pray behind them?

According to Ibn Rushd:

The [Ashʿarī] scholars whom you have named in your question are upright religious authorities whose advice must be followed because, thanks to their intervention, the triumph of the sacred law has been accomplished. They refuted the uncertainties of those who stray and have taken the road to perdition. They clarified ambiguities and explained thoroughly the beliefs that it is necessary to profess. They are right (*ʿalā l-ḥaqīqa*) because they know about the principles of religious beliefs, and about what is obligatory, licit and forbidden with respect to God, praise be upon Him, since the branches cannot be known without knowing their principles.

Their virtues must be acknowledged and their supremacy sanctioned because they are those to whom the Prophet referred in his *ḥadīth*: "This science will be taken by the just men of each generation; they will deliver it [i.e. the science] from the distortion of those who go too far, the plagiarism of those who forge and the interpretation of the ignorant ones."

Only a stupid, ignorant person, or an innovator who abandons the truth and strays from it, believes that they [i.e. the Ashʿarī theologians] are on the road to perdition and ignorance. Anyone who insults them and levels accusations against them that they do not deserve is an evil doer (*fāsiq*), because God the Almighty said: "And those who hurt believing men and believing women, without their having earned it, have laid upon themselves calumny and manifest sin."[62] Therefore, the ignorant must be shown their error, the corrupt must be punished and the innovators whose words have deviated from the truth must be invited to retract, on the condition that their innovation (*bidʿa*) be considered insignificant, but if they don't repent, they must be beaten until they repent, as ʿUmar b. al-Khaṭṭāb did with Ṣābigh, whose beliefs were suspicious, until he [viz. Ṣābigh] said: "Oh prince of the believers! If you want to cure me with a medicine, you have discovered the location of my illness, but if you want to kill me, do it." Then he released him.

[62] Qurʾān 33:58 (trans. A. Arberry).

This *fatwā* suggests that the amir and Ibn Rushd were acting in collusion to bolster Ashʿarī theology and thus counterbalancing the literalist approach of the profession of faith contained in the opening chapters of the *Risāla* of Ibn Abī Zayd al-Qayrawānī,[63] considered by many Andalusī Mālikīs as the creed they were bound to profess.

On a different occasion, Ibn Rushd was consulted by an unknown group of scholars concerning the position of saints (*awliyāʾ Allāh*) in the hierarchy of Islamic religious authority,[64] as established by al-Ghazālī in his *Iḥyāʾ ʿulūm al-dīn*. In the upper level of this hierarchy appear the prophets, followed by the friends of God (*awliyāʾ Allāh*), then those who have knowledge about God (*al-ʿārifīn bi-Llāh*), the sound experts in religious sciences (*al-ʿulamāʾ al-rāsikhīn*) and after them, the virtuous (*al-ṣāliḥīn*). In his response Ibn Rushd expresses his disapproval of the rise of Sufis as a distinctive category of men of religion and his reluctance to identify mysticism with Sufism. Despite his rejection of Sufism as a distinctive category of religious authority, Ibn Rushd does not appear to be bothered by ascetic and mystical practices, and he displays knowledge of what came to be recognized as Sufi science. Another salient feature of this *fatwā* is the emphasis on the superiority of discursive theologians (*mutakallimūn*) and experts in the fundamentals of both religion and law (*uṣūliyyūn*)—the kind of scholar with whom Ibn Rushd identified—over the *fuqahāʾ* in the hierarchy of nearness to God, a position which, as we have seen, he also stressed in his *fatwā* on the status of the followers of al-Ashʿarī.

The *mustaftī*s wanted to know whether the "friends of God" (*awliyāʾ Allāh*) mentioned by al-Ghazālī in his *Iḥyāʾ ʿulūm al-dīn* were equal to the Sufīs mentioned by al-Qushayrī in his *Risāla*. In al-Andalus, al-Qushayrī represented a moderate mysticism, compatible with main stream Mālikism. An affirmative answer to the question posed by Ibn Rushd's *mustaftī*s meant that Sufis were superior to traditional scholars, an implication they were unwilling to accept.

In the aforementioned *fatwā* Ibn Rushd submitted the question of religious authority to "knowledge about God" (*maʿrifa bi-Llāh*) and distinguished between those who have knowledge about God (*al-ʿārifūn bi-Llāh*) and those who have knowledge about God's legal norms (*al-ʿārifūn bi-aḥkām Allāh*). In the latter group he included the "people of the

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63 D. Serrano Ruano, "Los almorávides y la teología aš'arí," 473–5.

64 M. Fierro, "Opposition to Sufism in al-Andalus," 194–5, called attention to this *fatwā*. For a detailed treatment, see D. Serrano Ruano, "Why did the scholars of al-Andalus distrust al-Ghazālī?"

branches," whom he identified with the *fuqahāʾ*. Subsequently he placed the "people of the principles," i.e. the *mutakallimūn* and the *uṣūliyyūn*, in a position between the *ʿārifūn bi-Llāh* and the *ʿārifūn bi-aḥkām Allāh*, but finally excluded them from this latter category, bringing them close to the former:

> The difference between experts in discursive theology (*mutakallimūn*) and experts in the principles of religion and law (*uṣūliyyūn*), on the one hand, and the *ʿārifūn bi-Llāh* on the other hand, is that the former may know about the essence and the attributes of God, but the state (*ḥāl*) that derives from this knowledge is not constant in them.

Ibn Rushd undermined the identification of Sufis with the friends of God by stressing that the decisive criterion for determining the position a Muslim occupies in the rank of religious superiority is knowledge about God rather than deeds. Subsequently, he stated that the status of 'friend of God' is not reached through hardship in the fulfillment of the sacred law, but through knowledge about God.

Ibn Rushd distinguished between friendship with God and Sufism in an effort to break the monopoly over the 'friend of God' status exercised by those who saw themselves as Sufis. At the same time he left open the path to becoming a friend of God for those who regarded themselves as traditional *ʿulamāʾ*: In Ibn Rushd's opinion, daily experience demonstrates that the *fuqahāʾ* have little opportunity to attain the level of the *ʿārifūn*. However, he establishes a typology of experts in the legal norms (*al-ʿulamāʾ bi-l-aḥkām*), according to which: "If a jurist acts in agreement with his science and combines knowledge of God with knowledge of His legal norms, he will be considered one of the fortunate (*suʿadāʾ*)." If, additionally, his knowledge of God produces in him the "states" (*aḥwāl*), "he will belong to the most virtuous friends of God (*awliyāʾ Allāh*) whom Muslims must prefer over the experts in legal norms and those who teach them."

The *fatwā* ends with an addendum in which Ibn Rushd emphasizes the Prophet's precedence over the *awliyāʾ*.

Characteristic of Ibn Rushd's legal doctrine is his position on the performance of the pilgrimage to Mecca, which may explain why, unlike many other Andalusīs, he never traveled to the East. In his view,

> At the present time the obligation (*farḍ*) to perform the pilgrimage from al-Andalus is cancelled (*sāqiṭ*) because of lack of capacity (*istiṭāʿa*), i.e. the capacity to arrive without risking life and property. Whenever the obligation is not in force, its fulfillment becomes a reprehensible supererogatory deed because of the damage it may produce. It is clear that *jihād*, the benefits

> of which are countless, is preferable (*afḍal*) [to pilgrimage] —so clear that there is no point in asking about which is better, pilgrimage or *jihād*. To ask this question is relevant only when the roads are safe enough to insure safe arrival . . . This assessment applies also to non-Andalusīs, like the Maghribīs.

On one occasion, Ibn Rushd rejected a witness renowned for his rectitude (*rajul min ahl al-khayr wa-l-faḍl*) but who adhered to the Ẓāhirī school on the grounds that

> . . . declaring null and void all analogical reasoning exercised by the community of experts in religious science to derive the rules of the sacred law is an innovation (*bidʿa*) and a reason to reject (*jurḥa*) the testimony of someone who professes and believes it, since this [i.e. declaring *qiyās* null and void] amounts to being in disagreement with the indications of the Qurʾān and the traditions (*al-āthār*) and with the consensus of the Companions and of the *fuqahāʾ* of the garrison cities. . . .[65]

On a different occasion he was consulted about the murder of Sufyān b. al-ʿĀṣī, a member of a prominent family from Murviedro in Sharq al-Andalus. Two men suspected of having committed the crime were imprisoned, but they persisted in denying responsibility. Ibn Rushd responded that because of the strong suspicion (*lawth*), the relatives of the victim could swear fifty oaths to complete the evidence against the accused and then demand the death penalty for them.[66]

Another illustration of Ibn Rushd's doctrine on murder is found in the following *fatwā*: In 516/1122 a man was murdered in Cordova, leaving behind three underage children and a half brother who, himself, had two adult sons. Consulted about whether minor children have a right to claim the blood of their father, Ibn Rushd dismissed the established doctrine—that only those agnates who are adults at the moment of the murder have a right to claim the blood of the victim—and held that "only the children, upon reaching the age of majority, are entitled to either demand the murderer's punishment or opt for monetary compensation, if they do not pardon him altogether without receiving compensation." In Ibn Rushd's

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[65] See al-Wansharīsī, *Miʿyār*, 1:432–3 and 2:341–2; V. Lagardère, "La Haute judicature à l'époque almoravide en al-Andalus," 154 and 156; idem, *Histoire et société en Occident musulman au Moyen Age*, 63 no. 237, and 65, no. 244; and D. Urvoy, *Averroes*, 24–6.

[66] R. Peters, *Crime and Punishment in Islamic Law*, 17–18. Cf. M. Marín, "Quién lo hizo?," 415–22.

view, the claim of the victim's blood should be delayed until his children reached the age of majority.[67]

Intellectual Legacy

Ibn Rushd played a decisive role in the development of the Mālikī school. Through his commentaries he made the contents of earlier works on jurisprudence and law accessible to a large number of jurists and facilitated their assimilation of the methodological criteria of the science of the principles of Islamic law, which had been introduced to al-Andalus only half a century before by Ibn ʿAbd al-Barr and al-Bājī. Ibn Rushd insisted that the fundamentals of the law (*uṣūl al-fiqh*) must be studied together with the branches of law (*furūʿ al-fiqh*) and he himself made important contributions to contemporary legal practice, as both a *qāḍī* and a *muftī*. This sometimes proved more difficult than he expected, as happened when he issued a *fatwā* declaring null and void the sale of property acquired by illicit means. He was committed to providing legal practice with legal consistency, far from the extremes of his disciple Abū Bakr b. al-ʿArabī."[68] Ibn Rushd also attempted to reconcile the study of *fiqh* with that of *kalām*, and the study of religious science with that of mysticism, or, at least, the demand that faith must be accompanied by good deeds. This was his firm response to the main religious concerns of his time: The spread of rational theology and the challenge it posed to Mālikism; the spread of Sufism and the challenge it posed to *fiqh* and *kalām*; and the Almohad revolution.

The fact that Ibn Rushd occasionally received the support of the amir ʿAlī b. Yūsuf b. Tāshufīn, and, in return, issued *fatwā*s that sanctioned

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[67] W. Hallaq, "Murder in Cordoba," 57. On Ibn Rushd's *fatwā*s, see further V. Lagardère, "La Haute judicature à l'èpoque almoravide en al-Andalus," 153–73; A. Carmona, La expropiación forzosa por ampliación de mezquita en tres fetuas medievales"; M. Fierro, "El espacio de los muertos: fetuas andalusíes sobre tumbas y cementerios"; D. Serrano Ruano, "Las demandas particulares como limitación de las construcciones privadas en el Occidente islámico medieval"; idem, "La lapidación como castigo de las relaciones sexuales no legales (*zinā*)"; idem, "Minas en colecciones de fetuas y casos jurídicos del Occidente islámico (ss. XII–XVI d.C.)"; F. Vidal, "Venta de caballerías en el Toledo taifa y cristiano"; and A. Zomeño, *Dote y matrimonio en al-Andalus y el Norte de Africa.*

[68] On one occasion, Abū Bakr Ibn al-ʿArabī ordered that the cheeks of a flutist be pierced in order that he could no longer play his instrument. He was nominated *qāḍī* of Seville in 528/1135 and was known for the harshness of his judgments. One year after his nomination, he resigned because of pressure exerted against him by the Sevillians, who attacked his house with the intention of killing him and sacked his properties. See M. Lucini, "Ibn al-ʿArabī, Abū Bakr," 459.

some of the amir's decisions (his is not the only case that can be cited in this connection) must not be considered evidence of an idyllic relationship between Almoravid rulers and Mālikī *fuqahā'*, as certain historians have suggested.[69] In fact, Ibn Rushd's career teaches us about the many difficulties, contradictions and paradoxes involved in that relationship. However—and notwithstanding the conflicts and tensions between rulers and ruled and the inability of the former to fulfill the expectations they had created—one cannot deny the fact of collaboration between Andalusī '*ulamā*' and the Almoravids at different political, religious and cultural levels. This fact should suffice to definitively reject the view that the Almoravid conquest of al-Andalus represented a "clash" between a refined and highly developed culture, and primitive and intolerant foreign invaders, under whom the wings of Andalusī intellectual aspirations were clipped forever.

[69] 'Abd al-Wāḥid al-Marrākushī, *al-Mu'jib*, 122–4.

Appendix: Ibn Rushd's Works[70]

According to Ibn ʿIdhārī, Ibn Rushd wrote more than 100 books. Of these, the titles of the following have been preserved:

1. *ʿAqīdat al-īmān* or Tenets of the faith. Two copies of this work are extant. One contains both the *ʿAqīdat al-īmān* and the *Kitāb tarqīʿ al-ṣalawāt* (see below, no. 16).
2. *Kitāb al-Bayān wa-l-taḥṣīl wa-l-sharḥ wa-l-tawjīh wa-l-taʿlīl li-masāʾil al-ʿUtbiyya*, or *Kitāb al-Bayān wa-l-taḥṣīl li-mā fī l-mustakhraja min al-tawjīh wa-l-taʿlīl*, a commentary on the *Mustakhraja*, an early compilation of Mālikī jurisprudence also known as *al-ʿUtbiyya*, after its author, the Andalusian al-ʿUtbī. According to Ibn Rushd, he finished this book in Rabīʿ II 519/May 1125 (see *Bayān*, I:31). Edited by Ḥajjī. See bibliography.

The structure of the *Bayān* and its influence on later authors has been studied by A. Fernández Félix, who also used the content of the *Bayān* to analyze the process of islamization in al-Andalus. Numerous manuscripts of this work have been preserved.[71] A sign of the high value accorded to this book and its importance for the Mālikī school of Morocco is the testimony of al-ʿAbbās b. Ibrāhīm according to which in 1174/1760 the ʿAlawid sultan Sīdī Muḥammad b. ʿAbd Allāh ordered the scholar Sīdī Aḥmad al-Ghazzāl to prepare a copy of the *Bayān.* Four *ʿulamāʾ* were charged with the task of revising the copy: the shaykh al-Tāwidī, Sīdī ʿUmar al-Fāsī, Sīdī Muḥammad b. ʿAbd al-Qādir and Sīdī ʿAbd al-Qādir bū Khurayṣ. Al-ʿAbbās b. Ibrāhīm also states that the Moroccan collector of manuscripts ʿAbd al-Ḥājj al-Kattānī owned a copy of the *Bayān* signed by Aḥmad al-Wansharīsī (see *Iʿlām*, 4:52–8, no. 487).

3. *Dhabāʾiḥ*, on ritual sacrifices (see C. Brockelmann, *GAL*, I:480).
4. *Fahrasa* or index of Ibn Rushd's masters and of the works studied with them (see Makhlūf, *Shajarat al-nūr*, I:129).
5. *Fatāwā*: a compilation of legal opinions issued by Ibn Rushd, collected by Abū l-Ḥusayn Muḥammad b. al-Wazzān, whose signature appears

[70] On the extant manuscripts of Ibn Rushd's unedited works, see M. Fierro, "Manuscritos en al-Andalus. El proyecto H.A.T.A."

[71] A. Fernández Félix, *Cuestiones legales del Islam temprano*, 91–7.

in the extant mss., although he seems to have been assisted by other disciples of Ibn Rushd. The compilation is also known as *Masā'il, Ajwiba* and *Nawāzil Ibn Rushd* and has been used as a source by later compilers of *fatwā*s, like Muḥammad b. ʿIyāḍ, al-Wansharīsī, al-Burzulī and al-Mahdī al-Wazzānī. The *fatwā*s have been edited twice (see bibliography). On the differences between the two editions, see review by Delfina Serrano Ruano in *Al-Qanṭara*, 15 (1994): 531–4.

In most instances, dates and the names of persons and places involved in the legal cases dealt with in the *fatwā*s have been preserved. For this reason they are considered a rich source of information for historians of the pre-modern Islamic West, as pointed out by the editors and by other scholars such as I. ʿAbbās, ʿA.ʿA. al-Ahwānī, V. Lagardère, and R. Oswald.

6. *Fuṣūl fī l-fiqh al-mālikī* (see M. al-Manūnī, *Dalīl makhṭūṭāt Dār al-kutub al-Nāṣiriyya bi-Tamaghrūt*, 67, no. 486).
7. *Kitāb fī-hi "ḥajb al-mawārīth"*, on "excluding an heir from the inheritance" (see Ibn Khayr, *Fahrasa*, 266, Makhlūf, *Shajarat al-nūr*, I:129).
8. *Ikhtiṣār Kutub al-mabsūṭa fī ikhtilāf aṣḥāb Mālik.* A summary of a compendium on divergent legal opinions held by disciples of Mālik, written by Yaḥyā b. Isḥāq b. Yaḥyā (d. 293/905 or 303/916), grandson of Yaḥyā b. Yaḥyā al-Laythī, the famous transmitter of the *Muwaṭṭa'*, who brought it to al-Andalus. It appears that Ibn Rushd's summary of the *Kutub al-mabsūṭa fī ikhtilāf aṣḥāb Mālik* draws on an earlier summary of the work composed by the brothers Muḥammad and ʿAbd Allāh b. Abān b. ʿĪsā, grandsons of another important early figure of Mālikism in al-Andalus, ʿĪsā b. Dīnār (see Ibn Khayr, *Fahrasa*, 243 and A. Cuellas, *al-Marqaba al-ʿulyā de al-Nubāhī*, 287–90).
9. *Risāla fī ḥukm amwāl al-ẓalama* [*w*]*a-l-wulāt al-muʿtadīn wa-man kāna fī maʿnā-hum*: "Epistle on the legal status of properties illegally acquired by unjust rulers and by those who behave like them" (see C. Brockelmann, *GAL*, I:479–80). A copy of this text is preserved in a manuscript that bears the title, *Kitāb al-kaffāra*, folios 2v. to 8v. (see C. Brockelmann, *GAL*, SI:662 and M. García-Arenal, "Algunos manuscritos de *fiqh* andalusíes y norteafricanos," 21 no. 1132). Actually this "epistle" is a *fatwā* that appears in *Fatāwā Ibn Rushd*, I:631–49, and is reproduced by al-Burzulī, *Fatāwā al-Burzulī*, 5:143–50: *fī ḥukm amwāl al-ẓalama wa-l-wulāt al-muʿtadīn wa-l-murbiyīn wa-l-murtashīn wa-ashbāhi-him min al-mukhliṭīn wa-muʿāmalāti-him wa aʿṭiyāti-him* "[*Fatwā*] on [1] the legal rule concerning properties illegally acquired, [2] on rulers

who commit infringements, practice usury and accept bribes and those who, like them, mix the licit with the illicit, and [3] on transactions and donations that they make." The *fatwā* is also abridged in the *Kitāb al-jāmiʿ* of the *Muqaddamāt* of Ibn Rushd (see below, no. 13).

10. *Kitāb al-khums,* on the fifth of the booty.
11. *Al-Mukhtaṣar fī l-fiqh*: Summary of Islamic jurisprudence (see C. Brockelmann, *GAL*, I:479–80).
12. *Juz' Mukhtaṣar al-ḥajb ʿalā madhhab Mālik b. Anas*. A fragment of the "Summary of the book 'Excluding an heir from the inheritance according to the doctrine of Mālik b. Anas' " (see Ibn Khayr, *Fahrasa*, 266).
13. *Al-Muqaddamāt li-awā'il kutub al-Mudawwana* or *al-Muqaddamāt al-mumahhidāt li-bayān mā iqtaḍat-hu rusūm al-Mudawwana min al-aḥkām al-sharʿiyyāt wa-l-taḥṣīlāt al-muḥkamāt li-ummahāt masā'ili-hā al-mushkilāt*. The *Muqaddamāt* is a commentary on the sources and contents of the *Mudawwana* of Saḥnūn. In the opening chapter, which treats fundamentals of religion and law, Ibn Rushd discusses different forms of reasoning that allow one to understand God's unity, His attributes and His actions, and the principles underlying the legal rules. He insists on the need to seek knowledge in order to perfect faith and to identify the causes of its occasional decay[72]—a view reiterated in *Fatāwā Ibn Rushd*, 2:966–72, but restricted to experts (see above.)

The last chapter, dealing with "miscellaneous questions," has been edited separately: *al-Jāmiʿ min al-Muqaddamāt*, ed. M.Ṭ. al-Talīlī, Amman, Dār al-Furqān, 1985. On the edition of the entire text of the *Muqaddamāt*, see bibliography.

14. *Al-Muqaddima fī l-farā'iḍ*, "An introduction to the [science of] the heirs' shares in Islamic jurisprudence" (see C. Brockelmann, *GAL*, SI:662 note 4). One of the extant copies of this book contains also the *Juz' Mukhtaṣar al-ḥajb ʿalā madhhab Mālik b. Anas* (see above, no. 12).
15. *Tahdhīb Kitāb Mushkil al-āthār* of al-Ṭaḥāwī, "Review of al-Ṭaḥāwī's book about problematic traditions" (see C. Brockelmann, *GAL*, I:479–80, SI:662, note 4).

[72] Lagardère, "La Haute judicature à l'époque almoravide en al-Andalus," 174.

16. *Kitāb tarqīʿ al-ṣalawāt*, on how to make up a prayer that could not be fulfilled at its proper time or that was performed erroneously (see M. al-Manūnī, *Dalīl makhṭūṭāt Dār al-kutub al-Nāṣiriyya bi-Tamaghrūt*, 92, no. 1158).
17. A work on ritual ablution (*wuḍūʾ*).

CHAPTER FOURTEEN

QĀḌĪ ʿIYĀḌ (D. 544/1149)

Camilo Gómez-Rivas

ʿIyāḍ b. Mūsā—better known as Qāḍī ʿIyāḍ—was an eminent jurist whose career coincided with the 6th/12th-century expansion and consolidation of Mālikism into the Far Maghrib or Islamic West. This was especially significant in the region south of the historically more settled Mediterranean coast. Until the end of his life, ʿIyāḍ remained fiercely loyal to the Almoravid dynasty (*al-murābiṭūn*, 445–544/1054–1149), a Berber tribal confederation from the Saharan south, which, as the first major non-Arab Islamic power of the region, made use of Mālikī jurists as both legitimizing and administrative agents. A prolific author, ʿIyāḍ's most influential surviving works include the first major biographical dictionary of the Mālikī school (the dominant legal school in al-Andalus, the Maghrib, and West Africa), a bio-bibliographical work on his teachers and transmitters, and a treatise—famous far beyond the boundaries of his legal school—describing the life, attributes, miracles, and ritual and religious law surrounding the figure of the Prophet Muḥammad.

ʿIyāḍ's legal consultations and opinions produced on the occasion of cases (pl. *nawāzil*, sing. *nāzila*) over which he presided also survive in a collection compiled and annotated by his son, Muḥammad. These *nawāzil* shed light on Andalusī/Maghribī legal practice, on ʿIyāḍ's legal thought, and on the socio-economic landscape of the period. The figure of ʿIyāḍ that emerges from these *nawāzil* is that of the busy chief judge (*qāḍī al-jamāʿa*) of Ceuta (Arabic: Sabta), a city undergoing rapid commercial and demographic growth.[1] ʿIyāḍ personally oversaw two expansions of Ceuta's congregational mosque as the city developed in its new role as the main Almoravid port on the African coast of the Mediterranean. Legally and intellectually, ʿIyāḍ can be seen as a vital link in the flow of knowledge from al-Andalus, a land of established institutions and a long experience of government, to the Far Maghrib, where Marrakech—founded by

[1] Located on the Mediterranean coast of Morocco, Ceuta was occupied by Spain in 1578.

the Almoravids in the mid-5th/11th century—had recently inherited the centralizing power that had once belonged to Cordoba.

Life

ʿIyāḍ was born into an established family of Arab origin in Ceuta, a city where he spent most of his life and of which he became judge.[2] He left Ceuta only twice, to al-Andalus, for relatively brief periods of time: once, as an advanced student, to meet the scholars of the peninsula and gather teaching/transmitting licenses (*ijāzāt*); and a second time to assume the judgeship of Granada. ʿIyāḍ's career came to an end with the collapse of the Almoravid dynasty; he led the city in open rebellion against the Almohads, capitulated, and was exiled to Marrakech where he died under uncertain circumstances.

ʿIyāḍ's agnatic ancestors are said to have emigrated from the Yemen and to have lived in Basta, al-Andalus, and Qayrawān before settling in Ceuta. The first family member about whom there are concrete details is ʿIyāḍ's great-grandfather, ʿAmrūn, a prominent scholar reputed to have had perfect knowledge of the Qurʾān, who moved his family from Fez to Ceuta sometime after gaining wealth working in the service of al-Manṣūr b. Abī ʿĀmir (d. 392/1002)[3] and before his death in 397/1007. The family became well-established among the notable families of Ceutan society.

ʿIyāḍ's full name was Abū'l-Faḍl ʿIyāḍ b. Mūsā b. ʿIyāḍ b. ʿAmrūn b. Mūsā b. ʿIyāḍ b. Muḥammad b. ʿAbd Allāh b. Mūsā b. ʿIyāḍ al-Yaḥsubī al-Sabtī. He was born in Ceuta toward the middle of Shaʿbān 476/December 1083, six months after the Almoravid takeover of the city. Shortly thereafter, Yūsuf b. Tāshufīn, the great Almoravid leader, made the city the base of operations for his military excursions into al-Andalus. Ceuta was thereby turned into one of two principal ports of the growing empire (the other

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[2] See Delfina Serrano's comprehensive "'Iyāḍ, Abū l-Faḍl," 404–34 and the introductory study to her translation of the *Madhāhib al-ḥukkām fī nawāzil al-aḥkām*, 13–141; *EI*[2], s.v. "'Iyāḍ b. Mūsā"; M. José Hermosilla Llisterri, "En torno al-Qāḍī ʿIyāḍ I: Datos Biográficos," 149–74; Muḥammad b. ʿIyāḍ, *Taʿrīf biʾl-qāḍī ʿIyāḍ*; al-Maqqarī, *Azhār al-riyāḍ fī akhbār ʿIyāḍ*. See Ḥasan al-Warāgilī, *Abū al-Faḍl al-Qāḍī ʿIyāḍ al-Sabtī* for a complete annotated bibliography of Arabic works on ʿIyāḍ before 1994. For an updated bibliography, see Aḥmad Mutafakkir, *Abū al-Faḍl al-Qāḍī ʿIyāḍ: thabat bibliyūghrafī*. Ḥalīma Ferhat, *Sabta des Origines au XIV*[ième] *Siècle* presents important information on ʿIyāḍ's life in Ceuta.

[3] Chamberlain (*ḥājib*) of the Umayyad caliphs and virtual ruler of the caliphate, 368–392/978–1002.

being Almeria). ʿIyāḍ grew up in a burgeoning center with significant commercial and intellectual traffic.

As a scion of a notable scholarly family, ʿIyāḍ was able to learn from the best teachers Ceuta had to offer. The *qāḍī* Abū ʿAbd Allāh Muḥammad b. ʿĪsā al-Tamīmī (d. 505/1111) was ʿIyāḍ's first important teacher and is credited with his basic academic formation. Growing up, ʿIyāḍ benefitted from the traffic of scholars from al-Andalus, the Maghrib, and the eastern Islamic world. ʿIyāḍ became a prestigious scholar in his own right and appears to have won the support of the highest levels of society. The Almoravid *amīr*, ʿAlī b. Tāshufīn, sponsored the later stages of ʿIyāḍ's intellectual formation by supporting his first trip to al-Andalus. Thus it was that at the age of thirty and as a fairly established scholar, ʿIyāḍ made his *riḥlat al-ṭalab fī'l-ʿilm* or "journey in search of knowledge," a traditional requirement for Muslim scholars who sought employment in public functions such as the judgeship.

Traditionally, the *riḥla* had been performed together with the pilgrimage to Mecca, and thus, from al-Andalus and the Maghrib, it had been an eastward journey. The East, historically, was the source of all trends, intellectual and otherwise, that swept through this part of the Islamic world. The northward direction of ʿIyāḍ's scholarly journey is novel, and its novelty underscores a significant historical development: the creation of the first large-scale bureaucratic structure in the Far Maghrib by importing cultural and institutional know-how from the north. Al-Andalus was especially attractive to the Almoravids for its established state institutions and freedom from the Ismāʿīlī "heresy" of the Fatimids, against whom the Andalusī Umayyads had fought a proxy war through Berber client tribes in the Far and Middle Maghrib in the 4th/10th and 5th/11th centuries.[4] ʿIyāḍ's *riḥla* and ensuing correspondence with the jurists he met in al-Andalus marks the beginning of a process in which the cities of the Maghrib absorbed the intellectual and artistic traditions of al-Andalus, which, for their part, were coming under increasing military and economic pressure from the Christian kingdoms to the north. Through ʿIyāḍ, and several other lesser known jurists, the theoretical and practical application of

[4] Earlier alliances to Fatimids and Andalusians and later rivalries among the three largest Berber groups in the Maghrib played a crucial role in the history of the region. These major groups are the Ṣanḥāja (associated with the Almoravids), the Maṣmūda (associated with the Almohads), and the Zanāṭa (once allies of the Umayyads and later associated with the Merinids).

the science of jurisprudence flowed from Cordoba, Seville, and Granada, through Ceuta, to Fez, Marrakech and points south. The contacts made by ʿIyāḍ during his eight-month journey to the cities of al-Andalus, and the sustained correspondence he would carry on with these jurists once he returned, put him at the center of this flow of institutional, religious, and legal knowledge, influencing the shape that would be taken by the institutions of the Far Maghrib in later centuries.

ʿIyāḍ spent part of 507/1113 and 508/1114 visiting Cordoba, Murcia, Almeria, and Granada. He received *ijāza*s from the most important traditionist of his time, Abū ʿAlī al-Ṣadafī (d. 514/1120) in Murcia, and met with some of the most celebrated scholars of the moment, such as Ibn al-Ḥājj (d. 529/1134),[5] Ibn Rushd al-Jadd (d. 520/1126),[6] and Ibn Ḥamdīn (d. 508/1114).[7] Upon returning to Ceuta, ʿIyāḍ participated in a public debate on Saḥnūn's *Mudawwana*, a kind of rite of passage that was followed by his appointment to the *shūra*.[8] ʿIyāḍ was first appointed judge of Ceuta in 515/1121 and served in the position until 531/1136 (he served again from 539–543/1145–48).[9] It was presumably during his double tenure as judge of Ceuta that he was most prolific. Most of the consultations and cases compiled by his son are from this period, and his overall fame as a jurist and as a writer of *fiqh* (positive law) was most likely based on the work he did in this city.

In 515/1136, ʿIyāḍ was appointed judge of Granada, where he was initially well received. After a little more than a year, however, he fell into disfavor with the *amīr* of al-Andalus, Tāshufīn b. ʿAlī, who deposed him, according to one source, on account of his excessive censoriousness. After this episode, ʿIyāḍ stepped back from public life. He appears to have been active only once and briefly, arbitrating in an official capacity in the southern Iberian town of Algeciras. In 539/1145, after coming back into favor with the Almoravid administration, ʿIyāḍ was again appointed judge of Ceuta by the briefly-reigning Ibrāhīm b. Tāshufīn, second to last *amīr* of the Almoravids.

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[5] Abū ʿAbd Allāh b. al-Ḥājj, *qāḍī* of Cordoba.

[6] The celebrated Mālikī legal scholar and grandfather of the philosopher, Averroës.

[7] Muḥammad b. Ḥamdīn, *qāḍī* of Cordoba.

[8] In al-Andalus and the Maghrib, a consultative body at the service of the judge and, in this period, often a preliminary position toward the judgeship.

[9] ʿIyāḍ held the position of judge in Ceuta (515–531/1121–1136), Granada (531–532/1136–1138), Ceuta (539–542/1144–1144), and possibly, while briefly exiled, in Dāy (543/1148).

Two late eastern biographers of ʿIyāḍ, Ibn al-ʿImād (d. 1089/1679) and al-Shaʿrānī (d. 973/1565), claim that ʿIyāḍ instigated the public burning of al-Ghazālī's (d. 505/1111) *Iḥyāʾ ʿulūm al-dīn*.[10] The claim is doubtful as it is found in no earlier western sources. It would appear, rather, as a gloss on ʿIyāḍ's perceived close ties to the pro-Mālikī Almoravid dynasty and his subsequent fate at the hands of the anti-Mālikī Almohads, a conflict that, at least on a symbolic level, involved al-Ghazālī's famous work. This conflict over the notion of the proper role of the Muslim jurist in society pitted the members of a series of rebellious ṣūfī movements and other discontents against the Mālikī jurists.[11]

The earliest source on ʿIyāḍ is *al-Taʾrīf bi-l-Qāḍī ʿIyāḍ* by his son Muḥammad b. ʿIyāḍ. Muḥammad struggled with the problem of honoring his father in a political environment that was hostile to the dynasty to which the latter had remained steadfastly loyal. Filial piety and a desire to make his father acceptable to an antagonistic generation (and perhaps a lack of acquaintance with the man himself)[12] may account for Muḥammad's stock description of ʿIyāḍ as the ideal jurist: a man of pleasant appearance and smell, a smart dresser, an elegant rider, a tireless worker who was quick to chastise leaders when they strayed from the truth, and a man of self-abnegating magnanimity (Muḥammad reports inheriting a debt of 500 dinars, money his father reportedly spent toward the public interest out of his own pocket). This desire for acceptability may also account for Muḥammad's reticence about the events surrounding his father's rebellion, capitulation, and subsequent exile to Marrakech.[13]

The Almohads, a Berber confederation of Maṣmūda tribes from the Atlas mountains who never entirely submitted to the Ṣanḥāja confederation of the Almoravids, mounted a sustained military and ideological attack against the latter starting in the 510s/1120s. The Almoravid government crumbled precipitously with the death of Tāshufīn b. ʿAlī, the dynasty's last capable military leader. Marrakech, the Almoravid capital, fell in

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[10] Abū Ḥāmid Muḥammad b. Muḥammad b. Aḥmad, famous Shāfiʿī jurist, theologian, and mystic (d. 505/1111).

[11] Maribel Fierro, "La Religión," *El Retroceso Territorial de Al-Andalus*, 439. For more on the reception of the *Iḥyāʾ* in al-Andalus and the Maghrib and the role played therein by Mālikī jurists and the growing Sufi movement, see Kenneth Garden, "Al-Ghazālī's Contested Revival: *Iḥyāʾ ʿUlūm al-Dīn* and its Critics in Khorasan and the Maghrib," and Delfina Serrano Ruano, "Why Did the Scholars of al-Andalus Distrust al-Ghazālī? Ibn Rushd al-Jadd's *Fatwā* on *Awliyāʾ Allāh*."

[12] ʿIyāḍ, *Madhāhib al-ḥukkām* (trans. Serrano), 22.

[13] Ibid., 25.

Shawwāl 541/March 1147, when the dynasty's last *amīr*, Isḥāq b. ʿAlī, was slain. By then most of the cities of the Maghrib had capitulated, including Tangier and Ceuta. But when the Almoravid governor of al-Andalus managed to retake Algeciras, an Almoravid leader on the African side of the strait, Yaḥyā b. Abī Bakr al-Ṣaḥrāwī, was moved to launch his own, last ditch rebellion, starting from Ceuta and Tangier and eventually moving south, where he languished in the deserts of Mauritania. In what had become a recurrent pattern in al-Andalus and the Far Maghrib in times of political turmoil, ʿIyāḍ as chief judge of Ceuta, assumed leadership of the city, which now stood in open rebellion against the Almohads as a result of al-Ṣaḥrāwī's doomed revolt. The armies of ʿAbd al-Muʾmin, however, were quick to surround Ceuta and, when defeat was imminent, ʿIyāḍ sued for peace. The Almohads took the city without bloodshed, and ʿIyāḍ was exiled to Marrakech. Muḥammad b. ʿIyāḍ casts a positive light on subsequent events, in which, according to his version, his father submitted docilely to the Almohads and ingratiated himself with the Almohad leader upon arriving in Marrakesh. According to Muḥammad's account, ʿIyāḍ died after falling ill during a military campaign in which he was fighting *alongside* the Almohad *amīr*.

Other sources intimate a different reality, while later ones weave fancifully sinister endings. Ibn Khaldūn (d. 808/1406) places ʿIyāḍ at the time of his death in the province of Tādla, a region north of Marrakesh, where ʿIyāḍ reportedly served as a rural judge in exile.[14] Other biographers describe ʿIyāḍ dying dejectedly, murdered by orders of the Almohad *amīr*, either strangled (al-Bunnāhī, d. after 793/1391)[15] or poisoned by a Jew (Ibn Farḥūn, d. 799/1397).[16] Further versions have ʿIyāḍ killed by orders of the spiritual leader of the Almohads, the Mahdī b. Tūmart, for secretly practicing Judaism, or dying suddenly in the baths of Marrakech, felled by a malediction pronounced by al-Ghazālī himself. While these latter scenarios present chronological impossibilities (Ibn Tūmart and al-Ghazālī died before ʿIyāḍ), they point to the significance these fig-

[14] Ibn Khaldūn, *Kitāb al-ʿIbar*, 6:230. This information is corroborated by Muḥammad b. ʿIyāḍ in the *Taʿrīf*, where he quotes a poem by ʿIyāḍ mentioning his exile in Dāy, a town of the Tādla province. Muḥammad b. ʿIyāḍ, *Taʿrīf bi al-qāḍī ʿIyāḍ*, 98–9. See also Hermosilla Llisterri, "En torno al-Qāḍī ʿIyāḍ I: Datos Biográficos," 156.

[15] Al-Bunnāhī, *al-Marqaba al-ʿulyā* (Cairo, 1948), 101.

[16] *Al-Dibāj* (Cairo, 1932), 168–72.

ures gained posthumously, especially for the Maghribī Sufi movement, for whom al-Ghazālī's *Iḥyāʾ* had special symbolic import.[17]

ʿIyāḍ's prestige as a jurist and religious figure endured, however, in spite of his clash with the Almohads. He is venerated today as one of the seven patron saints of the city of Marrakech, where the university bears his name.

Scholarship

ʿIyāḍ's extant works include biographical dictionaries, a collection of *nawāzil*, and various works of *fiqh* (positive law). His two biographical dictionaries are among the earliest examples of the genre in the region. By identifying a network and genealogy of teachers, students, transmitters, and texts, these works were influential in the formation of the Mālikī identity in the Far Maghrib. ʿIyāḍ's collection of *nawāzil*[18] presents questions and opinions regarding cases over which he and some of his contemporaries presided. It comprises a kind of correspondence between judges, recording their attitudes and legal strategies for dealing with new realities and, significantly, for allowing for the development and adaptation of Mālikī jurisprudence to changing conditions. ʿIyāḍ's most enduringly popular work, *al-Shifāʾ*—also an early example of a genre—deals exclusively with the Prophet Muḥammad.

The *Tartīb al-madārik wa-taqrīb al-masālik li-maʿrifat aʿlām madhhab Mālik* (*Organizing the faculties and revealing the methods for discovering the signs of the school of Mālik*) is the most influential of ʿIyāḍ's biographical works. It traces the history, development, and diffusion of the Mālikī legal tradition from Medina to the different regions of the Islamic world, identifying and describing its main proponents and practitioners, from

[17] These last two reports appear in al-Murtaḍā al-Zābīdī, *Itḥāf al-sāda al-muttaqīn,* 38, quoted by Halima Ferhat, *Sabta des Origines*, 155, and in Garden, "Al-Ghazzālī's Contested Revival," 206–7. Garden argues that the *Iḥyāʾ* was symbolically more than substantively significant to the Sufi movement of the Maghrib, a significance with which Almoravids, but more effectively so, the anti-Almoravid Almohads sought to align themselves.

[18] Roughly synonymous with the term *fatāwā* (sing. *fatwā*) and of specialized use in the Maghrib, the *nawāzil* are collections of questions and opinions that serve as references for resolving legal cases. Unlike the term *fatwā*, which refers to the process of responding to a question, *nāzila* refers to the case about which the question is asked. It would also appear, as in the case of ʿIyāḍ's *nawāzil*, to refer to the compilation process from the perspective of the *qāḍī* (or at least not explicitly that of the *muftī*), including both opinions requested and given. *EI*[2], s.v. "Nāzila."

Mālik b. Anas, through nine generations or *ṭabaqāt*. The book opens with a brief apology for the school's legal epistemology and method (a section of which is translated below) and is followed by a detailed biography of Mālik, after which the jurists of the school are presented chronologically, according to generations and regions. ʿIyāḍ's second biographical work, *al-Ghunya* (The Riches), is, in a sense, more autobiographical, describing his recent contemporaries in the Mālikī school, placing special emphasis on his own teachers and on those from whom he garnered licenses or *ijāza*s.[19]

Muḥammad b. ʿIyāḍ compiled and annotated a collection of his father's papers that record cases over which ʿIyāḍ presided and for which he sought opinions from *muftī*s or jurisconsults; several entries include cases for which ʿIyāḍ wrote opinions in answer to consultations. The *Madhāhib al-ḥukkām fī nawāzil al-aḥkām* (*The procedures of judges in judicial practices*), which did not become as well-known or widespread as ʿIyāḍ's other works, provides important information of a unique sort about the practice and contemporary impact of ʿIyāḍ's legal work and thought, as well as that of a few of his most distinguished contemporaries. It shows how ʿIyāḍ corresponded with jurists of al-Andalus, such as Ibn Rushd and Ibn Ḥamdīn, and acted as a link in the transmission of ideas into the Maghrib.

The *Madhāhib al-ḥukkām* also presents a wealth of legal-historical and socio-historical information, concerning, for example, the court practice of Ceuta (which was closer to Andalusī than Maghribī practice), the composition of Ceutan courts, the qualities of witnesses, the use of documents, the jurisdiction of judges, the nature of the cases tried, the power of recourse to the law demonstrated by jurists and laymen, and the process of judicial review.

The most popular work by ʿIyāḍ—with a large number of extant manuscripts and commentaries found throughout the Islamic world—is his *al-Shifāʾ bi-taʿrīf ḥuqūq al-Muṣṭafā* (*The healing in knowing the truths of the Chosen One*). It is, properly, a work of *fiqh* on the Prophet Muḥammad, including the traditions which describe his character, elevated status, and miracles associated with his prophethood, as well as topics such as how to pray for him, or what judgments and punishments are incurred by those who disparage him. This work's success and diffusion point to the phenomenon of the emergence of the Prophet Muḥammad as a figure

[19] An *ijāza* (plural *ijāzāt*) is a certificate granting the right to teach transmissions of *ḥadīth* and other authoritative texts. See *EI*[2], s.v. "Iḏjāza."

of veneration from popular religion into mainstream Islamic society,[20] a phenomenon that in the Far Maghrib is manifest in the mystical or Sufi tradition, as well as in the political and social institution of Sharīfism, whereby descendants of the "House of Muḥammad"—through ʿAlī b. Abī Ṭālib and Fāṭima—garnered special political status. Sharīfism became prominent after the appearance of the Berber dynasties in the 5th/11th century.[21] The book became so famous that it was accorded a kind of sacredness of its own, reputedly bestowing the gift of protection upon any house in which it was found. ʿIyāḍ's intention, however, was orthodox and aimed at fulfilling what he saw as a growing need. As he explains in the introduction:

> You have repeatedly asked me to write something which gathers together all that is necessary to acquaint the reader with the true stature of the Prophet, peace and blessings be upon him, with the esteem and respect which is due to him, and with the verdict regarding anyone who does not fulfill what his stature demands or who attempts to denigrate his supreme status—even by as much as a nail-paring. I have been asked to compile what our forebears and Imams have said on this subject and I will amplify it with *ayā*s from the Qur'ān and other examples. . . . Writing about this calls for the evaluation of the primary sources, examination of secondary sources and investigation of the depths and details of the science of what is necessary for the Prophet, what should be attributed to him, and what is forbidden or permissible in respect of him; and deep knowledge of messengership and prophethood and of the love, intimate friendship and the special qualities of the sublime rank.[22]

In addition to the works mentioned above, ʿIyāḍ composed many others, some of which exist in printed editions and none of which, to my knowledge, have been translated into English or studied in any depth in the western academy. They include two *ḥadīth* works (*Sharḥ ṣaḥīḥ Muslim* and *Mashāriq al-anwār*), one on *ḥadīth* terminology (*al-Ilmāʿ ilā maʿrifat uṣūl al-riwāya wa-taqyīd al-samāʿ*), a commentary on Saḥnūn's *Mudawwana* (*al-Tanbīhāt al-mustanbaṭa ʿalā'l-kutub al-mudawwana*), and a work of law (*al-Iʿlām bi-ḥudūd qawāʿid al-Islām*). ʿIyāḍ also wrote poetry, of which some verses survive. The eventual edition and study of all of these will be important in the effort to reveal a more complete picture of the

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[20] Schimmel, *And Muhammad is His Messenger*, 33.

[21] Powers, *Law, Society, and Culture in the Maghrib, 1300–1500*, 13.

[22] Iyad b. Musa, *Muhammad: Messenger of Allah* (*Ash-Shifa of Qadi ʿIyad*), translated by Aisha Abdarrahman Bewley, vi.

impact and significance of this great scholar of the first Berber empire of Islam.

Translation of a Passage from *Tartīb al-madārik*

The following excerpt from the *Tartīb al-madārik* (1:47–54) highlights one of the distinguishing features of Mālikism: the prominence of the Medinese tradition as a source of law. ʿIyāḍ argues that the tradition of Medina, in the form of the consensus of Mālikī jurists and the Medinese community, has positive value as a source of law that can be stronger than prophetic traditions transmitted by single or very few individuals, in the form of the *khabar wāḥid* or lone report. This is especially significant when the *khabar wāḥid* contradicts the Medinese tradition, which is understood to be stronger or have preponderance, *tarjīḥ*, precisely because it was transmitted by the Medinese community as a whole, enjoying *tawātur*, that is to say, it was transmitted by numerous individuals at all points of its transmission.

The Medinese tradition includes prophetic Sunna as well as non-prophetic *ʿamal*, or the practice of the people of Medina. ʿIyāḍ describes what the relative weight of these traditions is as sources of law, especially when in conflict with other sources. In doing so he provides examples of Medinese, and therefore Mālikī-specific, practice. He describes disagreements within Mālikism over the relative juristic weight of practice that is not of prophetic origin. And he refutes jurists who have criticized Mālikī exceptionalism as misinterpretation. To this end he addresses the debate over the Islamic sale with option, or *al-bayʿ bi'l-khiyār*, which grants buyer and seller the right to rescind a sale's contract within a specified time limit. Muslim jurists disagreed over this limit, which the Mālikīs made dependent on the nature of the commodity and local custom.

> Explanation of the consensus of the people of Medina as an authoritative source, what it is, and the verification of the school (or doctrine) of Mālik—may God have mercy on him—concerning this.
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> You should know—may God bestow honor upon you—that the authorities of the other schools—their jurists, theologians, traditionists, and legal thinkers—are unified against our companions on this question and claim we are mistaken. They remonstrate against us, arguing by whatever means occurs to them, thus overstepping the boundaries of fanaticism and slander, to the point of defaming Medina and listing its shortcomings, all the while arguing points about which there has been no disagreement to begin with.

Many have neither thought the question through nor investigated the truth of our doctrine. They have spoken, as a result, based on conjecture and speculation. Others have learned about our doctrine from people who have not studied it from us. Yet others have stretched the words they heard, attributing to us what we have not said, as al-Ṣayrafī,[23] al-Muḥāmilī,[24] and al-Ghazālī[25] have done. They ascribed answers to questions that we have not asked and have protested against us as one would against slanderers of the consensus (which we are not).

Therefore, I set forth in detail here concerning what is said about the school of Mālik, in a way that, once established, the righteous will find incontrovertible. I will thereby distinguish the areas in which there is agreement from those in which there is disagreement—if God, may He be exalted, so wills.

You should begin by knowing that the consensus of the people of Medina is of two sorts: one that comes by way of the account and tradition that the people honor and transmit collectively, following it through their actions openly, which the community has passed down from the community of the time of the Prophet—may God bless and save him. This kind of consensus is divided into four types: the first is comprised of transmitted law, by means of the words or actions of the Prophet—may God bless and save him—containing information such as [the values of the units of measurement of] the *ṣāʿ* and the *mudd*, according to which he—blessings and peace be upon him—collected charity (*ṣadaqāt*) and end-of-Ramadan alms (*fiṭrāt*); the call to and initiation of congregational prayer (*iqāma*); the omission of publicly pronouncing the phrase "In the Name of God, the Compassionate, the Merciful" during prayer; the act of standing in prayer (*wuqūf*); or the formation of endowments (*aḥbās*).

The transmitted tradition of the people of Medina originates from the Prophet's words and actions, such as their tradition concerning the location of the Prophet's grave, his mosque, his *minbar* (raised pulpit), and his city, among other things, for which knowledge of his circumstances and life stories is necessary, along with knowledge of the manner of his prayer [the number of bowings and prostrations and the like].

[There is also] the transmitted tradition (*naql*) of his—peace and blessings be upon him—acceptance of actions of theirs [viz., the people of Medina] that he witnessed and of which no disavowal of his was handed down, such as the ownership of slaves, and the like; or of his abstention from certain matters and decisions which he did not impose upon them as a duty, with the prevalence and conspicuousness of the practice among them, such

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[23] Abū Bakr Muḥammad b. ʿAbd Allāh (d. 329/941 or 330/942), famous Shāfiʿī jurist.

[24] Abū ʿAbd Allāh al-Ḥusayn al-Muḥāmilī (d. 330/942), Shāfiʿī judge.

[25] Whose *al-Wajīz fī fiqh al-imām al-Shāfiʿī*, for example, contains sections refuting Mālik.

as his declining to take vegetables for alms (*zakāt*), even while knowing—peace be upon him—that these were plentiful among them.[26]

Taking these aspects into account, this kind of consensus of [the people of Medina] constitutes an authoritative source, the heeding of which is an obligation, as is rejecting what contradicts it based on a lone report (*khabar wāḥid*) or analogy (*qiyās*). This transmitted tradition (*naql*) is established and well known, leading to certain knowledge (*al-ʿilm al-qaṭʿī*). And it should, therefore, not be rejected for what is based on preponderant likelihood. This is what Abū Yūsuf[27] and other detractors resorted to when opposing Mālik and other people of Medina concerning the question of endowments (*awqāf*), and the *mudd* and the *ṣāʿ*, even while witnessing himself the transmitted tradition and its authenticity.

The righteous cannot disavow the authority of this [consensus], which is that described by Mālik and transmitted by the majority of our scholars. There is no disagreement regarding the soundness of this method (*ṭarīq*) and of its authority—on the part of the discerning (*ʿuqalāʾ*)—or [regarding the fact] that it conveys knowledge that attains certainty. Detractors concerning these questions who are not from Medina are simply those to whom the tradition of Medina has not been transmitted.

The *qāḍī* Abū Muḥammad ʿAbd al-Wahhāb[28] said there was no disagreement concerning this issue among our adherents or from al-Ṣayrafī and other adherents of al-Shāfiʿī, who all agreed with him, as al-Āmidī has related.

Some Shāfiʿīs, however, disagreed obdurately. And there will be no comfort for the detractor who believes this is not so. For these [detractors] are [comprised of] the people of the distant provinces, such as Basra, Kufa, and Mecca, alike. This is because, [they argue, the tradition] came to these places while there was a group of Companions there and they passed down the Prophetic Tradition. It is an obligation to betake oneself to the report that is uninterruptedly transmitted by numerous sources (*mutawātir*) of whatever nature, and establish knowledge by it. The authoritative source of law has come to reside in the transmitted tradition, of which Medina is not in exclusive possession. And so the question was dropped. This [notion, viz., that Medina is not in exclusive possession of authoritative traditions] constitutes one of their strongest arguments.

We say to them, however, that we would agree, were the question to be conceived in favor of someone other than [the people of Medina], but there is no such transmitted tradition in possession of others. For one of the conditions for a consecutively and widely transmitted tradition (*naql al-tawātur*) is the consistency of the number of sources in its beginning, middle, and end. This [consistency] is present with the people of Medina

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[26] Here, the Prophet Muḥammad is understood to establish a practice by omission: *zakāt* is taken only in wheat, not green vegetables.

[27] Abū Yūsuf Yaʿqūb (d. 182/798), Ḥanafī legal scholar, student of Abū Ḥanīfa, and chief judge (*qāḍī al-quḍāt*) under Hārūn al-Rashīd.

[28] ʿAbd al-Wahhāb al-Baghdādī (d. 422/1031 or 423/1032), Egyptian Mālikī scholar.

and their tradition, [passed down] by the community as a whole from the Prophet—may God bless and save him—or from the practice (*ʿamal*) of his time. The people from other provinces, on the other hand, transmit in their community only what can be traced back to one or two Companions. The question thus goes back to a lone report (*khabar al-āḥād*).

A good example to consider [for the elucidation of this problem] is the practice of the people of Mecca, regarding the call to prayer and their *mutawātir* transmission of the call to prayer, performed in the presence of the Prophet—peace be upon him. This tradition is contradicted, however, by another tradition of the Messenger of God—may God bless and save him—which is the one according to which he acted at the time of his death in Medina.

This is why Mālik said to his detractors concerning this question: "I do not know of a day call and a night call to prayer. This is the mosque of the Messenger of God—may God bless and save him—where the call has been performed from his time, and where the disavowal of the caller's practice has been recorded by no one."[29]

The second type of consensus is the consensus of there being a legal practice (*ʿamal*) whose validity can be proven by means of independent reasoning (*ijtihād*) and deduction (*istidlāl*). The adherents of our school have, however, disagreed amongst themselves in this regard. Most of them believed that it did not constitute an authoritative source or that it had no preponderance (*tarjīḥ*). This is the doctrine of the great scholars of Baghdad, among whom were Ibn Bukayr, Abū Yaʿqūb al-Rāzī, Abū al-Ḥasan b. al-Muntāb, Abū al-ʿAbbās al-Ṭayālisī, Abū al-Faraj al-Qāḍī, Abū Bakr al-Abḥārī, Abū al-Tammām, and Abū al-Ḥasan b. al-Qaṣṣār.[30] They said that because they formed part of the Muslim community (*al-umma*), an authoritative source (*al-ḥujja*) could only be one for and from the whole of the community. This constitutes the doctrine of the detractors in its entirety.

This [doctrine] is what the *qāḍī* Abū Bakr b. al-Ṭayyib and others embraced. They denied that Mālik believed in this kind of consensus or that this was his doctrine or that of the leaders among his adherents. Some, moreover, believed that this kind of consensus did not constitute an authoritative source but had preponderance over the independent legal reasoning (*ijtihād*) of others. This is the belief of a group of their jurisprudents (*mutafaqqihūn*) as well as some Shāfiʿīs. The *qāḍī* Abū Bakr [b. al-Ṭayyib] did not abide it, nor did the leaders of our school establish it.

Some of the Mālikīs, on the other hand, believed that this kind of consensus constituted an authoritative source much as that of the first kind. And

[29] The Meccan call to prayer, later taken up by the Shāfiʿīs, differs from the Mālikī practice, based on the practice of Medina. ʿIyāḍ argues here that the Medinese tradition is the only one that is both *mutawātir* and genuine, by contrasting it to another *mutawātir* tradition that, regardless of how well attested it is, according to Mālik, happens to be wrong.

[30] These Mālikī scholars were active in Baghdad between the 3rd/9th and early 5th/11th centuries.

they taught it as coming from Mālik. The *qāḍī* Ibn Naṣr said: "The words of Aḥmad b. al-Muʿadhdhal and Abū Muṣʿib suggest this." The *qāḍī* Abū al-Ḥasan b. Abī ʿUmar, among the Baghdādīs, believed it, as did a group of the Maghribīs among our fellow [Mālikīs]. They considered it to have preponderance over the lone report (*khabar al-wāḥid*) and analogical reasoning (*qiyās*). The detractors agreed that this was the doctrine of Mālik. But this does not follow from him in the absolute.

The *qāḍī* Abū al-Faḍl—God, may He be exalted, have mercy on him—said that the legal practice (*ʿamal*) of the people of Medina concerning lone reports (*akhbār al-āḥād*) is approached in one of three manners: either the practice is in conformity with the report, for it provides more certainty when it comes by means of transmission; or the lone report is given preponderance if it was [implemented] by means of unchallenged, independent reasoning (*ijtihād*), since nothing opposes it here except the *ijtihād* and *qiyās* of others who give precedence to *qiyās* over the lone report.

If the practice is in conformity with a lone report but in opposition to another, the practice [of the people of Medina] gives preponderance to the report [that belongs to their tradition], which is the strongest [way] in which reports may be given preponderance [over one another] when incompatible. The master, Abū Isḥāq al-Asfarāyaynī,[31] and those glossators (or verifiers [*muḥaqqiqūn*]), legal theorists (*uṣūliyyūn*), jurists, and others of the school of Mālik who followed him believed this.

If, on the other hand, the practice is in disagreement with the lone reports as a whole (*mukhālifᵉⁿ li'l-akhbār jumlatᵃⁿ*), then, if the consensus (*ijmāʿ*) resulted from a transmitted tradition, the report can be relinquished without objection on our part or by the glossators of other persuasions, as mentioned above. There is no need for glossators to imagine an objection concerning this, or pay attention to it, since positive and certain reports are not relinquished on the basis of preponderant likelihood. There is no agreement about this due to the existing dispute. Likewise, were this made clear to the righteous dissenter, he would reconsider. This is the point (*nukta*) of the question, such as that of the [values of the units of measurement of] the *ṣāʿ* and the *mudd*, the act of standing in prayer (*wuqūf*), the *zakāt* of vegetables, and others.

If their consensus resulted from *ijthād*, the report is given preference for the general public (*al-jumhūr*). There is disagreement among our adherents over this.

In the case in which there is no legal practice in disagreement or conformity [with a given report], the question is null. It becomes obligatory to go back to accepting the lone report, be it from the transmission [of the people of Medina] or from others, if the report is sound and uncontested. If, on the other hand, this Medinese report is contested by a report transmitted by people of remote regions (*ahl al-āfāq*), the Medinese tradition is given pre-

[31] Abū Ishāq Ibrāhīm b. Muḥammad b. Ibrāhīm b. Mahrān, Shāfiʿī jurist, legal theorist, and theologian (d. 418/1027).

ponderance, according to the opinion of the master, Abū Isḥāq, and other glossators, on account of the greater entitlement owed to the observation of those [acquainted] with the local context (*qarā'in al-aḥwāl*), basing themselves on the transmission of the traditions of the Prophet—peace be upon him, and on the fact that the people of Medina constitute a large group of people (*al-jamm al-ghafīr*) transmitting from a large group of people who transmitted from the Prophet.

On issues other than those we have presented above, the distortions of the dissenters concerning what has been transmitted from Mālik have multiplied. Abū Bakr al-Ṣayrafī and Abū Ḥamīd al-Ghazālī, for example, have recounted Mālik as saying: "Only the consensus of the people of Medina and none other is to be taken into account." This is something that neither Mālik nor any of his followers has said. Some legal theorists (*uṣūlīyyūn*) among the dissenters have said that Mālik considered the consensus of the seven jurists of Medina to constitute a formal consensus, and that he elevated [them] and said that perhaps they were the only people qualified for *ijthād* in that time. This is something Mālik never said, nor was this transmitted from him.

Furthermore, some have said that we do not accept reports unless they are associated with the people of Medina. This is ignorance or fabrication. [Those who say this] have not made the distinction between our rejection of reports contravening Medinese practice and between what we do accept, when it agrees with Medinese practice. They thus argue, concerning this distinction, by raising Mālik's rejection of the *ḥadīth* concerning both parties to a sale with an option (or with the right of withdrawal: *al-bayyiʿayn biʾl-khiyār*), which he himself and the people of Medina transmitted with their best chain of authorities. The words of Mālik, concerning this *ḥadīth* in his *Muwaṭṭa'* are: "There is no specified limit nor any matter which is applied in this case, according to us."[32] Their point about this contradiction is one of their greatest exaggerations and ugliest calumnies. They said: "This is a rejection of a sound report since the practice of the people of Medina does not proceed according to it; they have thus renounced the report." Ibn Abī Dhi'b[33] made a well-known and harsh pronouncement concerning this.

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[32] "Option" here concerns the right of both parties to a sale transaction to buy or sell (i.e., conclude or withdraw from the transaction) within a specified period of time (three days in the Shāfiʿī and Ḥanafī traditions). As Qāḍī ʿIyāḍ explains below, this period, according to Mālik, has no specific limit and depends, rather, on local custom and the item in question. Debates among jurists over the right to an option involved specifying the time frame for it to be invoked, assigning liability to buyer or seller, and questions over whether such a right is inheritable and applicable to delegated parties. See Ibn Rushd al-Ḥafīḍ, *Bidāyat al-Mujtahid* (*The Distinguished Jurist's Primer*), transl. Imran Ahsan Khan Nyazee (Reading, 1994), Vol. II, 250–5. See also *Muwaṭṭa'*, 2:79, chapter on "*bayʿ al-khiyār*." For an English translation, see Aisha Abdurrahman Bewley, *al-Muwatta of Imam Malik ibn Anas: the First Formulation of Islamic Law* (Inverness, 1991), 272. Bewley translates *khiyār* as "right of withdrawal," others render it as "sale with an option."

[33] Muḥammad b. ʿAbd al-Raḥmān b. al-Maghīra (d. 158 or 159/775 or 776), Medinese jurist and traditionist.

Our response to this is that [these critics of Mālikism] have been afflicted by the worst possible interpretation. Indeed, by these words, Mālik did not intend to reject [granting] an option to the two parties in a sale. What he intended by his words was what he referred to in the rest of the *ḥadīth*, namely: "except the sale with option." Thus he related that the sale with option has no determined limit in Medinese practice, except for the amount considered a commodity (*al-silʿa* [i.e., the nature of the commodity determines the time limit for concluding a sales transaction. It is brief for inexpensive items and relatively long for more expensive ones, such as a house]). This changes with the different kinds of sales, to which *ijtihād*, the local custom of the community in question, and the conditions of the sale and its intention are brought to bear.

This was the way in which the glossators of our masters—may God have mercy on them—interpreted his words. The practice is abandoned in favor of the *ḥadīth* only with another interpretation that separates the words from the contract of sale. In fact the option remains [for the buyers and sellers] as long as they are bargaining and negotiating. This is the meaning understood by the two of them, while they are undertaking the matter with which they are engaged, and this is what points to the fact that the transaction is incomplete, an interpretation which is supported by Mālik's words: "There is no sale for either of you over the sale of his brother." This is likewise the case for bargainers. Mālik termed this: "sale before its completion or conclusion."[34]

[34] ʿIyāḍ b. Mūsā, *Tartīb al-madārik* (Rabat, 1970), 1:47–54.

CHAPTER FIFTEEN

SAYF AL-DĪN AL-ĀMIDĪ (D. 631/1233)

Bernard G. Weiss

A Dream: al-Āmidī and al-Ghazālī

According to a story attributed to one of his students, Sayf al-Dīn al-Āmidī once had a dream in which he found himself standing in front of a house that had once belonged to Ghazālī. In the dream, Āmidī impulsively made his way into the house and found in it an open casket. The body that lay inside, he knew, was that of Ghazālī himself. Removing the burial cloth from his face, Āmidī bent over the form of "the Proof of Islam" and planted a kiss upon its forehead. So profound was the impact of this dream upon Āmidī that when he awoke he felt an immediate desire to commit to memory Ghazālī's famous work on the theory and methodology of the law entitled *al-Mustaṣfā fī uṣūl al-fiqh*, a task that he later claimed took little time.[1]

We may be inclined to question the veracity of this story, which is reported by only two biographers, Ṣafadī and Tāj al-Dīn Subkī. Whether true or not, it makes a point of great importance for any attempt to understand Āmidī: Sayf al-Dīn was keenly aware of standing in a transgenerational stream of thought and of being enormously indebted to the great minds of previous centuries. Ghazālī is unquestionably the towering figure in the intellectual life of the sixth Islamic century. Āmidī, who was born exactly a century after the birth of Ghazālī, considered himself heir to Ghazālī's legacy even though he was born too late to have had direct contact with him. His knowledge of the *Mustaṣfā* was certainly profound, as is evident from the frequent references to it in his *Kitāb al-Iḥkām fī uṣūl al-aḥkām* (hereafter *Iḥkām*). Although he is no match for the colossal greatness of Ghazālī, Āmidī is lauded by language that singles him out from all of his contemporaries. Ibn Khallikān, for example, is said to have called him the wonder of his time.[2] Like Ghazālī, he was concerned with

[1] Subkī, *Ṭabaqāt al-Shāfiʿīya al-kubrā*, 8:307; Ṣafadī, *al-Wāfī bi'l-wafayāt*, 21:342.
[2] Ibid., 21:340.

the logical structure of Islamic thought and the methods of argumentation that had to be employed in demonstrating that structure and in engaging in effective disputation. Like Ghazālī, he viewed jurisprudence as logically dependent on dialectical theology, from which it drew its starting principles, and regarded all the sciences as forming a system. Of course, Ghazālī, too, was part of a stream that reached back to earlier generations and through people like Āmidī would flow on into the future.

But Āmidī was no mere copy of Ghazālī. For one thing, Āmidī was much more devoted to theological dialectic than was Ghazālī and in fact went much further than Ghazālī was willing to go in treating theological dialectic as a precursor to jurisprudential dialectic. Āmidī in fact stands as unique in the historical development of Muslim thought by his having contributed a monumental treatise to both the field of theology and the field of jurisprudence. Ghazālī valued dialectical theology (*kalām*) but also saw its limitations and dangers. When placed in the wrong hands, it could confuse the simpleminded masses with its tedious and complex arguments, undermining rather than strengthening their faith. Furthermore, it could not, for some people (among whom Ghazālī counted himself), produce knowledge about which one could be absolutely certain. For this one had to turn to mysticism. The certainty of the mystics could be found in unitive experience, not in the dialectical searchings of the intellect. Āmidī, on the other hand, was much more sanguine about dialectical theology, and his *Abkār al-afkār* is by all accounts a milestone in Islamic theological development.

Āmidī's affinity with Ghazālī lies much more in the realm of jurisprudence, and it is significant that, after his dream, Āmidī chose to master Ghazālī's *Mustaṣfā* rather than a theological work such as his *al-Iqtiṣād fī'l-iʿtiqād* or a polemical work such as *Tahāfut al-falāsifa*. Nor was the *Mustaṣfā* the only jurisprudential work of Ghazālī that Āmidī mastered. Ghazālī's compendium of Shāfiʿī law entitled *al-Wasīṭ* also became part of his repertoire of intimately known texts. Apparently, Āmidī felt that he had much more to learn from Ghazālī in the field of law than in theology. Moreover, it is significant that, while Āmidī memorized the Qurʾān and much *ḥadīth*, nowhere in the biographical literature do we find a reference to any legal writings other than the *Mustaṣfā* and the *Wasīṭ* as objects of memorization (*ḥifẓ*) on Āmidī's part, except for a Ḥanbalī compendium he had memorized as a child in Āmid. The dream story is right in capturing Āmidī's especially close affinity with Ghazālī's intellectual persona.

Intellectual Formation and Scholarly Career

We do not know at what point in Āmidī's life the dream occurred, or at what point he pored over the pages of the *Mustaṣfā* and the *Wasīṭ*. If he had not yet familiarized himself deeply with these texts, we may suppose that these events occurred early in his life. Āmidī did of course go through the ordinary process of receiving an education directly from live mentors (in contrast to learning from a book), especially in his formative Baghdad years, as we shall see.

As with many biographies of famous persons who, during the course of their careers, move from place to place, so too in Āmidī's case period and place seem to fall naturally together. Thus we may speak of the Āmid years, the Baghdad years, and so on, resulting in the following periodization:

1. The Āmid years (550–564, or birth to age 14)
2. The Baghdad years (564–592, or ages 14 to 42)
3. The Cairo years (592–612, or ages 42–62)
4. The Hamah years (612–617, or ages 62–67)
5. The Damascus years (617–631, or ages 67–81)

Āmidī spent the first fourteen years of his life in his native town of Āmid (whence his *nisba*) where he grew up a Ḥanbalī. There he received his earliest education, which consisted of Qur'ānic instruction and memorization of a Ḥanbalī manual of *fiqh*.[3] At the age of fourteen, he moved to Baghdad to continue his studies. Retaining for a period of time his Ḥanbalī affiliation, he undertook study of both *ḥadīth* and the art of disputation under Ḥanbalī teachers: Abū al-Fatḥ al-Shātil in *ḥadīth* and Abū al-Fatḥ Naṣr b. Fityān b. al-Mannī (d. 583/1187–8) in disputation. He could not, however, resist the attraction of the leading Shāfiʿī scholar of the day in Baghdad, Abū al-Azīz Yaḥyā b. Abī al-Ḥasan, known as Ibn Faḍlān (d. 595/1199). Joining Ibn Faḍlān's circle of students and becoming a Shāfiʿī, he now was able to study disputation as cultivated within the Shāfiʿī tradition, memorizing the compendium of disputation of Shihāb al-Dīn al-Marāghī, known by the title *al-Sharīf*, as well as the addenda of Asʿad al-Mihanī (d. 523/1128–9). Through the tutelage of Ibn Faḍlān, Āmidī became linked to

[3] Dhahabī, *Taʾrīkh al-Islām*, 46:74.

his model, Ghazālī, by a chain (*silsila*) of scholars (Āmidī → Ibn Faḍlān → ʿAlī b. Muḥammad b. Yaḥyā → Ghazālī). As a fellow in Ibn Faḍlān's circle, Āmidī distinguished himself for his exceptional gifts in the art of disputation, a talent that would evoke both admiration and hostility from others in the years to come.

Āmidī spent almost thirty years in Baghdad (from the ages of fourteen to forty-two). A major part of this period—his adolescence and early manhood—was devoted to education. However, his intellectual interests began to branch out into an area beyond the standard curriculum of the *madrasa*, namely, the area of "first things." Speculative thought in general was not in good standing with the majority of scholars living in Iraq, and Āmidī's growing interest in it led to his marginalization within the scholarly community. The curriculum did include, of course, training in disputation, and while the skills thus acquired were designed for use in dealing with the issues of jurisprudence, they carried over into the science of first things. Two events in particular are indicative of what was going on in Āmidī's life during the later Baghdad years.

One of these was a trip to Aleppo to meet the famed mystical philosopher Shihāb al-Dīn al-Suhrawardī (d. 587/1191), after which, according to our source, he declared that meeting with the great illuminationist mystic was like drinking water from an ocean. Such words of praise for a man who, some years later, would be executed for heresy by order of Ṣalāḥ al-Dīn were bound to arouse suspicion in the minds of those scholars of Baghdad—and there were plenty of them—who were troubled by Suhrawardī's esotericism and mystical radicalism. Added to this was the fact that Āmidī received instruction in "first things" from Christian and Jewish philosophers who resided in the city of Karkh just outside Baghdad.[4] The domain of philosophical speculation was, for many jurists of the time, off limits and could only bring harm to the community. The same city that had witnessed the execution of Ḥallāj four centuries earlier was not a safe place for someone with Āmidī's interests, and he therefore decided to seek his fortune in Egypt.[5]

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[4] Ibn al-Qiftī, *Taʾrīkh al-ḥukamāʾ*, 230–1.

[5] Some sources have Āmidī proceeding from Baghdad to Syria and from Syria to Egypt. However, I follow Ibn Qiftī's account, which says explicitly that in 592 AH Āmidī went *from Iraq to Egypt*. This is not to say that while residing in Baghdad he did not travel to Syria. His meeting with Suhrawardī is one occasion on which he obviously did, and he is likely to have made other trips to Syria. But when he went to Egypt he pulled up stakes in Iraq.

In Cairo, Āmidī was appointed instructor (*muʿīd*) at a *madrasa* located next to the tomb of Shāfiʿī and then, apparently some time later, was appointed to a more prestigious position as lecturer at the Ẓāfirī mosque. By this time Āmidī was widely famed for his exceptional debating skills, and disputation sessions were held frequently, taking on the character of contests. Eventually, however, the troubles Āmidī had experienced in Baghdad re-emerged in Cairo. His invincibility in public debates and his ability to attract large numbers of students aroused envy among his peers, some of whom launched a campaign of vilification against him. Accusing him of false teaching, several of them produced a joint written statement declaring Āmidī's blood to be licit,[6] meaning in effect that he could no longer count upon protection from the state against attempts to kill him. Despite the great productivity of his Cairo years, this unhappy turn of events compelled him once again to flee a country that had been home to him and to seek a domicile elsewhere.

Encouraged by promises of a warm reception, Āmidī made his way to Ḥamāh, where the Ayyubid ruler al-Malik al-Manṣūr placed him in charge of a *madrasa*, paid him a salary and provided other benefits. His five years in Ḥamāh were exceptionally productive as he brought several works to completion, in particular, his mammoth treatise on dialectical theology, *Abkār al-afkār*. Despite these accomplishments, however, Āmidī had a greater fondness for Damascus, and when al-Malik al-Manṣūr died he immediately accepted the invitation of the Ayyubid al-Malik al-Muʿaẓẓam, ruler of Damascus, to go thither and enjoy the benefits that would await him in that city. These benefits included being placed in charge of the ʿAzīzīya *madrasa*. As elsewhere, so too in Damascus people were in awe of his amazing disputational skills, which were demonstrated in debates held regularly on Tuesday and Friday evenings by the north wall of the Damascus Friday mosque.[7]

Āmidī was already sixty-seven years old when he arrived in Damascus in 617 AH. Upon his death in 631 at the age of eighty-one, he still possessed a keen and active mind. The Damascus years were devoted largely to jurisprudential writings, and it was in Damascus that his great opus in *uṣūl al-fiqh, al-Iḥkām fī uṣūl al-aḥkām*, saw the light of day. The last year of his life was not, however, a happy one. In 631 AH, when the Ayyubid al-Malik al-Kāmil took control of Āmid, the ousted ruler communicated

[6] Ibn Khallikān, *Wafayāt al-aʿyān* (Cairo, n.d.), 2:2–3.
[7] Ibn Abī Uṣaybiʿa, *ʿUyūn al-anbāʾ fī ṭabaqāt al-aṭibbāʾ*, 650–1.

secretly with Āmidī, urging him to come to his aid by accepting from him an appointment as judge in his native town. Āmidī refused, but suspicion spread about his collusion with the fallen ruler, and, as a penalty, Āmidī was relieved of his post at the ʿAzīzīya *madrasa*.[8] He died a few months later.

The character profiles of Āmidī found in the biographical sources are all exceedingly positive. Ibn Abī Uṣaybiʿa (d. 668/1270), for example, describes him as "without equal among the virtuous, a master among the *ʿulamāʾ*, the most brilliant of his time, unrivaled in the extent of his knowledge; radiant of form, eloquent of speech, excellent in composition." Ṣafadī adds that he was "good-natured, sound-minded, balanced in his beliefs, little inclined to fanaticism." Both Ṣafadī and Tāj al-Dīn al-Subkī mention a certain Shaykh al-Islām ʿIzz al-Dīn b. ʿAbd al-Salām, a Shāfiʿī scholar some twenty years Āmidī's junior, who came to great prominence in the mid-seventh century AH, looking back on his presence at Āmidī's lecture circle with the comment: "I never heard anyone deliver lectures as well as he."[9] Āmidī's lectures were open to students of all four schools of law, and he is said to have treated all the schools and their masters with the greatest respect.

Āmidī clearly stands in the tradition of writing on the theory and methodology of law (*uṣūl al-fiqh*) that would later become known as the *mutakallim* tradition. As the designation implies, this tradition is predicated upon the connectedness between *kalām* and *uṣūl al-fiqh*, between dialectical theology and dialectical jurisprudence. In this tradition, the two disciplines are connected not only by their substance—in particular, by the dependence of jurisprudence upon postulates supplied by theology—but also by their method, that of dialectic. In none of the monotheistic religions has method been given such sustained attention in the elaboration of the law and theology as in Islam, and Āmidī is one of the greatest Muslim expositors of method of all times, although he must not be confused with ʿAbd al-Wahhāb b. Ḥusayn al-Āmidī (d. 550/1155), who also wrote on disputation (*munāẓara*).

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[8] Ibn al-Qiftī, *Taʾrīkh al-ḥukamāʾ*, 241.
[9] Subkī, *Ṭabaqāt al-Shāfiʿīya al-kubrā*, 8:307.

The *Iḥkām*

When one examines the *Iḥkām*, one soon discovers that the treatise is not written in the manner of a continuous essay. In fact, the treatise is not meant to be read in the sense we usually give to that term. One does not proceed page by page, reading each page from top to bottom. Rather the reader must move his eyes back and forth, flipping back on occasion to a previous page. The true setting of the *Iḥkām* is live debate, and the format of the text is designed to enable the reader to see connections that are important to successful participation in disputation. The text is organized in the manner of most classical Muslim writing, with main sections divided into subsections, and subsections into sub-subsections, as the process continues down through several levels. Eventually, however, we come to rock bottom, so to speak, where we typically encounter the unit of presentation that is most basic to Muslim dialectical writing, the *mas'ala* or "controversy". Āmidī's *masā'il* derive their structure from a paradigm that embraces ten distinct elements:

1. Statement of the issue.
2. Listing of the various positions taken on this issue.
3. Āmidī's statement of the position he deems correct or preferred.
4. Defective arguments for the correct or preferred position.
5. Critiques of the defective arguments.
6. Sound arguments for the correct or preferred position.
7. Objections that have been leveled against the sound arguments.
8. Counter-arguments that have been propounded.
9. Refutations of the objections.
10. Refutations of the counter-arguments.

Only rarely do we find all of these elements in a given *mas'ala*. Not infrequently, Āmidī will not express an opinion of his own on an issue, but will indicate the positions taken by others and the arguments on both sides of the controversy. Positions taken may be those of individuals or of schools or movements or they may be presented as anonymous. The distinction between objections and counter-arguments is important. An objection is an attack on an argument, frequently by showing that the argument leads to an absurdity or impossibility if carried to its logical conclusion. A counter-argument is an independently constructed argument whose conclusion is opposite to that of the argument under attack.

It is usually presented in the belief that it is a stronger argument than the one under attack.

The *Iḥkām* and works like it are obviously tools to be used by a student in honing his own dialectic skills. Just as Āmidī memorized the *Mustaṣfā* and *Wasīṭ* of Ghazālī in order to hone his dialectic skills, so too Āmidī's students were expected to memorize the *Iḥkām* for the same purpose. In committing to memory the arguments of a book such as the *Iḥkām*, a student is placing himself within a stream of argumentation going back several generations. He is learning arguments to support particular positions in the context of disputation. He may, in his encounter with intellectual adversaries, find it necessary to modify arguments whose weakness will come to light in debate. No one in the dialectical community anticipated that any work would be passively transferred through time intact. The development of juristic doctrine was an evolutionary process with "survival of the fittest" (meaning the fittest arguments) as the fundamental reality.

To give the reader a true impression of what the *Iḥkām* is like, one can do no better that translate a *mas'ala* in its entirety. In order to keep within reasonable space limits, I have chosen a *mas'ala* from Āmidī's abridgement of the *Iḥkām*, which bears the title *Muntahā al-ṣūl fī ʿilm al-uṣūl*. Needless to say, the *masā'il* in the abridgement are more concise and thus shorter than their counterparts in the *Iḥkām*. They are also more difficult to read with understanding because of their extreme condensation of what is found in the *Iḥkām*. But my purpose here is more to provide a sample of this kind of writing than to maximize understanding, although I trust that the main thrust of the arguments presented by Āmidī will be clear to the reader.

A feature of this kind of literature that should come into view upon reading the following selection is the practice of lining up objections or counter-arguments, before giving responses or rebuttals. If there are, say, eight objections and five counter-arguments and if one insists upon reading the text in the order of presentation established by Āmidī, one will read objections and counter-arguments one after the other and will most likely, by the time one reaches responses, not remember the objection or counter-argument at which the response is directed. It is important that the objections and counter-arguments be presented in a particular order that constitutes a logical progression. That is, after presenting an objection or counter-argument, the dialectician may say, "But even if we concede (*in sallamnā*) argument A, we still have argument B to consider, and so on."

The longer version of this *mas'ala* contained in the *Iḥkām* includes critiques of ten arguments (five rational and five textual) supporting the position favored by Āmidī that are, from his point of view, defective. These are omitted entirely from the shorter version in the *Muntahā*. As for objections and counter-arguments leveled against the favored position, these are more numerous in the *Iḥkām* version, and, more significantly, they are presented in a far more elaborate way than in the *Muntahā* version. In the translation that follows, I have included three objections and, under the Arabic numeral 4, two counter-arguments numbered with Roman numerals. The omission of the discussion of the defective arguments from the *Muntahā* version should not be taken to mean they are less important than what is included. As a matter of fact, it is only by considering those arguments and Āmidī's criticisms (introduced by the phrase *li-qā'il*^{in} *an yaqūl* ("someone may say") that we can appreciate the rigor of Āmidī's argumentation and the honest acceptance of the inconclusiveness that hovers over the entire dialectical landscape.

We should not assume that dealing with objections is, for Āmidī, a more serious undertaking than dealing with counter-arguments. Objections are direct attacks on the preferred position, and we might be inclined to assume that, if unsuccessful, they would render the preferred position more secure. Every attempt to demolish an objection carries its own vulnerabilities, however, since, in the context of live disputation, one's adversary might advance an unanticipated response that would catch one off guard. That is why Āmidī lines up objections in an order of subordination, with the phrase "even if we concede the foregoing, still . . ." (*sallamnā qawlak . . . lākin . . .*). Furthermore, counter-arguments are supplied after the full number of objections are accounted for only because one might need something to turn to in case one's objections all prove ineffective.

At the stage of the counter-argument, one is attempting, not to destroy the adversary's argument, but rather to deprive the adversary of a monopoly over well-constructed argumentation. If one feels unable to invalidate an adversary's arguments, which would have the effect of eliminating him from the debate, one might at least rob him of the satisfaction of having captured the prize of total victory. The willingness to turn from a true dismantling of the adversary's arguments to leaving those arguments in place while setting up arguments effective enough to demand equal attention was, in Āmidī's world, indicative of an acceptance of inconclusiveness, relativism, and pluralism. The resulting openness and rejection of dogmatism is characteristic of most classical Muslim dialectic.

It should be noted that just as objections and counter-arguments are presented in a logical order—an order of subordination ("this follows from that")—so too a similar logical order sometimes dictates the arrangement of the *masā'il*. The *mas'ala* translated below provides a good example of this. The immediately preceding *mas'ala* and the translated *mas'ala* both deal with the issue of the authority to be given to the *khabar al-wāḥid*, the report, information, statement, or account provided by a single informant. I have to this day not been able to decide on the best English rendering of *khabar*, but here I try something different from all my preceding scholarship relating to this term. I use "information" as a translation of *khabar* in the translation.

The central question of both *masā'il* is whether information about the Prophet Muḥammad—a saying or a deed or both—that is supplied by a single informant may be regarded as authoritative. The question has nothing to do with the authority of the Prophet, which is beyond question. The question is whether information about the Prophet transmitted through a line of single transmitters is authoritative. If so, its authority will of course derive from that of the Prophet. The authority of the information is thus entirely dependent on its authenticity. In contrast to the widespread transmission of information that leaves no doubt about its authenticity, information transmitted, so to speak, single-file across generations is more problematic with respect to the issue of authenticity. The immediately preceding *mas'ala* deals with the question of whether granting authority to such information is repugnant to reason, whereas the translated *mas'ala* proceeds from the assumption that granting authority to such information is not repugnant to reason and focuses on the question of whether—allowing for its theoretical possibility—it can be shown that such information actually does have such authority. We move from the issue of possibility to the issue of actual occurrence.

Translation

Among those who hold that it is possible from the standpoint of reason for a duty to be based [solely] on information (*khabar*) supplied by a single [trustworthy] individual, some such as the Shīʿa, Qashānī, and Ibn Dā'ūd deny that such information [in fact] carries final authority (*ḥujja*) while others consider that it does carry final authority. Among the latter there is agreement that the authority of such information has textual support and disagreement as to whether it also may be supported by rational argument. Aḥmad [b. Ḥanbal], Qaffāl, and Ibn Surayj maintain that it may also be supported by rational argument, while the others deny this. Abū ʿAbd

Allāh al-Baṣrī held that such information carries binding authority only when the information is unambiguous; where there is ambiguity there is no authority.

The view I [viz., Āmidī] favor is that the information supplied by a single [trustworthy] individual is unconditionally authoritative. Those who hold this view marshal many arguments, both rational and textual. These we have presented in the *Iḥkām* and shown to be defective. Here we will confine our attention to the argument of choice, which is that there was among the Companions of the Prophet a consensus to the effect that [the information in question is unconditionally authoritative.] This becomes clear from the following instances:

1. Abū Bakr is reported to have complied, in the matter of the inheritance of the grandmother, with information supplied by al-Mughīra according to which the Prophet allotted her a sixth as her share.
2. ʿUmar is reported to have complied, on the question of whether to exact the poll-tax from captives, with information supplied by ʿAbd al-Raḥmān b. ʿAwf, according to which the Prophet had said, "Deal with them as you deal with the People of the Book."
3. [ʿUmar] also affirmed [a right of a woman] to compensation for a destroyed fetus on the basis of information supplied by Aḥmad b. Mālik.
4. [ʿUmar] also complied, on the question of whether a woman may receive as an inheritance a portion of any blood-money paid for the life of her husband, with information supplied by al-Ḍaḥḥāk b. Sufyān.
5. [ʿUmar] also complied, on the question of whether indemnity is to be paid for the loss of fingers, with information supplied by ʿAmr b. Ḥazm.
6. ʿUthmān and ʿAlī are reported to have complied with information supplied by Furayʿa bt. Mālik in the matter of the waiting-period required before marriage in the case of a woman whose previous husband died in his house.
7. ʿAlī is reported to have said, "When I heard something directly from the Prophet, it was a blessing from God according to His will; if someone else related something to me about the Prophet, I made him take an oath, and when he had taken the oath, I accepted what he said as true."
8. Ibn ʿAbbās is reported to have complied, after having held the view that only a sale involving delayed payment for goods received should be judged usurious, with information supplied by Abū Saʿīd al-Khudrī indicating that the Prophet had pronounced exchanges of unequal monetary value to be usurious.
9. Zayd b. Thābit is reported to have complied with information supplied by a Muslim woman of Medina to the effect that a woman beginning to menstruate should retire promptly without bidding farewell.

Similarly, all the Companions complied with the following statements of Abū Bakr: "The Imams are from the Quraysh," "Prophets are buried where they die," "We are the kinfolk of prophets, not bequeathing what we leave behind as charity." [And they also complied with] information from ʿĀʾisha in regard to the obligation to perform full ablution following the meeting of the two circumcised parts [i.e. intercourse]. [And they complied], in the matter of the sharecropping contract, with information from Rāfiʿ b. Khadīj, and so it goes with many other

instances like the foregoing. This [practice] was widespread and widely known among the Companions without any objection from anyone. And it was the same with the generations after the Companions up to the time when the first dissenters appeared on the scene.

If it is said:

1. Your mentioning of these instances of [compliance with] information provided by single [trustworthy] individuals in order to prove your point presupposes what you are trying to prove, and this is the issue being debated.
2. Moreover, we do not concede that the Companions were complying with the information supplied by [trustworthy] individuals, since it is possible that in the instances you mention the Companions were complying with the requirements of textual evidence that happened to agree with the information of the single [trustworthy] individuals.
3. Even if we concede that the Companions were complying with the information you mention, still some did so, not all. Moreover, your claim that no one objected [to what these Companions were doing] is not valid, as is proven by the fact that Abū Bakr rejected the information of al-Mughīra concerning the inheritance of grandmothers until the information of Muḥammad b. Maslama was conjoined with it, and ʿAlī rejected the information of Abū Sinān al-Ashjaʿī concerning the woman married without a dowry, and ʿĀʾisha rejected the information of Ibn ʿUmar concerning the tormenting of a deceased person through the wailing of his family for him. But even if it be true that none of the Companions objected to the practice of complying with the information of single [trustworthy] individuals, still we cannot assume from this that there was a consensus, for reasons given in the section on consensus.
4. But assuming that the arguments you have presented so far are indeed valid as arguments for regarding information provided by a single [trustworthy] person as carrying binding authority, still those arguments may be countered by arguments that are equally valid but as proof of the opposing point of view. [These arguments include the following]:

    I. Compliance with information supplied by a single [trustworthy] individual amounts in the final analysis to non-compliance, for no such information can rule out the existence of other information of the same type [viz., information supplied by a single trustworthy individual] that contradicts it.
    II. Compliance with information supplied by a single [trustworthy] individual is tantamount to deferential submission to the authority of the person supplying the information; but deferential submission is not permissible for *mujtahids*.

Responses:

1. To the first objection: The information of the sort that we have been discussing is beyond measure. Thus even though they are supplied by individuals, they

are not less than the number required for widespread transmission, much like the information we have concerning the generosity of Ḥātim and the courage of ʿAnṭara.

2. To the second objection: It is not possible that they were complying with information other than that which we have related, since it is not in the nature of large groups as created by God to comply with information given to them and not to give an account of where they received this information. Moreover, in most cases they were explicit about their complying with the transmitted information; for example, ʿUmar said, "If I had not heard this, I would have judged otherwise." And Ibn ʿUmar said regarding share-cropping, ["We thought our sharecropping to be alright,"] until Rāfiʿ b. Khadīj related to us that the Prophet forbade it.
3. To the third objection: In a previous section [of this book] we have explained how silence is indicative of agreement. Those among them who rejected what they did attributed their rejection to the fact that the narrative did not reveal the truth of what he was narrating
4. To the counter-arguments:

    I. If we take the first argument seriously, then we can never adhere to the literal meaning of the Qurʾān or *Sunna*, since there is always the possibility of abrogation or restriction of meaning; nor can a judge ever render a decision on the basis of the word of witnesses, or a layman accept the opinion of a *muftī*, since there will always be the possibility that something will contradict it. But these consequences are contrary to what is agreed upon.
    II. A *mujtahid* and a supplier of information are not equals, not experts in the same field. Therefore the *mujtahid* must accept the information of the informant.
    [End of Translation]

Āmidī ends the *Iḥkām* version of the *masʾala* with the following remark: "The one who believes that this issue is of the kind that must be resolved with absolute certainty [if it is to be resolved at all] will find himself in a quandary, unable to make up his mind in favor of either an affirmative or a negative position. As for the one who considers the issue to be of the kind that admits of resolution based on opinion, let him utilize what he wants of the arguments mentioned above. God knows which resolution is right."

Āmidī makes it clear that he belongs to the second group. His arena of controversy is one in which absolute certainty is rare, conclusions are seldom final, and every argument is examined with rigorous scrutiny. It is an arena of freedom of choice, of acceptance of diversity, and of openness to divine mercy and grace.

CHAPTER SIXTEEN

ABŪ ISḤĀQ AL-SHĀṬIBĪ (D. 790/1388)

Muhammad Khalid Masud

Abū Isḥāq al-Shāṭibī, an 8th/14th century Muslim jurist who lived in Granada, has had an immense influence on modernist as well as revivalist Muslim legal thinkers of the last two centuries. Most Muslim thinkers regard his doctrine relating to the objectives of law (*maqāṣid al-sharīʿa*)[1] as a philosophy of Islamic law and his analysis of religious innovation (*bidʿa*) as a theory of Islamic normativity relevant to modern Islamic thought. In this essay I explore al-Shāṭibī's intellectual formation, analyze his legal reasoning, and translate a section of his *al-Iʿtiṣām* on the definition of *bidʿa.*

Early Life

Little information is available about al-Shāṭibī's family or early life.[2] His name, Abū Isḥāq Ibrāhīm b. Mūsā b. Muḥammad al-Lakhmī al-Shāṭibī, indicates that he belonged to the Arab tribe of Lakhm. He was most probably born in Granada, where he spent all his life. The *nisba* al-Shāṭibī caused some scholars to claim that he was born in Shāṭiba (Xativa or Jativa).[3] But this is not possible because the last Muslims were driven out of Shāṭiba in 1247.[4]

Al-Shāṭibī's date of birth is not known. Abū'l-Ajfān, who edited several of al-Shāṭibī's works, suggested that he was born before 720/1320, explaining that one of al-Shāṭibī's teachers, Abū Jaʿfar Aḥmad b. al-Zayyāt, died in 728/1327. Al-Shāṭibī must have been at least eight years old in 1327 if

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[1] For a detailed analysis of al-Shāṭibī's doctrine of *maqāṣid al-sharīʿa*, see Muhammad Khalid Masud, *Shāṭibī's Philosophy of Islamic Law*.

[2] On the sources for al-Shāṭibī's life, see Masud, *Shāṭibī's Philosophy of Islamic Law*, 82; al-Shāṭibī, *al-Ifādāt wa'l-Inshādāt*; and Abū ʿAbd Allāh al-Mujārī, *Barnāmaj*.

[3] See e.g., I. Goldziher, *Streitschrift des Ġazālī gegen die Bātinijja-Sekte*, 32; Brockelmann, *Supp.* II, 374; Asin Palacios, "Un précurseur hispanomusulmán de San Juan de la Cruz," 7–79. [French trans. By M.L. de Celigny. "Un précurseur Hispano-Musulman de San Juan de la Cruz," *Études Carmelitaines*, 1932, 121–2; English trans. By Douglas and Yoder, *Saint John of the Cross and Islam*]. See P. Nwyia, *Ibn ʿAbbad de Ronda*, 173, n.2.

[4] *EI*[1], s.v. "Shāṭiba."

he was al-Zayyāt's disciple. Abū'l-Ajfān concluded that al-Shāṭibī was probably born in 719/1319 or 720/1320.[5] Al-Shāṭibī died on 8 Shaʿbān 790/1388 in Granada.[6]

The kingdom of the Banū Aḥmar or Naṣrids, the last Muslim kings in al-Andalus, was confined to the city of Granada. During this period the entire region experienced tremendous political turmoil. Christians from the north of al-Andalus had been pushing Muslims to the south. Demographic pressure, decreasing cultivable land and the depletion of economic resources impacted negatively on the prosperity of the kingdom.

Al-Shāṭibī lived through the eventful reigns of the Nasrid kings Abū ʿAbd Allāh Muḥammad IV (r. 725–33/1325–33), Abū'l-Ḥajjāj Yūsuf I (r. 733–55/1333–54), and Muḥammad V al-Ghanī Bi'llāh (r. 755–60/1354–59 and 763–93/1362–91). These kings were great patrons of art, architecture and sciences. The Nasrids introduced several economic and social changes in the kingdom. Granada attracted a large number of scholars, artists, poets and statesmen from the Maghrib, where Muslim kingdoms were politically and economically unstable. The city gained a reputation as a great center of Islamic culture and learning.

The Madrasa Naṣriyya, built by Abū'l-Ḥajjāj Yūsuf, and the Alhambra, built by Sulṭān Muḥammad V al-Ghanī Bi'llāh, continue to invoke the glory of the Nasrid kings. The Madrasa Naṣriyya was a bold departure from the Mālikī tradition of learning in al-Andalus, where, previously, students went to mosques or to the residences of teachers to receive instruction. Mālikīs, particularly in al-Andalus, had long resisted the introduction of the *madrasa* system, in which teachers taught students in the *madrasa* itself. Al-Shāṭibī studied in the Madrasa Naṣriyya as well as with individual teachers at their residences.

Education

The biographical literature gives us a fair idea about the broad scope of al-Shāṭibī's education.[7] The sources mention that al-Shāṭibī studied the Qur'ān, Arabic language, literature, grammar, semantics (*ʿilm al-maʿānī*)

[5] Abu'l Ajfān, *Fatāwā al-Imām al-Shāṭibī*, 32.

[6] Aḥmad Bābā, *Nayl al-ibtihāj*, 49. This date is mentioned in a poem composed by one of al-Shāṭibī's disciples at the end of his abridgement of al-Shāṭibī's *al-Muwāfaqāt* entitled *Nayl al-munā*: "Until his life came to an end in the year ninety of seven hundred [790]." See Abu'l-Ajfān, *Fatāwā*, 48.

[7] Aḥmad Bābā, *Nayl*, 47.

and rhetoric with ʿAbd Allāh Muḥammad b. ʿAlī al-Fakhkhār al-Ilbīrī (d. 754/1353),[8] Abū'l-Qāsim al-Sharīf al-Sabtī (d. 760/1358), Abū ʿAbd Allāh al-Tilimsānī (d. 771/1369) and Abū ʿAbd Allāh al-Maqqarī al-Jadd (d. 759/1357). Al-Ilbīrī was known as 'the master of grammarians' (*shaykh al-nuḥāt*) in al-Andalus. Al-Sabtī, author of a well-known commentary on Ibn Ḥāzim al-Qarṭājinī's *Maqṣūra*,[9] was known as "the bearer of the standard of rhetoric."[10] Al-Maqqarī held the rank of *muḥaqqiq* or expert on the application of general principles of the [Mālikī] school to particular cases.[11]

Al-Shāṭibī undertook training in law (*fiqh*) and jurisprudence (*uṣūl al-fiqh*) with Abū Saʿīd b. Lubb (d. 1380) and Ibn Marzūq al-Jadd (d. 1379); both lectured in the Great Mosque of Granada as well as in the Madrasa Naṣriyya. Ibn Lubb was a recognized authority in *futyā* with the "rank of *ikhtiyār*" or authority on conflicting opinions.[12] In addition to the traditional Islamic sciences, al-Shāṭibī studied philosophy with Abū ʿAlī Manṣūr al-Zawāwī (alive in 1368) and medicine with Abū ʿAbd Allāh al-Shaqūrī.

Additional information about al-Shāṭibī's education is available in Abū ʿAbd Allāh al-Mujārī's *Barnāmaj* and al-Shāṭibī's *al-Ifādāt wa'l-Inshādāt.*[13] Al-Mujārī, who was al-Shāṭibī's disciple, gives a list of his teachers and the books that they taught. The *Barnāmaj* also provides valuable information about the learning environment in those days. For instance, al-Mujārī mentions the custom of studying a book with those teachers whose chain of learning went back to the author of that particular book.

Al-Shāṭibī's diary, *al-Ifādāt*, covering a period between 1355 and 1359, contains notes about his teachers, their lectures, advice, anecdotes and discussions between teachers and students.[14] Al-Shāṭibī frequently noted

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[8] Al-Maqqarī, *Nafḥ al-ṭīb*, 7:275; and Makhlūf, *Shajarat al-nūr al-zakiyya* (Cairo, 1930–33), 1:228.

[9] ʿUmar Riḍā Kaḥḥāla, *Muʿjam al-muʾallifīn*, 8:252.

[10] Makhlūf, *Shajara* (Cairo, 1930–33), 1:233.

[11] Ibid., 1:232.

[12] Ibid., 1:230.

[13] *Barnāmaj* is a genre of literature in which a scholar lists his teachers and the books that he studied with them. See *EI*[2], s.v. "Fahrasa."

[14] In this diary, al-Shāṭibī mentions the following teachers and the subjects that he studied with them: Abū Bakr Muḥammad b. ʿUmar al-Qurayshī al-Hāshimī (*adab* or Arabic literature), Abū'l Qāsim b. al-Bannā (*Ḥadīth* and Ibn al-Bannā's *Talkhīṣ*), Abū Muḥammad b. al-Naẓīr (*Taṣawwuf*), Abū ʿAbd Allāh Muḥammad b. Ibrāhīm al-Khūlānī al-Sharīsī (*fiqh*), Abū Jaʿfar Aḥmad b. Riḍwān b. ʿAbd al-ʿAẓīm (*fiqh*, literature), Abū ʿAbd Allāh Muḥammad b. al-Bāqī (*fiqh*), Abū Jaʿfar Aḥmad b. al-Rāwiya (d. 763/1361, *fiqh*), Abū ʿAbd Allāh Muḥammad al-ʿAbdarī (d. 756/1355, grammar), Abū'l Ḥajjāj Yūsuf b. ʿAlī al-Ṣadūrī al-Miknāsī (d. 781/1379, *fiqh*), Abū'l Baqā Khālid b. ʿĪsā al-Balāwī (*fiqh*, history), Abū ʿAbd

down in his diary verses of Arabic poetry, mentioning the exact date and occasion on which he heard them. Most of these notes pertain to the rules of Arabic grammar and poetry and to the meaning of Qurʾānic verses.

The following two incidents illustrate al-Shāṭibī's formation as a jurist. One day, Abū Saʿīd b. Lubb was lecturing on Ibn Mālik's commentary on *Tashīl al-fawā'id.* According to Ibn Mālik, a speaker may use the demonstrative pronoun indicating distance (*tilka*, 'that') to refer to a thing that is in fact close to the speaker. Ibn Mālik cites as example Qurʾān 20:17: "And what is that (*tilka*) in your right hand, O Moses?" Ibn Lubb asked al-Shāṭibī to explain the use of the pronoun 'that' to refer to Moses' staff when he was in the presence of God. Al-Shāṭibī recalls that he had no answer. Ibn Lubb then explained that if God had used 'this' (*dhālika*) instead of 'that' (*tilka*) the implication would be that God was close in space to Moses and to the object to which he was pointing, i.e., the staff. Clearly, one may not attribute space and direction to God. Hence, the Qurʾān uses the pronoun 'that' instead of 'this' to express the Greatness of God.[15]

The second incident took place in 1353, when Ibn Lubb began lecturing at the Madrasa Naṣriyya in Granada.[16] One day, al-Shāṭibī and other students were discussing *fatwā* writing with Ibn Lubb. As they were walking with Ibn Lubb to the gate of the Madrasa Naṣriyya, he invited them to come inside—probably to his house—so that he could explain to them his practice in issuing *fatwā*s. He said, "I want you to note a rule in *fatwā* issuing. It is extremely useful and is known as a practice of the scholars. [The rule] is that a *muftī* who issues a *fatwā* does not ask about the facts of the case from the person who requests the *fatwā*. Al-Shāṭibī notes that on that very day Ibn Lubb had issued a *fatwā* about an oath in which he had taken a lenient view. Earlier that morning, the students had questioned his view on the ground that it was contrary to the rules found in *al-Nihāya* and *Aḥkām Ibn al-Faras*, both famous texts. Ibn Lubb's explanation clarified most of the points that had been troubling al-Shāṭibī.[17] Although al-Shāṭibī had great respect for Ibn Lubb, he nevertheless came to differ

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Allāh al-Shaqūrī (medicine and *fiqh, Qawānīn Ibn Abī al-Rabīʿ, Talkhīṣ Ibn al-Bannā', Farā'iḍ al-talqīn* and *al-Mudawwana al-Kubrā*) and Abū'l Ḥasan ʿAlī al-Kuḥaylī, who taught him Ibn al-Yāsimīn's (d. 601/1204) *Arjūza fi'l jabr wa'l-muqābala* (algebra). Al-Shāṭibī, *al-Ifādāt*, 160.

15 Ibid., 93.

16 Aḥmad Bābā, *Nayl*, 219.

17 Al-Shāṭibī, *al-Ifādāt*, 153.

with his teacher on several issues later in life; he would also question this lenient approach to issuing *fatwās* (see below).

Another teacher who contributed to al-Shāṭibī's formation as a jurist was Abū ʿAbd Allāh al-Maqqarī al-Jadd, whose diverse academic tastes, which included history, Arabic language, jurisprudence, theology and Sufism, helped to broaden al-Shāṭibī's view of law. Mālikī jurists in al-Andalus were opposed to both Sufism and philosophy. Al-Ghazālī (d. 505/1111) and Fakhr al-Dīn al-Rāzī (d. 606/1209), two outstanding Shāfiʿī scholars who adopted philosophical methods in theology and jurisprudence, were not popular in this region. Al-Maqqarī, who was keenly interested in these subjects, wrote an abridgement of al-Rāzī's *al-Muḥaṣṣal*,[18] and a commentary on the *Mukhtaṣar* of Ibn Ḥājib (d. 647/1249), a widely used text on jurisprudence. Ibn Ḥājib, an influential Mālikī jurist, introduced Shāfiʿī principles of jurisprudence into Mālikī thought and helped to make al-Rāzī popular among the Mālikīs. Al-Maqqarī brought this influence to Granada, where philosophy was still unpopular, and he introduced al-Shāṭibī to these debates. Al-Maqqarī's teaching on Ṣūfī thought and practice helped al-Shāṭibī to distinguish between legal and moral concepts of obligation (see below).

Al-Shāṭibī also studied theology and philosophy with Abū ʿAlī Manṣūr al-Zawāwī[19] and al-Sharīf al-Tilimsānī (d. 771/1369), who introduced him to a critical study of Fakhr al-Dīn al-Rāzī's works on theology and jurisprudence. Al-Zawāwī (alive in 770/1368) had frequent disputations with Granada's jurists during his stay in this city from 753/1352 to 765/1363.[20] Although al-Shāṭibī had reservations about philosophers, he used philosophical methods of disputation for investigation in jurisprudence. He frequently engaged his contemporary scholars in disputations on law, philosophy, Ṣūfī practices and pedagogy. Al-Shāṭibī mastered both the traditional and the rational sciences, but he was mainly interested in the Arabic language and jurisprudence, particularly the latter.

In *al-Iʿtiṣām*, al-Shāṭibī mentions that he developed an interest in jurisprudence early in his life.

> Ever since I became intellectually curious about the nature of things and my appetite for knowledge increased, I began looking into its [viz., the Sharīʿa's]

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18 Al-Maqqarī, *Nafḥ*, 7:206.

19 According to Aḥmad Bābā, *Nayl*, 245, 346, and Makhlūf, *Shajara* (Cairo, 1930–33), 1:234, Zawāwī was alive in the year 770/1368. His date of death is not known.

20 Aḥmad Bābā, *Nayl*, 346.

> reasoning and the basis of its validity, its roots and its branches . . . I started with the principles of religion (*uṣūl al-dīn*) in theory and in practice and the substantive laws based on these principles. [It was] during this period [that] I developed a clear idea of what is innovation (*bidʿa*) and what is lawful and what is not.[21]

Al-Shāṭibī lived during a period of intense debates and disputes among the jurists of Granada. These disputes were sometimes fatal. For instance when Ibn al-Khaṭīb (d. 777/1375), the *wazīr* of Sulṭān Muḥammad V, came into conflict with contemporary jurists, al-Nubāhī, the chief qāḍī of Granada, charged him with heresy and put him in prison, where he was strangled to death. The chief qāḍī of Fez charged al-Maqqarī with treason and sentenced him to death. The jurists of Granada expelled al-Zawāwī from the city in 1363 because of his criticism of other jurists.

Al-Shāṭibī's disputes with fellow jurists ended in his being accused of unjustified religious innovation (*bidʿa*). In *al-Iʿtiṣām*, al-Shāṭibī recounts the story of his ordeal:

> I had entered into the common professions of preaching (*khiṭāba*) and leading the prayers (*imāma*). When I decided to correct myself, I found myself a stranger, alone among my contemporaries. The original tradition (*Sunna*) was stained and hidden beneath the rust of customs and practices . . .[22] I vacillated between two positions: (1) If I followed the *Sunna* in opposition to common practices, I inevitably would be declared an opponent of the accepted [social] practice, especially by those who uphold these practices and regard them as the *Sunna* . . . (2) If I followed the common practices I would deviate [from the true path] and would defy the *Sunna* and the pious ancients . . . I resolved that I would rather perish while following the *Sunna* and seeking salvation [than survive as an opponent of the *Sunna*]. Gradually, I started living as I had resolved. Soon havoc fell upon me; accusations were hurled at me . . . I was blamed for introducing innovation and heresy.[23]

Al-Shāṭibī began to examine the doctrines and contemporary religious practices of the jurists and Sufis of Granada. When he disputed the authenticity of some practices, his former teacher Ibn Lubb and his disciples accused al-Shāṭibī of innovations and had him removed from the position as *imām* in a local mosque.[24]

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[21] Al-Shāṭibī, *al-Iʿtiṣām*, 1:9.
[22] Ibid., 9f.
[23] Ibid., 11.
[24] In a letter to his friend, al-Shāṭibī implies that it was common to be dismissed from the office of *imām* or *khaṭīb* of a mosque after one had opposed *bidʿa* practices. See al-Wansharīsī, *al-Miʿyār*, 11:109.

Examination of these doctrines and practices led al-Shāṭibī to write treatises on these subjects. In his main work, *al-Muwāfaqāt*, he presented an innovative approach to Islamic legal theory.[25] He explored the concept and doctrines of religious innovation (*bidʿa*) in his *al-Iʿtiṣām*.[26] He also wrote on Arabic grammar and *ḥadīth*. In 1987, Abū'l-Ajfān collected and published al-Shāṭibī's *Fatāwā*.[27] Four of his seven works mentioned by the biographers are still unpublished.[28]

Al-Shāṭibī had several disciples who continued his critical approach to Islamic jurisprudence. The most noteworthy among his disciples was Abū Bakr Muḥammad b. ʿĀṣim (d. 830/1426), the chief qāḍī of Granada, widely known for his *Tuḥfat al-ḥukkām*, a compendium of rules for *qāḍī*s.[29] Ibn ʿĀṣim also wrote *Nayl al-munā*, an abridgement of al-Shāṭibī's *al-Muwāfaqāt.* His other disciples included Abū Yaḥyā Muḥammad b. ʿĀṣim (d. 814/1411), Abū ʿAbd Allāh Muḥammad al-Bayānī, Abū Jaʿfar Aḥmad al-Qaṣṣār, and Abū ʿAbd Allāh Muḥammad b. Muḥammad b. ʿAlī al-Mujārī (d. 863/1458), the author of *al-Barnāmaj* (see above).

Legal Reasoning

To better understand al-Shāṭibī's legal reasoning I shall discuss a few of his *fatwā*s. A Granadan Sulṭān, probably Muḥammad V al-Ghanī Bi'llāh, imposed a tax to collect revenues for building a security wall around the city. Ibn Lubb, the chief *muftī*, ruled that this tax was not in conformity with the *Sharīʿa*. Al-Shāṭibī responded by issuing a *fatwā* justifying this tax on the grounds of public interest (*maṣlaḥa*),[30] a basic principle in legal reasoning.

In al-Shāṭibī's *fatwā*s, the principle of public interest is a core concept in his efforts to find legal solutions to the problem of declining economic resources in Granada, where scarcity of land forced people to cultivate crops on rooftops. As their economy declined, Andalusians were forced to use new modes of agriculture and trade. We find references to debates on the new agricultural and commercial transactions among the jurists of

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[25] Al-Shāṭibī, *al-Muwāfaqāt fi uṣūl al-Sharīʿa*.
[26] Ed. Muḥammad Rashīd Riḍā.
[27] Abū'l-Ajfān (ed.), *Fatāwā al-Imām al-Shāṭibī*.
[28] For details see Masud, *Shāṭibī's Philosophy of Islamic Law*, 77–82.
[29] Léon Bercher (ed., transl., and commentator), *Ibn ʿAsim al-Maliki al-Gharnati, Al-ʿAçimiyya ou Tuḥfat al-ḥukkām fi nukat al-ʿuqoud wa'l aḥkām*, Introduction, iii.
[30] Aḥmad Bābā, *Nayl*, 49.

this period. In one case, several persons owned one olive tree. Al-Shāṭibī and other jurists were asked how to divide the produce of the olive tree among the partners. In another case, several persons pooled milk to make cheese, and al-Shāṭibī was asked how to divide the income from the cheese. In a third case, the question was how to divide the produce of silk when several persons participated in collecting enough mulberry leaves to feed the silkworms. While most jurists discouraged these modes of production as doubtful and risky, al-Shāṭibī allowed them as joint contracts of production and distributed the produce in proportion to the shares of the partners in the enterprise. These examples point to the introduction of new modes of production into this failing economy.

Al-Shāṭibī's *fatwā*s illustrate the impact of economic change. The new commercial transactions and partnership arrangements demanded adjustments to the existing legal instruments of contract. Most jurists took a conservative view and adhered to conventional Mālikī doctrines, sometimes called *al-madhhab al-mashhūr* (the widely known doctrine).[31] However, early in his career as a jurist al-Shāṭibī realized that Mālikī law was failing to meet the challenges posed by social change and political and economic problems. In his view, this failure was caused by inadequate methods for deriving new legal rules.

The weakness of legal methodology, al-Shāṭibī observed, lies in disregard for the objectives of the *Sharīʿa.* Influenced by Ashʿarism and Shāfiʿism, the dominant juridical theology denied the rationality of Divine commands. Mālikī jurisprudence, like that of the other schools, operated exclusively within the limits of the textual sources of the school. Consequently, reasoning by analogy (*qiyās*) and consensus (*ijmāʿ*), two methods of deriving and authenticating laws, became sources of law that were as authoritative as the Qurʾān and *Sunna*. In his *al-Muwāfaqāt*, al-Shāṭibī focused on the Qurʾān and *Sunna* as sources of law, to the exclusion of analogy and consensus. The principle of *maṣlaḥa* or human welfare lies at the core of al-Shāṭibī's doctrine of *maqāṣid al-sharīʿa* or the objectives of the law.

Maqāṣid al-sharīʿa: The Objectives of the Law

Jurists employ deductive and analogical methods of legal reasoning to discover new legal rules. Al-Shāṭibī criticized this method as arbitrary,

[31] For a critical analysis of this term in the Mālikī school, see Hallaq, *Authority*, 146–52.

because it is the jurist who selects a verse from the Qur'ān or a *ḥadīth* which, in his view, applies to the issue in question. Instead, al-Shāṭibī proposed the inductive method, which involves studying all of the relevant Qur'ānic verses and *ḥadīth* texts in order to develop a general and universal principle. He concluded that *Sharīʿa* law is based on the principle of *maṣlaḥa* or human welfare.

The doctrine of *maqāṣid al-sharīʿa*, as developed by al-Shāṭibī, explores the overall intent of the Lawgiver in the text, unlike analogical reasoning, which seeks the specific reason or cause (*ʿilla*) of an injunction in a particular text. Al-Shāṭibī analyzes the intent of the Lawgiver from the following five perspectives:

1. The primary purpose of law: the Lawgiver institutes the Law to ensure human welfare (*maṣlaḥa*).
2. Reasonability: The Lawgiver uses simple and plain language to communicate the Law so that the average person will understand it.
3. Human capacity: The Lawgiver does not impose an obligation that is impossible to perform; legal obligation does not create hardship.
4. Self-interest: The Lawgiver recognizes personal desire and self-interest.
5. Obedience: humans obey the Law because there is no conflict between the Lawgiver's intent and human interest.

Al-Shāṭibī defines *maṣlaḥa* as "that which relates to what sustains human life, the accomplishment of livelihood, and the acquisition of emotional and intellectual requirements."[32] These three aspects of *maṣlaḥa* may be presented as three concentric circles. The inner circle comprises five basic human interests (*maṣāliḥ*): religion, life, family, property and reason. Protection of these basic necessities (*ḍarūrāt*) is universally recognized among all nations, al-Shāṭibī claims.[33] The second circle comprises those laws and practices that are not directly prescribed by the law, but are assimilated into the *Sharīʿa* for the sake of public convenience. They are necessary (*ḥājiyāt*) for the protection of the first circle of interests. He gives the example of the practice of *qirāḍ* or silent partnership, also known as *muḍāraba*, which has its origins in the pre-Islamic trade practice of Mecca. The Meccans deposited cash and goods with traders who traveled throughout Arabia and Syria. On their return they shared the

[32] Al-Shāṭibī, *al-Muwāfaqāt*, 2:25.
[33] Ibid., 2:10.

profit with the depositors. Strictly speaking *Sharīʿa* does not allow such transactions because they involve risk, uncertainty and speculation.[34] The third and outermost circle comprises laws informed by finer elements of social practice, such as modesty, cleanliness and other cultural practices adopted by *Sharīʿa* because these practices tell us about what reasonability means within a society and what its cultural preferences (*taḥsīnīyāt*) are. Al-Shāṭibī explains that to go out in public without covering one's head is regarded as an offence in the East, while covering one's head is not considered a virtue in the West.[35]

In developing his doctrine of the objectives of the law, al-Shāṭibī benefited from the discussions of earlier jurists. It is important to note that he was not the first to speak about *maṣlaḥa* but he did systematize the concept. The understanding of *maqāṣid* as the protection of five basic human interests (see above) and the delineation of its three levels (*ḍarūrāt, ḥājīyāt* and *taḥsīnīyāt*, see above) had been developed previously by al-Ghazālī. *Maṣlaḥa*, according to al-Ghazālī, is of three types: approved by textual evidence; rejected by textual evidence; and neither clearly supported nor rejected by textual evidence. The first two categories posed no problem. The third category, usually known as *al-maṣlaḥa al-mursala*, was rejected by al-Ghazālī as seeking pleasure. He therefore limited the application of *al-maṣlaḥa al-mursala* to circumstances in which its application was inevitable, definitive (not conjectural or hypothetical) and universal (not limited to one case).[36]

Al-Shāṭibī divides *Sharīʿa* laws into two categories: (1) *ʿIbādāt* or ritual obligations, which protect religious interests, are beyond the comprehension of human reason because their goodness cannot be assessed by human experience; and (2) *ʿādāt*, or all other laws, which are accessible to human reason and experience.

Al-Shāṭibī explains that human welfare does not exist in a pure and absolute form. It is always relative, i.e., mixed with discomfort, hardship or other painful aspects of life. The world is created from a combination of opposites. Al-Shāṭibī takes a pragmatic view according to which it is human experience that defines what is mostly good and mostly evil for humans. He explains that the social practices (*ʿādāt*) of a society define the idea and scope of good and evil, and that *Sharīʿa* endorses them in

[34] Ibid., 2:12.
[35] Ibid., 2:284.
[36] Masud, *Shāṭibī's Philosophy of Islamic Law*, 139–42.

pure and absolute form. *Sharīʿa* modifies and reforms only those ideas and practices that are unjust.[37]

Al-Shāṭibī argues that Sufi influence on Islamic law obscured basic legal concepts like obligation, capacity, and intention.[38] The Sufis introduced extreme views of morality and piety, which blur juristic distinctions between legal and moral obligations. Legal obligation, on the other hand, is defined in terms of the physical capacity and limits of an average person.

Sufi moral obligation demands performance on a level that is virtually impossible for an ordinary human being to attain. For example, *sirr* is a Sufi term for the inner self, distinct from soul, heart and spirit, and close to the general conception of mind. "*Tafrīgh al-sirr*" means to empty one's mind of worldly thoughts during worship, particularly in case of the five obligatory prayers. Under Sufi influence some jurists made it obligatory for a person to free himself from everything that distracts the mind during prayer. "If something distracts the mind during his prayers, even for a moment, he must free his inner self (*sirr*) from this distraction by eliminating that thing, even if the distractions number as many as 50,000."[39]

Al-Shāṭibī clarified his view of religious obligation in debates on this and other issues with the jurists al-Qabbāb[40] (d. 779/1377) and Ibn Khaldūn (d. 784/1382),[41] and with Sufis like Ibn ʿAbbād of Ronda (d. 792/1389).[42] Al-Shāṭibī argued that it is absurd to demand *tafrīgh al-sirr* because it requires people to get rid of their property and abandon their towns, villages and families, all of which cause distraction. An ordinary person is always preoccupied with the worries of supporting a large family.[43]

Al-Shāṭibī regarded Sufi demands as an expression of love for ostentation and religious authority. Distinguishing between religious and legal obligations, he also questioned religious obligations that establish the religious authority of a person other than the Prophet. He defined such obligations as religious innovations. For example, he refuted the practice

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[37] Ibid., 2:307.

[38] For a detailed analysis of al-Shāṭibī's discussions of these concepts, see Masud, *Shāṭibī's Philosophy of Islamic Law*, chapters 7, 8, and 9.

[39] Al-Shāṭibī, *al-Muwāfaqāt*, 1:102.

[40] See note 42.

[41] Ibn Khaldun, *Shifāʾ al-sāʾil li-tahdhīb al-masāʾil*.

[42] Al-Shāṭibī's correspondence with al-Qabbāb and Ibn ʿAbbād is reproduced in P. Nwyia (ed.), *Ar-Rasāʾil as-ṣughrā*, 106–15, and Appendix C, 125–38, and in P. Nwyia, *Ibn ʿAbbād de Ronda*, 209–13. The correspondence between Ibn Khaldūn and al-Shāṭibī is reproduced in Ibn Khaldūn, *Shifāʾ*.

[43] Al-Shāṭibī, *al-Muwāfaqāt*, 1:103.

of collective invocations after canonical regular prayers because they establish the leadership and authority of the prayer leader as a mediator between man and God. I will discuss examples of such practices in the next section.

Bidʿa

Let me now illustrate al-Shāṭibī's method of legal reasoning by examining how he defines and analyzes the concept of religious innovation.

Al-Shāṭibī wrote *al-Iʿtiṣām* to analyze the concept of *bidʿa*. The text contains ten chapters that address the following aspects of *bidʿa*: definition; an analysis of the arguments for and against *bidʿa*; its various types; regulations; distinction between *bidʿa* and similar concepts; *bidʿa* and heresy; and the identification of the right path.

Al-Iʿtiṣām was published in 1915 by Rashīd Riḍā as part of his effort to support modern trends in Egyptian Islamic thought for the revival of *Sunna* and pure Islam.[44] Riḍā himself was opposed to *bidʿa*, and he was largely responsible for presenting al-Shāṭibī as a crusader against *bidʿa*.[45] Writers like ʿAbd al-Mutaʿāl al-Ṣaʿīdī followed Riḍā by presenting al-Shāṭibī as a revivalist reformer.[46] I. Goldziher[47] and D.S. Margoliouth[48] also read *al-Iʿtiṣām* as a work written by a champion against *bidʿa*.

The image of al-Shāṭibī as an opponent of *bidʿa*, in the contemporary Salafī understanding of the term, is incorrect. Indeed, al-Shāṭibī himself was accused of introducing innovative ideas into *Sharīʿa*, and he wrote *al-Iʿtiṣām* to defend himself against these accusations. Let me recount these accusations.

Al-Shāṭibī refers to his being accused of introducing innovations in a poem in which he describes how he felt about these accusations:

> O my people! You put me to the ordeal (*balayta*)
> An ordeal that shakes violently
> It whirls the accused until it seems to destroy him
> [You condemn me] for forbidding wrong, rather than

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[44] In 1913 Riḍā published some extracts of *al-Iʿtiṣām* in his journal *al-Manār*. Although the manuscript was incomplete, the book was edited and published by Riḍā in 1913–14.

[45] Riḍā emphasized the theme of *bidʿa* in his biography of Muḥammad ʿAbduh. See Rashīd Riḍā, *Taʾrīkh al-ustādh al-imām al-shaykh Muḥammad ʿAbduh*.

[46] Al-Ṣaʿīdī, *al-Mujaddidūn fīʾl-Islām* (Cairo, 1931), 294–6.

[47] Goldziher, *Streitschrift*, 32–4.

[48] D.S. Margoliouth, "Recent Arabic Literature," *Jewish Quarterly Review* 16:3 (1916), 397–8.

[Praising me] for commanding good (*maṣlaḥa*)
May God suffice me in my reason and religion.[49]

The use of the term *maṣlaḥa* in this poem suggests that al-Shāṭibī faced this ordeal because he approved, on the basis of human welfare (see above), the imposition of a tax that Ibn Lubb previously had declared contrary to *Sharīʿa* and thus an innovation. This dispute suggests that al-Shāṭibī and his contemporaries had different understandings of innovation. In al-Shāṭibī's view, any new obligation or practice that is unrelated to religious matters should not be called *bidʿa* and contrary to *Sharīʿa*, if it is in the public interest, which is the main objective of *Sharīʿa*. Al-Shāṭibī limited the application of *bidʿa* to religious matters.

Al-Shāṭibī addressed the issue of intention in relation to innovation. He limited the application of the term *bidʿa* to practices that relate exclusively to religious matters like *ʿibādāt*. In his view, new practices that are not religious in nature may be called *bidʿa*, but only if they are performed as religious obligations. Al-Shāṭibī claimed that his opponents lost sight of this distinction. They accused him of innovation for his new opinions in matters unrelated to religion, whereas they regarded a number of innovations in religious matters as obligatory (see below).

To better appreciate the debate on innovation, it will be helpful to examine the practices that were disputed by al-Shāṭibī and the jurists. In the following extract from *al-Iʿtiṣām*, al-Shāṭibī first lists the accusations that were made against him and then he explains his position:[50]

1. I was accused of extreme Shiʿism (*rafḍ*) and of spreading hatred against the Companions [of the Prophet] . . . This was because I do not adhere to the practice of mentioning the names of the pious caliphs in the Friday sermon (*khuṭba*).
2. I was accused of taking a hard line in *fatwā*s . . . That is because I adhere to the well-established tradition regarding legal obligations and duties in my *fatwā*s, whereas other *muftī*s ignore these principles and issue *fatwā*s according to the convenience of the person soliciting the response.
3. I was accused of enmity against the friends of God (*awliyāʾ Allah*). That is because I oppose certain Sufi innovations that are in conflict with the *Sunna* . . .
4. I was accused of inciting rebellion against the rulers (*aʾimma*). That is because I do not follow the practice of mentioning the names of the rulers in the Friday *khuṭba*.

[49] Aḥmad Bābā, *Nayl*, 49.
[50] Al-Shāṭibī, *al-Iʿtiṣām*, 11 ff.

5. I was accused of saying that invocation (*duʿā'*) serves no purpose. That is because I do not adhere to the practice of collective invocation after the ritual prayer (*ṣalāt*).[51]

Al-Shāṭibī regarded most of these practices as religious innovations and disputed their obligatory nature. Upon examination, it is clear that these accusations had a political context and, for that reason, they attracted strong opposition from jurists as well as from the officials of the kingdom. Let me explain this political context.

Ibn Tūmart al-Mahdī (d. 1130 CE) introduced the practice of invoking the name of the ruling caliph in the Friday sermon and in collective invocation after ritual prayers. During the Almohad period (1121–1269), mention of the name of the ruling Sulṭān was regarded as a symbol of legitimacy. The practice was discontinued by al-Manṣūr (r. 1184–99) and al-Idrīs Maʾmūn (r. 1229–32),[52] but the Almohad Caliph ʿAbd al-Wāḥid al-Rashīd (r. 1232–42) restored it in an attempt to check dissension and to stabilize the dynasty. By al-Shāṭibī's time the practice had become so firmly established that opposition to it was considered treason and an offense against religion punishable by death.[53]

Whereas many jurists claimed that there is a consensus regarding the validity of the practice of praying for the ruling caliph by name, al-Shāṭibī called this practice a *bidʿa.* He said that Abū ʿAbd Allāh b. Mujāhid (d. 1178) and his disciple Abū'l-ʿImrān al-Mīrtalī had opposed this practice at the risk of their lives.[54] In a letter to a friend, al-Shāṭibī mentions that an *imām* who discontinued the practice of praying for the ruling caliph on Friday was removed from his position.[55] The officials of the kingdom seem to have regarded the discontinuation of this practice as an act of public defiance. It is interesting to note that almost all the *qāḍī*s and other officials in al-Andalus and the Maghrib opposed al-Shāṭibī.[56] Abū'l-Ḥasan al-Nubāhī, the Qāḍī of al-Andalus,[57] Abū Saʿīd b. Lubb, the chief *muftī* of Granada,[58] and Ibn ʿArafa (d. 1400), the chief *qāḍī* of Tunis,[59] all wrote *fatwā*s

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[51] *Ṣalāt* and *duʿā* are both translated as 'prayer'. For an analysis of the distinction between these two terms, see *EI*[2], s. v. "Duʿā'."

[52] *EI*[1], s.v. "ʿAbd al-Wāḥid al-Rashīd."

[53] Al-Shāṭibī, *al-Iʿtiṣām*, 2:237.

[54] Ibid., 2:237–8.

[55] Al-Wansharīsī, *al-Miʿyār*, 11:109. In all likelihood al-Shāṭibī was referring to himself.

[56] Ibid.

[57] He wrote *Masʾalat al-duʿāʾ baʿd al-ṣalāt*. See Lévi-Provençal, introduction to al-Nubāhī, *al-Marqabat al-ʿulyā, ṭāʾ*.

[58] Ibn Lubb, *Masʾala al-adʿiya ithr al-ṣalāt*. See Makhlūf, *Shajara* (Cairo, 1930–33), 1:231.

[59] Al-Wansharīsī, *al-Miʿyār*, 7:258ff.

supporting the practice of praying for the caliph and refuting al-Shāṭibī's position. Al-Shāṭibī's disciple Abū Yaḥyā b. ʿĀṣim (d. 1410) wrote a treatise refuting Ibn Lubb and supporting al-Shāṭibī.[60] Muḥammad al-Fishtālī (d. 1367), the chief *qāḍī* of Fez, wrote *Kalām fī'l-duʿā' baʿd al-ṣalāt ʿalā al-hay'a al-maʿhūda*, refuting Ibn ʿĀṣim and supporting Ibn Lubb.

Additional examples of religious innovation are mentioned by al-Shāṭibī in his *Fatāwā*. He condemned the following practices as *bidʿa*:

1. Reciting the Qur'ānic chapter Yāsīn in unison in the manner of a chorus when preparing the body of the deceased for burial.[61]
2. Assembling in a particular place to perform *dhikr* (remembrance of God), singing and reciting poetry.[62]
3. Collective recital of the *ḥizb*[63] (certain prayer formulas).[64]
4. Reciting certain books in unison in the manner of a chorus in mosques.[65]
5. Performing collective invocations after the regular prayers (*ṣalāt*).[66]
6. Insisting on reciting the entire Qur'ān during the month of Ramaḍān.[67]
7. Loud utterance of the formulae declaring the greatness of God (*takbīr*s) on the eve of *ʿīd* prayers.[68]
8. Shaking hands and embracing others after *ʿīd* prayers.[69]
9. Adding certain sentences in the call to prayer (*adhān*),[70] as, for example, "The day dawned, praise be to God."[71]
10. *Taṣbīḥ al-qabr*: After the burial of the deceased it was customary for the Muslims of al-Andalus to gather for seven days and recite the Qur'ān loudly in unison in the manner of a chorus. Al-Shāṭibī declared

[60] Ibid., 7:247.
[61] Ibid., 7:267; Abū'l-Ajfān, *Fatāwā*, 209.
[62] Al-Wansharīsī, *al-Miʿyār*, 11:31–3; Abū'l-Ajfān, *Fatāwā*, 193.
[63] It was probably the Shādhiliyya who introduced the practice of reciting the invocation of *ḥizb* into al-Andalus. The well-known *ḥizb al-baḥr*, which is supposed to be chanted while crossing the sea, is attributed to Abū'l Ḥasan al-Shādhilī. See *EI*², s.v. "Ḥizb."
[64] Al-Wansharīsī, *al-Miʿyār*, 11:88; Abū'l-Ajfān, *Fatāwā*, 206.
[65] Ibid., *Fatāwā*, 211.
[66] Ibid., *Fatāwā*, 127f.
[67] Al-Wansharīsī, *al-Miʿyār*, 9:1; Abū'l-Ajfān, *Fatāwā*, 207f.
[68] Al-Wansharīsī, *al-Miʿyār*, 9:89; Abū'l-Ajfān, *Fatāwā*, 200f.
[69] Ibid., *Fatāwā*, 213.
[70] Al-Wansharīsī, *al-Miʿyār*, 1:229, Abū'l-Ajfān, *Fatāwā*, 207.
[71] Al-Shāṭibī, *al-Iʿtiṣām*, 1:207.

this custom equivalent to mourning (*ma'tam*), which is forbidden in Mālikī law.[72]

Al-Shāṭibī did not oppose these practices merely on the grounds of novelty or innovation but rather because they were performed as religious obligations. Although he appeared to be a champion of opposition to *bidʿa* and revivification of *Sunna*, that was not his position. Al-Shāṭibī was opposed to the elevation of these new practices to the status of religious obligations. His opponents accused him of religious innovation because he refused to perform these practices.

This raises the question of religious authority. Who defines what a religious obligation is? What is *Sunna* and what is an authentic tradition? Mālikī jurists often treat as authentic (*Sunna*) common practices that are unanimously accepted by religious scholars. Here, the meaning of *Sunna* is not limited to the practice of the ancients; rather it is claimed that the currently prevailing view constitutes consensus. Thus, anyone who disagrees with this consensus, even if he calls for the revival of ancient Islamic practices, is regarded as an innovator. Al-Shāṭibī questioned the authority of such views and challenged their underlying objectives and intentions. His definition of *bidʿa* exemplifies his understanding of *Sharīʿa* as well as his method of legal reasoning.

Translation

The following is a translation of the first chapter of al-Shāṭibī's *al-Iʿtiṣām* (1:36–42) on the definition of *bidʿa*. In this translation I have placed explanatory remarks and Arabic terms in parenthesis for the sake of clarity where the English translation may not fully explain the context of the discussion. Words added to compensate for the density of expression in the original are enclosed in square brackets, as are the page numbers of the original Arabic text.

[36] *Chapter On*e
The Definition and Meaning of bidʿa, and its Derivatives
The primary meaning of the root *b-d-ʿ* is to create something that has no precedent. An example of this usage is God's saying, "Creator (*badīʿ*) of the heavens and the earth" [Qurʾān 2:117], i.e., He created both [namely, heaven and the earth] without any precedent. Also the verse, "Say, I am not the first (*bidʿ*) of apostles"

[72] Al-Wansharīsī, *al-Miʿyār*, 1:267; Abū'l-Ajfān, *Fatāwā*, 209.

[Qurʾān 46:9] (i.e., I am not the first who brought a message from God to the people, but several prophets have preceded me). One says, "So-and-so introduced (*ibtadaʿa*) a new thing (*bidʿa*),"meaning that he introduced a practice or way of doing a thing (*ṭarīqa*) that has no precedent. "This is something entirely new (*badīʿ*)" is a phrase one uses to refer to something commendable that has no equal in its goodness. This is like saying that nothing similar or like it existed before.

It is in this sense that a new thing [idea or practice] is called an innovation (*bidʿa*). When something is introduced with the intention to abide by it, it is called an act of innovation (*ibtidāʿ*), and its form is called *bidʿa*. For this same reason, sometimes an action or practice is also called *bidʿa*. Thus it is in this sense that a certain practice is called *bidʿa* when no indication (*dalīl*) [of its permissibility] is available in the *Sharīʿa*. This [latter] application of the meaning is a more specific [technical] term than its [everyday] usage in ordinary language, as will be mentioned below, with the help of God.

The science of the principles [of *fiqh*] confirms three types of injunctions that are applicable to the actions or statements of humans. The first type of injunction, which connotes command, [relates to actions that] may be obligatory or commendable. The second type, which connotes proscription, [relates to actions], which may be forbidden or reprehensible. A third type of injunction, which denotes neutrality (*ibāḥa*), provides choice [of doing or not doing an act]. Thus actions and statements of people are of three types only: where action is required, where action is prohibited and where one is permitted to perform or not to perform a particular action. Abstaining from an act is required only when it is in conflict with the last two types.

Abstention, however, is of two types. First, one may either be required to abstain from an act or one may be forbidden to perform it because that act is specifically contrary [to these categories] regardless of other reasons. Now, if the act is forbidden, its performance would be characterized as 'an act of disobedience' and a 'sin', and the person committing that act is called a 'disobedient person' [37] and a 'sinner'. Otherwise, these terms would not apply. In that case, the act would fall into the category of exemption (*ʿafw*), as has been explained elsewhere.[73] Also, in that case, as far as its performance is concerned, this act cannot be called *lawful*, [abstention from which may be unlawful] or neutral (*mubāḥ*) because [calling it *lawful* or *neutral*] would mean combining permission and prohibition, which are mutually exclusive. [In short, the requirement of abstention is act-specific.]

Second, one may be required to abstain from an act and forbidden [to perform it] because the act comes into conflict with the form of Law (*tashrīʿ*) in terms of categories of definition (*ḥudūd*), determining the modes of performance, fixing specific forms and time of performance in a continuous manner, and so on. This [i.e., being formally contrary to *Sharīʿa*] is *ibtidāʿ* or *bidʿa*, and the person who commits that act is called an innovator (*mubtadiʿ*).

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[73] Al-Shāṭibī uses *ʿafw* and *maskūt ʿanhu* (Divine silence) interchangeably, neither constituting a legal obligation. For details, see al-Shāṭibī, *al-Muwāfaqāt*, 1:161–74.

Bidʿa, therefore, signifies a religious path (*ṭarīqa*) that resembles a *sharʿī* legal norm (*sunna*) and which the imitator performs with an exaggerated intent of obedience (*taʿabbud*) to God, may He be exalted. This definition does not include within the scope of *bidʿa* ordinary non-religious matters (*ʿādāt*) and it limits the application of the term exclusively to religious performances (*ʿibādāt*). However, those who also include ordinary acts within the scope of *bidʿa* define the term as: a religious path that resembles a *sharʿī* legal practice and that one performs with such intention as required for a *sharʿī* legal norm.

It is necessary to explain the terms used in this definition. "Way" (*ṭarīqa*), "road" or "path" (*sabīl*) and "norms" (*sunan*, pl. of *sunna*) all share one meaning, namely, a path designed to be followed. The term is qualified by 'religion' because innovation is created as a religious matter and the creator [of that innovation] attributes that practice to religion, and also because a practice is not called *bidʿa* if it is introduced specifically as a worldly matter. For example, the introduction of new crafts and the building of new cities are not introduced with the [religious] intentions that we mentioned above.

Since religious practices may be divided into those for which there is a precedent in law (*Sharīʿa*) and those for which there is no [precedent], the application of the definition is limited specifically to those types that are created (*mukhtaraʿ*). That is to say, it is a practice created without an example set by the Lawgiver. Thus the specific characteristic of a *bidʿa* is that it is outside the Lawgiver's prescriptions. This qualification in the definition immediately separates what appears to have been created [after the completion of religion, namely after the death of Prophet Muḥammad] from what is connected with religion, as, for example, the sciences of grammar, morphology (*ṣarf*), lexicography (*mufradāt al-lugha*), jurisprudence (*uṣūl al-fiqh*), theology (*uṣūl al-dīn*) and all other similar sciences that are rooted in *Sharīʿa*, even though they did not exist in the early days [of Islam]. Since tradition commands [us] to pronounce the inflections in the Qurʾān [correctly] [38] and since the sciences of language serve as guides to a correct reading of the Qurʾān and *Sunna*, the true nature of these sciences is that they provide knowledge about how to abide by the terms that denote the meanings of *Sharīʿa* and how to comply with [*sharʿī* injunctions].

Strictly speaking, *uṣūl al-fiqh* means discovering the universals in [the textual] indications (*adilla*) by [the method of] induction so that they provide direction for an expert (*mujtahid*) [for further reasoning] and are easily accessible to a novice. Similarly, the essence of *uṣūl al-dīn* (i.e. the principles of religion, *ʿilm al-kalām* [theology]), is to affirm the indications or injunctions in the Qurʾān and *Sunna* about the unity of God and related matters. Likewise the essence of *fiqh* is to affirm the indications [in the Qurʾān and *Sunna*] about substantial matters (*furūʿ*) pertaining to human beings.

If one objects that the classification [of these sciences] in this manner is an innovation, the answer is that this classification is rooted in *Sharīʿa*. There is some evidence [relating to its relevance] in the *Ḥadīth* [literature], although, admittedly, it is not specific. In general, however, the *Sharīʿa* endorses the validity of such a classification. Its validity is derived from the rule of *al-maṣāliḥ al-mursala* [the principle of validating something that is not specifically prescribed

or permitted in the revealed texts but which can be validated on grounds inferred from these texts]. A detailed explanation of this point will be given below, with the help of God.

It is not at all difficult to prove the validity [of the argument] that each science that attends to the needs of *Sharīʿa* becomes a part of it. This argument is not derived from one particular indication [of *Sharīʿa*]. Thus it is proven that [studying these sciences] is not an innovation.

If one rejects the above argument, this would entail that these sciences are innovations. [It would further entail that] since [these sciences] are innovations, they are evil, because every innovation is undoubtedly a deviation from the right path. This point is explained below, if God wills.

[If one agrees with the above view] it follows by necessity that putting the Qurʾān into writing and collecting it as a book is an abominable act (*qabīḥ*) [on the grounds that it was an innovation]. This conclusion is unanimously regarded as absurd. It follows that [the sciences in question, e.g., grammar, morphology and jurisprudence] are not innovations. [As for the point] that there must be a textual indicator, [it should be noted that] inference (*istidlāl*) [in this case] is clearly derived from the text as a whole [not from a particular statement]. This [method of] arguing in particular cases is known as [legal reasoning on the basis of] *al-maṣāliḥ al-mursala* [see above], which is an established, valid principle.

[39] Accordingly, the sciences of grammar and lexicology, the science of jurisprudence, and other similar sciences that attend to the needs of *Sharīʿa*, cannot in any way be called innovations. If someone uses the term *bidʿa* for these sciences, this usage is metaphorical, as when ʿUmar b. al-Khaṭṭāb, may God be pleased with him, called the practice of people's praying during the nights of Ramaḍān '*bidʿa*'. If [one does not regard its use as metaphorical,] then such a usage shows total disregard for the distinction between *sunna* and *bidʿa*. Such usage is neither to be taken seriously nor to be relied upon.

In the definition, the phrase "imitating the legal (*sharʿiyya*) norms" signifies that the innovation is apparently modeled after *Sharīʿa* norms, but in fact it is contrary to [*Sharīʿa*] on several grounds. One ground of conflict is [that innovation] imposes certain restrictions (*ḥudūd*) [on a ritual obligation]. For instance, a person vows that he will fast while standing [and will] never sit down [while fasting] or that he will remain in the sun, without seeking shade [while fasting]. [Other examples include adding the] special provision of [complete] withdrawal [from worldly attachments] during worship, the restriction on eating or wearing only a certain [type of] food or clothing, without any [personal or medical] reason.

Another such ground is [adding the requirement of] abiding by specific forms and conditions [as obligatory requirements] for the performance of a ritual act, [which characterize it as an obligation,] as, for instance, chanting the names of God (*dhikr*) in unison in the manner of a chorus, and celebrating the birthday of the Prophet, peace be on him, as [an obligatory] festival, and so on. [Adding the requirement of chanting in unison, or considering it obligatory to chant the names of God is an innovation.]

Another ground is to persist in performing certain specific religious rituals at a specified time, despite the fact that these specifications are not found in the *Sharīʿa* (e.g., fasting on the fifteenth of Shaʿbān and praying the entire night on that date).

Thus there are several other ways in which an innovation resembles lawfully sanctioned matters. If these grounds do not resemble religiously required matters, it [i.e. this new practice] is not an innovation. This is because, in that case, [the new practice] is [merely] an ordinary act.

[40] Further, an innovator creates it [viz., his innovation] to resemble a *Sunna* only in order to confuse other people, or to cause them to mistake it for *Sunna*. [The creator of the innovation causes this confusion] because no human [being] may invite others to obey him by commanding what is not lawful (*mashrūʿ*). The reason is that [in that case, the innovator] may not gain [personal] advantage or prevent any harm [from him]. Also, others would not respond to him [favorably]. This is why you find an innovator reinforcing his innovation with such matters as appear to be normative. He even claims the authority of someone who is well known among reasonable people.

Consider the pre-Islamic Arabs who introduced changes into the religion of Abraham, peace be upon him. They justified their claims invoking their names [namely, those of Abraham and his followers]. For instance, they justified the principle of association [idol worship], saying, "We worship them only in order that they may bring us closer to God" [Qurʾān 39:2]. And, for example, they discontinued the practice of staying at ʿArafa (*ḥums*), saying, "We do not leave the sanctuary [of the Kaʿba in Mecca,] out of consideration for its sanctity." Those who circumambulated the House while naked said, "We do not circumambulate wearing the clothes that we used as sinners [before performing pilgrimage]." They offered similar justifications to make their practices appear normative. What do you expect from those who are counted or who count themselves as members of the elite in the community? [Imagine the extent to which] they take liberties [in these matters]. They are wrong but they assume that they are right. After this explanation, it becomes clear why the phrase "resembling the *sharʿī* legal norms" is a necessary qualification of the definition of *bidʿa*.

In the definition, the phrase "with the intention of performing that act with an exaggerated emphasis on the idea of obedience (*taʿabbud*) to God, may He be exalted" provides the full sense of the idea of *bidʿa*, because that [viz., obedience] is the objective of making it normative (*tashrīʿ*).

This is because the basic reason for including it [viz., *bidʿa*] in *Sharīʿa* is to exhort and invite a person to devote himself exclusively to a religious performance (*ʿibāda*), because God says, "I have created the jinn and humans only in order that they worship me" [Qurʾān 51:56]. It is as if the innovator considers this meaning to be the objective of this verse. It does not occur to him that the laws and restrictions that the Lawgiver has given in this regard [i.e., regarding religious performances (*ʿibādāt*)] are sufficient. Rather, he thinks that since the command [about religious observances] is indefinite, he must add some details and necessary qualifications to regularize the command. At the same time, [desires like] love of ostentation, [exaggerated display of knowledge to impress people], or dis-

regard for the impropriety of such claims confound one's mind. So there is reason to suspect this restriction to be an innovation.

[41] Also, human beings become tired and bored with the monotony in regulated religious worship. People find in unusual and new things a fresh type of activity, which is not available in old practices. This feeling is conveyed in the proverb, "Every new thing is sweet." As someone says, "Just as people are sentenced in accordance with the offences they commit, so too they become attracted to better things when they are listless."

In a *ḥadīth* reported by Muʿādh b. Jabal [d. 639 CE], may God be pleased with him, it is said that [during the period of trial to come, when there will be abundance of wealth and the Qurʾān will be frequently recited,] "there will be a person who will ask, 'Why do the people not follow me? They should have followed me, as I recited the Qurʾān to you [viz., them]. They will not follow me unless I create something else for them.' Beware of what he invents because whatever he invents is an error."

This qualification makes it clear that the term 'innovations' (*bidaʿ*) does not apply to ordinary matters (*ʿādāt*). Thus the designation [of *bidʿa*] does not apply to an innovation that is not meant to be a religious observance in an exaggerated sense of devotion (*taʿabbud*) to God, even though it is introduced in the manner of religion and it resembles a legitimate religious practice. This [viz., the term *bidʿa*] does not apply, for example, to taxes levied on properties, etc. These taxes, which, [although apparently] similar to the religious observance of the alms-tax (*zakāt*), in specifying ratio and value, were not, however, [previously] regarded as inevitable. Similarly, the use of sieves, washing hands with soap (i.e. potash) and so on did not exist in the past. They cannot be included in either of the definitions.

The meaning of the second definition of *bidʿa* is clear, except for the phrase: "which has the same aim as intended by the norms of *Sharīʿa*." This phrase means that the *Sharīʿa* aims to realize human interests in this world and in the Hereafter, so that it makes them available in both worlds in the most complete form. That is what the innovator of a *bidʿa* also seeks to accomplish. A *bidʿa* may be a religious observance or an ordinary usage. In the case of a religious observance, the innovator intends to exaggerate the sense of obedience to what he imagines to be the utmost benefit, in order that, in his estimation, the [original] religious obligation receives the highest level [of reward] in the Hereafter. The same holds for an ordinary innovation [unrelated to religious observance]. The goal of the innovator is to achieve the best of the benefits in that matter.

[42] Thus a person who regards [using] a sieve as *bidʿa* evidently acknowledges that sifted flour is better than non-sifted flour. Similarly, people enjoy lofty, inhabited buildings more than jungles and ruins. Another example is the tax on property levied by the ruler. *Sharīʿa* allows wider authority [to rulers] in worldly matters. The person who calls these things *bidʿa* does so with that perspective in mind.

Now the meaning of *bidʿa* and its legal position is clear. Praise be to God.

Conclusion

Al-Shāṭibī based his defense against the accusations of innovation on the following arguments.

1. There is a clear distinction between *ʿibādāt* and *ʿādāt*. The term *bidʿa* applies only to innovations relating to the performance of religious obligations.
2. The term *bidʿa* does not apply to non-religious innovations.
3. Consensus (*ijmāʿ*) cannot transform a religious innovation into a *Sunna*.
4. It is not permitted to introduce a practice as a religious observance when it is contrary to the objectives of the *Sharīʿa*.
5. Innovation in religious matters is a complex process that involves political, psychological and religious motives.

Reviewing the history of *bidʿa*, al-Shāṭibī observes that religious innovations led people to heresies and heretical sects. He enumerates these sects, explaining that deviations are generally caused by ignorance of Arabic usage in understanding the Qurʾān and *Sunna*, and by lack of knowledge about the objectives of Islamic law. His definition of *bidʿa*, especially the concluding sentences, suggests that the debate over innovation in his days began with his *fatwā* in favor of an additional tax levied by Sulṭān Muḥammad V. Al-Shāṭibī defended his position by exploring the concept and doctrine of *bidʿa*, and by analyzing the motives of innovators. Distinguishing religious innovation from non-religious innovations and examining contemporary religious practices and innovations, al-Shāṭibī not only clarified the ambiguity of the concepts of *bidʿa* but also refined the application of human welfare (*maṣlaḥa*) in non-religious matters.

CHAPTER SEVENTEEN

AḤMAD AL-WANSHARĪSĪ (D. 914/1509)*

David S. Powers

Life and Times

Abū al-ʿAbbās Aḥmad al-Wansharīsī[1] was born *ca.* 834/1430–31 in Jabal Wansharīs [Ouarsenis], a mountain massif in the Central Algerian Tell inhabited by Berber tribes, approximately 50 km. southwest of Algiers. His birth coincided with a period of political, military, and social instability. When Aḥmad was perhaps five years old, his father, Abū Zakariyā' Yaḥyā—who may have been a jurist—moved the family to Tlemcen.[2] There Aḥmad studied Qur'ān, Arabic language, and Mālikī law and jurisprudence with many distinguished scholars, including three generations of ʿUqbānīs (Qāsim, Ibrāhīm, and Muḥammad) and Muḥammad b. Marzūq al-Kafīf. After finishing his studies, he devoted his life to teaching Mālikī law, serving as a *muftī*, and writing legal treatises.[3]

In 874/1469, al-Wansharīsī incurred the wrath of the Zayyānid Sulṭān Muḥammad IV, who ordered the ransacking of his house and the plundering of his possessions. Leaving behind many of his worldly goods, including his books, al-Wansharīsī made his way to Fez, where the Waṭṭāsids recently had taken over as regents for the Marīnids. There he received shelter and food from Muḥammad al-Ṣughayyir, a distinguished jurist who reportedly prepared for his guest a dish known as *mukhfīya* (alternatively: *salwī*) made from couscous and topped with bananas. He soon

* I wish to thank Najmeddin Hentati for his assistance with the translation of al-Wansharīsī's comment and Francisco Vidal-Castro for his assistance with the table of al-Wansharīsī's works. All errors are mine.

[1] The *nisba*-adjective "al-Wansharīsī" is derived from the Berber term "Wansharīs" ("nothing higher"), referring to the pyramidal peak located in the central part of the massif at Kef Sidi Ahmar (1985 m.), which dominates the surrounding countryside. See *EI*[2], s.v. Wansharīs.

[2] The evidence that Abū Zakariyā' Yaḥyā was a jurist is limited to a reference to him as "*al-shaykh al-faqīh*" in a query sent to his son, Aḥmad, by a third party. Al-Wansharīsī, *Miʿyār*, 3:349.

[3] See further Vidal Castro, "Aḥmad al-Wanšarīsī (m. 914/1508). Principales Aspectos de su Vida"; Benchekroun, *La Vie Intellectuelle Marocaine*, 395–401.

moved into a house that had been designated as an endowment, located near the Muʿallaq Mosque in the Sharrāṭīn quarter of Fez al-Qarawiyyīn.

Al-Wansharīsī was appointed professor of Mālikī law at the Madrasa Miṣbāḥiyya, where he taught the *Mudawwana* and *Farʿī Ibn al-Ḥājib*. He quickly came to be recognized as one of the most distinguished jurists in Fez,[4] and he served as chief *muftī* of the city.[5] His knowledge of the law was proverbial. "He who has not studied with [al-Wansharīsī,]" one person said, "has not studied with anyone."[6] His mastery of classical Arabic and eloquence of speech and writing are reflected in the exclamation of one of his students, "If Sībawayh [himself] were to attend his circle, he would learn grammar from him."[7] One day, when al-Wansharīsī passed by the Shaykh al-Jamāʿa Muḥammad b. Ghāzī in the Qarawiyyīn mosque, the latter exclaimed, "If a man swears to divorce his wife on the condition that Abū al-ʿAbbās al-Wansharīsī has not mastered both the principles and the branches of the Mālikī school, the man is absolved of his oath, and his wife is not to be divorced from him."[8]

Scholarship

Al-Wansharīsī composed thirty treatises on a range of subjects that included jurisprudence (salutary innovations, legal principles, and legal terms); procedure and evidence (the office of *qāḍī*, notaries and their documents); substantive law (contracts, inheritance, legal capacity, marriage, commercial transactions, and controversial questions); and topics of general interest (the proper mosque in which to deliver the Friday sermon, the veneration of prophets, migration from *dār al-ḥarb*, and Sufism). He is best known, however, as the compiler of a massive collection of *fatwā*s known as the *Kitāb al-Miʿyār*.[9] [See Table]

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[4] Vidal Castro, "Aḥmad al-Wanšarīsī (m. 914/1508). Principales Aspectos de su Vida," 320–9.

[5] Vidal Castro, "'Abd al-Wāḥid al-Wanšarīsī (m. 1549): adul, cadi y mufti de Fez," 141–57; Devin Stewart, "The identity of 'the muftī of Oran,'" 297–8.

[6] *Miʿyār*, 1:jīm.

[7] Ibid.

[8] Ibid.

[9] On al-Wansharīsī's literary oeuvre, see Vidal Castro, "Las obras de Aḥmad al-Wanšarīsī (m. 914/1508). Inventario analítico," 73 ff.; idem, "El *Miʿyār* de al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones"; idem, "El *Miʿyār* de al-Wanšarīsī (m. 914/1508). II: Contenido," 213–46; Benchekroun, *La Vie Intellectuelle Marocaine*, 398–400.

Table

AL-WANSHARĪSĪ'S WORKS

A. *Available in print* (in order of first date of printed text)

1. *Kitāb al-wilāyāt*, ed. and trans. by H. Bruno and M. Gaudefroy-Demombynes, *Le livre de magistratures d'el-Wanchereisi*, Rabat, 1937; Muḥammad al-Amīn Bilghayth, Alger, 1985; ed. al-Ẓāhir, Cairo, 2001 (on the office of the *qāḍī*).
2. *al-Mustaḥsan min al-bidaʿ*, ed. H. Pérès, Algiers, 1946; *Miʿyār*, 2:461–511 (on customs, social traditions, and 'good' innovations).
3. *Asnā al-matājir fi bayān aḥkām man ghalaba ʿalā waṭanihi al-naṣārā wa-lam yuhājir wa-mā yatarattabu ʿalayhi min al-ʿuqūbāt wa'l-zawājir*, ed. H. Muʾnis, 'Asnā al-matājir . . .', in *Revista del Instituto Egipcio de Estudios Islámicos en Madrid*, 5 (1957), 129–91 (= *Miʿyār*, 2:119–36) (response to a question posed by Ibn Qaṭīya regarding Andalusians who fled to the Maghrib after the Christian Reconquista but sought to return to al-Andalus).
4. Prologue to the *Muthlā* of Ibn al-Khaṭīb, ed. ʿAbd al-Ḥasan Manṣūr, *al-Mashriq*, 63 (1969), 47–66; ed. Rabat, 1973; A.M. Turki, *Arabica*, 16 (1969), 279–312; Algiers, 1983 (a response to the Granadan vizier's attack on the incompetence and corruption of contemporary notaries).
5. *Wafayāt*, published in *Alf sana min al-wafayāt*, ed. M. Ḥajjī, Rabat, 1976; new ed. M. Ḥajjī, Beirut, 1996 (biograms of distinguished scholars—mostly Maghribīs—who lived between 701/1301 and 912/1507).
6. *Īḍāḥ al-masālik ilā qawāʿid al-Imām Abī ʿAbdallāh Mālik*, ed. Aḥmad Bū Ṭāhir al-Khaṭṭābī, Rabat, 1980; ed. al-Ghiryānī, Exeter, 1984 and Tripoli, 1991; ed. A. Farid, Beirut, 2005 (a collection of legal principles and norms).
7. *Naẓm al-durar al-manthūra wa-ḍamm al-aqwāl al-ṣaḥīḥa, Miʿyār*, 6:574–606 (a response to the objections and criticisms of a Tlemceni jurist relating to a *fatwā* about a *ṣulḥ* settlement).
8. *Tanbīh al-ḥādhiq al-nadis ʿalā khaṭaʾ man sawwā bayna jāmiʿ al-Qarawiyyīn wa'l-Andalus*, *Miʿyār*, 1:251–74 (on the Friday sermon in Fez, which may be celebrated only in the Andalusian mosque and not in the Qarawiyyīn).
9. *Tanbīh al-ṭālib al-darrāk ʿalā tawjīh ṣiḥḥat al-ṣulḥ al-munʿaqad bayna Ibn Saʿd wa'l-Ḥabbāk*, *Miʿyār*, 6:541–62 (about an inheritance dispute).
10. Biographical work about al-Maqqarī al-Jadd, partially preserved in later works, e.g., Aḥmad Bābā, Ibn Maryam.
11. *Salwat al-khazīn fī mawt al-nabiyyīn*, ed. Muḥammad Ṣāliḥ, 1985 (?). Second author: Ibn Abī Ḥilja al-Tilimsānī (on the veneration of prophets).
12. *ʿUddat al-burūq fī jamʿ mā fī al-madhhab min al-jumūʿ wa'l-furūq*, lithograph, Fez, n.d.; ed. Fez, 1342/1923–4; ed. Ḥamza Abū Fāris, Beirut, 1990; ed. A. Farīd, Beirut, 2005 (on controversial questions of law).
13. *Al-Manhaj al-fāʾiq wa'l-manhal al-rāʾiq wa'l-maʿnā al-lāʾiq bi-ādāb* [sic] *al-muwaththiq wa-aḥkām al-wathāʾiq*, lithograph, Fez, 1881; ed. L. al-Ḥasanī, Rabat, 1997; ed. ʿAbd al-Raḥmān b. Muḥammad al-Aṭram, Dubai, 2005 (on the office of the notary and his documents).
14. *Taʿlīq ʿalā Ibn al-Ḥājib al-Farʿī*, ed. Badr al-ʿImrānī al-Ṭanyī, Beirut, 2004 (a commentary on the legal compendium of Ibn al-Ḥājib).

15. *Durar al-qalā'id wa-ghurar al-ṭurar wa'l-fawā'id*, ed. Abū al-Faḍl Badr al-ʿImrānī, Beirut, 2004 (notes and a compilation of glosses on the legal compendium of Ibn al-Ḥājib).

B. *Lithographs*

16. *Ghunyat al-muʿāṣir wa'l-tālī fī sharḥ fiqh wathā'iq al-qāḍī al-Fishtālī*, Fez, 1890 (marginal commentary on al-Fishtālī's treatise on notary documents).
17. *Al-Mubdī li-khaṭa' al-Ḥumaydī*, Fez, 1895–6 (about the marriage of persons without legal capacity).
18. *Iḍā'at al-ḥalaq wa'l-murjiʿ bi'l-darak ʿalā man aftā min fuqahā' Fās bi-taḍmin al-rāʿī al-mushtarak*, Fez, n.d. (written in Fez in response to criticisms of al-Ḥumaydī's judicial decisions/opinions).

C. *Works in Manuscript*

19. *Mukhtaṣar aḥkām al-Burzulī*, Qarawiyyīn Library, Fez, 433/3; General Library of Rabat, 1343 (= 1447 dāl), 2198 dāl, 581 (jīm), 6581 qāf, 634 qāf; Royal Library of Rabat, 9843 and 8462; Tetuan Library, 654; General Library of Riyad 76 qāf and 1207 qāf (summary and supplement to the treatise of al-Burzulī and compilation of legal dicta).
20. *Sharḥ Muṣṭalaḥāt al-Mukhtaṣar al-fiqhī li-Ibn ʿArafa*, private ms., Rabat (commentary on legal terms).
21. *Kitāb al-ajwiba or Ajibwa fiqhiyya*, General Library of Rabat, K. 684; Tetuan Library 654 (answers to legal questions).
22. *Kitāb al-as'ila wa'l-ajwiba*, General Library of Rabat, D. 2197 (questions sent to al-Qawrī and his answers).
23. *Risāla fī al-masā'il al-fiqhiyya*, Princeton University Library, 178 (miscellaneous legal questions).
24. *Kitāb al-fawā'id al-muhimma*, General Library of Rabat, D-2197 (annotations of questions relating to Sufism, judgments, legal sources, and related matters).
25. *Sharḥ al-Khazrajiyya fī al-ʿarūḍ*, General Library of Rabat, Q. 1061 (commentary on prosody).
26. *Qawa'id al-madkhal*, Royal Library of Rabat, 2052.
27. *Fahrasa* (not located)

D. *Lost works*

28. *Kitāb al-wāʿī li-masā'il al-aḥkām wa'l-tadāʿī* (on contracts).
29. *Ḥall al-ribqa ʿan asīr al-ṣafqa* (on the law of *retracto entre socios*).
30. *Kitāb al-qawāʿid fī al-fiqh* (on legal rules and principles)

The *Miʿyār*

As a refugee scholar, al-Wansharīsī relied on the excellent private libraries of Fez, one of which belonged to his former student, Abū ʿAbdallāh Muḥammad b. Muḥammad b. al-Gardīs al-Taghlibī (d. 897 or 899/1491–2

or 1493–4), scion of a family that had been involved in Fāsī scholarship and politics since the Idrīsid period (172–314/789–926).[10] Over the years, the family had assembled a magnificent collection of Andalusian and Maghribian manuscripts that was especially strong in Mālikī law and jurisprudence. Ibn al-Gardīs opened the doors of the library to his master, giving him unrestricted access to its contents. In the library, al-Wansharīsī came across large numbers of *fatwā*s issued in al-Andalus, the Maghrib, and Ifrīqiyā in the period between approximately 400/1009–10 and 890/1485. These *fatwā*s represented nearly half a millennium of Mālikī juristic activity.

Beginning in the first half of the 9th/15th century, Mālikī scholars began to compile collections of *fatwā*s written by multiple jurists. Prominent examples of these meta-collections include the *Jāmiʿ masāʾil al-aḥkām li-mā nazala min al-qaḍāyā biʾl-muftīn waʾl-ḥukkām*, compiled by al-Burzulī (d. 841/1438),[11] and *al-Durar al-maknūnā fī nawāzil Māzūna*, compiled by Abū Zakariyāʾ Yaḥyā b. Mūsā b. ʿĪsā al-Maghīlī (d. 883/1478), a student of al-Wansharīsī's.[12] It may have been on one of al-Wansharīsī's visits to the al-Gardīs library—which no doubt contained copies of both manuscripts—that he conceived the idea of compiling a new and even more comprehensive collection of *fatwā*s. This decision may have been shaped by al-Wansharīsī's awareness of the impending defeat of the Naṣrids of Granada, which would occur in 897/1492, and his desire to preserve an important aspect of the Andalusian intellectual heritage. In addition, al-Wansharīsī clearly understood the potential usefulness of a collection of *fatwā*s for contemporary judges and jurists, although he could not have known that his compilation would serve as an important reference work for more than 500 years.[13]

Al-Wansharīsī began working on the *Miʿyār ca.* 890/1485. With the permission of Ibn al-Gardīs, he removed from the library several manuscripts, or fascicles thereof, loading his cargo on a donkey. He then made his way through the narrow and winding streets of Fez to his house, where he guided the donkey through the entrance and into the courtyard, unloaded his cargo, and arranged the materials into two piles. Once inside the

[10] On Ibn al-Gardīs, see *Miʿyār*, 1:wāw; Vidal Castro, "Aḥmad al-Wanšarīsī (m. 914/1508). Principales Aspectos de su Vida," 333.

[11] Ed. Muḥammad al-Ḥabīb al-Ḥīla. 7 vols. Beirut: Dār al-Gharb al-Islāmī, 2002.

[12] Ed. Ḥassānī Mukhtār. 2 vols. Al-Jazāʾir: Makhbar al-Makhṭūṭāt, Jāmiʿat al-Jazāʾir, 2004. On the sources of the *Miʿyār*, see Vidal Castro, "El *Miʿyār* de al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones," 323–36.

[13] David S. Powers and Etty Terem, "From the *Miʿyār* of al-Wansharīsī to the *New Miʿyār* of al-Wazzānī: Continuity and Change."

house, the scholar removed his outer cloak, exposing a *qashshāba* or long wool garment that left his bald pate uncovered. Fastened to his leather belt was an inkwell. With a pen in one hand and a piece of paper in the other, al-Wansharīsī walked back and forth between the two piles, selecting individual *fatwā*s for transcription. One imagines that the toils of transcription were eased by the richness of the texts, which gave access to the litigants' lives and to the jurists' wisdom, against which the compiler honed and tested his own legal skills. In this manner he toiled, at what pace we do not know, for eleven years.[14] In the colophon to the finished work, al-Wansharīsī indicates that he completed the text on Sunday, 28 Shawwāl 901 [10 July 1496].[15] But he continued to make corrections and revisions and to add new material until his death in 914/1508, nearly a quarter of a century after beginning the project.

The preface to the *Miʿyār* contains the following brief statement of purpose:

> . . . I have entitled this book *al-Miʿyār al-Muʿrib wa'l-jāmiʿ al-mughrib ʿan fatāwī ʿulamāʾ Ifrīqiyā wa'l-Andalus wa'l-Maghrib* [The Clear Measure and the Extraordinary Collection of the Judicial Opinions of the Scholars of Ifrīqiyā, al-Andalus, and the Maghrib].[16] In it I have assembled from the responses [issued by] contemporary and ancient [scholars] those that are the most difficult to find in their sources and to extract from their hiding places because they have been scattered and dispersed and because their locations and access to them are obscure. [I have assembled the book] in the hope that [it] will be of general utility and that it will lead to the augmentation of [heavenly] reward. I have organized it according to legal rubrics in order to facilitate its use by whoever examines it, and I have specified the names of the *muftī*s—except on rare occasions. It is my hope that God—praised be He—will designate it as a means for obtaining good fortune and as a road leading to happiness and abundance [of reward]. For He—may He be magnified and exalted—is the one whom one asks for the most abundant reward and for guidance towards the truth.

The voices that dominate the remainder of the text are those of hundreds of *muftī*s who lived in the Islamic West between 400 and 900 AH. Only

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[14] Upon the death of Ibn al-Gardīs in either 897/1491–2 or 899/1493–4, al-Wansharīsī presumably secured permission for the continued use of the library from surviving members of the family.

[15] *Miʿyār*, 12:395.

[16] Note the minor discrepancy (*ahl* versus *ʿulamāʾ*) between the title specified by al-Wansharīsī and that of the modern printed edition. On variants in the title, see Vidal Castro, "El *Miʿyār* de al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones," 321.

rarely does the reader discern the presence of the compiler and copyist, as, for instance, when al-Wansharīsī makes certain editorial remarks relating to the identification of documents that he has transcribed, offers a brief comment on a *fatwā* with which he disagrees, or inserts one of his own *fatwā*s into the text.[17] In terms of modern notions of authorship, al-Wansharīsī's subordination of his own voice is striking, especially when one considers the enormous labor—mental and physical—involved in the compilation of the *Miʿyār*.[18]

A lithograph edition of the *Miʿyār*, produced on the basis of five manuscripts by a committee of eight jurists under the supervision of Ibn al-ʿAbbās al-Būʿazzāwī, was published in Fez, in twelve volumes, in 1314–15/1896–97. A printed edition of the text was published in Rabat in 1401–03/1981–83 by the Ministry of Culture and Religious Affairs, and in Beirut by Dār al-Gharb al-Islāmī (12 vols. + index). The printed edition, produced by a committee of seven scholars under the supervision of Muḥammad Ḥajjī, is essentially a transcription of the lithograph. Unfortunately, it contains numerous typographical errors, and a definitive scientific edition is a scholarly desideratum.

The *Miʿyār* is distinctive for its size, geographical range, and chronological parameters. Unlike *fatwā* collections that incorporate the output of a single *muftī* living in a particular time and place (e.g., Ibn Rushd), the *Miʿyār* contains *fatwā*s issued by hundreds of *muftī*s who lived in the major towns and cities of Ifrīqiyā, the Maghrib, and al-Andalus over nearly half a millennium.[19] Although the individual responses in the printed edition are not numbered, I estimate that it contains at least 5,000 *fatwā*s. The editor of the printed edition, Muḥammad Ḥajjī, has compared the collection to a bottomless ocean that easily swallows anyone who dives into it, observing that it was the legal text that he feared most as a student.[20]

Another distinctive feature of the *Miʿyār* is its inclusion of a small number of *fatwā*s that have escaped editing and abridgement.[21] Some contain

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[17] I have analyzed one of al-Wansharīsī's *fatwā*s, on the practice of *tawlīj*, in *Law, Society, and Culture in the Maghrib, 1300–1500*, ch. 6.

[18] All references to the *Miʿyār* in this essay are to the Rabat edition. On the publication of the *Miʿyār*, see further Vidal Castro, "El *Miʿyār* de al-Wanšarīsī (m. 914/1508). I: Fuentes, manuscritos, ediciones, traducciones," 344–7.

[19] On *fatwā* collections generally, see Ḥajjī Khalīfa, *Kashf al-ẓunūn* (Istanbul, 1941–3), 2:1218–31; C. Brockelmann, *Geschichte der arabischen Litteratur*, supplement III, index, s.v., fatāwā(ī); Fuat Sezgin, *GAS*, 1:393–596.

[20] Wansharīsī, *Miʿyār*, vol. 1:ṭā'.

[21] Many of the *fatwā*s included in the *Miʿyār* underwent a process of editing and abridgement: First, the names of people and places, words and phrases that were not of

transcriptions of documents giving the names of the parties, the locations of transactions, and the dates of legal events. These transcriptions—important artifacts of Islamic court practice of which little evidence has survived for the period prior to the Ottomans—include bequests, endowment deeds, gifts, oaths, acknowledgements, marriage contracts, dower agreements, deposits, appointments of agency, and judicial certifications. Al-Wansharīsī's inclusion of these documents demonstrates that the *fatwā*s contained in the *Miʿyār*, although often formulated in abstract and hypothetical terms, are in fact responses to real-life situations; they are not hypothetical answers to hypothetical questions, as some scholars believe to be true of these and other *fatwā*s.[22]

Aḥmad al-Wansharīsī died on 20 Ṣafar 914/19 June 1508, leaving one son, the jurist ʿAbd al-Wāḥid (b. ca. 880/1475–6; d. 955/1549). He was buried in the Bāb al-Futūḥ cemetery, near the grave of Ibn ʿAbbād al-Rundī.

A Synagogue in Tamanṭīṭ/Tuwāt

Below, I translate and discuss one of the comments inserted in the *Miʿyār* by al-Wansharīsī. The subject of this comment is the status of a synagogue in Tamanṭīṭ, a fortified settlement in a remote but strategically located area of the Sahara. Analysis of this comment may provide insight into the mind of al-Wansharīsī and his judicial philosophy.

Tamanṭīṭ (Berb. *ṭīṭ* = "spring") is the name of a cluster of fortified settlements (Berb. *qṣūr*, sg. *qṣar*; Ar. *qaṣr*) in the oasis of Tuwāt (Berb. *t-wa-t* = "oasis"), a vast depression that stretches for approximately 120 miles from NE to SW in what is today Algeria, some 900 miles east of the Atlantic and 500 miles south of the Mediterranean. The depression receives little or no rainfall and is covered by large, rolling sand dunes. Human habitation is made possible by the availability of subterranean water brought to the surface by a combination of underground canals and pumps. Date-palm groves provide shade for small gardens in which fruits and vegetables are grown. Despite its remoteness, the oasis is strategically located on the caravan route that stretches from Tlemcen to Timbuktu, and it played an

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direct legal relevance, and documents attached to or embedded in the original *fatwā* were stripped away (*tajrīd*). Second, the original *fatwā* was summarized (*talkhīṣ*), thereby reducing its length. As a result of this two-step process, a narrative dealing with a specific and historically contextualized situation was transformed into an abstract case that refers to one or more nameless individuals living in an unspecified place at an undetermined time. See Hallaq, "From *Fatwā*s to *Furūʿ*," 43–8.

[22] See further Powers, *Law, Society, and Culture in the Maghrib, 1300–1500*.

important role in the trans-Saharan traffic in gold, slaves, leather, salt and other items.[23]

In ancient times Tuwāt was settled by Saharan nomads, in all likelihood Zenata Berbers. In the second century CE, Jews—known as Mhājriyya (Ar. *Muhājirūn*)—are said to have arrived in the oasis after their expulsion from Cyrenaica by the Roman emperor Trajan in 118 CE. In the 7th/13th century Arab pastoralists arrived in Tuwāt. Thus, in the 9th/15th century, the oasis was inhabited by a combination of Berbers, Jews, Arabs, and Africans who lived together in relative peace and harmony. This balance appears to have been upset at the end of the century by changing social, economic and political conditions.[24]

The Jews of Tamanṭīṭ prayed in a synagogue. *Ca.* 1480—approximately ten years before al-Wansharīsī began to compile the *Miʿyār*—the status of this synagogue became the subject of a heated dispute that attracted the attention of several distinguished Maghribī jurists. The dispute was instigated by a contemporary of al-Wansharīsī's, a jurist by the name of Muḥammad b. ʿAbd al-Karīm al-Maghīlī (d. 909/1503–4 or 910/1506–6).[25] Both men were Berbers who spent their formative years in Tlemcen—and they no doubt knew one another. Both men had migrated from their hometown: As noted, in 874/1469 al-Wansharīsī was forced to leave Tlemcen and relocated in Fez. At an uncertain date, and for unknown reasons, al-Maghīlī moved from Tlemcen to Tamanṭīṭ.[26]

According to Mālikī legal doctrine, non-Muslims are prohibited from constructing new houses of worship in any settlement that originally was laid out or established by Muslims (e.g., Kufa, Basra, or Fustat).[27] In Arabic the verb for marking out a new settlement is *ikhtaṭṭa*, which signifies to place a mark (*khiṭṭa*) on a plot of land in order to make it known that one intends to build there.[28]

At the time of al-Maghīlī's arrival in Tamanṭīṭ, there was general agreement that the *qṣar* had been established by Muslims, and that the synagogue had been built after the establishment of the fortified settlement. (None of the jurists who participated in the dispute argued that the

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[23] *EI*[2], s.v. Tuwāt (A. Moussaoui); Hunwick, *Sharīʿa in Songhay*, 34.

[24] *EI*[2], s.v. Tuwāt.

[25] On al-Maghīlī, see *EI*[2], s.v. al-Maghīlī (J. Hunwick)—and the sources mentioned there; see also Batran, "A Contribution to the Biography," 381–94.

[26] Hunwick, *Sharīʿa in Songhay*, 28–48; idem, *Jews of a Saharan Oasis*, 11–31.

[27] See Fattal, *Le statut légal des non-musulmans en pays d'Islam*, 174–203; S. Ward, "Construction and repair of churches and synagogues in Islamic Law: a treatise by Taqī al-Dīn ʿAlī b. ʿAbd al-Kāfī al-Subkī."

[28] Lane, *Arabic-English Lexicon*, s.v. *kh-ṭ-ṭ*. Cf. *Miʿyār*, 2:227, *fatwā* of al-Mawāsī.

synagogue had been built prior to the arrival of Muslims.) For this reason, al-Maghīlī demanded that the synagogue be destroyed. It may have been at this time that al-Maghīlī wrote a legal treatise in which, *inter alia*, he formulated his argument for destruction of the synagogue.[29] Not satisfied with a theoretical argument, al-Maghīlī urged the *qāḍī* of Tuwāt, ʿAbdallāh b. Abī Bakr al-Aṣnūnī, to issue a judgment ordering demolition of the synagogue. Not only did the *qāḍī* refuse to comply with his request, but he also composed a *fatwā* in which he argued that the synagogue should not be destroyed.[30] This was the first of at least eight *fatwā*s issued on the subject. Subsequently, copies of these *fatwā*s were acquired by al-Wansharīsī and included in the *Miʿyār*.[31] Although al-Wansharīsī no doubt followed the affair closely, he did not issue a *fatwā* of his own. He did, however, insert into the *Miʿyār* a personal comment on the subject. It is with this comment that we are concerned here.

Five of the eight *muftī*s were opposed to demolition of the synagogue. Although they knew that black-letter *fiqh* doctrine prohibits non-Muslims from constructing new houses of worship in a settlement established by Muslims, they struggled to circumvent this doctrine, motivated no doubt by their sense of fairness and, perhaps, sympathy for the Jews. Their main arguments are as follows:

1. The status of synagogues constructed in settlements established by Muslims was a matter of dispute; for this reason, the synagogue should *not* be destroyed.[32]
2. It is possible that the Jews of Tuwāt had received permission to build a synagogue in the distant past. If so, this ancient privilege should be recognized at the present time—unless it could be proven that the synagogue had been built illegally.[33]
3. For as long as anyone could remember, Muslim authorities in Tuwāt had accepted the existence of the synagogue without uttering a word of protest. Likewise, no Tuwātī jurist had ever called for its demolition.[34]

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[29] The title of this treatise is *Taʾlīf fī mā yajibu ʿalā ʾl-muslimīn min ijtināb al-kuffār*. For a summary and translations of extracts, see Hunwick, *Jews of a Saharan Oasis*, 14–31.

[30] The *fatwā* was solicited by a disciple of al-Maghīlī by the name of al-Fijjījī.

[31] The Tamanṭīṭ affair has been studied extensively by John Hunwick. See his "Al-Ma[g]hîlî and the Jews of Tuwât: The Demise of a Community," 155–83; idem, *Sharīʿa in Songhay*, 29–48; idem, *Jews of a Saharan Oasis*.

[32] *Miʿyār*, 2:221, ll. 3–5.

[33] Ibid., 2:225–7, *fatwā* of al-Mawāsī.

[34] Ibid., 2:214–17, letter of al-Aṣnūnī to the jurists of Tlemcen and Fez.

4. The Jews of Tuwāt must have migrated to the oasis from another region of the Muslim world where, presumably, they had received permission from a Muslim authority to repair their synagogues. This privilege accompanied them to Tuwāt.[35] That is to say, *dhimma* or protection is indivisible: it applies throughout the Abode of Islam. If *dhimmī*s in one region of the Muslim world enjoy a pact of protection, all privileges (and obligations) specified in that agreement accompany them to any other region of the Muslim world.
5. If non-Muslims who are in compliance with the terms of their protection agreement are forced to move from one area of the Abode of Islam to another, they have the right to build *new* houses of worship in their new place of residence.[36]
6. It does not follow from the fact that *dhimmī*s are prohibited from constructing a new house of worship in a Muslim settlement that Muslims are required to *destroy* an existing house of worship—even if that structure was built without permission.[37]
7. Finally, it is more important to prevent an evil—the spilling of blood and plunder of property, than to obtain a benefit—rightful demolition.[38]

However much one may be attracted to these arguments, it must be conceded that none of them is based on either Qur'ān or *ḥadīth*.

The opposite view—that the synagogue must be destroyed—was advanced by al-Maghīlī and two other jurists, al-Tanasī[39] and al-Sanūsī.[40] The argument for destruction of the synagogue, based squarely on established *fiqh* doctrine, was simple and straightforward: Non-Muslims are prohibited from building new houses of worship in any settlement that originally was laid out or established by Muslims. Tamanṭīṭ is such a settlement, and any synagogue located in the *qṣar* must therefore be destroyed. Even if a Muslim authority did give the Jews of Tamanṭīṭ permission to construct a new synagogue in the settlement (see point 2,

[35] Ibid.

[36] Ibid., 2:218, ll. 18 ff., *fatwā* of Ibn Zakrī, citing Ibn al-Ḥājj al-Fāsī (d. 737–8/1336), *Tuḥfa*, 171.

[37] *Mi'yār*, 2:217–25, *fatwā* of Ibn Zakrī.

[38] Ibid., 2:229–31, *fatwā* of Abū Zakariyā' Yaḥyā b. 'Abdallāh b. Abī al-Barakāt al-Ghumārī.

[39] Al-Tanasī (d. 899/1494) was a prominent *muftī* in Tlemcen; on him, see Aḥmad Bābā, *Nayl*, 572–3, no. 697.

[40] Al-Sanūsī (d. 895/1490) was a prominent jurist and theologian; on him, see *EI*[2], s.v. al-Sanūsī (H. Bencheneb), and the sources cited there.

above), that decree has no legal force whatsoever, and the synagogue must be destroyed.[41]

In this instance, we know the outcome of the dispute. Al-Maghīlī took matters into his own hands by offering seven gold *mithqāl*s for the head of every Jew killed in Tamanṭīṭ. The band of thugs who accepted his offer attacked the *qṣar*. The Jews reportedly attempted to defend themselves. Some were killed, others fled. The synagogue was destroyed. Al-Maghīlī and his men now headed north—intent on destroying additional synagogues, but they were intercepted and defeated by Waṭṭāsid forces. Al-Maghīlī, who escaped capture, traveled to Fez, where he secured an audience with the Waṭṭāsid Sultan, who, after a tense exchange, expelled al-Maghīlī from the city. He now headed south, across the Sahara, arriving first in Kano and then in Gao, where he persuaded the ruler of the Songhay empire, Askiy al-Ḥājj Muḥammad (r. 1493–1529) to prohibit Jews from entering his territory.[42]

When al-Wansharīsī began work on the *Miʿyār* ca. 890/1487, he surely was aware of the outcome of the affair in Tamanṭīṭ—the destruction of the synagogue and spilling of Jewish blood. To his credit, he included not only the *fatwā*s of the jurists who argued for destruction of the synagogue, but also those of the jurists who argued for its preservation. The arguments advanced by the five *muftī*s who held for preservation of the synagogue were inconsistent with the action taken by al-Maghīlī and the Muslims of Tuwāt. This may explain why al-Wansharīsī decided to exercise his privilege as compiler of the *Miʿyar* to insert a comment explaining his position on the status of the synagogue in Tamanṭīṭ. His comment, which may be found in volume 2, pp. 232–235 of the *Miʿyār*, is composed of three parts. For convenience, I divide it into three sections.

Translation of al-Wansharīsī's Comment

[*Section 1*]

> I say: The clear truth—indubitable and unavoidable—is that the Tuwātī territories (*bilād*) and other Saharan fortified habitations (*quṣūr*) that have been marked off for settlement (*al-mukhtaṭṭa*) facing the hills of the Central Maghrib

[41] *Miʿyār*, 2:235 ff., *fatwā* of al-Shassī.
[42] See further Hunwick, *Sharīʿa in Songhay*.

behind the rolling sand dunes, which do not produce crops or livestock, are lands of Islam on the basis of their having been marked out for settlement (*ikhtiṭāṭ*). Any synagogue built by the accursed Jews (*al-malāʿīn al-yahūd*)–may God do away with them–inside [the oasis] must be destroyed, as agreed upon by Ibn al-Qāsim (d. 191/806) and others. There is no argument for them in a general claim of possession (*al-ḥawz al-aʿamm*) relating to the type of *sharʿī* legal permission that is taken into consideration, or its absence, because that which is general does not contain any sign that points to a specific designation. This is because the consequence [of a general claim] is that possession (*ḥawz*) vacillates between permission and non-permission, and this is a source (*ʿayn*) of doubt in the stipulation; and doubt constitutes an obstacle for establishing the object of the stipulation. It is inconceivable that there would have been a disagreement of such a nature between Ibn al-Qāsim and others regarding [land] marked out for Muslims (*al-mukhṭaṭṭa li'l-muslimīn*), like these [lands]—unless the Shaykhs of the locality and the inhabitants of those regions (*awṭān*) confirmed [the granting] of permission. It is therefore incumbent upon anyone who constructs a new synagogue to establish and clarify [this confirmation,] because they are making a [false] claim to something, when the true situation is the reverse. Any [position] other than this one is a false lie and gibberish. If they establish the [type of] permission that is conditional upon its public benefit (*maṣlaḥa*), in doing so, the case is a disputed question, and the legal determination (*ḥukm*) of the judge, if it is connected to one of their two opinions, removes the other [opinion.] Subsequent to his judgment on the basis of one of the two, the issue is treated as if it [has attained the status of] consensus. But so long as permission on their behalf has not been established by upright witnesses, there is no confirmation (*iqrār*) or certainty (*thabāt*) for their synagogues. And a single, isolated permission does not remove the disagreement; whoever says so has gone [too] far in the response, deviating from the broad path of the truth and the correct road.

[*Section 2*]

Al-Qurṭubī [d. 671/1273] said in his *Aḥkām*, on the authority of Ibn Khuwāzmindād [fl. 4th/10th century], regarding His word [Q. 22:42], may He be exalted: "If God had not repelled the people, etc."

This verse contains a prohibition of destroying the [already existing] synagogues of the *dhimmī*s, their churches, and their fire temples, [but] they are not allowed to build [new structures] that did not exist [previously]; they may not make an addition to the building, either for the purpose of expansion or elevation. It is not appropriate for Muslims to enter them or pray in them. If they do undertake an addition, it is obligatory to destroy it [viz., the addition]. One may destroy churches and synagogues found in the Lands of War (*bilād al-ḥarb*), but one may not destroy [already existing churches and synagogues] found in the Lands of Muslims that belong to the *dhimmī*s, because [these structures] have the same status as their homes and their

wealth, about which they have made a contractual agreement. It is not permissible for them to be empowered to make additions, because this constitutes an external manifestation of the causes of infidelity. End of citation.[43]

In the *Sirāj* [*al-mulūk*] of al-Ṭurṭūshī [d. 520/1126]:[44]

> As for churches, ʿUmar b. al-Khaṭṭāb [d. 23/644], may God [2:233] be pleased with him, ordered the destruction of every church that did not exist before Islam, prohibited the construction of a new church, and ordered that any cross displayed on the outside of a church should be broken over the head of its owner. ʿUrwa b. Muḥammad [d. ?] used to destroy them [viz., churches] in Ṣanʿāʾ. This is the position (*madhhab*) of all Muslim jurists. ʿUmar b. ʿAbd al-ʿAzīz [d. 101/720] was even more severe than that: he ordered that no church or synagogue whatsoever—new or old—may be left standing in the Abode of Islam. The same view was held by al-Ḥasan al-Baṣrī [d. 110/728], who said, "It is established practice (*sunna*) to destroy old and new churches in garrison towns, and *dhimmī*s are enjoined from rebuilding what has fallen into disrepair." End of citation.[45]
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> At the end of the second [section] of the *Aḥkām* of Ibn Sahl [d. 482/1089], on the authority of Ibn Lubbāba [d. 314/926] and his colleagues, [one reads]: "Nowhere in the Islamic *sharīʿa* does one find [permission] for *dhimmī*s, i.e., Jews and Christians, to build new houses of worship or [other] abominations in Muslim towns and in their midst." Ibn Sahl [said]: "Ibn Ḥabīb [d. 238/852] mentioned, in the third [section] on *jihād* [in] the *Wāḍiḥa*, on the authority of Ibn Mājishūn [d. 212/827], on the authority of Mālik [d. 179/795], that the Messenger of God, peace and blessings be upon him, said, "Do not allow Judaism and Christianity to rise up among you."[46] Ibn Mājishūn said:
>
> No church may be constructed in the Abode of Islam or within its sacred precincts (*ḥarīm*) or within its boundary (*ʿalam*). If, however, the *dhimmī*s are separated from the Abode of Islam and its sacred precincts [and] there are no Muslims among them, then they are not enjoined from building [such structures] among themselves, from bringing wine into them, or from acquiring pigs. But if they are in the midst of Muslims, then they are enjoined from all of these things, and from repairing their old churches, with respect to which they made a *ṣulḥ*-agreement, when they become dilapidated, except if they stipulated this [viz., repair] as part of their *ṣulḥ*-agreement, in which case [the stipulation] must be upheld; and they are enjoined from making additions to them, whether the addition is to the exterior or interior [literally: manifest or hidden]. If they stipulated that they shall not be enjoined from constructing [new] churches, and the Imām made a *ṣulḥ*-agreement

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[43] Al-Qurṭubī, *al-Jāmiʿ li-aḥkām al-qurʾān*, 12:70–1.

[44] Al-Ṭurṭūshī, *Sirāj al-mulūk*, 2:550. Al-Ṭurṭūshī (d. 520/1126), was an Andalusian jurist. See Ibn Farḥūn, *Dībāj* (Cairo, 2003), 2:225–9, no. 504; Makhlūf, *Shajara* (Beirut, *ca.* 1975), 1:134, no. 320.

[45] Al-Ṭurṭūshī, *Sirāj al-mulūk*, 2:550.

[46] Cf. Bayhaqī, *al-Sunan al-kubrā*, 9:340 ("Do not allow crosses to rise up among you").

with them on that [basis,] as a result of ignorance on his part, then it is more proper to follow and obey the prohibition of that by the Messenger of God, peace and blessings be upon him. They are enjoined from this [viz., constructing new houses of worship] in the sacred precincts of Islam and in [those of] their villages in which Muslims have taken up residence. No agreement may be made in disobedience to God, except regarding the repair of their churches, if they stipulated this, but nothing else, in which case [the stipulation] should be upheld on their behalf.

Ibn Mājishūn said:

All this [relates] to people who capitulated peacefully (*ahl al-ṣulḥ*), that is, people who agree to pay the poll-tax (*jizya*). As for people who were conquered by force, at the time that the poll-tax is imposed upon them, every church belonging to them should be destroyed, and they are not allowed to construct new [churches], even if they are separated from the Muslim community, because they are like slaves who belong to the Muslims (*ka-ʿabīd al-muslimīn*), and they do not have a contractual agreement (*ʿahd*) that must be upheld on their behalf; rather, they have a contractual agreement that merely forbids [the spilling of] their blood when the poll-tax is collected from them.

In the Chapter on Wages in the *Mudawwanah*: Ibn al-Qāsim said, on the authority of Mālik, "Christians may not use [2:234] churches in the Lands of Islam unless they have received an authorization for it (*amr uʿṭūhu*)." Ibn al-Qāsim said, on the authority of Mālik: "They are not enjoined from this [viz., using their houses of worship] in villages belonging to them with respect to which they surrendered peacefully, because these are their lands, in which, if they wish, they may sell their land and houses. If, however, the land was conquered by force, then they do not have the right to construct any new [houses of worship,] because they do not have the right to sell them or inherit them [viz., the houses of worship], since they are booty (*fayʾ*) that belongs to the Muslims. If they become Muslims, they [viz., their houses of worship] should be seized from them."

Someone else said:

They are not enjoined from [using] churches in settlements that belong to them, in which they settled after they were conquered by force, nor [are they enjoined from constructing] new churches in them, because they settled in them on the [basis] of their protection (*dhimma*) and on the basis of actions that are permissible for them. They are not obligated to pay the land-tax (*kharāj*) on them; rather, the *kharāj*-tax is on the land [itself]. End of citation

In the *Wajīz* of al-Ghazālī [d. 505/1111]:[47]

. . . Then he [viz., al-Ghazālī] said: As for the legal assessment that relates to them [viz., *dhimmī*s], there are five stipulations: The first relates to churches. If they are in a town (*balda*) built by Muslims, they are not empowered to

[47] I have deleted from my translation a paragraph dealing with the collection of the poll-tax, which is not directly relevant to the status of synagogues. *Wajīz*, 2:200–1.

> construct a church; the same holds if we [viz., Muslims] acquired ownership of one of their towns through force. However, if it were the case that the Imām wanted to preserve one of their old churches, and one of their sects [wanted to] preserve one of them by paying the poll-tax, there are two opinions about this—the better [of the two] is the obligation to destroy their churches. As for the case in which [a town] capitulates peacefully, on the condition that they may reside in it by paying the land tax (*kharāj*), whereas ownership of the buildings belongs to the Muslims, and they stipulated the continuance of a [particular] church, this is permissible. But if they made [peace] unconditionally, then with respect to the obligation to do that, in fulfillment of (*itmām^an li-*) the stipulation (*taqrīr*) that we agreed upon, there are two opinions.

[Here, al-Wansharīsī inserts a clarification:] "[al-Ghazālī] says 'in fulfillment of' (*itmām^an li*), because it is impossible for them to be established (*al-qarār*) without a cultus (*mutaʿabbad*) and a gathering place for prayer (*jāmiʿ*)."[48]

> As for the case in which it was conquered on the condition that ownership of the town belongs to them, and they are obligated to pay the land tax, then it is their town, and their churches may not be destroyed. The clear meaning [of this opinion] is that they may not be enjoined from constructing a new church, and it is permissible for them to display wine, the clapper, and other things [in their town]. [2:235] Where new construction is enjoined, there is no injunction [prohibiting the repair of] old buildings, if repair is needed. If they become dilapidated, then with regard to the permissibility of repairing them there are two opinions and with regard to the expansion of their walls there are two opinions. [Furthermore,] it is not obligatory for them to conceal the repairs, but the striking of the clapper is prohibited, as is the display of wine. Some say: it [viz., wine] belongs to the church.[49]

[*Section 3*]

> I [viz., al-Wansharīsī] say: Consider [al-Ghazālī's] statement, "If they are in a town (*balda*) built by Muslims." Verily, this is a clear indicator that the synagogues newly constructed by the accursed Jews in the Tuwātī fortresses and other lands of the Jarīd facing the hills of the central Maghrib may not be preserved. Indeed, they should be destroyed. There is no force whatsoever to the disagreement between Ibn al-Qāsim or others in the Chapter on Leases and Wages, as imagined by the Tilimsānī and Fāsī jurists who issued *fatwā*s to them about that, in accordance with what we have recorded about them earlier. This is a loathsome error—may God guard us from mistakes, and may He grant us success for [our] good words and deeds.

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[48] This sentence, which is not found in *Wajīz*, 2:202, appears to be the voice of al-Wansharīsī.

[49] *Wajīz*, 2:202.

Discussion

Al-Wansharīsī's three-part comment opens and closes with a paragraph in which he expresses his personal and unequivocal opinion, supported by only a small amount of legal reasoning: It is incumbent upon Muslims to destroy not only the synagogue in Tamanṭīṭ but also any synagogue located in the oasis of Tuwāt. Sandwiched between these two statements are citations from the relevant sections of five legal treatises, presented in the following order: the *Aḥkām* of al-Qurṭubī (d. 671/1273), *Sirāj al-Mulūk* of al-Ṭurtūshī (d. 520/1126), *Aḥkām* of Ibn Sahl (d. 482/1089), *Mudawwanah* of Saḥnūn (d. 240/854), and *Wajīz* of al-Ghazālī (d. 505/1111)—all Mālikī scholars, except for al-Ghazālī. With the exception of a minor linguistic gloss, these citations are presented without any comment from the compiler and without any effort to relate the legal doctrine found in them to the case-at-hand.

Al-Wansharīsī no doubt assumed that his audience would be able to work through the material with little or no difficulty, make the relevant connections, and draw the inevitable conclusion. Although this may have been true of his immediate audience—the jurists of Tlemcen and Fez, the modern reader who is unfamiliar with the subject finds himself confronted with a considerable amount of information that is presented in no apparent order and with little regard for legal logic or chronology. In what follows, I attempt to represent this information in a manner that highlights the historical development of Mālikī legal doctrine on the status of houses of worship constructed by non-Muslims.

[*Section 1: Opening Statement*]

In his opening statement, al-Wansharīsī asserts that the fortified settlements located in Tuwāt were established by Muslims and are therefore governed by the rules that apply to the Abode of Islam. For this reason, any synagogue located within the oasis must be destroyed. Drawing on the Jew-baiting invective used by al-Maghīlī and others, al-Wansharīsī characterizes the Jews as accursed (*malaʿīn al-yahūd*) and expresses the wish that God banish them (literally: send them far away). As support for the argument that the synagogue must be destroyed, he invokes the authority of Ibn al-Qāsim and refers to other, unnamed jurists. Next, al-Wansharīsī responds to two arguments advanced by the *muftī*s who held for preservation of the synagogue:

1. As for the argument that the Jews had received a general authorization to build a house of worship, al-Wansharīsī responds that a general claim creates doubt: the Jews may or may not have received permission to build a synagogue in this instance. The construction of a specific synagogue may not be allowed on such a weak epistemological basis.
2. As for the argument that the synagogue should be left intact because of a disagreement between Ibn al-Qāsim and other jurists over whether or not it is permissible for *dhimmī*s to construct houses of worship in settlements established by Muslims, al-Wansharīsī, responds that *fiqh* doctrine is clear and that such a disagreement is inconceivable.

The only exception that al-Wansharīsī would allow is if the inhabitants of Tuwāt were to establish that a Muslim authority had in fact granted the Jews permission to build a new synagogue. In that case, the burden of proof would lie upon the Jews, who must document the authorization. Their inability to do so strongly undermined their claim and suggested that they were lying. Al-Wansharīsī does concede that if the Jews were to produce credible evidence of an earlier authorization, granted for the sake of public benefit (*maṣlaḥa*), then a judge might allow for the continued existence of the synagogue. In the absence of such credible evidence, however, there is no legal basis for the continued existence of the synagogue.

[*Section 2: Fiqh Doctrine*]

In the second, and longest, section of his comment, al-Wansharīsī draws upon his extensive knowledge of Islamic legal doctrine by adducing statements made by earlier jurists that provide support for his position. Embedded in these citations are verses of the Qurʾān, Prophetic *ḥadīth*, and reports about the practice of the first caliphs.

The first authority statement cited by al-Wansharīsī (in a citation from al-Qurṭubī) is Q. 22:40, a key proof-text relating to the status of Muslim and non-Muslim houses of worship. The relevant section of this verse reads as follows:

> . . . Had God not repelled the people, some of them by means of others, then surely *ṣawāmiʿ, biyaʿ, ṣalawāt*, and *masājid* in which the name of God is mentioned frequently would have been destroyed. Indeed, God supports those who support Him.

The verse mentions four structures—presumably monasteries, churches, synagogues and mosques, respectively—that merit protection because the people who pray in them support God and mention His name frequently.

The verse looks back in time to several instances in which "people"—no doubt unbelievers—had threatened to destroy these houses of worship. These threats would have been successful had it not been for successive acts of divine intervention. After conferring upon the believers the power to repel the unbelievers, God instructed them to engage in *jihād*. One might infer from the formulation of Q. 22:40 that monasteries, churches, and synagogues—like mosques—are protected by God and should not be destroyed.[50]

In fact, this inference is only partially correct. The protection afforded to non-Muslim houses of worship by Q. 22:40 was qualified by the *sunna* of the Prophet. On one occasion, Muḥammad is reported to have instructed his Companions as follows: "Do not allow Judaism and Christianity to rise up among you,"[51] that is to say, adherents of these two religious communities should not be allowed to flourish within the Abode of Islam. The *sunna*ic instruction to prevent Judaism and Christianity from flourishing in Islamic lands is in tension with the Qurʾānic statement that monasteries, churches, and synagogues are protected by God. What is the relationship between these two conflicting norms?

The answer to this question may be found in reports about early Islamic history. The second caliph, ʿUmar b. al-Khaṭṭāb (d. 23/644), is said to have prohibited the construction of new houses of worship and ordered the destruction of all houses of worship built subsequent to the appearance of Islam.[52] The key issue here was time: Was a house of worship constructed before or after the Muslim conquests? The date on which a house of worship was built determined its legality or illegality. If it had been constructed illegally—i.e., after the Muslim takeover—then it should be destroyed.

The policy regarding non-Muslim houses of worship appears to have hardened under the Umayyad caliph ʿUmar b. ʿAbd al-ʿAzīz (d. 101/720), who is said to have ordered the destruction of all houses of worship—new and old—located in the Abode of Islam.[53] Here the issue is not time but place. A narrower interpretation of this policy is attributed to al-Ḥasan al-Baṣrī (d. 110/728), who specified that it is a *sunna* for Muslims to destroy any non-Muslim house of worship—new or old—found in a garrison

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[50] Al-Qurṭubī, *al-Jāmiʿ li-aḥkām al-qurʾān*, 12:70.

[51] *Miʿyār*, 2:233. Cf. Bayhaqī, *al-Sunan al-kubrā*, 9:340 ("Do not allow crosses to rise up among you").

[52] *Miʿyār*, 2:232–3. The second caliph also ordered that if a cross were found outside of a church, it should be broken over the head of its owner.

[53] Ibid., 2:233, ll. 3–5.

town, adding that non-Muslims may not rebuild an old house of worship that has fallen into disrepair.[54]

In fact, it was the policy attributed to ʿUmar b. al-Khaṭṭāb—the more lenient policy—that became the standard position of Sunni jurists. Houses of worship constructed prior to the Islamic conquests in cities such as Damascus, Jerusalem, and Alexandria were protected. Non-Muslims were not, however, allowed to construct new houses of worship inside Islamic garrison towns and other settlements established by Muslims; and any house of worship built within the Abode of Islam after the conquests should be destroyed.

Over time, the juristic treatment of the status of non-Muslim houses of worship became more sophisticated. If, initially, the key issues were where and when a particular house of worship had been built, by the second half of the second century AH, three new variables had been added to the equation: (1) whether or not a Muslim ruler had given non-Muslims permission to use a house of worship located within the Abode of Islam; (2) whether the non-Muslims lived in proximity to Muslims or in their own communities; and (3) whether the inhabitants of a particular region became subject to Islamic authority peacefully or by force.

In the second half of the second century AH, Mālikī jurists posed the following question: May non-Muslims use a house of worship on the strength of an authorization conferred by a Muslim ruler? According to Ibn al-Qāsim (d. 191/806)—relying on the authority of his teacher, Mālik b. Anas (d. 179/795)—the only circumstance in which non-Muslims may continue to use houses of worship within the Abode of Islam is if they received an explicit authorization for such use from a Muslim ruler (*amr uʿtūhu*). Similarly, *dhimmī*s who live in settlements of their own, and who submitted peacefully to the Muslims, are permitted to continue to use pre-existing houses of worship, on the strength of an explicit authorization from a Muslim ruler. If, however, *dhimmī*s were conquered by force (*ʿanwat*^{an}), then they may not continue to use pre-existing houses of worship and their property is booty (*fay'*) that belongs to the Muslim community. If the *dhimmī*s become Muslims, their houses of worship should be seized (and, presumably, transformed into mosques).[55]

Another student of Mālik's, Ibn Mājishūn (d. 212/827), invoked a distinction between *dhimmī*s who live in their own villages, towns, and cities,

[54] Ibid., 2:233, ll. 6–7.
[55] Ibid., 2:233 (bottom)—234, l. 5.

in which there are no Muslims, and those who live within a Muslim village, town or city. In the former case—segregation along confessional lines, *dhimmī*s may construct new houses of worship. In the latter case—mixed religious communities, Ibn Mājishūn distinguishes between the construction of new houses of worship and the repair of old ones: *Dhimmī*s living in the midst of Muslims may not construct new houses of worship. As for pre-existing houses of worship, these may be repaired, but only if a stipulation to that effect was included in the *ṣulḥ*-agreement drawn up when the non-Muslims submitted to the Muslims. In addition, even if the *ṣulḥ*-agreement stipulates the permissibility of repair, *dhimmī*s may not make any additions to the structure, either internally or externally.[56]

One might think that the authorization of a Muslim ruler would prevail over any other consideration. Sometimes, however, a ruler may make a mistake. Ibn Mājishūn poses a hypothetical question: Suppose that a Muslim ruler—out of ignorance—concludes a *ṣulḥ*-agreement with *dhimmī*s in which it is stipulated—improperly—that the *dhimmī*s are entitled to construct new houses of worship. Should such an agreement be respected? The proper course of action, the jurist opines, is to ignore the invalid stipulation and to enforce established policy, i.e., the prohibition on the construction of new houses of worship in the Abode of Islam. This prohibition, according to Ibn Mājishūn, is based on the *sunna* or model behavior of the Prophet Muḥammad. The policy applies throughout the Abode of Islam, even in villages, towns and cities originally inhabited by *dhimmī*s but in which Muslims subsequently took up residence. No agreement, Ibn Mājishūn observes, invoking a well-known principle, may be made in disobedience to God. There is nothing objectionable, however, about a stipulation made by a Muslim ruler giving *dhimmī*s permission to repair—but not to enlarge—an existing house of worship.[57]

As for non-Muslims who were conquered by force, a different—and harsher—policy applies. Following the forceful conquest of a region, Muslim authorities should impose the poll-tax and then destroy all currently existing houses of worship. The inhabitants of a region conquered by force may not construct new synagogues, even if there are no Muslims within their midst. The protection accorded to these *dhimmī* communities, based on payment of the poll-tax, applies only to their lives, not to their property. In a telling statement, Ibn Mājishūn likens the status of *dhimmī*s who

[56] Ibid., 2:233, ll. 12–18.
[57] Ibid., 2:233, ll. 18–23.

resist the Muslim conquest to that of slaves owned by Muslims (*ka-ʿabīd al-muslimīn*).[58]

In fact, non-Muslims did construct new houses of worship in the Abode of Islam, and at least some Muslim jurists condoned this practice. This did not mean, however, that the practice was legitimate. When Ibn Lubbāba (d. 314/926) was asked about Muslim jurists who condoned this practice, he responded that nowhere within the corpus of Islamic law does one find a statement permitting the construction of new churches and synagogues within the Abode of Islam.[59]

Al-Wansharīsī began the second section of his comment by citing al-Qurṭubī's discussion of Q. 22:40. Al-Qurṭubī, in turn, cited an eastern Mālikī by the name of Ibn Khuwāzmindād (fl. 4th/10th century), who articulated the now standard *fiqh* doctrine as follows: *Dhimmī*s may not construct new houses of worship in the Abode of Islam, nor may they make an addition to an existing house of worship, because either act is a manifestation of infidelity; if they violate this rule by enlarging an old house of worship, the addition may be destroyed.[60] It will be noted that Ibn Khuwāzmindād stops short of explicitly stating that illegally constructed houses of worship should be destroyed.

In his *Wajīz*, the Shāfiʿī scholar al-Ghazālī (d. 505/1111)—cited with approval by al-Wansharīsī—lists and discusses five rules (*aḥkām*) that apply to *dhimmī*s. The first rule deals with *dhimmī* houses of worship.[61] According to al-Ghazālī, *dhimmī*s may not construct new houses of worship in a town that was established by Muslims or in one of their own towns, if the latter was conquered by force. If Muslims find a non-Muslim house of worship in a town conquered by force, they must destroy it, even if the Muslim ruler is willing to preserve the structure, and notwithstanding the fact that the *dhimmī*s pay the poll-tax.[62] Al-Ghazālī draws atten-

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[58] Ibid., 2:233, ll. 23–7.

[59] Ibid., 2:233, ll. 7–9.

[60] Al-Qurṭubī, *al-Jāmiʿ li-aḥkām al-qurʾān*, 12:70–71; cited at *Miʿyār*, 2:232.

[61] Wansharīsī includes al-Ghazālī's discussion of the requirement that Muslims humiliate non-Muslims when the latter pay the poll-tax: A *dhimmī* should lower his head so that the tax collector can hit him on the face. A *dhimmī* may not avoid personal humiliation by appointing a Muslim agent to pay his poll-tax on his behalf; conversely, a Muslim may not guarantee the payment of a *dhimmī*'s poll-tax obligation. The only circumstance in which an exception may be made regarding the poll-tax is if the exception will serve a public benefit (*maṣlaḥa*). At his discretion, a Muslim ruler may accept from *dhimmī*s in lieu of the *jizya* twice the value of the stipulated *ṣadaqa*-tax.

[62] *Miʿyār*, 2:234, ll. 20–3. Ghazālī considers two additional scenarios. First, suppose that the inhabitants of a town capitulate peacefully on the condition of continued residence in the town and payment of the *kharāj* land-tax. The buildings in this town become the prop-

tion to the illegality of non-Muslim houses of worship established after the fact in *ṣulḥ*-territories, but, like Ibn Khuwāzmindād, stops short of explicitly stating that these structures should be destroyed.

[*Section 3: Closing Statement*]

Al-Wansharīsī concludes his comment by drawing attention to al-Ghazālī's assertion that non-Muslims may not build a new house of worship in a town that was established by Muslims. This assertion, al-Wansharīsī says, is a clear sign of the illegality of the synagogues built by the "accursed Jews" in the oasis of Tuwāt. As noted, neither al-Ghazālī nor Ibn Khuwāzmindād explicitly stated that such a house of worship should be destroyed. Al-Wansharīsī takes their argument to its logical conclusion: These illegal houses of worship, he says, must be destroyed. As for the jurists of Fez and Tlemcen who argued otherwise, they had committed a "loathsome error." For this reason, al-Wansharīsī intimates, their *fatwā*s should be ignored.

Conclusion

The position adopted in verse 40 of *Sūrat al-Ḥajj* with respect to the status of monotheist houses of worship is decidedly ecumenical: ". . . Had God not repelled the people, some of them by means of others, then surely monasteries, churches, synagogues and mosques in which the name of God is mentioned frequently would have been destroyed" (Q. 22:40).

The ecumenical spirit of the Qur'ān was soon overshadowed, however, by emerging legal doctrine on the status of non-Muslim houses of worship. This doctrine crystallized in the 2nd/8th and 3rd/9th centuries, at a time when Muslims exercised political control over much of the Near East but were themselves still a minority. A primary goal of *fiqh* doctrine was to insure the continued growth and expansion of the Muslim community.

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erty of the Muslims. It is permissible for the Muslim ruler to stipulate that a particular house of worship may be preserved. Second, suppose that the Muslims make an unconditional peace agreement with the *dhimmī*s of a particular locality; and suppose further that the *dhimmī*s want to preserve an existing house of worship. There are two views: First, if the town was conquered with the understanding that ownership of the town belongs to the *dhimmī*s and that they are required to pay the land-tax, then the town belongs to the *dhimmī*s. In that case, *dhimmī*s may construct new houses of worship; and the Muslims may not destroy existing houses of worship. If, however, the terms of conquest stipulate that the construction of new houses of worship is prohibited, then it is nevertheless permissible to repair old houses of worship, and it is not necessary for the *dhimmī*s to conceal the repairs. *Mi'yār*, 2:234–5.

That goal had been achieved by the 9th/15th century. In the Islamic West, however, the expulsion of Muslims (and Jews) from al-Andalus in 1492 signaled a shift in the balance of power in favor of the Christians. As al-Wansharīsī was compiling the *Miʿyār*, refugees from al-Andalus, both Muslims and Jews, were entering the major towns and cities of the Maghrib.[63] As the Jewish population expanded, it stands to reason that a need would have arisen for the construction of new synagogues. Should Jews be allowed to build new synagogues?

The scholarly contest over the status of a Jewish synagogue in the oasis of Tuwāt may have served as a test case. As Andalusian Jewish refugees entered the towns and cities of the Maghrib at the turn of the 10th/16th century, they no doubt attempted to establish new places of worship, with or without the permission of Muslim authorities. If so, the *fatwā*s gathered by al-Wansharīsī in the *Miʿyār* would have provided those authorities with legal arguments that might serve as the basis of policy decisions relating to these new houses of worship. It will be recalled that one of the arguments put forward by the *muftī*s who opposed destruction of the synagogue in Tamanṭīṭ was that non-Muslims who are in compliance with the terms of their protection agreement, but who are forced to move from one area of the Abode of Islam to another, have the right to build *new* houses of worship in their new place of residence (see argument 6, above).[64] According to this argument, if it could be established that Andalusian Jews had been in compliance with their protection agreements with their Muslim overlords prior to expulsion, then they should be allowed to build new synagogues in the Maghrib. Al-Wansharīsī's determination to undermine this argument may in part explain his decision to insert a personal comment into the *Miʿyār*.

In this instance, al-Wansharīsī adopted the position of a strict constructionist who insists on rigid adherence to established legal doctrine, irrespective of changing historical conditions. Unlike some *muftī*s, he expressed no interest in tempering the harshness of *fiqh* doctrine. Indeed, he evinced no sympathy whatsoever for the Jews of Tamanṭīṭ who had been killed by the mob and whose synagogue had been destroyed. These

[63] Jewish refugees from al-Andalus had been settling in the Maghrib since the end of the 8th/14th century. In Tlemcen, for example, approximately 4% of the population was Jewish. Members of the Jewish community reportedly dressed like Muslims, rode horses, and accompanied Muslims on trading expeditions—actions that reportedly irritated certain segments of the Muslim population.

[64] *Miʿyār*, 2:218, ll. 18 ff., *fatwā* of Ibn Zakrī, citing Ibn al-Ḥājj, *Tuḥfa*, 171.

Jews, in his words, were "accursed" and deserved to be sent far away. In his mind, to be on the right side of the law was to be on the right side of history.

In my view, al-Wansharīsī was on the wrong side of history. In his comment, he exposes himself as a heartless, dispassionate, and cruel man who advocated strict adherence to *fiqh* doctrine at the expense of human life itself.[65] One wonders what prevented him from following the lead of the five jurists who argued—with passion—for the preservation of the synagogue and protection of the Jews in Tamanṭīṭ. One would like to know what elements of his personal history, intellectual formation, and worldview may have combined to shape his judicial personality: Had he been hardened by his experience as a refugee scholar who was forced to reinvent himself at the age of forty? Or disheartened by the fall of Granada and the retreat of Islam in the West? What was the impact on his legal thinking of any interactions he may have had with Jews and Christians in Tlemcen and Fez? Was his legal thinking largely a product of his training as a jurist and his experience as the collector of the *Miʿyār*? Prudence dictates that we suspend judgment on these questions until more of al-Wansharīsī's jurisprudence has been subjected to careful examination.[66]

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[65] Al-Wansharīsī is known to have adopted different judicial styles in different cases. See Powers, *Law, Society, and Culture in the Maghrib*, chapter 6.

[66] In defense of al-Wansharīsī, it should be noted that elsewhere he adopted a hardline position against his fellow Muslims. In one of his longest and best-known *fatwā*s, known as *Asnā al-Matājir*, he argued that Muslims living in the former Naṣrid kingdom of Granada must emigrate to the Abode of Islam and that they may not voluntarily choose to remain subject to non-Muslim authority. See *Miʿyār*, 2:119 ff. His position on this issue has been criticized by several modern scholars: H. Mu'nis characterized al-Wansharīsī as a cruel, ignorant, and lazy jurist whose *fatwā* had a disastrous effect on the viability of Muslim communities in al-Andalus after 1492. See Ḥ. Mu'nis (ed.), "*Asná al-matājir* . . ., by . . . al-Wansharīsī," *Revista del Instituto Egipcio de Estudiós Islamicos en Madrid* 5 (1957), 15–18. H. Buzineb and L.P. Harvey described him as an authoritarian. See H. Buzineb, "Respuestas de Jurisconsultos Maghrebies en Torno a la Inmigración de Musulmanes Hispánicos," *Hespéris Tamuda* 16–17 (1988–89), 60, L.P. Harvey, *Islamic Spain, 1250 to 1500*, 56, idem, *Muslims in Spain, 1500 to 1614*, 60–4. K. Miller has characterized al-Wansharīsī as a "rigorist" who "refused to envision a Muslim exclave as a legitimate community and so dismissed the Mudejars as disobedient exiles." See K. Miller, *Guardians of Islam*, 23, cf. idem, "Muslim Minorities and the Obligation to Emigrate to Islamic Territory: Two *fatwā*s from Fifteenth-Century Granada," *Islamic Law and Society* 7:2 (2000): 256–88. These assessments recently have been challenged by J. Hendrickson, according to whom *Asnā al-Matājir* is best seen in its North African context, where it occupies a central position in "a lively and previously unexplored juristic discourse on the position of Muslims living under foreign occupation in Morocco itself." See J. Hendrickson, "The Islamic Obligation to Emigrate: Al-Wansharīsī's *Asnā al-Matājir*."

CHAPTER EIGHTEEN

EBU'S-SU'UD (D. 982/1574)

Colin Imber

Life and Works

Although Ebu's-su'ud has acquired lasting fame as a Hanafī jurist, his position within the school is unusual. His reputation does not rest on a major work of *fiqh* such as the *Multaqā'l-Abhur* of Ibrāhīm al-Ḥalabī or *al-Baḥr al-Rā'iq* of Ibn Nujaym, both of which were composed during his lifetime and within the borders of the Ottoman empire whose government he served. Furthermore, although he was Mufti of Istanbul for almost thirty years, between 1545 and 1574, he never collected his fatwas into a single volume, claiming, according to an Ottoman tradition, that he could never hope to emulate the compilation of the great Crimean jurist Ibn Bazzāz (d. 1414).[1] The survival of so many of his fatwas is thanks to the efforts of his protégés Veli Yegan and Buzenzade and to later anthologists.[2]

The literary work for which Ebu's-su'ud is—or was—best known is in fact his Qur'an commentary *Irshād al-'Aql al-Salīm ilā Mazāyā al-Kitāb al-Karīm*, completed in 1566, the year of the death of its dedicatee, the Ottoman sultan Süleyman I (1520–66). His Ottoman biographers also single out for praise a *qaṣīda* and an elegy, both in Arabic, on the death of Sultan Süleyman, and frequently quote in full his fatwa on the dissolution of an oath written in Persian verse in response to a question similarly framed, and his fatwa on the correct recitation of the Qur'an, written, like the question, in Arabic rhymed prose. These, however, they quote in order to demonstrate his skill in literary composition rather than his skill as a jurist. His works of formal *fiqh* and related sciences—two commentaries on the 'Book of Sale' in *al-Hidāya* of al-Marghinānī, and his commentaries on part of *al-Talwīh* of al-Taftazānī and on *al-Manār* of al-Nasafī—he probably wrote as textbooks during his teaching career, while his commentary on the chapter on *jihād* in *al-Hidāya* he composed on the order

[1] Ḥājjī Khalīfa (ed. Gustav Flügel), *Kashf al-Ẓunūn*, 2:49.
[2] 'Atā'ī, *Ḥadā'iq al-Ḥaqā'iq*, 313.

of Süleyman I. These works are mainly forgotten, and none of them played any part in establishing his reputation as a jurist. More respected, although few in number, were his *risāla*s on contemporary legal problems,[3] and these in fact reflect more accurately the basis of his fame, which was as a practical jurist, working for an imperial government and confronting every day the problems of government and society, from affairs of state to the everyday concerns of individuals.

During his career, Ebu's-su'ud came to occupy the most important legal offices of the Ottoman empire, and to leave a mark on both legal institutions and legal practice. His entry into the profession and his close links with the Ottoman dynasty came about through the influence of his father, Muhiyyü'd-din Mehmed, a scholar and respected sufi. Muhiyyü'd-din was a member of the circle of the future sultan Bayezid II (1481–1512), and came to Istanbul with Bayezid when he ascended the throne in 1481. Ebu's-su'ud was born, it seems, in 1490, and had his father as his first teacher. It was through his father, too, that he came to the attention of Bayezid who, impressed by his abilities, granted him a daily stipend. His good fortune, and apparently also his stipend, continued even after the deposition of Bayezid in 1512, the death of his father in 1514, and the deaths of other early patrons and teachers. From 1516, his career followed a pattern which was typical for the highest ranking legal officers in the Ottoman empire. A series of teaching posts between 1516 and 1533 led from the humble position of *mudarris* at a provincial *madrasa* in İnegöl to becoming *mudarris* in 1528 in one of the Eight Madrasas established in Istanbul by Mehmed II (1451–81) and by this time the most prestigious institutions of learning in the Ottoman empire. A position in one of these colleges was a necessary prelude the highest judicial office. Ebu's-su'ud left the Eight Madrasas in 1533 to become first *qadi* of Bursa and then, in the same year, *qadi* of Istanbul, the Ottoman capital, a position which he occupied until 1537. Since he was a man with a practical mind and a desire to impose order and uniformity on the legal system, it is very likely that his *Biḍā'at al-qāḍī*, an anthology of legal exemplars to assist *qadi*s in the correct formulation of documents, dates from this period of his life.

It is unlikely that, even during his short periods as a provincial *mudarris*, Ebu's-su'ud ever cut his ties with the dynasty or with influential figures in Istanbul. However, the period of his ascendancy and of his closest links

[3] For a bibliography of Ebu's-su'ud's works, see Pehlül Düzenli, "Şeyhülislam Ebussuûd Efendi: bibliyografik bir değerlendirme," in *Türkiye Araştırmaları Literatür Dergisi*, 3:5 (2005), 441–75.

to the sultan began in 1537, with his appointment as *qadi'asker* of Rumelia. This post made him the senior *qadi* in the Empire and gave him a seat on the sultan's Imperial Council, the central organ of the Ottoman government, meeting under the presidency of the grand vizier. It was during his period as *qadi'asker* that he became engaged with several of the issues for which he acquired a lasting reputation: the formulation of the Ottoman laws of land-tenure and the framing of the Ottoman sultans' claim to the Caliphate. The biographers also note the reforms he instituted during this period to systematise appointments in the professions of *mudarris* and *qadi*. In 1545, Süleyman I appointed him Mufti of Istanbul,[4] a prestigious position but one whose reputation had sunk since the time of the greatest holder of the office, Kemalpaşazade (1525–34). From Ebu's-su'ud's period, however, the mufti—who came to be known as the *şeyhülislam*—was undisputedly the head of the Ottoman religio-legal hierarchy. This development reflected not only Ebu's-su'ud's personal prestige, but equally the changes he brought to the office. It was Ebu's-su'ud who introduced the practice of employing legally qualified clerks to classify the questions presented to the mufti and to cast them in the correct form, ready for the mufti to add the reply. The presence of permanent staff who, after Ebu's-su'ud's time, came to bear most of the burden of issuing fatwas, allowed the *şeyhülislam*'s office to maintain both high legal standards and the prestige of the institution despite frequent changes of *şeyhülislam*.[5] It was probably also during his time as mufti that he wrote his guide to correct spelling and language usage in Turkish,[6] in order to systematise and raise the standard of legal formulation.

The Mufti of Istanbul who, in principle, stood above the affairs of government to act as intermediary between God's law and the practical problems of the world, was not a member of the Imperial Council. In practice, however, Ebu's-su'ud and his successors belonged to the ruling élite of the Ottoman empire and clearly played an important part in the informal councils of government. Furthermore, Ebu's-su'ud seems to have enjoyed the friendship of, and personal access to, Süleyman I, and the respect at least of his son Selim II (re. 1566–74). His connections, therefore, made him, from 1537 until his death in 1574, one of the most influential figures in the Ottoman empire.

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[4] On this office and on Ebu's-su'ud's career, see R.C. Repp, *The Müfti of Istanbul*. On Ebu's-su'ud's career, see Colin Imber, *Ebu's-su'ud: the Islamic Legal Tradition*, ch. 1.

[5] Uriel Heyd, "Some aspects of the Ottoman *fetva*."

[6] Fikret Turan, "Şeyhülislam Ebussuud'un İmla Kuralları."

On Land-Tenure and Taxation

Ebu's-su'ud's period in office coincided with an important period in the development of Ottoman imperial and dynastic ideology. It was in the sixteenth century that the Ottoman empire emerged as the greatest power in the Islamic world. It was a time, too, when consciousness of the Ottoman sultan as the promulgator and protector of Islamic orthodoxy came to play a central role in imperial ideology, and it was in Islamic terms that the sultans formulated their military and political goals, whether against the 'infidel' western powers or the against the 'heretical' Safavids in the east. It was Ebu's-su'ud in particular who gave Ottoman imperial-Islamic ideology its precise formulation, but equally importantly he used this formulation to systematise the Ottoman legal order.

How he did this becomes evident in the 'Law Book of Buda' of 1543. In 1540 Süleyman I's nominee as king of Hungary died, provoking a Hapsburg invasion. The sultan's response to the crisis, after defeating the invaders, was to convert the central part of the old Kingdom of Hungary to a directly ruled Ottoman province, where the system of land-tenure and taxation prevalent in the Ottoman Balkans would be enforced. This created two problems. The first was that no general and methodical description of the laws existed. The reign of Süleyman's grandfather, Bayezid II (1481–1512), had seen the promulgation of the first systematic codes (*kanunname*s)[7] governing land-tenure and taxation in each *sanjak*, that is a subdivision of a province under the governorship of a *sanjak beyi*, and also an attempt as far as possible to standardise the law throughout the Empire. Indeed, the early 1540s saw the final recension of the 'general' *kanunname* of Bayezid II. These codes, however, contain only detailed statutes, and no statement of principle. This is what Ebu's-su'ud was to provide. The second problem was that it was custom and necessity that had shaped the Ottoman system of land-tenure and taxation, and neither conformed to the principles of *fiqh*. The basis of the system was the *timar*, a fief held by a cavalryman with a contractual obligation to serve in the sultan's army with a horse, weapons, armour, tent and armed retainers. The *timar* consisted normally of a village or villages and the surrounding agricultural land and pasture, from which the cavalryman had the right to collect the taxes specified in the land and tax register for the *sanjak*. *Timar*s were revocable and non-hereditary: a *timar* holder's son inherited the right to a timar, but

[7] See Uriel Heyd, *Studies in Old Ottoman Criminal Law*.

not specifically to his father's holding. Nor did the peasants own the land they worked. The land was in principle hereditary in the male line, but the occupier could not, in principle, dispose of it at will, and he could lose it after three years if he ceased cultivation. The question therefore was not who owned the land, but rather who had the right of occupancy and what rights and obligations did occupancy entail. In essence, the *timar*-holder had the right to collect the legally specified taxes in return for an obligation to go to war. The peasant had the right to occupy the land in return for an obligation to pay the taxes on it and keep it under cultivation. This was quite different from Hanafi theory, which treats land as a commodity in private ownership, and makes taxation of the land dependent on its status at the time of the Muslim conquest. Land granted to the Islamic conquerors pays only *'ushr*, a tithe on the produce, whose payment is classified as 'an act of worship.' Land which remained in the ownership of its pre-conquest proprietors pays two taxes in perpetuity, whose payment is classified as a 'burden' (*ma'ūna*). These are *kharāj muqāsama* and *kharāj muwaẓẓaf*. The first is a proportional tax on the crops, which may be levied at up to 50% 'according to what the land may bear.' The second is a fixed annual tax resembling a rent.

Although the Ottoman system of *timar*-holding and taxation of the land was very different from what Hanafi doctrine prescribes, Ebu's-su'ud had nonetheless to reconcile the two. It was, however, an old problem in *fiqh*, since 'feudal' land-tenure had always been widespread in the Islamic world and Hanafi doctrine had always been a fiction. It is unsurprising therefore to find that Hanafi works, from the *Kitāb al-Kharāj* attributed to Abū Yūsuf onwards,[8] had attempted to explain how land supposedly in private ownership had come to be at the disposal of the ruler, and how 'feudal' taxation could be explained as being *kharāj*. Qadikhan (d. 1189) for example, had used the fiction of the 'death of the *kharāj* payers' to explain how land had come into the ownership of the ruler and also explained, in a roundabout way, how this had given him the right to allocate the *kharāj* from the land to a fighting man as a 'legitimate recipient' whose activities benefit the community.[9] Ibn Bazzāz, in discussing the problem, describes 'feudal' land as *arāḍī'l-mamlaka*, a term which was to pass into Ottoman usage:

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[8] Abū Yūsuf, *Kitāb al-Kharāj* (Cairo, 1976), 63.

[9] Qāḍīkhān, *al-Fatawā*, on the margin of *al-Fatāwā al-Hindiyya* (Bulaq, 1912–13), 3:591–2. See also Baber Johansen, *The Islamic Law of Tax and Rent*.

> There are two ways to explain *arāḍī'l-mamlaka*. Either it is land with no owner, which the ruler (*imām*) has given to a man to tend as an owner, and who pays *kharāj*. Or second, it is land with an owner who is unable to pay *kharāj*, which the ruler gives to a man who stands in place of an owner in [the matters of] paying *kharāj* and cultivation. He does not possess [the right] to sell [the land] because the ruler did not make him owner, but only put him in the position of an owner as a special case. However, the ruler takes the *kharāj* from what is due as rent (*dahqāniyya*).[10]

Ebu's-su'ud was not the first Ottoman jurist to approach the problem. His predecessor as Mufti of Istanbul, Kemalpaşazade (d. 1534), had also tried to explain Ottoman 'feudal' tenure in Hanafi terms:

> Leasehold (*ḥawz*) land and *arāḍī'l-mamlaka* are lands about which no one knows from whom they were seized at the time of the conquest, or to whom they were given, or whose owners have died out. Because the status [of the lands] and [their] owners are unknown, they were taken for the treasury.
>
> When the sultan's agents registered the provinces, they assigned the lands as fiefs (*iqṭā'*). The right to reside on (*haqq-i qarār*) and enjoy the usufruct of the fiefs was given to cavalrymen (*sipahi*) in the form of *timar* revenue. In these realms this category of land is called *mīrī*. The holder of the *timar* is entitled to the right of settlement by letters patent (*berāt*) or license (*tezkere*). He sells the use of the land to his peasants (*re'āyā*) and cultivators, taking from them his customary dues and canonical taxes.
>
> Since neither the *timar*-holders nor the occupiers own the essence (*aṣl*) or the substance (*raqaba*) of the land, sale, gift and conversion to *waqf* are not permissible, though lease and loan are. Nevertheless, in accordance with sultanic law, sale and inheritance by male children has been permitted.[11]

Here Kemalpaşazade borrows from his predecessors the fiction of how the land had ceased to be privately owned and became the property not, however, of the ruler, but of the treasury which, in legal theory, is the joint property of the Muslim community. He then distinguishes carefully between the substance (*raqaba*) and the use (*taṣarruf*) of the land. The *timar*-holders have a right of residence on, but not ownership of, the land. The peasants derive their right to cultivate by virtue of the *timar*-holder's 'selling the use' of the land, a concept that explains the taxes he collects from the peasants as a rent. Kemalpaşazade is unable, however, to explain in Hanafi terms why the peasants are able to buy and sell land which, by his definition, they do not own. This Ebu's-su'ud was to attempt to do.

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[10] Ibn Bazzāz, *al-Fatāwā*, on the margins of *al-Fatāwā al-Hindiyya*, 4:92–3.

[11] Text preserved in the "New Qanun," *Millī Tetebbü'ler Mecmū'ası* (1913), 55.

Ebu's-su'ud clearly knew the work of his Hanafi predecessors and in his own formulation of Ottoman land- and tax-law was to take into account Kemalpaşazade's statement in particular. However, in 1543, unlike his predecessors, Ebu's-su'ud had to provide a systematic statement of fundamental Ottoman law as it was in practice. He does not therefore bother with the theoretical issue of how privately owned lands came into the possession of the 'state'—he was to do this in a later statement on the same subject from 1568–9—but deals strictly with practicalities:

> The inhabitants of the said province [of Hungary] are to remain where they are settled. The movable goods in their possession, their houses in towns and villages, and their cultivated vineyards and orchards are their property to dispose of as they wish. They may transfer ownership by sale, gift or other means. They should pay dues on their vineyards and orchards. When they die, ownership of these properties descends to their heirs. No one should intervene or interfere.
>
> The fields which they have of old cultivated and tilled are also confirmed in their possession. However, whereas their goods in the categories mentioned above are their property, their fields are not. Rather, they belong to the category of *araḍi'l-mamlaka*, known elsewhere in the Protected [Ottoman] Realms as *mīrī* land. The real substance (*raqaba*) is reserved for the treasury of the Muslims, and the peasants (*re'āyā*) have the use of it by way of a loan. They sow and reap whatever cereals and crops they wish, and pay their *kharāj muqāsama* under the name of 'tithe' (*'ushr*) and benefit from the land however they wish.
>
> So long as they do not let the land lie fallow, but cultivate, till and tend it as required, and pay their dues in full, no one may intervene or interfere. They should have the use of it until they die, and when they die, their sons should occupy their positions and have disposal [of the land] in the manner set forth. If they have no sons, then, as in the rest of the Protected Realms, advance rent should be taken from outsiders who are capable of cultivating, and the lands given to them by *tapu*, in the established manner. These too should have the use of them in the manner set forth above.
>
> The plots [where] their vineyards and orchards [are planted] also belong to this category. When their vineyards and orchards fall into a state of neglect, the land [on which they are planted] is like other fields and cultivated places which they occupy. It should not be thought that it is their property.[12]

Unlike Kemalpaşazade, Ebu's-su'ud does not try to define the legal position of *timar*-holders on the land, presumably because this was outside his brief. However, he follows Kemalpaşazade in fixing the ownership of

[12] Ö.L. Barkan, *Kanunar*, 296.

the land with the treasury, in effect putting it at the disposal of the sultan. He also follows Kemalpaşazade in distinguishing between the *raqaba* of the land which belongs to the treasury and the *taṣarruf* which belongs to its occupants, and in attempting to define the legal basis of occupancy in Hanafi terms. However, by defining the cultivators as enjoying the use of the land by way of a loan (*ʿāriyya*) he parts company with Kemalpaşazade, at the same time giving the treasury—or the sultan—complete discretion over the use of the land, since an owner may revoke a loan at will. At the same time, by re-defining the Ottoman tithe (*ʿushr*) which cultivators paid on crops as the Hanafi *kharāj muqāsama*, he is giving the sultan the right to impose the tax at a rate of up to 50%. This becomes evident when, as mufti, he answered questions on the legality of levying the tithe at more than 10%:

> The cavalryman Zeyd takes two bushels in fifteen as *ʿushr*. Is this lawful?
>
> Answer: To call what the cavalryman levies *ʿushr* is ignorance. If it were *ʿushr*, it would be given to the poor. It is *kharāj muqāsama*. It is not necessary that it be levied at a rate of one-tenth. It is imposed according to what the land can support and is licit up to half.[13]

Ebu's-su'ud's statement on the Ottoman law of land-tenure and taxation has the effect, therefore, of increasing the sultan's control of the land and of the rate at which tax on its produce can be levied. More important, however, is the clarity with which he distinguishes between the land itself, which is in the ownership of the treasury, and the movable goods, buildings and trees which the land supports and which remain in private ownership. At the same time he provides a solution, in the treasury's favour, to the question of who owns the land on which vineyards, orchards and other trees are planted. It had been, and indeed continued to be, a common belief that ownership of trees automatically entailed ownership of the land beneath. Ebu's-su'ud states clearly that this is not the case.

The three decades that followed saw Ebu's-su'ud refine some of his formulations in 'Law Book of Buda'. In 1568–9, at the age of almost 80, he undertook a land and tax survey of Macedonia and in the 'Law Book of Skopje and Salonica' once again laid out the principles first enunciated in 1543. This time, however, he follows earlier Hanafi jurists in prefixing an account of the distinction between *ʿushrī* and *kharājī* lands and in explaining how the *arāḍī'l-mamlaka*, which are not held as private lands, came to be formed:

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[13] M.E. Düzdağ, *Ebussuûd Efendi Fetvaları*, no. 45.

> . . . There is another category [of land] which is neither *'ushrī* nor *kharājī* as explained above. It is called *arz-i memleket*. It is in essence *kharāj* land, but if it had been given to its owners (*ṣāḥib*) as private property, on their death it would have been divided among [their] heirs and each one would have received only a tiny portion. If *kharāj* had been determined and allocated according to each [person's] share, [its collection] would have been difficult, indeed impossible. For this reason, the *raqaba* of the land was taken for the treasury of the Muslims and it was given to the peasants (*reʿāyā*) by way of a loan. They tilled and cultivated it, and created orchards, vineyards and gardens and were ordered to pay *kharāj muqāsama* and *kharāj muwaẓẓaf* on the produce.
>
> The lands of these fruitful realms are *arz-memleket* of this sort, and known as *mīrī* land. They are not the private property of the peasants. They have the use of them by way of a loan, and they pay *kharāj muqāsama* under the name of *'ushr* and *kharāj muwaẓẓaf* under the name of *çift akçesi* . . .[14]

As in the earlier 'Law Book', Ebu's-su'ud here redefines the Ottoman tithe as *kharāj muqāsama*. This time, however, he further reinforces the illusion of conformity with Hanafi law by equating the *çift akçesi*, a fixed annual tax which peasants paid on their land-holdings (*çift*), with the *kharāj muwaẓẓaf* of Hanafi theory. In this document too he restates the fiction that the entry fine (*tapu resmi*) which a peasant cultivator pays to the fief-holder in order to acquire the title (*tapu*) to the land was an advance rent (*ujra muʿajjala*). This definition raises a problem. A valid contract of rent requires the term of the lease to be known, whereas a *tapu* contract is valid until death and can descend to male heirs. Its term is therefore unknown. In an answer to a question on the subject, Ebu's-su'ud for this reason gave the entry fine an alternative definition: '. . . because the term of occupancy is not [fixed], it is a defective lease (*ijāra fāsida*).'[15]

These modifications to the 'Law Book of Buda' had no effect on practice. However, another section of the 'Law Book' of 1568–9 shows Ebu's-su'ud attempting to translate theoretical concepts into legal reality. His predecessor, Kemalpaşazade had been unable to explain in Hanafi terms why peasants were able to buy and sell land they did not own. He could do no better than to say that it was permitted 'by sultanic law (*qanun*)'. Ebu's-su'ud, however, solved the problem by borrowing from Kemalpaşazade the concept of *haqq-i qarār* or right of residence, which Kemalpaşazade had applied to *timar*-holders but which Ebu's-su'ud was to apply to the peasants on the land. In Ebu's-su'ud's formulation, what the peasant bought or sold was not the land itself, but the 'right of residence':

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[14] Ö.L. Barkan, *Kanunlar*, 299.
[15] *Millī Tetebbüʿler Mecmūʿası*, 53.

> No one may have the use (*taṣarruf*) of [these lands] except in the manner set forth above. Sale, purchase, gift or transferring or acquiring ownership of them in any other way, or making them *waqf*, are all null and void. Certificates and *waqfiyya*s which *qāḍī*s write to this effect are all invalid. If somebody wishes to vacate the place of which he has the disposal, he may, with the cognizance of the cavalryman [on whose timar he resides], take a sum of money for the *ḥaqq-i qarār*. When he vacates it, it is legal (*mashrū'*) and acceptable for the cavalryman to give it to the person by *tapu*.

That Ebu's-su'ud intended his account of the law to be applied in practice is clear from his strict prohibition on the issue of certificates of sale and purchase:

> If *qāḍī*s give certificates of sale and purchase, they are absolutely null and void.[16]

It is clear too from the instructions that he gave to *qadi*s on the correct formula to use when recording transfers of *mīrī* land:

> When this kind of transaction occurs, the *qāḍī* must record the purchaser's right of residence (*ḥaqq-i qarār*) stating: '[A], with the cavalryman's permission, received x *akçes* from B to make over (*tafwīḍ*) [to him] the use of his land, and the cavalryman gave it to B by *tapu*.'[17]

In this formula Ebu's-su'ud sidesteps a legal obstacle. The right of residence cannot, in Hanafi law, be the object of a sale as it is not a tangible property and, furthermore, its term cannot be known in advance. It is for this reason that he avoids the term 'sale', using instead *tafwīḍ*.

In re-defining the *de facto* sale of *mīrī* land Ebu's-su'ud clearly had several goals in mind. He evidently wished to explain the practice within the theoretical framework of the law as he had constructed it, but he seems also to have had practical goals. By insisting that such transactions required 'the cavalryman's permission'—that is, the permission of the *timar*-holder who would himself be an appointee of the sultan—the sultan maintained control of the land, and the cavalryman would not lose the income due to him from the *tapu* tax. At the same time, his re-definition would prevent *mīrī* land passing into private ownership, where it would no longer be at the sultan's disposal. As in the 'Law Book of Buda' of 1543, Ebu's-su'ud wished not only to bring the Ottoman laws of land-tenure into a theoretical conformity with Hanafi principles but, in doing

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[16] *Millī Tetebbü'ler Mecmū'ası*, 51.
[17] Ibid.

so, he wished to reinforce the sultan's surveillance and control. This was an aspect of his work that appealed to later legislators. The compilers of a new land-code, promulgated in the 1670s during the period of Köprülü reforms and in force until 1858, adopted the 'Law Book of Buda' as its basic statement of principle.

In the 'Law Book of Buda' and the later 'Law Book of Skopje and Salonica,' therefore, Ebu's-su'ud provided the first systematic description of the fundamental rules of Ottoman land-tenure and taxation. At the same time, by adopting the Hanafi concept of 'loan' to describe peasant tenure, he increased the degree of control the sultan—acting on behalf of the 'treasury of the Muslims' which was the nominal owner of the land—could, in principle, exercise over the land. He also, by using the Hanafi concept of *kharāj muqāsama* to describe the Ottoman tithe, gave the sultan the theoretical power to levy this tax at a rate of up to 50%.

Sultanic Authority

In the exordia to the two 'Law Books' Ebu's-su'ud provides what is in effect a justification for his use of Hanafi principles to increase the authority of the Ottoman sultan. Both statements open with the first unequivocal assertion of the Ottoman caliphate, describing the sultan as 'Caliph of the Messenger of the Lord of the Worlds' and continue with phrases implying that it is only through his rule that the law is put into effect: 'The one who makes smooth the path for the manifest *sharī'a*' and, even bolder: 'The one who makes evident the Exalted Word.' This claim by itself buttressed the sultan's ideological position as defender of the *sharī'a*. More specifically, some versions of the Sunni doctrine of the Caliphate require the Caliph to possess 'knowledge' (*'ilm*) to a degree necessary to exercise *ijtihād*,[18] meaning evidently power to exercise independent judgment within the options offered by his *madhhab*. The sultan, as Caliph, would therefore have the ability to make judgments concerning the application of the law, and this was a power that could justify Ebu's-su'ud's reformulation, on the sultan's behalf, of Ottoman law in Hanafi terms.

The declaration of the Ottoman caliphate was problematic. In Sunni theory, the institution was elective, and a necessary qualification for a candidate to the office was descent from the Quraysh. The Ottoman

[18] For example, Abū Manṣūr al-Baghdādī, *Uṣūl al-Dīn* (Istanbul, 1928), 278.

sultanate was however hereditary, and the dynastic genealogy, created during the course of the fifteenth century and effectively canonised by the sixteenth, did not trace the line of descent from the Quraysh. The first of these problems was not, it appears, a matter of concern. The question of the Quraysh, however, was clearly a subject of debate, leading a former Grand Vizier, Lutfi Pasha (held office 1539–41)—who must have discussed the problem with Ebu'-s-su'ud—to compose a treatise 'proving' from canonical sources that descent from the Quraysh was not a necessary qualification for the Caliphate. Ebu's-su'ud's way round the problem was to ignore it altogether. Instead he made the bold declaration that the Ottoman sultan was, in effect, Caliph by divine right. This is clearest in the dedication of his *Irshād al-ʿAql al-Salīm*, which states simply that the dedicatee, Süleyman I, is the one upon whom 'God Most High has bestowed the Caliphate of the earth' and in the inscription which he composed to surmount the portal of the Süleymaniye mosque (1557), where Süleyman is 'made mighty with divine power' and 'resplendent with divine glory.' Ebu's-su'ud also makes it clear that the Caliphate is hereditary in the Ottoman dynasty. Already in the exordium to the 'Law Book of Buda' he describes the sultan as the 'inheritor of the Great Caliphate from generation to generation.' Furthermore, the phrase 'inheritor of the Great Caliphate' (*al-khilāfa al-kubrā*) which Ebu's-su'ud pairs with the rhyming phrase 'possessor of the Great Imamate' (*ḥā'iz al-imāma al-uẓmā*), implies that the Ottoman sultans were not merely Caliphs, but specifically the direct heirs in that office to the four Rightly Guided Caliphs who succeeded the Prophet.

The formulae which Ebu's-su'ud composed in order to promulgate the Ottoman claim to the Caliphate had a mainly rhetorical purpose, and were to remain in use as elements in the titulature of the Ottoman sultans until the nineteenth century. Nonetheless, Ebu's-su'ud clearly also saw the caliphal claim, and in particular the power that it gave to the sultan to exercise *ijtihād*, as having an immediate practical purpose. In his work as mufti, Ebu's-su'ud encountered problems and ambiguities in the law. As mufti, however, he possessed no executive powers and could not therefore solve these difficulties by giving rulings that would be both binding and applicable beyond the particular case in question. His solution, therefore, was to present the problem to the sultan with a suggested solution, and a request that the sultan—as caliph exercising *ijtihād*—legislate to remove the difficulty. One such problem was the absence in Hanafi law of a statute of limitation, allowing plaintiffs to delay cases beyond a reasonable period. It was Ebu's-su'ud who submitted the case for such a statute:

> A plaintiff has delayed his case for a while without a legal excuse. Now there is no tradition from the great Imams specifying the period beyond which a case may not be heard. In cases which people have enquired about up to now, [I] have given the following reply: 'If the time lapse is not excessive, if the plaintiff is not acting fraudulently, and if there are witnesses, it should be heard.' The fear is that if [cases] are not heard on the grounds that time has lapsed, many rights will be lost. [On the other hand] there is a fear that, if they are heard, this will open the door to fraud.

I have therefore petitioned the Threshold of Felicity [as follows]:

> It is understood to be reasonable that a time limit be set, that *qāḍī*s should be permitted to hear cases within this limit, and that, beyond this limit, they should hear them only [if authorised to do so] by a special sultanic decree.

A note added to the petition records its outcome:

> It has been decreed that, when there is no sultanic command, cases that have been delayed for ten years without a legal excuse should not be heard. This is in cases involving land. In other cases fifteen years has been specified. A sultanic command to this effect was issued in 957/1550.[19]

Another problem was the question as to whether the owner or the occupier of rented property should pay the *diya* in cases of homicide on the property when the killer was unknown. Hanafi law offered contradictory solutions:

> There have been many enquiries [like the following]: 'There has been a killing in the wine-shops which the infidels occupy by lease, and the killer is unknown.' Or the *sanjak* governor's officers came to a village with chained prisoners, and forcibly billeted them in a house, ejecting the owner. At night, some of the prisoners are found hanged or killed. If it is not known who did it, who is liable for *diya* and *qasāma*?
>
> According to the Great Imam [viz., Abū Ḥanīfa], in cases like these, if the place in question is [private] property, [liability for] *diya* falls on the owner. If it belongs to a *waqf*, then it falls on the *waqf*. In the opinion of Abū Yūsuf, *diya* falls on the occupier. So if a corpse is found in a place where a guest is staying and the killer is unknown, if the guest is the sole occupant of the house, and the owner is not in residence, then the owner is liable for neither *diya* nor *qasāma*.
>
> The following submission is therefore made to the Sublime Threshold. In cases such as these, where the owner of the property is uninvolved and in another place, to act in accordance with the opinion of the Great Imam and make him liable for *diya* leads to deficiencies and carelessness in the

[19] Paul Horster, *Zur Anwendung des Islamischen Rechts im 16. Jahrhundert*, 56.

> occupants' vigilance. To act in accordance with Abū Yūsuf's opinion, and to make the occupants responsible for *diya*, is to make them take greater care in protecting and guarding [the premises], and is considered more suitable for the prevention of wrongdoing.

A note to the petition records:

> A decree was issued on this matter, commanding *qāḍī*s to act in accordance with the opinion of Abū Yūsuf, in Rabīʿ al-awwal, 957/February–March, 1550.[20]

In these petitions, as in his statements on land-tenure and taxation, Ebu's-su'ud is extending the sultan's authority to cover details of the law which some jurists might have considered beyond the reach of the secular power. This, however, Ebu's-su'ud could justify by the claim that, as caliph, the sultan's authority was no longer merely secular. Furthermore, he is using the sultan's authority for the very specific purpose of rationalising the legal system. This was something which his successors were to appreciate. His petitions, or at least a selection of them, have survived thanks to an anonymous compiler in the 1670s, who clearly regarded them as a model for reform in his own day. The collection frequently appears as a supplement to manuscripts of the new land code promulgated in the 1670s, which took Ebu's-su'ud's 'Law Book of Buda' as its basic statement on land law.

[20] Ibid., 58–9.

CHAPTER NINETEEN

MUḤAMMAD BĀQIR AL-BIHBIHĀNĪ (D. 1205/1791)

Robert Gleave

Introduction

Muḥammad Bāqir b. Muḥammad Akmal al-Bihbihānī (d. 1205/1791), also known as al-Waḥīd al-Bihbihānī (also spelled Bahbahānī, and known in Persian as Āghā-yi Bihbihānī), receives fulsome praise in modern Shīʿī writings on two accounts. First, he was a prolific author, credited with at least 103 works. Most of these concern aspects of *fiqh* and *uṣūl al-fiqh*, but amongst them are also works of biography (*rijāl*) and theology (*kalām*). Many of these works are marginalia (*ḥawāshī*) on standard Imāmī works of *fiqh* or *uṣūl al-fiqh*. Others are substantial commentaries (*shurūḥ*) on these works, or short treatises (*rasāʾil*) on particular topics.[1] In most of these works, his principal aim was to argue for (and thereby re-establish) the Shīʿī juristic school known as the Uṣūliyya, which had been eclipsed in the preceding two centuries by the Akhbāriyya. Second, and perhaps more importantly, he is remembered for his teaching activities. In the biographical notices devoted to him, there are long and impressive lists of pupils, those who "relate" from him (*al-ruwāt ʿanhu*) and those who received his "licenses" (*ijāzāt*).[2] Many of these pupils and followers became important Uṣūlī jurists in the following decades, and their dominance of the Shīʿī intellectual scene during the early years of the Qajar dynasty in Iran was

[1] Bihbihānī's works can be found listed in the entries in biographical compendia (*Ṭabaqāt*). For a list of such entries, see below, n. 15. However, these are usually partial. There is a book-length study of Bihbihānī in Persian (Davānī, *Vaḥīd-i Bihbihānī*), hagiographic in tone, though containing useful information concerning his life. The most complete list known to me is given in the editor's introductions to the printed editions of selections of Bihbihānī's treatises: Bihbihānī, *al-Rasāʾil al-Fiqhiyya*, 31–6 and *al-Rasāʾil al-Uṣūlīya*, 59–64.

[2] A *shaykh* or master would give a student a "license" (*ijāza*) to relate *ḥadīth* from him once he felt the student had reached a certain level of competence. This is normally described in *ṭabaqāt* works by the phrase "so-and-so relates from his master, so and so." On late classical Shīʿī *ijāza*s, see Gleave, "The *Ijāza*," Schmitke, "The *Ijāza*," and Salati, "La Luʾluʾa."

perhaps Bihbihānī's most lasting legacy. Through the work of these pupils, the Akhbārī school was marginalized and defeated in the Shīʿī heartlands of the ʿAtabāt (the Shīʿī shrines of Iraq) and the Iranian seminaries. The Uṣūlī school returned to the prominence it had enjoyed before the emergence of Akhbarism in the 11th/17th century, and it has dominated Imāmī Shiism ever since. For these two achievements, then, Bihbihānī is called *al-mujaddid* ("the renewer") of the Shīʿī *madhhab* in the 13th Hijrī century, or *al-muʾassis* ("the re-establisher") of the true faith in the face of the Akhbārī heresy.

The Akhbārī-Uṣūlī Conflict

To assess the importance of Bihbihānī's achievements, then, an understanding of the Akhbārī-Uṣūlī dispute is essential since it was he (it is claimed) who brought it to an end in favor of the Uṣūlīs. There is some debate about when to date the beginnings of the Akhbārī-Uṣūlī dispute.[3] Some 7th/13th century texts talk of a dispute between two opposing groups of Imāmī Shīʿīs: the *akhbāriyyūn* and *uṣūliyyūn*.[4] However, it is not (yet) clear whether these two terms refer to "schools" as such. It seems more likely that these terms were amongst the many different names given to "traditionist" (*akhbāriyya*, *ahl al-ḥadīth* and *ḥashawiyya*) and rationalist (*uṣūliyya, kalāmiyya* or simply *muʿtazila*) tendencies in Shīʿī theology, exegesis and law.[5] It is only with the emergence of Muḥammad Amīn al-Astarābādī (d. 1033/1624 or 1036/1627) that the usage of the terms Akhbāriyya/Akhbāriyyūn and Uṣūliyya/Uṣūliyyūn begins to stabilize, and one sees the beginnings of "schools" of thought demonstrating a measure of doctrinal coherence within each school, an internal (polemically driven) historical perspective and a nascent institutional school structure. Astarābādī championed a method of juristic interpretation that he termed "the way of the Akhbārīs" (*ṭarīqah-ye Akhbāriyya*), and he pitted this against the method of the Uṣūlīs, also called "*al-mujtahidūn*" (the *mujtahid*s).[6] The Uṣūlīs had, in Astarābādī's view, strayed from the path of true Shīʿī juris-

[3] See Newman, "The Akhbārī/Uṣūlī Dispute, pt. 2," 250–1, and Gleave, "Akhbārī Shīʿī *uṣūl al-fiqh*," 24–8.

[4] The texts include Shahrastānī, *al-Milal*, 172 and the Persian *Kitāb al-Naqḍ* of ʿAbd al-Jalīl al-Qazwīnī (d. after 565/1170). See, for example, *Kitāb al-Naqḍ*, 256 and 492.

[5] Modarressi, "Rationalism and Traditionalism," 152–3.

[6] Astarābādī, *Dānishnāmih-yi Shāhī*, f.3a.12.

prudence by adopting a number of Sunni hermeneutic mechanisms in their interpretation of the sources of *sharīʿa* or divine law.

The Uṣūlī position, championed and reestablished by Bihbihānī, can be described as follows. The texts of revelation, from which God's law can be deduced, are, on certain occasions, unclear or silent. They are in need of interpretation by expert jurists using interpretive tools. The texts he consults are the Qurʾān, the *ḥadīth*s attributed to the Prophet Muḥammad, and the *akhbār* attributed to the Shīʿī Imams. He is given the responsibility of using these interpretive tools, to "try his hardest" (*ijtihād*) to reach an opinion as to what God is communicating directly (in the Qurʾān) or through his messengers (the Prophet and the Imams). The tools in question included:

1. "reading into" a text an implication which is not explicitly expressed (*mafāhīm*),
2. "discovering" the "reason" (*ʿilla*) behind a ruling and generalizing the ruling to all cases that share this "reason" (known as *qiyās*, although, as we shall see, this was controversial, even amongst Uṣūlīs),
3. weighing the possible authenticity of contradictory texts, and deciding which takes prominence on the basis of the greater likelihood of its being authentic (*tarjīḥ*) and
4. joining together contradictory texts by what might be considered an over-interpretation of one of the texts, such that its meaning accords with or adds to (and no longer contradicts) the meaning of the other (*jamʿ*).[7]

Shīʿī scholars, in particular al-ʿAllāma al-Ḥillī (d. 726/1325), employed these techniques, composing works of *uṣūl al-fiqh*, an example of which is al-ʿAllāma's own *Mabādiʾ al-Wuṣūl ilā ʿIlm al-Uṣūl*.[8] Of course, these interpretive techniques were not available to all believers. As in Sunni legal theory, these tools required skilled operators who have undergone proper training. Only once qualified would a scholar be able to issue independent judgments (*fatāwā*) on the basis of his own reasoning. Believers who did not reach this level were commanded simply to follow (*taqlīd*) the rulings of those jurists who had (i.e., *mujtahid*s).

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[7] This description of *jamʿ* is, in part, an Akhbārī characterisation of this Uṣūlī interpretive method. Uṣūlīs see this process as a *bone fide* attempt to understand the true meaning of both contradictory reports. See Gleave, *Inevitable Doubt*, 142–4.

[8] For a general account of how *ijtihād* became part of Imāmī legal thought, see Calder, "Doubt and Prerogative."

The qualification for being a *mujtahid* was termed in Shīʿī juristic writing the "grade of *ijtihād*" (*rutbat al-ijtihād*), and the qualified scholar was a *mujtahid*. *Ijtihād* refers to the intellectual effort which a qualified jurist expends in his search for an opinion (*ẓann*) about a particular ruling. In this theory, established as normative in both Sunni and Shīʿī juristic thought by the time of Astarābādī, the jurist presents his personal opinion (*ẓann*) of God's ruling. This opinion has an epistemological status lower than the certainty (*yaqīn, ʿilm, qaṭʿ*) required for matters of religious belief. For matters of religious belief, each believer must have absolute certainty that the creed (*ʿaqīda*) to which he has committed himself is the truth. In most matters of religious law, however, the jurist need not attain this certainty. He merely needs to reach an opinion about the law, based on the preponderant evidence available to him in the sources. The jurist's opinion of the rule constitutes his view as to the most likely candidate for God's ruling. Different *mujtahid*s will inevitably reach different conclusions; only one of these opinions, however, can be correct. A *mujtahid* produces an authoritative opinion since only he (and occasionally she) can perform *ijtihād*. Whilst for him, the opinion is less than certain, for his followers (*muqallid*s), the ruling is authoritative. Whilst there is a possibility that the *mujtahid*'s opinion is not identical with God's ruling, it is known (with certainty, according to the *mujtahid*s) that the *muqallid*, in obeying the *mujtahid*'s opinion, is considered (by God) to have fulfilled his religious duty. In short, according to this theory, it is not necessary for the believer to follow the *sharʿī* ruling, i.e. the "true ruling" (*al-ḥukm al-wāqiʿī*), in order to avoid the punishment due for transgressors. Rather, God charges individuals within their capabilities. For *muqallid*s this means that they should follow a *mujtahid*, and for *mujtahid*s that they should expend maximum effort (*istifrāgh al-wusʿ*) in order to reach an opinion. This, in brief, is the theory of the Uṣūlīs, articulated by Bihbihānī in a number of his works.[9]

This theory, according to Astarābādī and subsequent Akhbārīs, was simply lifted from the works of Sunni legal theorists, and it was against this theory that he directed vicious criticism in his famous work *al-Fawāʾid al-Madaniyya*.[10] Astarābādī's objections to this theory are understandable.

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[9] A fuller description of Bihbihānī's Uṣūlī position can be found in Gleave, *Inevitable Doubt*, passim.

[10] See Astarābādī, *al-Fawāʾid al-Madaniyya* generally, but 41–74 in particular. Summaries of his views are found in Kohlberg, "Aspects of Akhbari thought," 133–6, Stewart, *Islamic Legal Orthodoxy*, 189–207.

Believers, he argues, are charged with following the Sharīʿa of God, not the *mujtahid*'s opinion of the *Sharīʿa* of God. It is failure to obey God which leads to punishment, not failure to obey another human being's opinion of God's *Sharīʿa*. The texts, Astarābādī argues, give us certain knowledge as to God's will for His creation. To posit that they do not, and so to argue for the necessity of a panoply of interpretive techniques, is to accuse God of vagueness, ambiguity, and (most tellingly) injustice. If He is to punish us for our failures, then He must have made clear, through his revelation, the duties we are required to perform. Astarābādī and his *mujtahid* opponents agreed that juristic and theological principles such as the impossibility of God charging an individual believer with something he is unable to perform (*taklīf mā lā yuṭāq*) are justified and operative. They were not anti-rationalists, as is sometimes assumed,[11] and both groups of scholars employed elements of rationalism in their theology and in their legal theory. The difference between the schools was not over the validity of principles such as the impossibility of *taklīf mā lā yuṭāq*. Rather, they differed over how such principles should be applied within their respective legal theories. That is, they differed over whether these principles should be used to defend certainty (as the Akhbārīs argued) or to accept (and embrace) the inevitability of doubt (as the Uṣūlīs argued).

Astarābādī's criticism of the Uṣūlī position quickly became popular in the Shīʿī world. There developed a tradition of Akhbārī scholarship and teaching which dominated Imāmī Shīʿī legal discourse, and, by the time of Yūsuf al-Baḥrānī (d. 1186/1772), the great Akhbārī scholar with whom Bihbihānī did battle, it was said that those who studied Uṣūlī ideas had to do so in secret. Akhbārīs were openly declaring that mere contact with a work of Uṣūlī jurisprudence caused a minor ritual purity infraction. In the ʿAtabāt, it is said Akhbārī scholars would carry Uṣūlī works in handkerchiefs in order to avoid their supposedly ritually polluting effects.[12]

Whilst there was much diversity within the Akhbārī school, the basic principles of the school were developed and elaborated by Astarābādī and his followers, who asserted that the *akhbār* of the Imams were the only legitimate sources of the law. This position gave the group its name. For Akhbārīs, the Qur'ān and even the Prophet's *ḥadīth*s could not be interpreted directly but only through the prism of the Imams' statements. The

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[11] Newman, "The Uṣūlī (rationalist) and Akhbārī (traditionalist) Schools," passim; Modarressi, "Rationalism and Traditionalism," 154–5.

[12] This story, possibly fabulous, is well-attested in the *ṭabaqāt* literature. See, for example, Tunkābunī, *Qiṣaṣ al-ʿUlamā'*, 201; Khwānsārī, *Rawḍāt al-Jannāt*, 2:92.

Imams, due to their special knowledge of God's will, were cognizant of the true meaning of these texts, and hence their interpretation (*tafsīr*) revealed the true meaning of God's revelation. In order to expand the material available to them in their search for "the Imam's *tafsīr*," the Akhbārīs declared all *akhbār* found in the various collections made by the earliest Shīʿī scholars "sound"—that is historically authentic and legally relevant. The Uṣūlī techniques of assessing a report in terms of its *isnād* (chain of transmitters) and *matn* (text) were rejected by the Akhbārīs, as they undermined the central role of the statements and actions of the Imams in the derivation of legal rulings. When two reports did contradict each other, the jurist's task was not to contrive convoluted interpretations in an effort to harmonize their messages. Instead, the community had to accept that the *akhbār* corpus contained contradictions, and that this came about solely because of the Imams' need for *taqiyya* or precautionary dissimulation. The Imams, at times, had been forced to conceal the true interpretation of the sources, and therefore the *Sharīʿa* of God itself owing to the oppression they faced from the Sunni majority. Since there was no certain way of knowing which *akhbār* were *taqiyya*-generated and which were not, the Imams had allowed the community to follow any of the two or more contradictory reports. Hence, Akhbārīs such as Yūsuf al-Baḥrānī eventually reached the conclusion that although, because of *taqiyya*, the *Sharīʿa* of God itself, may not be available, a justified course of action was in fact known and available. The Akhbārīs, eventually, also had to accept that on certain occasions, God's law is in doubt. In this, their position was not so different from that of the Uṣūlīs. This was the juristic framework within which Bihbihānī began to teaching and argue for a return to Usulism.

Life and Travels

Bihbihānī's life and travels are described in a number of biographical notices devoted to him. However, these accounts do contradict each other and there is considerable uncertainty about the dates of the major events in his life.[13]

[13] Biographical entries include (in Arabic): Amīn, *Aʿyān al-Shīʿa*, 9:182; Khʷānsārī *Rawḍāt al-Jannāt*, 2:91 and (in Persian) Tunkābunī, *Qiṣaṣ al-ʿUlamāʾ*, 198; Qummī, *Favaʾid al-Raḍawiyya*, 404; Tabrīzī, *Rayḥānat al-Adab*, 1:51. An analysis of the biographical entries on Bihbihānī is found in Gleave, "The Akhbari-Usuli Dispute."

His birth, it is commonly agreed, was in Isfahan, although the year of birth is recorded as 1116, 1117 or 1118 AH (i.e., between 1704 and 1707) by different biographers. He studied first with his father, a scholar in his own right, with whom he moved to the town of Bihbihan in the province of Fars, at an unknown date. It is said that the move was prompted by a downturn in Isfahan's security, perhaps due to the Ghilzay Afghan capture of the city in 1135/1722, which marked the beginning of Safavid demise. Bihbihānī also spent time studying in the ʿAtabāt, completing his seminary studies in the great *madrasa*s of Najaf. In Najaf he married the daughter of Sayyid Muḥammad al-Ṭabāṭabaʾī al-Burūjirdī, one of the few Uṣūlī scholars of the period. This may have been before moving to Bihbihan, or perhaps immediately after his move there.

Whatever the exact itinerary of Bihbihānī's travels, he arrived in Bihbihan and spent thirty years there, teaching, writing and involving himself in local politics. He eventually returned to the ʿAtabāt, settling in Karbala, probably at the age of 50 (i.e., between 1165/1751 and 1170/1757). In Karbala, he set up classes rivaling those of Yūsuf al-Baḥrānī, and the two scholars engaged in regular debates. Bihbihānī is said to have declared that prayer behind Baḥrānī was invalid, implying that Akhbārīs did not have the requisite moral probity (*ʿadāla*). One story tells of how one evening, Baḥrānī and Bihbihānī were seen arguing in the courtyard of the shrine of Imam Ḥusayn in Karbala. The gatekeepers wanted to close the shrine, so the two scholars continued their argument in the outer courtyard. Eventually that too had to be closed and they moved out onto the street. When the gatekeepers returned the next morning, the two scholars were still arguing. The time for dawn prayer came, the worshippers gathered in the *ḥaram*, and Baḥrānī went to lead prayer. Bihbihānī laid out his cloak in the courtyard and prayed in the courtyard, apparently refusing to join the worshippers in the *ḥaram*.[14] Despite these differences, there was a certain scholarly respect between the two scholars. Baḥrānī left a request in his will that Bihbihānī pray over him at his funeral, which, by all accounts, Bihbihānī did.

The death of Baḥrānī in 1772, probably a victim of the plague that hit southern Iraq, gave Bihbihānī an opportunity to develop his Uṣūlī *madrasa* in the ʿAtabāt. The Akhbārīs were left without a leader, and a large number

[14] A combination of the different versions of this story can be found in Davānī, *Vaḥīd-i Bihbihānī*, 123–6, together with other stories exemplifying the relationship between the two scholars.

of Baḥrānī's Akhbārī scholars also died in the plague. For the next twenty years (until his death in 1205/1791), Bihbihānī trained scholars, taught in the *madrasa*s and wrote additional works of jurisprudence. His pupils included Shaykh Kāshif al-Ghiṭā' (d. 1228/1813), who is credited with defeating Akhbarism in Iran; Abū ʿAlī al-Ḥā'irī (d. 1215/1800), author of an important Uṣūlī work of *ṭabaqāt*; Muḥammad Mahdī Baḥr al-ʿUlūm (d. 1212/1797–8), who also gained an *ijāza* from Baḥrānī; and Sayyid ʿAlī al-Ṭabaṭabā'ī (d. 1231/1816), Bihbihānī's brother-in-law. All of these scholars participated in the Uṣūlī revival initiated by Bihbihānī. Some stayed in the ʿAtabāt, but many of his pupils founded seminaries and teaching establishments in Iran. However, they themselves were always quick to identify themselves as the pupils of Bihbihānī and it is through their industry that Usulism flourished once more. Akhbarism is today restricted to a few villages in southern Iran, Bahrain and pockets of Akhbarism in India. Bihbihānī died in 1205/1791 (the dates 1206/1792 and 1208/1774 are also mentioned) and was buried in the Graveyard of the Martyrs in Karbala, next to his father.

Treatise on *Qiyās*

Bihbihani's treatise on *qiyās*, translated below, was completed in 1198/1783–4, and was originally a postscript to his commentary on a work by Muḥammad Bāqir al-Sabzawārī (d. 1090/1679). As mentioned above, *qiyās* was a Sunni technique that the Akhbārīs accused the Uṣūlīs of legitimizing, and this—the Akhbārīs argued—was in direct contradiction to the command of the Imams. As is well known, there are a large number of *akhbār* in which the Imams reject *qiyās* and criticize those who use it. A debate began early in Imāmī thought as to what was meant by *qiyās* in these reports, and the debate later formed an element of the Akhbārī polemic against the Uṣūlīs.[15] Despite never mentioning the Akhbārīs, it is clear that they are the primary targets of Bihbihānī's argumentation in this treatise. In his view, the intended meaning of "*qiyās*" in the *akhbār* is a technical, legal one, and not the general, unqualified meaning the Akhbārīs took the Imams to be referring to. Like most works of *uṣūl al-fiqh*, the treatise presents problems for a translator. Arguments are compressed, or referred to and rarely explicated in full. The audience is assumed to be aware of the niceties of juristic argument. Technical terms

[15] See, generally, Gleave, "Imāmī Shīʿī refutations of *Qiyās*."

are used, unglossed and unexplained. For these reasons, a certain amount of exposition is necessary before the significance of the treatise can be fully understood.[16]

Sunni jurists also debate which interpretive techniques fall under the rubric of *qiyās*. There is, of course, the simple case of analogical reasoning. God has prohibited grape wine, for example, because of its ability to intoxicate the consumer. Therefore, all substances which intoxicate are also prohibited. Analogies such as this are the prime means whereby the jurist is able to extend the relevance of revelatory texts (in which, for example, God prohibits wine) to novel or unmentioned cases (all intoxicating substances are prohibited). However, even about a seemingly simple analogy such as this, there is dispute. How does one know that God has prohibited wine because of its intoxicating ability? Some jurists assert that there are other texts found in the *Sunna* (the example of the Prophet and, for Shīʿīs, the *akhbār* of the Imams) that reveal the reason why God prohibited grape wine. Yet others have argued that grape wine has a number of qualities, all of which are candidates for the reason for the prohibition, but that its intoxicating effects is by far the most likely of these. Still others attempted to redefine the word *khamr* in the Qurʾān, arguing that *khamr* actually means all intoxicating substances and has come to mean grape wine only through usage. Even if the reason behind the prohibition is known, there remains the question of why God should be limited to prohibiting all substances in which the quality of "ability to intoxicate" is present? Surely God is beyond the demand for (human) logical consistency, and can prohibit whatever He wishes. In short, He needs no reason to declare wine prohibited, and to seek a reason is to force Him to conform to human logic.

In addition to the questions of whether a ruling (*ḥukm*) from God requires a reason (*ʿilla*), there are procedures which some jurists considered examples of *qiyās* and others did not. For example, when God says, "Do not say to them [viz., one's parents] *uff*" (Q. 17:23), is He at the same time also prohibiting actions worse than "saying *uff*" (*uff* being a mild expression of contempt and impertinence, roughly equivalent to "Fie!"). Is God, in fact, saying "Respect for one's parents should be such that one must not say even *uff* to them"? That is, is a prohibition on beating one's parents *implicitly* contained within Q. 17:23? Most jurists said that it was, but they differed over whether this was a case of analogy or simply

[16] I present my own summary of Bihbihānī's in what follows, and further elaboration can be found in my notes to the translation below.

a matter of linguistic understanding. Cases such as this ("implications," *mafāhīm*, specifically "the implication of agreement") were counted as *qiyās* by Shāfiʿīs and Ḥanbalīs, and as an example of linguistic understanding by Ḥanafīs.[17]

The uncertainty as to what the Imams meant by their condemnation of *qiyās* is, then, set against this background of debate amongst the Sunnis. If the Imams were referring to *qiyās* defined in the most general manner, then a raft of useful interpretive techniques are prohibited for the Shīʿa. The Akhbārīs, already suspicious of interpretive techniques, generally considered this meaning of *qiyās* to have been intended by the Imams. On the other hand, if *qiyās* is defined in its most restrictive terms, the jurist had at his disposal a larger range of exegetical mechanisms whereby knowledge of the *Sharīʿa* could be drawn from the revelatory texts. Unsurprisingly, this latter view was the thrust of Uṣūlī arguments concerning *qiyās* from al-ʿAllāma al-Ḥillī onwards. It is in this latter tradition that Bihbihānī writes.

Bihbihānī argues that the Imams were prohibiting the specific legal technical device when they prohibited *qiyās*. This device can be defined as the transference of a ruling that is explicitly stated in the revelatory texts to a novel case unmentioned in the text, after a jurist postulates a reason for the textual ruling, and presumes it to be present in the novel case. This restricted definition, then, excludes a number of other devices that were classified as *qiyās*. Importantly of course, there are the linguistic inferences drawn from the text. These may be called *qiyās* if one is using the term in its most general sense (according to Bihbihānī), but this is not what the Imams were referring to when they condemned *qiyās*. Also excluded from the category of *qiyās* are occasions when the text explicitly states the reason for the rulings, or when God makes a general statement which covers all items in a category. In the former, God (either directly or indirectly) says that a particular ruling has been given for a specific reason. By specifying the reason (rather than leaving it to a jurist's speculation), God is effectively saying that on all occasions when this reason is found, this ruling applies. In the latter case (a general statement), God is saying that all cases of a particular type have a common accompanying ruling (for example, all marriages between a man and his mother are forbidden). God does not need to give a reason for the ruling, since the process involves the application of a general statement to a specific case, not generalizing from one case to all similar cases.

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[17] See Hallaq, "Non-analogical Arguments," 291, n. 17.

In the treatise, argumentation for this position is rather convoluted.[18] Bihbihānī's arguments follow the citation of two relevant *akhbār* (Section C. below) in which "*qiyās*" is condemned. Whilst all Shīʿa agree that *qiyās* is forbidden, he argues, there is no consensus about what is meant by *qiyās* in the *akhbār* (D.2.a and D.3.a). In cases in which there is doubt as to the meaning of a word, there is a rule that one should take the most general meaning as the referent of the word, *unless there is evidence that it is not the intended meaning*. In the case of *qiyās*, there is much evidence to suggest that a diversion from the general meaning of *qiyās* has taken place. According to Bihbhānī, this evidence is as follows:

1. The Imams surely would not have condemned the ordinary, straightforward use of language. Linguistic inferences (*mafāhīm*) are just that, so it is extremely unlikely that the message they were meant to convey was that not only analogy, but also ordinary linguistic inferences, were forbidden. (D.4 and D.5).
2. The reason why *qiyās* was forbidden is because of the harm (*ḍarar*) that may result from ruling or acting on the basis of mere supposition (*ẓann*). It is clear that no such harm results from linguistic inference; therefore linguistic inference cannot be an element of what was prohibited by the Imams. (D.2.b–D.2.c and D.3.b and D.3.c) Ironically, this is a case of a non-analogy being used to maintain the prohibition of analogical reasoning. *Qiyās* is forbidden because it causes harm. Linguistic inferences do not cause harm. Therefore they are not *qiyās*.
3. The Imams condemned Abū Ḥanīfa and his followers for adhering to *qiyās*; Abū Ḥanīfa's notion of *qiyās* was the technical legal definition of the term and not the general, unqualified meaning. (E.1, E. 2) Furthermore, proof as to what the meaning of *qiyās* might be in these *akhbār* cannot be abstracted from its historical circumstances. "The usage at the time of the Imams is the proof" (G.1.b). This usage indicates a legal-technical meaning.
4. The Imams provided examples of the *qiyās* they condemned, none of which displayed linguistic inference. (E.2)
5. *Qiyās*, in the juristic literature, refers to rulings that are reached through a process of reasoning (*ijtihād*). Specifically, they require a jurist's effort. Linguistic inferences require no effort on the jurist's

[18] In the following summary, references (such as D.2, D.3, etc.) refer to paragraphs in my translation below.

part (they are immediately comprehended by any language user), and hence they are not examples of *qiyās*. (F.2) Even in cases in which the *ʿilla* is explicitly mentioned in the text, the jurist is not required to exercise effort (G.4), and hence these cases are not *qiyās* either. The same irony pointed out regarding argument 2. above (concerning the use of analogy in the definition of analogy) may be mentioned here.

Bihbihānī also includes some arguments for a reader unconvinced by the above evidence for a restricted meaning of *qiyās*. These are:

1. Linguistic inferences may be included in *qiyās*, or they may not. The possibility of uncertainty here does not *in itself* justify a cautionary ruling that all linguistic inferences should be treated as prohibited (E.3, G.2). It should be noted that the role of caution (*iḥtiyāṭ*) in the derivation of rulings played a significant role in Akhbārī jurisprudence, and, for this reason, it can be assumed that the opponents here are Akhbārī jurists.[19]
2. Whilst the evidence of a diversion from the general (or original) meaning of *qiyās* may not be conclusive, there is sufficient evidence to make it highly likely that a diversion has occurred and that the Imams are referring to the technical legal definition of *qiyās*. Indeed, the evidence makes it more likely that a diversion has occurred than not. In such cases, it would be incautious, as well as illogical, to take the less likely option (in this case, the general meaning). (G.3)

In this way, through juristic finesse and extremely dense argumentation, Bihbihānī argues that the type of *qiyās* that is prohibited by the Imams encompasses only those occasions when the jurist forms an opinion as to the reason (*ʿilla*) and transfers it to a new situation. Excluded from this definition of *qiyās* are linguistic inferences and occasions when God, the Prophet or the Imams explicitly state the reason for a ruling. These latter may be *qiyās* in the most general usage of the term, but they are not *qiyās* in the specific sense intended by the Imams. They require no effort or *ijtihād* by the jurist, but "are immediately comprehended by common sense and normal understanding" (B.2). Linguistic inferences, not being *qiyās*, are now available to the jurist in his interpretation of

[19] A more detailed analysis of *iḥtiyāṭ* in both Akhbārī and Uṣūlī jurisprudence can be found in Gleave, "Akhbārī Shīʿī *uṣūl al-fiqh*."

the law. Although Bihbihānī does not state this here, he argues elsewhere that deciding whether or not a particular deduction from a text requires *ijtihād* (ultimately whether or not it is *qiyās*) is, itself, a matter of the jurist's *ijtihād*.[20] Therefore, the jurist maintains control of the interpretive process, and the rest of the community is systematically excluded from participation in the law-making process. It was this position that Bihbihānī argued for, and it is in this way that his treatise on *qiyās* contributes to the hermeneutic monopoly of the clergy that formed the basis of subsequent Shīʿī jurisprudence.

[20] Bihbihānī, *al-Fawā'id al-Ḥā'iriyya*, 500–4. See also Gleave, *Inevitable Doubt*, 238–44.

Treatise on *Qiyās*
by Muḥammad Bāqir b. Muḥammad Akmal al-Bihbihānī[21]

[*A: Introductory Prayers*]

[A.1] In the name of God the Merciful, the Beneficent. Praise be to God, Lord of the Worlds, and may God bless Muḥammad and his family, the Pure Ones.

[*B: Introduction to the Treatise and Summary of* qiyās]

[B.1] Now to our topic: this is an investigation of *qiyās* and a warning to those of weak and limited mind. I am the lowliest servant, Muḥammad Bāqir b. Muḥammad Akmal, and this is the conclusion to the comments I wrote on *al-Dhakhīra*.[22]

[B.2] When a ruling concerning a specific case comes from the Lawgiver, then if, when hearing of it, another specific ruling is understood and immediately comprehended by common sense and normal understanding, then this ruling—that is the second specific ruling—is one of the implications (*mafāhīm*) of the words of the Law. This is called the "implication of agreement," or "of disagreement," or "of quality," or "of a limit" etc.[23] The designation of the "implication of agreement" as *qiyās*, through the a *minori ad maius* argument is, perhaps, incontestable.[24]

[B.3] If, when hearing of [the original ruling], this [immediate] understanding and comprehension do not occur, then it is not a legal proof, because there is both [1] no legal indicator and [2] a legal indicator that there is no [legal indicator].[25] This is in accordance with the general meaning of [the reports from the Imams] which indicate that *qiyās* and other types [of legal reasoning] are prohibited.

[*C: Proofs from the* akhbār *that* qiyās *is Forbidden*]

[C.1] Al-Kulaynī, in *al-Kāfī*, relates from Samāʿa b. Mihrān from [al-Imām] al-Kāẓim (upon whom be peace). He says: "I said, May God the Most High bless you! We gather and we discuss a certain problem, and the only thing we can think of is that [the answer] is hidden. It is in circumstances such as this that God has shown us favor by giving us you [viz., the Imams]. When the slightest thing is referred to us, and we do not know have any answer, some of us consider

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[21] An edition of this work is found in Bihbihānī, *al-Rasā'il al-Uṣūliyya*, 309–16. The paragraph numbers and subject heading are my own, and are provided for reference.

[22] This is a reference to the *Dhakhīrat al-Maʿād* of the Safavid jurist, Muḥammad Bāqir al-Sabzawārī (d. 1090/1679). Bihbihānī's comments on the *Dhakhīra* remain unpublished, though manuscript copies exist. See Moddarressi, *Introduction to Shīʿī Law*, 85.

[23] An account of these types of implication can be found in Weiss, *The Search for God's Law*, 484–502.

[24] Bihbhānī's reference here is to the so-called "*awlā*" argumentation, such as the implications drawn from Q. 17:23 (concerning saying *uff* to one's parents), mentioned above.

[25] *lam yakun ḥujja li-ʿadam al-dalīl, bal li-dalīl al-ʿadm ayḍᵐ*. The fact that there is no indicator (textual or otherwise) of a particular thing, is *itself* an indicator that can be used in argumentation.

the case, find another which is similar to it, and make an analogy with the better [attested] of the two."

He [viz., the Imam] asked "Why do you perform *qiyās*?" Then he [the Imam] said, "When something you know comes to you, affirm it. If something you do not know comes to you, then look here!" And he reached for his mouth with his hand.[26]

[C.2] And from Muḥammad b. al-Ḥakīm who says, concerning him [i.e., al-Imām al-Kāẓim]: "I said to him: 'Make me your sacrifice! When we consider religion . . .'"[27] then one reaches the point where he says, "Then perhaps something is referred to us, and we have nothing concerning it from you or your fathers. Should we then look to the best option that presents itself to us, the most fitting thing, in accordance with what has come from you? And then take it?"

He [viz., the Imam] said, "How preposterous! What an idea!"[28]

[*D: The Meaning of the Word* qiyās *in the* akhbār]

[D.1] Let it not be said that the general reference [of these *ḥadīths*] includes the first type [of *qiyās*, mentioned earlier], as well [as the second],[29] even though [the general reference is taken as the meaning] if it is present, unless there is something which prevents it from coming to light.[30]

[D.2] For we say that the prohibition of *qiyās* is indicated by

[D.2.a] the consensus of the Shīʿa

[D.2.b] the principle that] legal rulings are not validated by supposition alone [*bi-mujarrad al-ẓann*]

[D.2.c] the evidence which] indicates that it is prohibited to act on the basis of supposition, and

[D.2.d] the *akhbār* which demonstrate that it is prohibited to act on the basis of *qiyās*.

[D.3] However;

[D.3.a] There is no consensus on the matter upon which we are deciding. The experts in the science of jurisprudence all agree that neither those who support *qiyās* nor those who deny it argue that it is prohibited to act on the basis of an "implication of agreement."[31]

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[26] Kulaynī, *al-Kāfī*, 1:56, no. 13.

[27] A large section of text is omitted here by Bihbhānī, as he considers it not relevant to his argument.

[28] Kulaynī, *al-Kāfī*, 1:56–9.

[29] The "first type" refers to linguistic implications, and the "second type" refers to strict analogical argumentation when the jurist performs *ijtihād* to discover the *ʿilla*. See above, B.2 and B.3.

[30] This is a formulation of the exegetical principle that general meanings (*ʿumūm*) are assumed to be the intended meaning of an utterance unless there is evidence that "prevents" one from making this assumption. Though Bihbhānī does not dispute this principle, he does dispute whether it is applicable in the case of the Imams' use of the term *qiyās*.

[31] *Al-mafhūm al-muwāfiq*, also known as *mafhūm al-muwāfaqa*, referring to the *a minori ad maius* argument.

[D.3.b and D.3.c] with regard to the second and the third [of the above points], neither the proofs for [the validity of] implications, nor common sense, indicate that there is any harm (*ḍarar*) or any impediment [to acting on the basis of "implication of agreement"].

[D.3.d] with regard to the *akhbār* that indicate that it is prohibited to act on the basis of *qiyās*, one should not think that these indicate that it is prohibited to act on this basis unconditionally. Rather, one must first know what they [viz., the Imams] mean by the word "*qiyās*" in these *akhbār*, so that one can then rule that it is prohibited to use it.

[D.4] We say that it is obvious to anyone who reflects upon these *akhbār* that what they [viz., the Imams] mean by *qiyās* is what those who argued that *qiyās* had probative force said it was, that is, connecting a secondary case to an original case by speculation and *ijtihād*.

[D.5] They did not mean to prohibit] whatever can be understood from the words of the Lawgiver, in accordance with the understanding and practice of the common people, and all that one can understand from the mere operation of language. This was not an innovation [as *qiyās* is]. As with all implications, this does not require speculation, *ijtihād* or deduction. However, discussion, dispute and debate have increased concerning [*qiyās*], opinions have become confused and various unfounded views have been proposed.

[*E: Additional Proofs for a Technical Interpretation of the Meaning of* qiyās *in the* akhbār]

[E.1] Amongst the things that prove what we say here are the condemnations [by the Imams] of Abū Ḥanīfa and his confused opinions, and the many criticisms of him and his followers found in [the *akhbār*].

[E.2] Also in [the *akhbār*] are specific examples [of *qiyās*] such as the *qiyās* of Satan comparing fire and earth, and the prayer of the menstruating woman compared with her fast in terms of compensation, and the comparison of the superogatory prayer and the recommended fast when one has not fulfilled one's obligation to its fullest extent. There are other examples.[32]

[E.3] If it is [still] not clear, after accepting and considering [the *akhbār*], that the linguistic and common sense implications [of language] are not included in [the category of *qiyās*], then one's doubt over their inclusion [in the category of *qiyās*] is not inconsiderable. So it is possible that [implications] are included in

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[32] These are examples where *qiyās* indicates a ruling, but the Imams' explicitly state that another is the ruling of God. They are (1) the example of Satan (Q. 38:76) where Satan claims superiority over Adam because he was made from fire unlike Adam who was made from clay. *Qiyās* decrees that fire is superior to earth, and hence Satan is superior to Adam, but of course he is not; (2) a menstruating woman must make up fasting days missed. *Qiyās* decrees she should also make up missed prayers, but this is not required; (3) an incomplete recommended fast which is intended by the worshipper, when his obligatory fast is not completed, must be made up, but an incomplete supererogatory prayer in similar circumstances need not be made up. *Qiyās* dictates that the two cases should be treated similarly.

[*qiyās*], and it is possible that they are not. Possibility alone, however, does not prove prohibition, as we have said on many occasions.

[*F: Further Discussion of the Two Possible Meaning of* qiyās *in the* akhbār]

[F.1] We say that the linguistic meaning of *qiyās* is "estimation" and "equality," such as when one says, "I compared one sandal with another," meaning that [one compared] the size of one with the other, or when one says, "so and so cannot be compared to so and so," meaning that they are not equal. In legal usage [however, *qiyās*] is as we have already described it.[33]

[F.2] It is agreed that some [scholars] give the name *qiyās* to the "implication of agreement," [and they do this] unconditionally, saying "this is *qiyās*." They call it "obvious *qiyās*," and "a *minori ad maius*."[34] However, this [type of deduction] does not depend on speculation and *ijtihād* to be known. This view can, therefore, be declared false, and whoever wishes to know more about it, can consult the proper place.[35]

[F.3] Once one knows this, then we say that [the answer] is obvious. What [the Imams] meant in these reports by the word "*qiyās*" is the meaning current within the law, and not the linguistic meaning. The way in which this becomes obvious is clear to anyone who has considered the matter, especially after having considered what we have said.

[F.4] So, by considering what we have indicated concerning the falsity [of *qiyās*], it is the second category that is the *qiyās* [intended by the Imams in the *akhbār*], not the first.[36] This is supported by what we have said previously.

[*G: The Opponents' Arguments and Their Refutation*]

[G.1 One might argue]

[G.1.a] that it is not demonstrated which of the two [meanings] found at the time of [the Imams] is meant.

[G.1.b] We say [however] that this being the case is not a proof. It is such that one could consider [the meaning of *qiyās*] as both [the technical meaning] and the general meaning. The procedure in [such circumstances] is well known: [one should take] the unqualified meaning, such that one can determine that the object of [the Imams'] attention in these *akhbār* is the unqualified meaning [of *qiyās*]. [However] not all unqualified meanings are proofs. Rather the usage at the time [of the Imams] is the proof.

[G.2] If it is [yet still] not clear that what the [Imams] meant by the word *qiyās* is the technical meaning, then it is also not clear that what they meant was the linguistic meaning. The fundamental lack [of an indicator here] in cases such as

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[33] Here Bihbhānī is re-iterating the two different definitions of *qiyās*: the general, common usage and the specific legal-technical definition.

[34] *Al-ṭarīq al-awlā* (see above).

[35] Bihbihānī may be referring here to his other discussions of *qiyās*, notably Bihbihānī, *al-Fawā'id al-Ḥā'iriyya*, 451–3.

[36] See above, B.2 and B.3.

these is not proof [that what was meant was the general meaning]. This we have pointed out previously.

[G.3] If we say that the intended meaning here is the linguistic meaning, then we say that there can be no doubt that what they meant was the original meaning. [However] there is evidence of a diversion [away from the original meaning] to be found here. As for this specific case, if we do not argue that it is proven that the lack [of an indication is itself an indication of the general meaning], the case by which it is proven that what is meant is the second category [i.e., linguistic meaning] is not improved.

[G.4] Amongst the things we should mention is the case in which the reason for a [particular ruling] is explicitly stated. The discussion of this is well-known.[37]

[*H: Concluding Remarks*]

[H.1] Perhaps you, by looking at what we say here, are able to discern the true and the false in what the jurists—may God be pleased with them—practice when they transfer [rulings] from a position in the text and the subject of the ruling. One could, perhaps, clarify the situation better than this at [a future] time when it is required—God willing.

[H.2] God is the One Who makes the right proper and makes the proper correct.

[H.3] This book was completed, with the aid of the generous Lord, in the year 1198 [AH].

[37] The reference here is to *manṣūṣ al-ʿilla*—cases in which God, or His emissary, explicitly states the reason for a ruling, and therefore gives the believer the right to transfer it to novel cases. See Gleave, *Inevitable Doubt*, 103–5.

PART THREE

MODERN PERIOD (1798–PRESENT)

CHAPTER TWENTY

AL-MAHDĪ AL-WAZZĀNĪ (D. 1342/1923)*

Etty Terem

Historical Background: 1860–1912

The study of the relationship between rulers and jurists (*fuqahāʾ*) is a subject of considerable interest for the social and political history of Islam, as well as for the history of Islamic law. Any investigation into the question of the relationship between the ruling elite and the legal profession must be guided, of course, by the distinctiveness of the place and time under discussion. In this essay, I explore the specific nature of this relationship with reference to pre-Protectorate Morocco.

The period under discussion, the late 19th, and early 20th century, is considered one of major transformation in Moroccan history. Beginning in the second half of the 19th century, Moroccan state and society experienced new circumstances arising from two interrelated historical developments: the growing disparity in power between Morocco and Europe, which prompted ever-increasing foreign interference in Moroccan affairs, and the modernizing projects initiated and led by the Moroccan state (henceforth, the Makhzan).[1] Given the social importance and the practical status of the *sharīʿa*, change and reform in Morocco were ultimately grounded in questions of Islamic law and became the focus of intense debates and heated conversations concerning the demarcations between accepted practice (*sunna*) and illegitimate innovation (*bidʿa*).

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* I wish to thank Mostafa Atamnia for his help with the Arabic text of the *fatwā*, and Yoav Di-Capua and Roger Owen for their comments on draft versions of this chapter.

[1] In Morocco, the state, or the Makhzan, usually coincides with the monarchy. The Moroccan monarchy has retained a remarkable longevity over time. Since the 9th century, Morocco has been continuously governed by a sultan. The present dynasty, the ʿAlawī, came to power in the 17th century and has monopolized the government ever since. The term "Makhzan" (literally storehouse) refers to the essential task of tax collection, in money or kind, as the foundation of the consolidation of Moroccan royal power. See *EI*², s.v. "Makhzan."

The French occupation of Algeria in July 1830 had fateful repercussions for Morocco. Shortly thereafter, Europe affirmed its economic and military superiority at Morocco's expense. Between the middle of the 19th century and the beginning of colonial rule in 1912, Moroccan sovereignty was challenged at an increasingly accelerated pace with unceasing pressure from the European powers. The sultan's armies suffered crushing military defeats at the hands of modern European armies in 1844 (the battle of Isly against France) and again in 1859 (the Tetouan war against Spain), forcing the Makhzan to sign a truce and humiliating peace treaties. The financial cost of the wars and the large war indemnity forced the Makhzan to accept foreign loans, which bankrupted the Moroccan state. The unfavorable commercial treaties concluded with European states (beginning with England in 1856) opened Morocco to an increasingly aggressive European economic expansion that the Makhzan was unprepared to meet, further impairing the sovereignty of the sultan.[2]

Confronted by Europe's political, military, and economic superiority and a deepening economic crisis, the Makhzan initiated reforms in the government, the financial system, and the army. The second half of the 19th century marked a period of extensive Makhzan-led reform that was meant to place more political, fiscal, and religious authority in the hands of the state. In the process, local practices and social ideals strongly identified with *sharīʿa* law were modified and replaced with new and innovative institutions and practices. This intensive process of centralization and reform of the Moroccan state prompted considerable local resistance and generated internal social unrest in Moroccan society.[3]

By the latter part of the 19th century, many Moroccans were concerned with the nature of European power and the apparent weakness of Islam in relation to it. Moroccan writings of the time manifest the anger and frustration of particular sectors of the population with the inability of the state to stop European encroachment.[4] It was not long before certain segments of Moroccan society viewed the Makhzan as part of the problem. The Makhzan was seen as being composed of a weak political elite that

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[2] The classic study of European economic intervention in Morocco in the 19th century is Miège, *Le Maroc et L'Europe, 1830–1894*. See also Ennaji, *Expansion Européenne et changement social au Maroc 16–19 siècles*.

[3] On the Makhzan reforms and opposition to them during the reigns of Mawlāy Ḥasan (r. 1873–1894) and Mawlāy ʿAbd al-ʿAzīz (r. 1894–1908), see Laroui, *Les origines sociales et culturelles*, 263–390; Burke, *Prelude to Protectorate in Morocco*, 31–99; Pennell, *Morocco since 1830*, 68–110.

[4] See, for example, Miller and Rassam, "The View from the Court: Moroccan Reactions to European Penetration during the Late Nineteenth century," 25–38.

collaborated in the European assault on Islam and the Muslim community, oppressed its own people, ignored the duty of Islamic government, and abandoned *jihād*. On numerous occasions, the Makhzan was in dire need of legitimization and it frequently called upon the legal and moral authority of the learned religious elite. By the nature of their profession as experts in religious law and exemplars of virtuous Muslim life, the *fuqahā'* served the rulers as an effective tool for securing legitimacy in the eyes of the populace.[5] It is this relationship of cooperation between jurists and rulers that forms the backdrop for this essay.

In his important book *Religion and Power in Morocco*, Henry Munson examines the political role of Islam during the late 19th and early 20th centuries. According to Munson, the cultivation of a relationship between the Makhzan and the *'ulamā'* was a salient feature of the Moroccan religio-political system in the pre-Protectorate period. Although the *'ulamā'* lacked the power to implement their views, their religious knowledge and interpretative authority gave them considerable influence. The sultans who strove to acquire legitimacy through religious and juristic channels could not dispense with the religio-legal elite. Moreover, Munson explicitly maintains that the sultans' quest for legal legitimacy was generally successful.[6]

Focusing on a few distinguished and illustrious *fuqahā'* who embodied the ideal of the 'righteous man of God' who courageously denounces an unjust ruler, Munson argues that "[the scholars who dared to defy sultans] were always greatly outnumbered by the *'ulamā'* who endorsed whatever a particular sultan wanted endorsed."[7] He asserts that "the attitude of scholars to sultans in pre-colonial Morocco was usually one of servile submission" that stemmed in large part from the fear of sultanic retribution. Munson demonstrates that "the sultans were usually able to force most *'ulamā'* to legitimate whatever they wanted legitimated."[8] Thus, he concludes that most of the *'ulamā'*, particularly in the early 20th century, were politically compliant and supported the sultan in power.

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[5] Another example from the same period that exhibits the appeal of the ruling elite to the religio-legal specialists as a locus of legitimacy in an age of state-designed reforms and rapid change can be seen in the important treatise of Khayr al-Dīn al-Tūnisī, *The Surest Path to Knowledge Concerning the Condition of Countries*. In it, the author, a competent Tunisian minister and a great reformer, advocates a close alliance between statesmen and *'ulamā'* as a measure of legitimizing the reforms and protecting the religious law. See Brown, *The Surest Path: The Political Treatise of a Nineteenth-Century Muslim Statesman*.

[6] Munson, *Religion and Power in Morocco*, 50–61.

[7] Ibid., 50.

[8] Ibid., 54–5.

Whereas Munson focuses his attention on conflicts and contestations between a few 'righteous men of God' and sultans, I focus on a jurist whose career clearly exhibits a relationship of cooperation with the Moroccan Makhzan. My route into the subject is through an examination of the approach to political power of al-Mahdī al-Wazzānī, a prominent *faqīh* in pre-Protectorate Morocco. I argue that al-Wazzānī was closely associated with the Moroccan sultan's circles of power and frequently provided the doctrinal underpinnings for a Makhzan in need of legitimization.[9] Furthermore, I demonstrate that he promulgated ideals of submission to tyrannical government and autocratic rule. Whatever motivations underlay his approach, it is reasonable to assume that he cooperated with the Makhzan and often expressed the will and aspirations of the sultan and the ruling elite.

In what follows, I first review al-Wazzānī's biography and the trajectory of his career. Next, I discuss a *fatwā* or legal opinion, which records his juristic interpretation of government and political rule. Al-Wazzānī's *fatwā* is of considerable interest. Although he was involved in the politics of his day, al-Wazzānī did not compose a discrete work of political theory. Thus, this *fatwā* provides the historian with a point of entry into his juristic interpretation of government and political power that otherwise is difficult to access. More importantly, the exposition of such ideas by a leading *faqīh* may be useful for exploring certain aspects of the political culture in pre-colonial Morocco. Al-Wazzānī's legal argument is an instructive example of a vision that may have existed, or been considered, among the Moroccan *'ulamā'* in the late 19th and early 20th centuries.

The Making of a Moroccan *Faqīh*

Al-Mahdī al-Wazzānī was born in 1266/1849 in the city of Wazzān in northern Morocco.[10] As a *sharīf* of the celebrated 'Imrānī line, al-Wazzānī

[9] It is common to regard the cooperation of legal scholars with the ruler as granting religious legitimacy and morality to the ruling elite. However, further investigation is needed in order to understand the concrete historical process in which jurists conferred legal authority upon political power. For example, it is not clear how legal justifications of extra-Qur'ānic taxes imposed as part of extensive Makhzan-led reform or a serious violation of a religious institution such as the sanctuary (*ḥarām*, in the Maghrib known as *ḥurm*) yield religious legitimacy and authority.

[10] His full name is Abū 'Īsā Muḥammad al-Mahdī b. Muḥammad b. Muḥammad b. al-Khaḍir b. Qāsim b. Mūsā al-'Imrānī al-Wazzānī al-Fāsī.

enjoyed special religious prestige and respect.[11] In Wazzān, where he studied under his father and other religious scholars, he memorized the Qurʾān and acquired fundamental skills in reading and writing Arabic, in grammar, and in Islamic law.

To complete his studies, al-Wazzānī left Wazzān for Fez, where he studied Islamic law at the Qarawiyyīn mosque-university, the most prestigious center of higher learning in Morocco. Al-Wazzānī's teachers at the Qarawiyyīn included accomplished scholars such as Abū ʿAbdallāh Muḥammad b. al-Madanī Gannūn (d. 1885), Aḥmad Bannānī (d. 1888), Abū Muḥammad al-Ḥājj Ṣāliḥ (d. 1889), Abū al-ʿAbbās Aḥmad b. al-Ṭālib b. Sūda (d. 1903), Jaʿfar b. Idrīs al-Kattānī (d. 1905), Muḥammad Muṣṭafā Mā al-ʿAynayn (d. 1910), and Abū ʿAbdallāh Muḥammad al-Qādirī (d. 1912). Under their guidance, al-Wazzānī studied the classical Islamic sciences: the Qurʾān; Mālikī law, including the *Muwaṭṭaʾ* of Mālik b. Anas and the *Mukhtaṣar* of Khalīl b. Isḥāq; jurisprudence, including the *Jamʿ al-Jawāmiʿ* of Ibn al-Subkī; and the major collections of traditions of the Prophet, including the *Ṣaḥīḥ*s of Bukhārī and Muslim, *Shamāʾil* of Tirmidhī, and *Kitāb al-Shifā* of Qāḍī ʿIyāḍ.[12]

After completing his studies, al-Wazzānī wrote legal treatises, taught at the Qarawiyyīn, and issued *fatwā*s, engaging in the various roles of the trained legal scholar. It may be argued that his legal career represents the highest level of Mālikī scholarship and professionalism according to the standards of his time. As a professional jurist and thinker, al-Wazzānī was deeply embedded in the Mālikī legal tradition. He was a prolific author who wrote numerous works on Mālikī law. One focus of his jurisprudential writings was the authoritative collections of Mālikī *ʿamal* or judicial practice.[13] Al-Wazzānī also wrote several commentaries on grammar texts, and a *fahrasa* or curriculum vitae. His juristic reputation is strongly associated with his two best-known collections of *fatwā*s, especially, the *New Miʿyār* (*al-Miʿyār al-jadīd*).[14] Compiled during the first decade of the 20th

[11] The ʿImrānī *sharīf*s of northern Morocco claim a long genealogy that links them to the house of the Prophet Muḥammad and his descendant, the founder of Fez, Mawlāy Idrīs (d. 213/828).

[12] Al-Wazzānī lists these texts in his *fahrasa* or autobiographical curriculum vitae. See al-Wazzānī, *Hādhihī fahrasa*, lithograph, 2off.

[13] Al-Wazzānī wrote four commentaries on three celebrated Mālikī *ʿamal* collections. That two of his commentaries were still taught as part of the curriculum at the Qarawiyyīn in the 1920s is a tribute to the esteem in which his work was held by jurists in Fez.

[14] Al-Mahdī al-Wazzānī's first *fatwā* collection is entitled *al-Nawāzil al-ṣughrā al-musammā bi'l-minaḥ al-sāmīya fī'l-nawāzil al-fiqhiyya*; his second collection is entitled *al-Nawāzil al-jadīda al-kubrā fī-mā li-ahl fās wa-ghayrihim min al-badw wa'l-qurā*

century, the *New Miʿyār* is a multi-volume work containing Mālikī *fatwā*s issued by al-Wazzānī himself and by other prominent Mālikī muftīs, his contemporaries and predecessors. Al-Wazzānī's *New Miʿyār* continues al-Wansharīsī's *Kitāb al-Miʿyār*, the primary collection of Mālikī *fatwā*s composed in the Islamic West in the period between 1000 and 1500 C.E.[15] Al-Wazzānī also wrote independent treatises in support of Sufi beliefs and mystical practices in matters of worship. He was himself a Sufi practitioner of the Wazzāniyya Sufi order.[16] According to one of his biographers, al-Wazzānī was a skillful writer and a knowledgeable jurist who "never turned away from Mālik's doctrine."[17] As a legal scholar, to be sure, he was highly proficient in the fundamental Mālikī texts and the methodology of legal reasoning.

As a professor at the Qarawiyyīn, al-Wazzānī taught the classic works of Mālikī law and grammar that were at the heart of the curriculum. During his career as a teacher, al-Wazzānī had many students. Among his close disciples were Sultan ʿAbd al-Ḥafiẓ, the well-known historian ʿAbd al-Raḥmān b. Zaydān, and Shaykh ʿAbd al-Ḥayy al-Kattānī. Other distinguished students of al-Wazzānī were ʿAbd al-Ḥafiẓ al-Fāsī, and Muḥammad b. Muḥammad Makhlūf, who became prominent writers themselves, as well as al-Wazzānī's principal biographers.[18] As a renowned teacher at the celebrated Qarawiyyīn mosque-university and a prominent member of the vibrant scholarly community of Fez, al-Wazzānī was exposed to contemporary ideas and trends, and circles of teachers and students from Morocco and from the wider Islamic world. He was well aware of the social and political views of the influential 19th-century reformer, Muḥammad ʿAbduh, and his famous student, Rashīd Riḍā, with whom he corresponded on matters pertaining to social and legal norms in the face of new social circumstances.[19] He participated in controversies and heated discussions

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al-musammā bi'l-miʿyār al-jadīd al-jāmiʿ al-muʿrib ʿan fatāwī al-mutaʾakhkhirīn min ʿulamāʾ al-maghrib [henceforth, the *New Miʿyār*]. All references to the *New Miʿyār* in this essay are to the Rabat edition (1412–13/1992–93).

[15] On the historical circumstances in which the *New Miʿyār* was formulated, al-Wazzānī's plan for his work, and the nature of the work, see Chapter 2 in Terem, "The *New Miʿyar* of al-Mahdi al-Wazzani." On the *Miʿyār* of al-Wansharīsī, see Powers, *Law, Society, and Culture in the Maghrib*.

[16] Laghzāwī, "al-Mumārasa al-thaqāfiyya li'l-zāwiya al-Wazzāniyya: muʿālaja fī al-tafkīk wa'l-tarkīb," 2:577.

[17] Ḥajjī, *Mawsūʿat aʿlām al-Maghrib*, 8:2935–6.

[18] al-Fāsī, *Muʿjam al-shuyūkh al-musammā riyāḍ al-jannah*, 175–7; Makhlūf, *Shajarat al-nūr al-zakiyya fī ṭabaqāt al-mālikiyya*, 1:435–6.

[19] See, for example, al-Wazzānī's letter to ʿAbduh, published in the celebrated journal *al-Manār*, on the issue of a Muslim eating meat slaughtered by Christians and Jews. al-Manūnī, *Maẓāhir yaqẓat al-maghrib al-ḥadīth*, 2:327–8.

about the ethical norms and behavior for guaranteeing the survival of a moral Muslim society.[20] Undoubtedly, al-Wazzānī was an active member of the Moroccan intellectual and cultural scene of his day.

In his role as a *muftī*, al-Wazzānī applied his knowledge of law to the affairs of his community. A Mālikī by training and intellectual posture, al-Wazzānī brought Mālikī law to bear on actual problems and conflicts faced by late 19th-century Fāsī society. In describing the impact of his *fatwā*s on the community of belief, the biographical sources indicate that people strove to acquire and benefit from his works, that "they carried his work to the Sudan, Algeria, and Tunisia,"[21] and that "they issued *fatwā*s only after consulting his work, and never turned away from it because it includes the saying of earlier masters and contemporary scholars."[22] Clearly, during his lifetime, al-Wazzānī was considered an example of a distinguished *muftī* who was proficient in Mālikī legal rulings and texts.

Al-Wazzānī thus emerges as a Mālikī scholar of high caliber and an expert in jurisprudence. In addition, he was involved not only in the intellectual community of his peers and colleagues, but also in the legal and social affairs of the people of Fez. Al-Wazzānī was recognized by his peers as one of the most prominent Mālikī jurists, and he enjoyed veneration and respect from the general population. His precedence in the scholarly community and involvement in the affairs of the populace must have been recognized by the Moroccan ruling elite. Indeed, soon enough, al-Wazzānī became a counselor to Sultan ʿAbd al-ʿAzīz (r. 1894–1908) and was often drawn into his service.

In at least three instances, al-Wazzānī was called upon to act as a loyal servant and supporter of the Moroccan sultan. One occasion occurred during the Makhzan's efforts to suppress the Abū Ḥimāra revolt, which threatened the Makhzan's authority. In October–November 1902, Jilālī b. Idrīs al-Zarhūnī al-Yūsufī (Abū Ḥimāra [in Moroccan dialect, Bū Ḥmāra]) called upon the people of Fez and the tribes of the Taza and Oujda regions (to the northeast of Fez) to support him in his efforts to end the reign of Sultan ʿAbd al-ʿAzīz and claim the throne.[23] The Abū Ḥimāra rebellion

[20] See, for example, al-Wazzānī's reaction to an article published in the Algerian journal *Kawkab Ifrīqiyā*, concerning the efforts of the Moroccan sultanate to seek help from European countries in the process of reform and reorganization of the Moroccan state. al-Manūnī, *Maẓāhir yaqẓat al-maghrib*, 2:335–8.

[21] al-Fāsī, *Muʿjam al-shuyūkh*, 176.

[22] Ḥajjī, *Mawsūʿat aʿlām al-maghrib*, 8:2936.

[23] On the Abū Ḥimāra rebellion, see Aubin, *Morocco of Today*, 89–108; Dunn, "The Bu Himara Rebellion in Northeast Morocco: Phase 1," 31–48; idem, "France, Spain, and the Bu Himara Rebellion," 145–58.

met with much sympathy from the Moroccan ruling elite and the general population. Its appeal was based on a growing sense of anger and frustration with the sultan, who increasingly was viewed by certain segments within Moroccan society as an illegitimate ruler. Despite the enormous financial and military resources directed against Abū Ḥimāra's forces, the Makhzan was unable to suppress the prolonged rebellion. The resulting damage to the sultan's stature in the eyes of the people further compromised his legitimacy.

In March 1903, in an attempt to counter Abū Ḥimāra's threat and repair his damaged authority, Sultan ʿAbd al-ʿAzīz called upon some of the most prominent *ʿulamāʾ* of Fez, al-Wazzānī included, to sign a *fatwā* condemning the Abū Ḥimāra revolt and declaring allegiance to the sultan.[24] In the *fatwā*, the *ʿulamāʾ* denounced the rebellion, arguing that supporting the rebel and refusing to obey the sultan could lead only to anarchy and to violence against Muslims.[25] The *ʿulamāʾ* stressed the idea that obedience to the Moroccan sultan was obedience to God and that disobedience was a conspiracy with the devil against God's law: "Whoever obeys the sultan, obeys the merciful God and His Prophet; and whoever refuses to obey the sultan, obeys the devil and enters into a war on the side of the misguided people (*ahl al-ḍalāl wa'l-khasrān*)."[26]

Since al-Wazzānī merely signed a *fatwā* written by a secretary of the Makhzan, which echoed its official position, it is virtually impossible to know his opinion of the Abū Ḥimāra revolt. Be that as it may, it is important to note that the Sultan ʿAbd al-ʿAzīz and his Makhzan officials clearly viewed al-Wazzānī as a distinguished figure whose opinion commanded respect and whose support was necessary for the success of this *fatwā* in reaffirming the legitimacy of the sultan's rule and the illegitimacy of the Abū Ḥimāra revolt.

The second occasion on which al-Wazzānī was called upon to represent the interests of the Moroccan sultanate was in connection with his role as a member of the Council of Notables (*majlis al-aʿyān*) that was established in February 1905. The Council members were chosen to serve as representatives of Moroccan opinion and as advisors to Sultan ʿAbd

[24] The *fatwā* was composed by Aḥmad b. al-Mawwāz, First Secretary of the First Minister (*wazīr al-awwal*), Muḥammad al-Mufaḍḍal Gharīṭ. A French translation of the text may be found in "Lettre des oulama de Fez," 241–55. Parts of the Arabic text are published in al-ʿAlawī, *Jāmiʿ al-qarawiyyīn wa'l-fikr al-salafī*, 127–9.

[25] "Lettre des oulama de Fez," 247.

[26] al-ʿAlawī, *Jāmiʿ al-qarawiyyīn wa'l-fikr al-salafī*, 128.

al-ʿAzīz in evaluating a French proposal for a program of military, fiscal, and administrative reform.[27] Al-Wazzānī was one of forty notables from the major cities and tribes of Morocco selected to participate in the council. As a close and trusted consultant of the sultan, he was sent to Tangier, Algeria, and Tunisia to gather opinions on the position that should be taken on the French reform proposal by the Moroccan representatives.[28] In this role, al-Wazzānī emerges as a prominent dignitary who executed the sultan's orders and represented the government's power to local officials and the Moroccan population at large.

On the third occasion on which Sultan ʿAbd al-ʿAzīz turned to al-Wazzānī, in 1907, the survival of the Makhzan was at stake. The Algeciras Act, signed in May 1906, provided for European intervention in Moroccan political and economic affairs. Moroccan critics accused ʿAbd al-ʿAzīz of delivering Morocco into the hands of the Europeans and of driving the Makhzan to bankruptcy with extravagant spending on tasteless European entertainments. Discontent with the sultan intensified when rumors seemed to confirm that he had fallen under the spell of the Christians and converted to Christianity. In the eyes of many Moroccans, Sultan ʿAbd al-ʿAzīz was no longer fit to rule. Violence erupted in March 1907 when Émile Mauchamp, a French doctor working in Marrakesh, was murdered by an angry crowd. The ensuing French reprisals culminated in March 1908 in the occupation of Oujda, a city located to the northwest of Fez not far from the Algerian border. This was followed by the bombardment of Casablanca in July.[29]

In the face of unprecedented French military aggression and Moroccan anxiety and opposition, the sultan sought the advice of some of the most prominent *ʿulamāʾ* of Fez, al-Wazzānī included, on the correct manner of dealing with the crisis. Two prominent ministers in the Makhzan met with influential members of the Moroccan elite in Fez, briefed them on the official position and instructed them to defend the Makhzan for its failure to alter the political situation with France.[30] Once again, it seems that al-Wazzānī must have been valued as a man who could justify the

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[27] On the circumstances in which ʿAbd al-ʿAzīz established the council of Moroccan notables, and on its discussions and meetings, see Burke, *Prelude to Protectorate in Morocco*, 85–86; Laroui, *Les origines*, 374–8. For a partial list of the notables who were members of the council, see al-Manūnī, *Maẓāhir yaqẓat al-maghrib*, 2:203–4.

[28] Burke, *Prelude to Protectorate*, 86.

[29] Ibid., 85–98. For a detailed study of the Mauchamp affair see Katz, *Murder in Marrakesh: Émile Mauchamp and the French Colonial Adventure*.

[30] Laroui, *Les origines*, 385–9; al-Manūnī, *Maẓāhir yaqẓat al-maghrib*, 2:342.

position of the Makhzan and consolidate the sultan's legitimacy and religious and moral authority.

Although we may never know al-Wazzānī's opinion of ʿAbd al-ʿAzīz and the Makhzan's policy toward French encroachment, this fragmented and brief information indicates that al-Wazzānī was closely associated with the innermost circle of Sultan ʿAbd al-ʿAzīz. As a confidant of the Makhzan, al-Wazzānī advised the sultan on matters of law and proper conduct and was entrusted with representing an official viewpoint to the Moroccan public.

Al-Mahdī al-Wazzānī died on Wednesday, September 13, 1923 (Ṣafar 1342) at the age of seventy-six and was buried outside Bāb al-Fuṭūḥ in Fez.

On Securing Consular Protection against the Tyranny of a Muslim Ruler

The *fatwā* to be discussed here, issued by al-Wazzānī on an unspecified date during the latter part of the 19th century, is recorded in his *New Miʿyār*. The *fatwā* can be found in the chapter on *Jihād* in which al-Wazzānī addresses questions dealing with the application of Islamic law to various issues pertaining to contact with the non-Muslim world and Moroccan Jewry. This *fatwā* is of great interest because it takes us into a socio-legal domain—the *ḥimāya* or protégés system—that became increasingly troubled in this period of transition in Moroccan history. The term *ḥimāya* refers to the practice whereby, especially from 1860 onwards, foreign residents granted extraterritorial rights to their local employees and business agents. These rights conferred legal and fiscal immunities on Moroccan subjects under the protection of European consulates.[31]

A system in which Moroccan subjects became protégés of foreign powers considerably transformed relations between the Moroccan ruler and his subjects and directly challenged Moroccan authority and sovereignty.[32]

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[31] On the protection system, see Kenbib, *Les protégés: Contribution à l'histoire contemporaine du Maroc*; idem, "European Protections in Morocco 1904–1939," 47. The *fatwā* studied here is part of a longer discussion by al-Wazzānī on the system of foreign protection. The *fatwā* may be found in the *Miʿyār al-jadīd*, 3:71–6. The rest of al-Wazzānī's discussion is found at ibid., 3:76–8. See also *EI*[2], s.v. "Ḥimāya."

[32] Important segments of the local elite, Muslims and Jews alike, rich merchants, heads of Sufi orders, and certain high-ranking bureaucrats became protégés of European states, which guaranteed them protection and jurisdiction that openly defied that of the Moroccan state, represented by the sultan. See Kenbib, "Structures traditionnelles et protections étrangères au Maroc au XIX[e] siècle," 79–101. In 1906, as discontent with the leadership

One of the most important figures who became a protégé of France in the last decades of the 19th century was Sīdī ʿAbd al-Salām al-Wazzānī, the *sharīf* of Wazzān, whose prestige was unparalleled.[33] This plain insult to the Moroccan sultan's sovereign rights may be of great value in evaluating the circumstances that gave rise to al-Wazzānī's *fatwā*. Over the years, al-Wazzānī maintained close contacts with the city of Wazzān and its prominent *sharīf*s, especially with ʿAbd al-Salām al-Wazzānī, who initiated him into the Wazzāniyya *Ṭarīqa*.[34] It is conceivable that al-Wazzānī was valued by the Makhzan for his political connections and ties with the *sharīf* of Wazzān, which would have allowed him to intercede on behalf of the Moroccan sultan, either Mawlāy Ḥasan or his successor Mawlāy ʿAbd al-ʿAzīz.[35] Al-Wazzānī's *fatwā* can be interpreted as an attack on the *sharīf* of Wazzān, who placed himself under the protection of the French, asserting the sultan's objections to the expressed offense to his authority and prestige.

Al-Wazzānī's *fatwā* purports to be a careful legal response to an earlier *fatwā* issued by a distinguished Tunisian jurist who justified the practice of securing consular protection against injustices perpetrated by a tyrannical ruler. In fact, al-Wazzānī's *fatwā* is not limited to a legal opinion on consular protection. The points that al-Wazzānī wishes to reinforce are much concerned with the ruler's absolute authority and legitimacy, and the duty of unconditional obedience on the part of his subjects.[36]

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of the ruling sultan ʿAbd al-ʿAzīz accelerated, Mawlāy ʿAbd al-Ḥafiẓ himself, the sultan's brother and successor, solicited French protection. Although his request was denied by the French, the destabilizing effect on the sovereign rights of the Moroccan sultan is not hard to imagine. See Burke, *Prelude to Protectorate*, 103.

[33] On the relationship between the Wazzānī *sharīf* and the Moroccan sultan, Mawlāy Ḥasan, and the specific incident that led him to request French protection in 1875, see Michaux-Bellaire, "La Maison d'Ouezzan," 50–1.

[34] Laghzāwī, "al-Mumārasa al-thaqāfiyya li'l-zāwiya al-Wazzāniyya," 2:577.

[35] Unfortunately, the *fatwā* does not contain the specific date on which al-Wazzānī wrote his opinion. It can only be said that the *fatwā* was issued during the reign of either Ḥasan or ʿAbd al-ʿAzīz.

[36] The unquestionable duty of Muslims to obey their rulers and the inherent sinfulness of any rebellion against the established order has been the ruling political position of Sunni Islam throughout history. The tacit assumption of this political position centers around the view that anarchy or challenge of the ruling elite poses a greater danger than does tolerance for coercive powers and violations of Islamic law and morality. What I seek to illustrate, however, is that despite the emergence of abundant debates and varied approaches (shaped by the new historical conditions) to the question of the ability and legitimacy of the Moroccan sultan to rule, and his position in relation to the law, al-Wazzānī displays a strict position that justifies government tyranny in the name of religion.

Unfortunately, the full text of the *istiftāʾ*, or request for a *fatwā*, is not included in the *New Miʿyār*, probably because the *jawāb*, or response, was sufficiently explicit to demonstrate the matter under discussion. The loss of the *istiftāʾ* means that I do not know the identity of the person who posed the question. It may have come from al-Wazzānī himself, from one of the Moroccan sultans, or from one of his agents. The tone of his response may provide a clue to the intended audience. The response is written in language that would have been intelligible to a jurist familiar with legal discourse and the art of legal reasoning. It is formulated with the care and precision that characterize al-Wazzānī's style. Significantly, it refers to an array of sources and maintains a detailed level of legal discussion. Although there is no evidence that the Moroccan sultan was directly involved in the case, there is no doubt that he could have followed al-Wazzānī's line of reasoning.[37]

At an unspecified date, during the latter part of the 19th century, an unidentified person approached al-Wazzānī, asking his counsel on "the disastrous calamity (*dāhiya*) that had become prevalent (*ʿammat*) throughout the country at that time, namely, seeking the protection of the infidels (*al-iḥtimāʾ bi'l-kuffār*)."[38] Al-Wazzānī begins his discussion by indicating that he does not know anyone who has justified this practice, with the exception of one legal opinion issued by a distinguished Tunisian jurist by the name of Sīdī Ibrāhīm al-Riyāḥī al-Tūnisī (d. 1849), the *shaykh al-jamāʿa* or supreme juridical authority of Tunis, who supervised the activities of the *muftī*s in the capital city.[39] Recognizing the legal value of a *fatwā* issued by a jurist and *muftī* responsible for instructing other *muftī*s, al-Wazzānī immediately turns to a careful examination of that text.

1. *The* Fatwā *of al-Riyāḥī*

From al-Wazzānī's response the following facts may be reconstructed: at an unspecified date, possibly in the late 18th century or the first half of the 19th century, a certain chief (*amīr*, pl. *umarāʾ*) forced into service

[37] Many sultans in pre-colonial Morocco were trained in Islamic scholarship and Mālikī legal doctrine, and possessed the knowledge required to understand the technical language of a legal opinion. For instance, one of al-Wazzānī's students was Sultan ʿAbd al-Ḥafīẓ (r. 1908–1912).

[38] *Miʿyār al-jadīd*, 3:71.

[39] See Makhlūf, *Shajarat al-nūr al-zakiyya fī ṭabaqāt al-mālikiyya*, 1:386–9. On the office of *shaykh al-jamāʿa*, see Laroui, *Les Origines sociales*, 101, 195.

(*khidma*) the two sons of a certain *qāḍī*, al-ʿAnnābī.[40] The *qāḍī*, presumably desperate to ransom his sons, offered the chief a large sum of money, which he accepted. However, in apparent disregard for his end of the bargain, the chief did not release the *qāḍī*'s sons. The *qāḍī* then fled to the house of the English consul, seeking protection from the injustice (*ẓulm*) that had befallen him. The consul became involved in the case and went to great lengths to secure the release of the *qāḍī*'s two sons and promised their safety, along with that of the *qāḍī*, in a written document authorized by the Bey.

Because the case involved a *qāḍī*, a prominent member of the Muslim community, who sought the protection of non-Muslims (*ghayr ahl al-dīn*) against another Muslim, his disgraceful (*shanʿā'*) action became of special importance (*ʿaẓuma*). No doubt acting on the basis of his concern about the possible social and political repercussions of the incident, the Bey sent his *istiftā'* to the aforementioned chief muftī, al-Riyāḥī. He posed the following question: "Is the persistence of this *qāḍī* in his position permissible given that what has occurred diminished [his authority] in the eyes of the people?"[41] Details mentioned later in the *fatwā* suggest that the Bey was strongly inclined to dismiss al-ʿAnnābī from his position as a *qāḍī*, on the grounds that he had defamed Islam, and that he wanted al-Riyāḥī to issue a *fatwā* corroborating the validity of his decision.

Al-Riyāḥī began his response by referring to an earlier *fatwā* he had issued that was relevant to the matter at hand. In that earlier case, he had authorized the seeking of protection from non-Muslims (*al-iḥtimā' bi-ghayr ahl al-milla*) because, as he explained, "there is no prohibition against that in the sacred law of Islam." As textual authority for his response, he cited *Rawḍ al-unuf*, a commentary by Suhaylī on the *Sīra* or Biography of the Prophet Muḥammad edited by Ibn Hishām.[42] In addition, al-Riyāḥī observed that even if, in the past, the common people (*ʿāmma*) viewed the seeking of protection from non-Muslims as apostasy (*kufr*), at present they are more mindful and point the blame at the person who causes the Muslim to seek this protection. Thus, he implied, it was the behavior and conduct of the chief that was inappropriate. At this point, al-Riyāḥī made a key reference to the first caliph, Abū Bakr, observing that when he migrated to Medina with the Prophet Muḥammad, he placed his family

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[40] I have been unable to identify this *qāḍī*. His *nisba* indicates that he was originally from ʿAnnāba, a town in northern Algeria.

[41] *Miʿyār al-jadīd*, 3:72.

[42] Ibid. See Suhaylī, *al-Rawḍ al-unuf fī sharḥ al-sīra al-nabawiyya li-Ibn Hishām*.

and his property under the protection of polytheists.[43] In other words, to persuade his audience, al-Riyāḥī found support for his position by appealing to the authority of Abū Bakr, an exemplar of the early Islamic *umma*. Note that the legal value of this reference subsequently played an important role in al-Wazzānī's deliberations.

Confident in the direction of his argument, al-Riyāḥī continued by explaining that he could not justify the removal of *qāḍī* al-ʿAnnābī on the basis of defamation (*tajrīḥ*) of Islam since "he did his duty or what was permitted to him." A Muslim, al-Riyāḥī noted, should not be accused of defaming Islam by such an act "because a man is entrusted with the defense of his life, his family, and his property from injustice, even if it leads to killing, and if he dies in the course of this defense he is counted among the martyrs (*shuhadāʾ*)."[44] Clearly, in his view, there was no ground for a slanderous accusation against al-ʿAnnābī.

Al-Riyāḥī next made an overt presumption in his legal strategy and gave an example to emphasize the legitimacy of al-ʿAnnābī's act. He explained that "if a man walking on the road encounters a famished dog, and there is a nearby tavern (*ḥānat khammār*) or other place to which entry is forbidden, it is incumbent upon that man to enter this place in order to protect his own life."[45] By analogy, the chief muftī claimed, seeking protection from infidels was justified in the present case because of the clear danger to al-ʿAnnābī's life.

Having nearly finished his *fatwā*, al-Riyāḥī argued that he would not renounce his earlier opinion and that it was permissible for al-ʿAnnābī to seek protection from non-Muslims, even if the Bey chose to dismiss him. He concluded with sincere advice (*naṣīḥa*) to his master, the Bey, urging him "to ignore the matter and settle the affair once and for all."[46]

2. *The* Fatwā *of al-Wazzānī*

Ultimately, al-Riyāḥī reasoned, al-ʿAnnābī acted in accordance with the standards of Islamic conduct. His *fatwā* to the Bey repeatedly asserts the right to protect oneself from injustice by seeking protection from non-Muslims. Al-Riyāḥī, it will be recalled, was a distinguished jurist and his *fatwā* was the only legal precedent available to al-Wazzānī that justified

[43] *Miʿyār al-jadīd*, 3:72.
[44] Ibid.
[45] Ibid.
[46] Ibid.

the practice of *ḥimāya*, hence the importance of dealing with it in a systematic manner.

Al-Wazzānī begins the substantive section of his response by unequivocally rejecting al-Riyāḥī's *fatwā*, announcing that "evoking difficulty (*ḥaraj*) and abuse (*shaṭaṭ*) [as the basis upon which to permit non-Muslim protection] is entirely wrong (*ghalaṭ*)."[47] It will be remembered that al-Riyāḥī had invoked the authority of Abū Bakr in order to support his legal opinion. Sensitive to the religious significance of this reference, al-Wazzānī raises four specific issues that call into question al-Riyāḥī's juristic reasoning and legal assessment as it pertains to the analogy with Abū Bakr.

> 1. "Abu Bakr sought protection against polytheists (*al-mushrikūn*), not against [Muslim] rulers who rule over Muslims (*wulāt al-muslimīn*)." The *sharīʿa*, al-Wazzānī explains, does not stipulate the endurance (*ṣabr*) of ill-treatment by polytheists. The reverse, that is, enduring the roughness of Muslim rulers and the prohibition to rebel against them (*al-khurūj ʿanhum*) even if they commit injustice, is prescribed in the law and recorded in many Prophetic traditions. How is it possible, al-Wazzānī asks, to draw an analogy (*kayfa yuqās*) between rebellion against Muslim rulers and seeking the protection of infidels, on the one hand, and seeking the protection of a polytheist against the harm of other polytheists, on the other?[48]

From the outset al-Wazzānī establishes the issue at hand as rebellion against the Muslim ruler and violation of Islamic norms. Such behavior could not be attributed to Abū Bakr, whose authority is paradigmatic in the eyes of every Muslim.

2. Al-Wazzānī argues:

> Seeking the protection of the infidels today means abandoning Islam (*al-khurūj ʿan al-Islām*) and becoming submissive to the infidels. [This act] is equivalent to an infidel's commanding [a Muslim] to do something and he hurries to obey his order, whereas if the greatest of all Muslims commands him to do something, if only to obey, he would neither assist him, nor agree with him, nor consider [his wish], unless the infidel allows him to do so. [Clearly, such conduct] "could never proceed from Abū Bakr."[49]

3. Al-Wazzānī asserts:

> Abū Bakr sought protection in order to strengthen (*taḥṣīn*) his religion and perfect (*tatmīm*) his belief, not to strengthen his body or property. How is

[47] Ibid.
[48] Ibid., 72–3.
[49] Ibid., 73.

> it possible, he asks, to draw an analogy between a worldly concern (*amr al-dunyā*) and religion (*al-dīn*)?

Cleverly drawing upon Islamic history, al-Wazzānī recalls the notorious Umayyad governor, al-Ḥajjāj b. Yūsuf (d. 714) and other oppressive Muslim leaders who killed thousands of pious followers of the Prophet and other Muslims.[50] Nevertheless, no one from among the Muslim community at the time approved the reprehensible act of seeking protection from the infidels.[51] In speaking about early Islamic history, al-Wazzānī asserts that if the dictate to endure a tyrannical ruler applies to the early *umma*, then it certainly applies to contemporary Muslims.

4. Al-Wazzānī argues:

> Seeking foreign protection runs counter to the norms of Islamic life, and it may never be ascribed to Abū Bakr. Al-Wazzānī announces: Those who grant protection (*al-muḥtamūn*) ridicule the Muslims, denigrate their concerns, and wish them shameful things, so that that they will become like them. He then quotes Qur'ān 4: 89: "They wish you to become disbelievers as they are." Finally, he asserts: Infidels who provide protection to Muslims against Muslim sovereigns wish their associates, or protégés, the victory "and other forbidden things of which a Muslim does not approve."[52]

Al-Wazzānī sends a clear message to his audience: any attempt to invoke Abū Bakr and, by implication, the Prophet Muḥammad—whose tradition or practice (*sunna*) is the paradigm of Islamic life—as support for seeking protection of infidels against a tyrannical Muslim ruler is invalid and erroneous.

After refuting the validity of al-Riyāḥī's invocation of the authority of Abū Bakr, al-Wazzānī skillfully turns to a point-by-point analysis of al-Riyāḥī's legal opinion and rejects his arguments. He divides his analysis into five parts. Each part opens with al-Riyāḥī's exact words, followed by al-Wazzānī's refutation of his arguments.

1. He begins by quoting al-Riyāḥī's claim:

> "I issued a *fatwā* authorizing the seeking of protection from non-Muslims, since there is no prohibition of that in the sacred law of Islam." These words, according to al-Wazzānī, are null and void (*kalām bāṭil*). By issuing this *fatwā*, al-Riyāḥī neglected the law, for, as al-Wazzānī explains:

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[50] It is possible that al-Wazzānī refers here to al-Ḥajjāj's forceful attack on Mecca, see *EI*[2], s.v. "al-Ḥaǧǧāǧ b. Yūsuf."

[51] *Mi'yār al-jadīd*, 3:73.

[52] Ibid.

> It is permitted to write it down [viz., an authorization to seek foreign protection] only for the purpose of refuting it, as in the case of a fabricated *ḥadīth* (*al-ḥadīth al-mawḍūʿ*).[53]

2. Al-Wazzānī next cites al-Riyāḥī's reference to Abū Bakr:

> "Our master, Abū Bakr, placed his family and his property under polytheist protection." The comparison to Abū Bakr, al-Wazzānī explains (reiterating the point he made earlier), has no bearing on the present case, because, as should be clear by now, the circumstances faced by Abū Bakr were different from those faced by contemporary society.[54]

3. Al-Wazzānī now focuses his attention and that of his audience on al-Riyāḥī's claim that *qāḍī* al-ʿAnnābī

> "did his duty or what was permitted to him." This claim contradicts *sharīʿa* texts that prescribe the principle of endurance with regard to the actions of Muslim sovereigns. To demonstrate that al-Riyāḥī's claim was wrong, al-Wazzānī cites a *ḥadīth* attributed to Ibn ʿAbbās (d. 687–8). According to this *ḥadīth*, the Prophet said, "Anyone who sees his ruler do that which is loathsome, let him endure and yield, because no one should depart from the community, not even by an inch, and if he [viz., the one who departs] dies, it is a death of religious ignorance (*jāhiliyya*)."[55]

The *ḥadīth* underscores the obligation to give unquestioning obedience to the ruler, however unjust he may be. As support for this third assertion, al-Wazzānī cites three legal discussions that corroborate one another on this point.

3.1 Al-Wazzānī quotes a text written by ʿĪsā al-Sijistānī, the *qāḍī* of Marrakesh.[56] In his *Nawāzil*, al-Sijiistānī noted that the conduct (*sīra*) of the first few generations of Muslims (the "pious forebears," *al-salaf al-ṣāliḥ*) reveals the following:

> If a ruler (*imām*) is tyrannical (*jā'ir*), kills, seizes property unlawfully, and commits sins such as fornication (*zinā*), but deposing him becomes impossible except by murder and by bloodshed, it is forbidden to do so, even if correcting the injustice is mandatory. If he repents, or is left alone, patience is necessary and there is no way to rebel against him (*al-qiyām ʿalayhi*). This is demonstrated by the *salaf al-ṣāliḥ* who had many bad rulers, to whom they offered advice (*naṣīḥa*) to command good and forbid evil as much as possible. However, they were not successful in removing them, nor did they insult them in public or proceed to fight them because the evils of rebellion (*mafāsid al-qiyām*) are stronger and greater than the sins committed by

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53 Ibid.
54 Ibid., 74.
55 Ibid.
56 I have been unable to identify this *qāḍī*.

> them [viz., the unjust rulers]. The maxim is that if two wrongs occur, the lesser evil should be committed. And in following the *salaf al-ṣāliḥ* there is safety. May God protect us from error and accord us success in doing right. In honor of our Prophet and master, Muḥammad, may God bless him and grant him salvation.[57]

3.2 Al-Wazzānī remarks that in his *Nawāzil*, ʿAbd al-ʿAzīz al-Zayātī (d. 1645) related the following statement, cited by *qāḍī* Abū Sālim al-Kūlālī:[58]

> Ibn al-Khaṭīb (d. 1375) said: "If someone hopes for his [viz., the ruler's] blessing whenever he is subjected to injustice, there is no objection if he swears against the evil doers, secretly and publicly. If he submits to the rule of God, there is no need to go further. However, if the sultan is the oppressor, it is prohibited to swear at him, or at someone who acts wrongly in his name. Because of his [viz., the Prophet Muḥammad's] saying, may God bless him and grant him peace: 'If [the sultan] acts justly, be thankful, if he oppresses, be patient.' Further, the Prophet said: 'Do that which is required of you, and leave to God that which is required of them [viz., the rulers].' This means that we are required to obey. In addition, the Prophet said: 'Anyone who curses the sultan, God will impose him [viz., the sultan] as ruler on him.' It has been said by some of the rightly guided: 'Our sultan oppresses us.' He [viz., the Prophet Muḥammad] responded: 'I am afraid you will lose him and that someone who is more oppressive than he will come, so the matter is left to God the Supreme.'[59]

3.3 Al-Wazzānī now addresses the religious obligation that is reflected in the prophetic *ḥadīth*: "Do not rebel against the sultan [even] if he illegally seizes property and strikes the spine." He cites the opinion of *qāḍī* Muḥammad b. Sūda, who wrote:[60]

> Sound prophetic traditions are explicit in [speaking about] the protest of the rightly guided Muslims (*ahl al-ḥaqq*) against anyone who denied the *fatwā* of Ibn Manẓūr and directed his protest and blame against him.[61] For [denying Ibn Manẓūr's *fatwā*] is nothing but alteration of religion, overturning the truth, rejection of the texts (*nuṣūṣ*, i.e., the Qurʾān and *ḥadīth*), and denial of the *salaf*'s endurance of the pain inflicted by al-Ḥajjāj and people like him from among the oppressors. In their time, one would not find many from among the people of religious knowledge (*ahl al-ʿilm*), such as Companions of the Prophet, Successors, and their Followers. Nonetheless they

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[57] *Miʿyār al-jadīd*, 3:74.

[58] I have been unable to identify this jurist.

[59] *Miʿyār al-jadīd*, 3:74–5.

[60] The Sūda family was widely recognized in Fez for generations of learned men who were prominent members of the Fāsī religious elite. A certain Muḥammad b. Sūda (d. 1794) was the *shaykh al-jamāʿa*. See Laroui, *Les Origines sociales*, 195.

[61] Unfortunately, al-Wazzānī does not record here the *fatwā* of Ibn Manẓūr.

> did not approve of agitation and rebellion against the sultan. And there is no indication given to their contemporaries from among the people of power and courage [that they approved of that] when they saw the consequences of rebellion, the violation of contract, and infidelity to the oath of allegiance to the ruler (*bayʿa*) from the person who issued it. [We might learn from] their action—may God have mercy upon them and may we benefit from them—that they held to the *sharīʿa* and they did not allow wrong ideas to be forced on them by the common people (*al-ʿawāmm*), who complain, advocate their individual opinions, and refuse the principles of religion, namely the appointment of the ruler and the prohibition of rebelling against him. May God save us from them and from their harm.[62]

According to al-Wazzānī, al-Riyāḥī was entirely wrong in stating that *qāḍī* al-ʿAnnābī acted in accordance with his Islamic rights and duties. In this long and detailed legal discussion, he not only refutes al-Riyāḥī's specific argument but also, citing three legal opinions, establishes that obedience to the ruler is tantamount to submission to the *sunna* of the Prophet and the *salaf*. Furthermore, obedience is not conditional on the ruler's taking advice from, or consulting with, his subjects, or on his dispensing justice, avoiding sins, or acting upon the religious obligation to 'command good and forbid evil.' Obedience to the sultan is a religious obligation that may not be forfeited. Disobedience is a sin.

4. Next, al-Wazzānī responds to al-Riyāḥī's statement that al-ʿAnnābī acted properly by seeking consular protection:

> "Because a man is entrusted with the defense of his life, his family, and his property from someone who commits injustice, even if it leads to killing." This statement is an error (*ghalaṭ*), he says, adding: "Because it does not apply to the *amīr* who would not be removed."
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> In other words, self-defense against an unjust Muslim ruler is prohibited, as it may result in his killing. The second caliph, ʿUmar b. al-Khaṭṭāb, is reported to have said: "If he [viz., the ruler] oppresses you, be patient; if he dispossesses you, be patient; if he strikes you, be patient, and if he commands injustice, say, 'obedience (*ṭāʿa*) to my Lord and not to anyone who was created like me.'" To reinforce his point, al-Wazzānī cites the Prophet, who said, "Hear and obey, even if an Ethiopian slave whose head is like a raisin is placed over you."[63]

5. Finally, al-Wazzānī considers al-Riyāḥī's line of reasoning in his hypothetical example of a man who was forced to enter a tavern after

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[62] *Miʿyār al-jadīd*, 3:75–6.
[63] Ibid., 76.

running into a famished dog. Al-Wazzānī argues that this example is worthless (*sāqiṭ*).

> He writes: "Entering a wine shop and the like is not the same as entering the religion of the infidels (*millat al-kuffār*); it does not glorify them, nor does it reveal an attachment to them, and it is not an insult to Islam (*dīn al-Islām*)." Al-Wazzānī explains that between al-Riyāḥī's example and the present case, "There is distance and difference as [great as that] between a lizard and a whale." After citing the words of a poet—"she went East and I went West, what a big difference between East and West"—he completes his discussion.[64]

Al-Wazzānī signals the end of his response with his characteristic signature: "And God knows best. This is the saying of the author, may God protect him."

The Jurist and the Ruler

Al-Mahdī al-Wazzānī lived in an age of shifting political order, social practice, and local legal climate that constituted a crucial phase of accelerated passage to modernity. His legal opinion echoes many of the concerns of the time to which it belongs. In particular, it provides important information that is not readily available about al-Wazzānī's political thought. The relationship between al-Wazzānī and Sultan ʿAbd al-ʿAzīz suggests close collaboration between the jurist and the ruler. In general, the story of al-Wazzānī is in accord with Munson's observations on the relationship between the *ʿulamāʾ* and the sultans in pre-Protectorate Morocco.[65]

The reign of ʿAbd al-ʿAzīz was one of major crisis that eventually erupted into violence and led to his removal from power. During this period, the Moroccan sultan frequently called upon the religio-legal elite to portray him as a legitimate ruler, protecting the supreme law of God. Al-Wazzānī played a decisive role in conferring legitimacy on the Makhzan of ʿAbd al-ʿAzīz and he clearly was willing to extend legal and religious authority to the political elite when the need arose. This relationship is also reflected in al-Wazzānī's *fatwā*, in which he expresses unconditional support for the ruler, however insufferable, tyrannical, and despotic he might be. Al-Wazzānī demands that subjects manifest absolute and unlimited

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[64] Ibid.

[65] Munson, *Religion and Power in Morocco*, 54–5.

obedience to the sovereign; criticism, opposition and rebellion against the sultan are illegitimate. It may be argued that al-Wazzānī conceives of the sultan's governance and relationship to society as autocracy.

Al-Wazzānī posits conformity with the ideal of submission to the ruler no matter how oppressive he may be; it is noteworthy that there is no plea to the sultan, not even in implicit terms, to respect Islamic legal norms and to conduct himself in accordance with justice. Nowhere in this *fatwā* does al-Wazzānī remind the ruler that he must avoid sin and rule justly or that his authority or the obedience of his subjects is bound by and contingent upon his subservience to the religious law and the *sunna*. Even more striking is al-Wazzānī's failure to offer any advice that would help the sultan conform to just conduct. Indeed his *fatwā* implies that the appropriate implementation of the law is not relevant. Al-Wazzānī addresses the sultan with an exhortation he would have liked, and expected, to hear. It appears that al-Wazzānī's aim in writing his *fatwā* was not only to prohibit the practice of *ḥimāya* but also to justify the contentious politics of the day.

The fact that al-Wazzānī wrote this *fatwā* does not, of course, vouch for its truth-claims, but it does mean that it can give us a fair idea of how the position of the sultan vis-à-vis Moroccan society was visualized in the milieu in which this text originated. That this *fatwā* comes from a *faqīh* loyal to the sultan is not insignificant, for it suggests the vision of a religio-legal elite closely associated with the service of the state. Viewed in this manner, al-Wazzānī's *fatwā* becomes a document of the utmost importance that fills a gap in our knowledge of the manner in which the learned religious elite articulated the cultural and legal values that defined government and political power in pre-colonial Morocco. Al-Wazzānī's overriding concern with the subjects' absolute obedience to the ruler, on the one hand, and his silence on the sultan's duties to the people, on the other, are most revealing.

CHAPTER TWENTY-ONE

MUḤAMMAD RASHĪD RIḌĀ (D. 1935)

Mahmoud O. Haddad

Life and Intellectual Formation

Muḥammad Rashīd b. ʿAlī Riḍā b. Muḥammad Shams al-Dīn b. Muḥammad Bahāʾ al-Dīn b. Munlā ʿAlī Khalīfa (1865–1935) was a well-known member of the modern reformist Salafiyya movement.[1] He was born in Qalamūn, a Sunni Muslim village on the East Mediterranean coast three miles south of Tripoli. After 1888 Qalamūn and Tripoli, though historically in Syria, were administered by the Ottomans as part of the new coastal Mediterranean province (*wilāya*) of Beirut that extended from Latakia in the north to Acre and Nablus in the South. Riḍā came from a Sunni family of modest means that relied on the revenues of its limited olive-tree holdings and on fees earned by some of its members who served as *ʿulamāʾ*. In fact, the *ʿulamāʾ* of the Riḍā family controlled the affairs of the Qalamūn mosque for many generations.[2] They were Shāfiʿīs and claimed descent from the family of the Prophet Muḥammad (*ahl al-bayt*), specifically from al-Ḥusayn b. ʿAlī b. Abī Ṭālib.[3] Stories about al-Ḥusayn were repeated frequently inside the family.[4] Riḍā himself identified al-Ḥusayn as one of his "great-grandfathers" and, without naming them, cursed those who were responsible for his slaying.[5] Riḍā developed an exaggerated sense of self-importance that he actively promoted. He always emphasized, for example, that he was a *sayyid*, or descendant of the Prophet Muḥammad.

Riḍā published his autobiography in serialized form in early issues of *al-Manār* after 1898. In 1934 he published these materials as the second

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[1] Haddad, "The Manarists and Modernism," 55–73. See also *EI²*, s.vv. "Salafiyya" (in Egypt and Syria), "Iṣlāḥ" (The Arab world).

[2] Durnīqa, *al-Sayyid Muḥammad Rashīd Riḍā*, 21.

[3] Ibid., 133.

[4] Al-Shāfiʿī the founder of the Shāfiʿī school of law, emphasized the right of ʿAlī b. Abī Ṭālib and his descendants to the caliphate rather than the Umayyads or ʿAbbasids. See Muḥammad Abū Zahra, *al-Shāfiʿī: Ḥayātuhu wa-ārāʾuhu wa-fiqhuhu*, 141–2.

[5] Riḍā, *al-Manār wa'l-Azhar*, 178.

section of his book, *al-Manār and al-Azhār* (*al-Manār wa'l-Azhār*).[6] The autobiography treats his life and experience before his immigration to Egypt in 1897. Although he wrote little about the more than three and one half decades he spent in Egypt, many episodes relating to his life there, particularly to his intellectual activity, can be found in different pieces he wrote in *al-Manār* and in his biography of Muḥammad ʿAbduh, *Tārīkh al-Ustādh al-Imām al-Sheikh Muḥammad ʿAbduh*.[7] The long-neglected introduction to the second edition of *al-Manār* published in 1327/1909, more than a decade after he began publishing his journal, is especially important in this regard. Another helpful source is Shakīb Arslān's book containing letters he exchanged with Riḍā over a period of forty years, *al-Sayyīd Rashīd Riḍā aw ikhā' arbaʿīnā Sana*.[8] Although Riḍā was closely associated with the Egyptian *ʿālim* and reformer Muḥammad ʿAbduh (d. 1905), he did not become a member of the Egyptian circle of *ʿulamā'*. Unlike ʿAbduh, who became grand *muftī* of Egypt (despite his being regarded as too far ahead of his times by most Egyptian *ʿulamā'*),[9] Riḍā apparently was more interested in theoretical Islamic questions and in what was taking place outside Egypt, especially in greater Syria and the Hijaz.

Riḍā was a staunch supporter of *ijtihād*, which he understood as the reinterpretation of Islamic law to adapt to changing conditions. He rejected the assertion that the door of *ijtihād* had been closed and he associated *ijtihād* with *talfīq*,[10] the procedure that allows Muslims of one school to use the rules of other schools to achieve unity in religious, political and juridical matters.[11] Although he was a Shāfiʿī, Riḍā defended the Ḥanbalī Wahhābīs. One element of his program for Muslim reform was to unite all law schools (both Sunni and Shiʿi) into one school of Islamic jurisprudence. Between 1900 and 1903, he published in *al-Manār* several

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6 Ibid.

7 Riḍā, *Tārīkh al-Ustādh al-Imām al-Shaykh Muḥammad ʿAbduh*.

8 Shakīb Arslān, *al-Sayyid Rashīd Riḍā aw ikhā' arbaʿīna sana*.

9 In his memoirs, Ṭāhā Ḥusayn mentions that when Muḥammad ʿAbduh died, "Egypt was disquieted by his death, but the Azhari milieu was the least disquieted by that grave event." He differentiated between the wearers of the turban and the wearers of the fez. The former were indifferent to ʿAbduh's death while the latter mourned him sincerely. See Ṭāhā Ḥusayn, *al-Ayyām*, 2:146.

10 *Talfīq* "… designates any modern legislative enactment that combines, in a statutory provision, parts of doctrines of more than one recognized Sunni school." *EI*², s.v. "Talfīḳ."

11 Riḍā, "Fātiḥat maqālāt al-muṣliḥ wa'l muqqalid," in *al-Waḥda al-Islāmiyya*, 12.

extensive articles on this proposal,[12] which bore fruit—at least in its Sunni component—in 1331/1912–13, when the official office of Shaykh al-Islam (*Mashyakhat al-Islām*) approved it in Istanbul.[13]

After the 1860 civil war between the Christian Maronites and the Druze in Mount Lebanon and the landing of French troops in the country, the Ottoman government, under pressure from European powers, granted Mount Lebanon administrative autonomy under a Lebanese Christian ruler who was not from Mount Lebanon. Qalamūn, located just outside Mount Lebanon, "was to be included in this new government, but the inhabitants refused to be detached from the direct rule of the Turks and preferred to remain under the administrative district (*Mutassarifiyya*) of Tripoli rather than enjoy the privileges of the administrative autonomy of Mount Lebanon and be ruled by a Christian."[14]

Riḍā began his elementary education in a local Qur'ānic school (*kuttāb*) in Qalamūn, and then moved to the Turkish government elementary school (*rushdiyya*) in Tripoli, where he received instruction in grammar, mathematics, geography and religion, in addition to Arabic and Turkish. Perhaps because Turkish was the only language of instruction for all courses (except Arabic language and religion),[15] Riḍā left the government elementary school after just one year and then enrolled in the National Islamic School (*al-Madrasa al-Islāmiyya al-Waṭaniyya*) of Shaykh Ḥusayn al-Jisr (1845–1909) in Tripoli. Al-Jisr was a moderate modernist *ʿālim* who had graduated from al-Azhar University in Cairo. Although he maintained the traditional view that the door of *ijtihād* had been closed, he emphasized that the interpretation of Qur'ān and *ḥadīth* should not contradict any rational principle.[16] Al-Jisr wrote about Darwinism and argued that if the theory were true, it was consistent with Islamic beliefs because God himself would have set evolution in motion.[17] Al-Jisr also emphasized that the progress of the Muslim community (*umma*) is "contingent on learning both the religious and secular sciences using modern European methods."[18]

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[12] These articles, written between 1900 and 1903, were collected and published in *al-Waḥda al-Islāmiyya wa'l-ukhūwa al-dīniyya*.

[13] *Fatāwā Muhimma fi'l-Sharīʿa al-Islāmiyya fi'l-Maḥākim al-ʿUthmāniyya wa'l-Miṣriyya*, published by al-Sayyid Muḥammad Rashīd Riḍā, 1331/1912–13.

[14] Translated memorandum dated 25 March 1916 and signed by I[brahim] D[imitri], Wingate Papers, Sudan Archives, 135/7/168.

[15] Riḍā, *al-Manār wa'l-Azhar*, 138–9.

[16] Albert Hourani, *Arabic Thought in the Liberal Age*, 223.

[17] M.A. Badawi, *The Reformers of Egypt*, 97.

[18] Riḍā, *al-Manār wa'l-Azhar*, 139.

According to Riḍā, the name of al-Jisr's school, "National Islamic," pointed to another concern, that is, the necessity for Muslims to combine the modern sciences with national Islamic instruction to compensate for the influence of foreign instruction in European and American secular schools as well as in schools run by missionaries.[19] The language of instruction at al-Jisr's school was Arabic, and the curriculum included Arabic, Turkish, and French, the Islamic religious sciences, logic, mathematics, and modern natural sciences.[20] In the autobiographical section of *al-Manār wa'l-Azhar*, Riḍā boasts of his excellent academic record, but concedes that he did not pay attention to either Turkish or French which, he thought, had no religious utility.[21] Riḍā's teachers included Shaykh Maḥmūd Nashābeh (d. 1890), Shaykh ʿAbd al-Ghānī al-Rāfiʿī (d. 1890), who introduced him to the Yemeni jurist al-Shawkānī, and Shaykh Muḥammad al-Kawukjī (d. 1887).[22] Riḍā explained that as a young man he was a sufi and a follower of the Naqshbandī order (*ṭarīqa*).[23] When the Ottoman government refused to exempt its students from military service on the grounds that it was not a religious institution,[24] al-Jisr had to close down his school. Riḍā enrolled at a traditional religious school in Tripoli, graduating as an *ʿālim* in 1897.[25]

The intellectual influences on Riḍā were many. Al-Jisr's ideas shaped some of his later thinking. Al-Ghazālī's (d. 505/1111) *Iḥyāʾ ʿulūm al-dīn* had a profound impact on him "and in a sense this was to remain the deepest influence of his life."[26] It was this work that led him towards sufism and the Naqshbandī order. He was not tolerant, however, of popular sufi orders, which he considered false forms of sufism, because they did not adhere closely enough to the *sharīʿa*. After witnessing a ritual celebration by the Mawlawī order in the countryside of Tripoli, he attacked such practices,[27] and came to believe, as Albert Hourani has shown, that this

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[19] Ibid.

[20] Ibid.

[21] Ibid., 138–9. There was and still is a group of pious Muslims who consider learning a language other than Arabic, the language of the Qurʾān, as religiously undesirable. Riḍā, *Tārikh al-Ustādh al-Imām*, 2:84.

[22] Durnīqa, *al-Sayyid Muḥammad Rashīd Riḍā*, 23–5.

[23] Riḍā, *al-Manār wa'l-Azhar*, 139; Riḍā, *Tārīkh*, 1:84.

[24] Riḍā, *al-Manār wa'l-Azhar*, 139.

[25] Adams, *Islam and Modernism in Egypt*, 177.

[26] Hourani, *Arabic Thought*, 224.

[27] Riḍā, *al-Manār wa'l-Azhar*, 155–7. In *Arabic Thought* (225–6), Hourani suggests that Riḍā turned against Sufism as a whole. He corrects this suggestion in his "Sufism and Modern Islam: Rashīd Riḍā," in his *The Emergence of the Modern Middle East*, 91.

kind of sufism corrupts the purity of the faith because it produces rituals that are not authorized by the teachings of true Islam, as he defined it.[28] It is important to note, however, that he did not condemn "sufism as a whole" at any point in his career.[29] His disapproval of popular sufism led to some friction between him and his first mentor, Shaykh al-Jisr.[30] In fact, while still in Qalamūn, Riḍā wrote a book about sufism, which was never published. Parts of this work, "The Sharʿī Wisdom in Judging the Qādirī and Rifāʿī Orders" (*al-Ḥikma al-sharʿiyya fī muḥākamāt al-qādiriyya wa'l-rifā'iyya*), was later serialized in *al-Manār*.[31] This work defends the superior religious status of ʿAbd al-Qādir al-Jīlī or Gīlānī (407–561/1077–1166), one of the most prominent Ḥanbalī sufis and the founder of the *ṭarīqa* followed by the well-known jurist Ibn Taymiyya (d. 728/1328).[32] However, Riḍā later maintained that he knew little about either Ibn Taymiyya or the Wahhābī movement in Arabia at this early stage of his life.[33] Riḍā wrote this book as a reply to one of Sultan ʿAbdul-Ḥamīd II's most prominent Arab advisors, Abū al-Hudā al-Ṣayyādī, who was responsible for disseminating the Pan-Islamic propaganda of the Sultan in the Arab provinces. According to Riḍā, al-Ṣayyādī abused his position to highlight the superior spiritual status of one of his forebears, the sufi leader Aḥmad al-Rifāʿī.[34]

Riḍā strongly opposed mystical interpretation (*taʾwīl*) of the Qurʾān or *ḥadīth* because it does not conform closely enough to the *sharīʿa*. On this point he criticized the views of al-Ghazālī.[35] But his attitude toward popular belief was more complex than appears at first glance. He disapproved of the ascription of sacredness to either saints or natural objects. As a young man, he persuaded the women of Qalamūn to stop lighting candles in front of shrines and ordered the cutting down of a large olive tree associated with a woman saint.[36] At the same time, he believed in the graces or miracles (*karāmāt*) of saints and in the spiritual powers of individuals favored by God.

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[28] Hourani, "Sufism," 96.
[29] Ibid., 91.
[30] Riḍā, *al-Manār wa'l-Azhar*, 172–3.
[31] *al-Manār* (Cairo), I (1898), 519–20.
[32] On Ibn Taymiyya's sufism, see al-Muṣṭīf, *Taṣawwuf Ibn Taymiyya*.
[33] *Al-Manār*, I (1898), 179, 189–90; Hourani, "Sufism," 94–8.
[34] For an insightful study of al-Ṣayyādī, see Eich, "The Forgotten Salafi: Abū al-Hudā aṣ-Ṣayyādī," 61–87.
[35] Hourani, "Sufism," 97.
[36] Ibid., 97–8; Riḍā, *al-Manār wa'l-Azhar*, 178.

In his autobiography, Riḍā explicitly stated that the people of Qalamūn believed that he was a saint who healed the sick and predicted the future. He claimed that his friends saw him in their dreams as someone who resembled the Prophet Muḥammad.[37] For most of his life, he seems to have believed that he possessed *karāmāt* although, as one scholar points out, his journal, *al-Manār*, argues "that most occurrences commonly labeled as *karāmāt* in reality can be explained away as tricks."[38] There is a tension in Riḍā's character, an intertwining of "the medieval characteristics of Riḍā's autobiography and the . . . different perception derived from free rational enquiry and an openness to consider ideas from across the spectrum of Islamic thought, tinged also with the thought of Europe."[39]

In 1884 Riḍā's intellectual life took a new turn following the publication of the short-lived, Paris-based journal, *al-ʿUrwā al-wuthqā* ("the Firm [religious] Bond"), edited by Jamāl al-Dīn al-Afghānī (d. 1897) and Muḥammad ʿAbduh. After discovering a few issues in 1892–3 among his father's possessions, he described his feelings as follows:

> (. . .) every issue was like an electric current striking me, giving my soul a shock, or setting it ablaze, and carrying me from one state to another (. . .) My own experience, that of others, and history have taught me that no other Arabic discourse in this age or the centuries that preceded it has done what it did in the way of touching the seat of emotion in the heart and persuasion in the mind.[40]

Al-ʿUrwā al-wuthqā was to have much deeper significance for Riḍā. After acquiring a complete set of the journal, which he copied, apparently by hand, and read more than once, he wrote:

> I moved to a new way of understanding Islam, that is, that Islam is not merely spiritual and otherworldly but rather a religion that deals with soul and body, the temporal and the spiritual. Its objective is to guide man to sovereignty on earth by what is right so that he may act as God's caliph in deciding for love and justice.[41]

This new understanding of Islam convinced Riḍā to change his methods. Before reading *al-ʿUrwā al-wuthqā*, he had occupied himself with trying to guide his fellow Muslims exclusively in religious affairs. After

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[37] Riḍā, *al-Manār wa'l-Azhar*, 158–70.
[38] Eich, "The Forgotten Salafī," 80.
[39] Sirriyeh, "Rashīd Riḍā's Autobiography," 188.
[40] Riḍā, *Tārīkh*, 1:303. The translation of this passage is taken from Hourani, *Arabic Thought*, 226.
[41] Riḍā, *Tārīkh*, 1:84–5.

his intellectual encounter with al-Afghānī and ʿAbduh, he explained that his "soul became attached to the idea of guiding Muslims to the life of civilization, preservation of their domains, and competition with powerful nations in sciences, crafts, industries, and all that life requires."[42] However, Riḍā also discovered in *al-ʿUrwā al-wuthqā*[43] and the teachings of al-Jisr and al-Ghazālī another message that would have a profound impact on his social outlook. All three sources suggested to him one basic idea: the *ʿulamāʾ* were to blame for the decline of Muslim society and thus needed reforming. In the early 12th century CE, al-Ghazālī had criticized the majority of the *ʿulamāʾ* for their worldliness and association with the rulers. According to al-Jisr, the *ʿulamāʾ* needed to acquire knowledge in modern sciences to be better prepared to defend Islam. And al-Afghani and ʿAbduh had pointed out in *al-ʿUrwā al-wuthqā* that the "renaissance" of Islam and its triumph over Western colonialism was dependent on the "renaissance" of the *ʿulamāʾ*, who should assume responsibility for mobilizing Muslims to attain such a goal.[44]

Riḍā was in the habit of reading two periodicals: *al-Muqtaṭaf* ("Selections"), published in Cairo by the Lebanese journalists Yaʿqūb Sarrūf and Fāris Nimr, which he credited with marrying the Arabic language and modern scientific language,[45] and *al-Ṭabīb* ("The Physician"), published in Beirut by a number of figures associated with the Syrian Protestant College, the most important of whom was the American reverend, George Post. Both Arabic periodicals concentrated on scientific and medical topics and were influenced by Victorian thought.[46] Riḍā also benefited from intellectual encounters with what he called "free Christian thinkers" and American Protestant missionaries who were providing educational and medical services in Tripoli. He seems to have been on particularly good terms with Cornelius van Dyke, an American missionary who taught at the Syrian Protestant College (renamed The American University of Beirut in 1920), and who maintained especially good relations with Muslims.[47]

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[42] Ibid., 85.

[43] Riḍā later re-published in *al-Manār* some of *al-ʿUrwa al-wuthqā's* articles by al-Afghānī and ʿAbduh. See, for example, *al-Manār* 9:9 (19 October 1906), 664–72; 9:11 (17 December 1906), 836–41; 9:12 (13 Feb. 1907), 905–6.

[44] Riḍā, *al-Manār wa'l-Azhar*, 193.

[45] Riḍā delivered a speech on this topic at the golden jubilee of *al-Muqtaṭaf* on 30 April 1926 and he published it in *al-Manār* 27:10 (4 January 1927), 786–91.

[46] Ibid.

[47] "Al-Jūyūsh al-gharbiyya al-maʿnawiyya" (The Moral Muslim Armies), *al-Manār* (1898), 1:302.

Apparently, the missionaries left a positive impression on Riḍā, who later wrote that in the task of spreading Islam, Muslims could benefit from emulating the zeal and organization of Christian missionaries.[48]

Another important influence on Riḍā was Ibn Khaldūn's *Muqaddima*. In his autobiography Riḍā refers to the text and praises Ibn Khaldūn as a "wise man;"[49] elsewhere, he characterizes Ibn Khaldūn as "the wise man of Islam."[50] Inexplicably, scholars of Riḍā's thought have ignored these positive statements and stressed instead Riḍā's criticism of some of Ibn Khaldūn's doctrinal points. As I have shown elsewhere,[51] Ibn Khaldūn's views were instrumental in shaping Riḍā's doctrines and political behavior, especially on the subject of the caliphate (although he did reject the connection made by Ibn Khaldūn between *ʿaṣabiyya* and competence on the grounds that this idea is based on race and is therefore inconsistent with Islamic tenets).[52] In the early issues of *al-Manār*, Riḍā praised Ibn Khaldūn, describing the *Muqaddima* as a source of pride for the Islamic community (*umma*) and as a guide to Western nations in the philosophy of history, sociology, politics, and pedagogy.[53]

al-Manār

The impression made by *al-ʿUrwā al-wuthqā* on Riḍā was so strong that he contemplated joining al-Afghānī in Istanbul in 1892–3.[54] There is, however, no indication that he took any serious step in that direction, especially since he was years away from completing his studies. Following his graduation in 1897, one year after al-Afghānī's death, he immigrated to Egypt to join ʿAbduh and try to publish a newspaper along the general

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48 Adams, *Islam and Modernism in Egypt*, 196.

49 Ibid.

50 Riḍā, *al-Sunna wa'l-Shiʿa aw al-Wahhābiyya wa'l-Rāfiḍa*, 7.

51 See Haddad "The Ideas of Amir Shakib Arslan," 101–15; idem, "Arab Religious Nationalism in the Era of Colonialism: Rereading Rashīd Riḍā's Ideas on the Caliphate," 253–77, at 273.

52 Haddad, "Arab Religious Nationalism." Riḍā also read an Arabic translation of *Tārīkh Jawdat*, by the Turkish historian and public official Aḥmad Jawdat Pasha (d. 1895), which covered Ottoman history from 1774 to 1826. Jawdat Pasha, in turn, was influenced by Ibn Khaldūn's philosophy of history. See *EI*², s.v. "Aḥmad Djewdet Pasha."

53 Riḍā, "Muḥāwarāt al-muṣliḥ wa'l-muqallid al-muḥāwara al-rābiʿa," *al-Manār* 3:31 (6 Feb. 1901), 795–804, at 804.

54 Adams, *Islam and Modernism in Egypt*, 179.

lines of *al-ʿUrwā al-wuthqā*.[55] The move was motivated by three factors. First, if he returned home he likely would have become an *ʿālim* in a small village like Qalamūn, and it is clear that he was searching for a larger stage on which to perform.[56] Second, he feared that Ottoman censorship in Syria was too pervasive to permit him to express his reformist opinions, whereas in Egypt, which was nominally an Ottoman province but effectively under British occupation, the press was relatively free. Third, he wished to join ʿAbduh, whom he considered "the heir of al-Afghānī's knowledge and wisdom."[57]

Riḍā's desire to join ʿAbduh is revealing. Although Riḍā was committed to ʿAbduh's strategy of religious reform, he never accepted his new mentor's position on the futility of political activity, although ʿAbduh tried to steer him away from addressing political matters, especially those related to Ottoman affairs. According to one account, when ʿAbduh returned from exile in 1889 he became passionate about the question of reforming education, especially at al-Azhar. He used to say, "May God give His blessings to knowledge and education, the giving and receiving of it, to the scholar and to one who knows and who is known. In short [may He give blessings] to the letters "*ʿayn, lām* and *mīm*"[58] (the Arabic root letters in the verb "to learn"). It is no coincidence that the sub-title of *al-Manār*, which was initially published as a weekly newspaper (1315–16/1898–99), indicated that it was "a scientific, literary, and political newspaper" (*jarīda ʿilmiyya adabiyya siyāsiyya)*. In its second year of publication (1316–17/1899–90), *al-Manār* became a weekly journal, in its third through eighth year it was published bi-monthly, and in its ninth year (1324/1906–07) it became monthly. Throughout this period, its subtitle was "a scientific, literary, educational, nationalist, and news reporting journal" (*Majalla ʿilmiyya adabiyya tahdhībiyya milliyya iḫbāriyya*). It was Muḥammad ʿAbduh, most probably, who persuaded Riḍā to delete the adjective "political" from the sub-title. Following Italy's occupation of Tripolitania in 1911 and the Ottoman defeat in the Balkans a year later, Riḍā's sense that a European colonial onslaught was about to be unleashed against the core Arab and Muslim lands increased, especially after World War I and the

[55] Riḍā, *Tārīkh*, 1:998. Riḍā re-published in *al-Manār* many articles previously published in *al-ʿUrwa al-wuthqā*. See, for example, 9:9 (19 October 1906), 664–72; 9:11 (17 December 1906), 836–41.

[56] Riḍā, *al-Manār wa'l-Azhar*, 192.

[57] Riḍā, *Tārīkh*, 1:998.

[58] Cited in Kāmil Zuhairī, "Niṣf al-ḥaqīqa," in *al-Qāhira* (Cairo), March 1, 2005.

establishment of French and British Mandates in Greater Syria and Iraq.[59] As late as 1912 he openly preferred British colonialism over the French and Italian. In a speech he delivered in India he said,

> The British government is the most liberal of the colonial governments in dispensing freedom. It is possible for those who are under its rule, if they follow the path of reason and wisdom, to better themselves, something that is not possible for those under the rule of other colonial powers . . . It stands to reason and wisdom that those who are engaged in Islamic and moral reform should distance themselves from politics both openly and discreetly because politics has never entered into a thing without corrupting it, as al-Shaykh al-Imām [Muḥammad ʿAbduh] had pointed out.[60]

Yet, after it became clear that Britain had allied itself completely with the Zionist project in Palestine, Riḍā was disappointed and began to suggest that Muslims should break with Britain. He wrote: "It is either friendship or absolute enmity."[61]

In the introduction to the second edition of the first volume of *al-Manār*, published in 1327/1909, Riḍā explained his motives for publishing his journal. One of his many objectives was "to show the compatibility of Islam with science and reason."[62] He wrote:

> I did not publish *al-Manār* to make money or earn a decoration, or a new rank from some ruler, or status in the eyes of the public. I did that because it was a duty for the public good, and because not to do so would be [to commit] a sin that would burden the entire nation. The only thing I cared about was to tell the truth and advocate what is good, to enjoin what is good and forbid what is evil. If I did well, to the best of my learning and ability, then I cared little for public approval or lack of it. I cared little for criticism or praise, acceptance of *al-Manār* or rejection.

Regarding the distribution of *al-Manār* as a newspaper in its first year of publication in 1898, Riḍā revealed:

> The earliest editions of the newspaper had a print run of 1500, most of which were sent to people in Egypt and Syria whose names I already knew, and, to

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[59] Riḍā, *Tārīkh*, 1:1022; I have made this point about Riḍā's political outlook in my "Wathīqa: Risālat al-Shaykh Rashīd Riḍā," 159–76.

[60] Riḍā's speech in Lucknow (India) at the Muslim ʿUlamā's conference in 1912. It was published in *al-Muʾayyad* (Cairo), May 19, 1912, 1–2. On Riḍā's perception of Great Britain, see further Umar Ryad, "Islamic Reformism and Great Britain: Rashid Rida's Image as Reflected in the Journal *Al-Manar* in Cairo," 263–85.

[61] *al-Manār* 29 (1928): 7–8. Cited in Shahin, *Through Muslim Eyes*, 87, n. 42.

[62] "Muqaddimat al-ṭabʿa al-thāniyya liʾl-mujallad al-ʿawwal min al-Manār," *al-Manār*, vol. 1, 2nd ed. (1907), 1–8, at 2.

> subscribers in some other countries. Most of the issues I sent to Egyptians were returned to me. Shortly thereafter, the Hamidian government [i.e. the Ottoman Sultan ʿAbdul-Hamīd II] blocked the issues sent to Syrians and other Ottomans. I reduced the print run to 1000, but within two years, the number of subscribers reached almost 3000.

Despite the obstacles, Riḍā remained confident. The public's lack of interest in *al-Manār* did not cause him to feed his work to the flames or turn it into wrapping paper for the use of merchants, as the owners of many failed newspapers commonly did.[63] He recollects:

> What nourished my hope is what I used to hear from some thoughtful, educated people, who understood sociology. They said that *al-Manār* was a natural necessity for contemporary Muslims, and an indispensable need for each household. Even if Muslims did not yet understand that, they would do so some time in the future. Two non-Muslims agreed about when that day would come. One, an Englishman, knew *al-Manār* because Maḥmūd Sāmī Pasha al-Barūdī[64] used to read it to him. The other was a Syrian. They reached the same conclusion, although neither one knew the other. They both said that in fifty years Muslims would seek *al-Manār* and re-issue its earlier editions. I do not know if, when they made this prediction, they thought that Muslims would sleep for fifty years before awakening and seeing this reform. Perhaps they meant that in fifty years, *al-Manār* would no longer be in existence because of its owner's death or incapacity, and that people would seek out the newspaper, because one never knows the value of anything until he loses it, and one never realizes the worth of a laborer until he is gone.
>
> Perhaps Muslims are better than that. Moreover, perhaps what they expected arrived earlier than they thought [it would]. Here we are now, reprinting the entire collection of the first year, and about to reprint the second and third years as well, because there are very few copies left and their price is rising.

Riḍā divided his journal into eight sections: (1) a religious section that included Islamic creeds (*al-ʿaqā'id*), Qur'ānic exegesis (*tafsīr*), legal opinions (*fatāwā*), unsound *ḥadīth*s and harmful innovations (*bidaʿ*); (2) literary questions; (3) a historical section; (4) scientific concerns; (5) educational

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[63] Many newspaper owners sold leftover copies of their publications to merchants and bakers.

[64] Maḥmoud Sāmī Pasha al-Barūdī was a prominent Egyptian nationalist. He served as a high-ranking army officer and then became a minister of education and religious endowments (*awqāf*) in the late 19th century. He served as a prime minister before the British occupation of Egypt in 1882 and participated in the Aḥmad ʿUrābī revolt in 1881. In 1882, the British exiled him, first to Ceylon and later to Beirut. In 1900, he was pardoned and then returned to Egypt, where he died in 1322/1904.

issues; (6) social issues; (7) philosophy; and (8) sundry issues, including book reviews. Riḍā was the main writer, but there were other contributors to the journal, especially in its early years. Besides Muḥammad ʿAbduh,[65] the most important were Syrian intellectuals living in Egypt such as Rafīq al-ʿAẓm, Muḥammad Kurd ʿAlī, or visitors to the Egyptian capital like Shukrī al-ʿAsalī.[66] Starting with the first volume of *al-Manār*,[67] Riḍā was critical of both Muslim rulers and the *ʿulamāʾ*. He saved the brunt of his attacks for the *ʿulamāʾ* who, he thought, followed the example of rulers in every field instead of playing an independent religious role. In the name of religion, they assisted the rulers in all their affairs. Throughout the centuries, scholars, including religious scholars, paid attention only to questions pleasing to kings and rulers.

Worldview

For Riḍā the first five centuries of Islamic history were the best age in terms of scholarship, religion, and worldly success. Later, matters deteriorated: total ignorance and anarchy prevailed, and scholars were concerned only with pleasing the mighty and powerful who led the community astray with false opinions. Their disputes led to fissures and divisions in the faith. Some accused others of apostasy. They abandoned the Qurʾān in favor of worldly interests. At first Riḍā adopted the method of scolding the Muslims by using the early Meccan *sūra*s of the Qurʾān that were intended to instill fear in the hearts of people in order to induce them to follow the Messenger of God: He asked Muslims to think at length about the verse: "Now surely they fold up their breasts that they may (conceal their enmity) from Him: now surely, when they put their garments as a covering, He knows what they conceal and what they make public; surely He knows what is in the breasts" (Q. 11:5) and also, "And your Lord has commanded that you shall not serve (any) but Him and that you show goodness to your parents" (Q. 17:23). He sought to drive home the idea that God is severe and warned people not to be unfaithful. He referred to another Meccan *sūra*, "Say: My Lord has only prohibited indecencies,

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[65] See, for example, Riḍā's article "Mā akthara al-qawl wa mā aqalla al-ʿamal," *al-Manār* 1:9 (1898), 143–9.

[66] See, for example, the article "al-Istiqlāl wa'l-ittikāl" by Muḥammad Kūrd ʿAlī in *al-Manār* 4:16 (29 October 1901), 601–15.

[67] "Editorial of the first volume," *al-Manār* (1315/1898).

those of them that are apparent as well as those that are concealed, and sin and rebellion without justice and that you associate with God that for which He has not sent down any authority and that you say against God what you do not know" (Q. 7:33).

Riḍā pointed to the many fruitless disputes that flared up among Muslims. One example is the argument about which of the Companions of the Prophet was entitled to succeed him as caliph, a dispute that continued to preoccupy Muslims of Riḍā's day. It was this dispute that split Islam into two major factions, Sunnis and Shiʿis, and led to intellectual and material impoverishment, loss of state authority and shameful disunity. In sum, *ʿulamāʾ* had committed the following sins: (1) they disagreed about the faith; (2) abandoned the Qurʾān and *sunna*; (3) abandoned proper and polite conduct which is at the heart of the faith; (4) abandoned the study of the laws of nature mentioned in the Qurʾān; (5) manifested hostility to science and arts, which are the foundation of civilization; (6) abandoned the call to promote good, forbid evil, and advocate the faith; (7) misused the Friday sermons and abandoned their original purpose; (8) abandoned the simplicity of the faith by focusing on the minute details of specific physical duties;[68] (9) ignored changing times in their judicial rulings, thereby making it necessary for rulers to create temporal laws not based on the *sharīʿa*. And this was despite the fact that the *sharīʿa* is broad in its scope and suited for all times. Inflexibility and insistence on one single school of thought made Muslims lose their religious law. Thus, secondary disputes between Muslim schools of law were another curse, since they originally were meant to serve the faithful; and (10) made learning extraordinarily difficult.

Riḍā was a modernist Salafī *ʿālim* although not always consistently so. In his thinking, modernism and traditionalism co-existed in a complex way.[69] Today the term Salafī is used as an adjective for fundamentalist, but in the early 20th century Salafī implied a modernist. Modernity and tradition are not diametrically opposed concepts and they may even be

[68] For Riḍā, this made the easy faith (which could be understood by an ignorant Bedouin in one meeting with the Prophet) incomprehensible to an ordinary person who had not undergone long years of study, especially if that person were engaged in another profession.

[69] Dallal, "Appropriating the Past," 325–58. Another study of a work by Riḍā serialized in *al-Manār* starting in 1901 reaches the same conclusion. See Skovgaard-Petersen, "Portrait of the Intellectual as a Young Man: Rashīd Riḍā's *Muhāwarāt al-muṣliḥ wa'l-muqallid* (1906)," 93–104.

compatible.[70] The title of Riḍā's Qurʾānic exegesis is a simple example: He called it "a Salafī, traditional, civil, modern, instructive, social, and political commentary" (*Tafsīr salafī atharī madanī ʿaṣrī irshādī ijtimāʿī siyāsī*). Thus, even if we are skeptical about the Salafī predilections of Jamāl al-Dīn al-Afghānī and Muḥammad ʿAbduh,[71] Riḍā clearly considered himself to be a Salafī thinker, at least in matters relating to theology, as he indicated in his Qurʾānic exegesis—even if he did not use the term Salafī when he defined the general objectives of *al-Manar* (see above).[72] At one point, however, "traditionalism" overcame "modernism" in his thought and at another "modernism" overcame "traditionalism," depending on circumstances and context.[73] Politically, before World War I he favored adopting constructive Western values, but changed his direction when he perceived the West as a destructive colonizer using its military might and economic superiority to occupy Islamic lands and try to strip its inhabitants of their Islamic identity.[74] When "modernism" came to mean Westernization outside the cultural and religious framework of Islam as he understood it, he did not hesitate to stop advocating it altogether. To be precise, he considered anti-Islamic doctrines or actions both anti-modern and anti-religious and even against secular nationalist feelings. After World War I, Riḍā found that Islam itself—and in the Islamic heartlands—was under attack by foreign Europeans, secular nationalists and unbelievers. Nevertheless, both then and later, his emphasis on Islamic values and identity did not mean renouncing modernity.

Hybridity: Modernism and Traditionalism

Riḍā's hybrid modernism and traditionalism is reflected in the many twists and turns in his thought and activities. The most important element in

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[70] For a recent case study on this issue, see Ouis, "Islamization as a Strategy for Reconciliation between Modernity and Tradition," 315–34.

[71] Laurziere, "The Construction of the Salafiyya: Reconsidering Salafism from the Perspective of Conceptual History," 369–89. On Rida's alliance with the Wahhabis in Arabia see, Weismann, "Genealogies of Fundamentalism: Salafi Discourse in Nineteenth Century Baghdad," 267–80.

[72] "Tafsīr al-Qurʾān al-Ḥakīm," *al-Manār* 29:8 (12 December 1928), 588.

[73] In his "Appropriating the Past," Dallal criticizes Ridwān al-Sayyid's observation that Riḍā's thinking about analogy (*qiyās*) changed after World War I. Be that as it may, Riḍā's religious and political outlook did change considerably. See n. 59 above. For *qiyās*, see *EI²*, s.v. "Ḳiyās."

[74] See M. Haddad, "The Manarists and Modernism," esp. 61–2; see also Shahin, *Through Muslim Eyes*, 75–87.

Riḍā's thinking was his use of the principle of "public interest" (*maṣlaḥa*).[75] According to Majid Khadduri, Riḍā "might be regarded as the most effective protagonist of the use of *maṣlaḥa* as a source for legal and political reform. In his treatise "The Caliphate or the Grand Imamate" (*al-Khilāfa aw al-imāma al-ʿuẓmā*) . . . he tried to re-interpret the *sharīʿa* on the basis of *maṣlaḥa* and *ḍarūra* (necessity) as the expression of public interest."[76] In this respect he was influenced by the Ḥanbalī jurist Ibn Taymiyya (d. 728/1328) and his disciple Ibn Qayyim al-Jawziyya (d. 751/1350).[77] The three *fatāwā* produced below are concrete examples of his use of this principle.

An example of Riḍā's fusion of traditionalism and modernism is found in a short booklet he published in 1926, about translating the Qurʾān, especially into Turkish.[78] Some earlier jurists had permitted the recitation of the Holy Book in the languages of those who know no others. Riḍā rejected this practice. Here he referred to Ibn Taymyya and al-Shāṭibī (d. 790/1388), both of whom permitted the translation of the Qurʾān (or the translation of the meanings of the Qurʾān), albeit for different reasons. In *Naqḍ al-manṭiq*, Ibn Taymiyya wrote, "It is well-known that the Islamic community (*umma*) is ordered to communicate the Qurʾān, its letter and spirit, as the Prophet commanded. This communication to non-Arabs requires that it be translated for them to the extent possible."[79] In his *al-Muwāfaqāt*, however, al-Shāṭibī argued that it is difficult or even impossible to translate the Qurʾān in its exact and complex sense, although he conceded that it could be translated in a simple sense, and it is correct to interpret it and impart its meaning to commoners (*al-ʿāmma*) and to those who lack the ability to understand its meanings.[80] Riḍā's logic was simple: Unlike Ibn Taymiyya and al-Shāṭibī,[81] who sought to convert people to Islam by making the meaning of the Qurʾān available to them, Riḍā was responding to the Turkish government's intention to do the opposite, i.e., to efface all Arabic in the Turkish language and in the Turkish nation. While interpretations of the Qurʾān in Turkish were widely available, according to Riḍā, the atheists among the Turks revealed their true intentions when they set up a society to "purify" the Turkish language of its Arabic vocabulary

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75 Hourani, *Arabic Thought*, 233–4.
76 *EI²*, s.v. "Maṣlaḥa."
77 Ibid.
78 Riḍā, *Tarjamat al-Qurʾān wa mā fīhā min al-mafāsid wa munāfāt al-Islām*.
79 Ibn Taymiyya, *Naqḍ al-manṭiq*, 98.
80 al-Shāṭibī, *al-Muwāfaqāt* (al-Khubar, 1997), 2:105–7, at 107.
81 *EI²*, s.v. "al-Shāṭibī."

and write it in the Latin alphabet.[82] The purposes or intentions (*maqāṣid*) of the modern Turkish nationalists directly contradicted those of Ibn Taymiyya and al-Shāṭibī.

In religious matters, even in the second phase of his life, after World War I, Riḍā remained a modernist jurist. In 1928 he was asked about a certain *ḥadīth* of the Prophet called "the *ḥadīth* of the flies" (*ḥadīth al-dhubāb*).[83] An Egyptian questioner mentioned that al-Bukhārī (d. 256/870) related a *ḥadīth* that flies carry illness on one of their wings and remedy on the other.[84] Al-Bukhārī related this *ḥadīth* on the authority of Abū Hurayra (d. 58/678), a Companion of the Prophet's and an authoritative *ḥadīth* transmitter. Riḍā's *fatwā* on this question was unequivocal. He rejected this *ḥadīth* which, he said, does not stand the test of any principle of Islamic jurisprudence, even though Abū Hurayra transmitted it. For Riḍā, no *ḥadīth* transmitter was infallible (*maʿṣūm*) and any of them could have erred.[85] In another instance, Riḍā relied on al-Shāṭibī's argument against harmful innovations (*bidaʿ*) in his *al-Iʿtiṣām*:[86] In a case of absolute necessity, it is permissible to eat food prepared or purchased by someone who makes his living by unlawful usury (*ribā*).[87]

In 1923, after Turkey had separated the caliphate from the sultanate and abolished the sultanate, Riḍā proposed forming a new Islamic caliphate. He envisioned a caliphate as a modern religious institution that would control only religious matters and that would accord far-reaching autonomy to Muslim countries in their temporal affairs.[88] He also hoped that the new caliphate would combine religious and secular issues.[89]

In his 1923 book, *al-Khilāfa aw al-imāma al-ʿuẓmā*, Riḍā proposed establishing a new viable caliphate, and he emphasized the desirability of consultative/democratic government and rule. He used the term *ūlū al-amr* synonymously with *ahl al-ḥall wa'l-ʿaqd* and *ahl al-shūra*. He identified this group as those who, by means of a *shūra* (consultative assembly), would choose the caliph and lead the *umma*. For him, the members of this group were the leaders of the *umma* in both religious and temporal

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82 See the text of third *fatwā* at the end of this essay.

83 "*Fatāwā al-Manār*," 29:1 (22 March 1928), 37–51.

84 Ibid., questions 6–9.

85 Ibid., 48–51.

86 Riḍā republished this book in two volumes and wrote an introduction to it (Cairo: al-Maṭbaʿa al-Tijāriyya al-Kubrā, 1913).

87 "*Fatāwā al-Manār*," in *al-Manār* 29:8 (12 December 1928), 593–4.

88 Haddad, "Arab Religious Nationalism in the Era of Colonialism," 275–7.

89 Ibid., 273–4.

affairs.[90] In modern times, Riḍā suggested, the *ahl al-ḥall wa'l-ʿaqd* should include not only *ʿulamāʾ* and jurists but also merchants and agriculturalists, managers of companies and public works, leaders of political parties, distinguished writers, physicians and lawyers.[91]

In his 1923 proposal for a new caliphate, Riḍā wanted to create a centralized religious authority not unlike the Catholic papacy. This was evident in the outline he developed for the organization of his caliphate. The following are some of the functions of the institution of the caliphate he proposed:

1. Instituting a higher educational college where the caliphs and *mujtahid*s study and from which they graduate.
2. Studying a mechanism for electing a caliph.
3. Forming an administrative and financial council for the caliphate responsible for:
   a. The consultative assembly (*shūrā*);
   b. The council of *fatāwā, sharīʿa* opinions and evaluation of publications;
   c. The council of investiture of heads of government, *qāḍī*s and *muftī*s;
   d. The council of general surveillance of the government.[92]

Riḍā clearly was searching for a middle ground that was neither too traditional nor too modernist (read: westernized), so that Muslims could become modern without losing their identity. In 1931, Riḍā summed up his position:

> We need an independent renewal similar to that of Japan, so that our economic, military and political interests advance and our agricultural, industrial and commercial wealth develop. This will make us a proud and powerful nation that maintains its own character, including its religion, culture, laws and language and preserves its basic national identity of dress, good customs and literature. We do not need a traditional renewal similar to that of the Ottoman state, which ended with the break-up of its vast empire and its disappearance from the political map of the world. Nor do we need a renewal similar to that of the Egyptian state, which, during the reign of its founder, the great Muḥammad ʿAlī, started as an independent renewal

[90] Riḍā, *al-Khilāfa aw al-imāma al-ʿuẓmā*, 58.
[91] Ibid., 15 n.1; idem, *Tafsīr al-Qurʾān al-Ḥakīm*, 5:181.
[92] Riḍā, *al-Khilāfa aw al-imāma al-ʿuẓmā*, 80.

> but later became dependent, ending with foreign occupation and loss of independence.[93]

A Print Media *Muftī*

For Riḍā, *al-Manār* served as an extremely effective instrument for communicating with Muslims all around the world. His "print *fatāwā*" were forerunners of the Yemeni "radio *fatāwā*" analyzed by Brinkley Messick.[94] If Yemeni *muftī*s were "media muftis"[95] or more precisely "talk media muftis," Riḍā was a "print media mufti." Richard Bulliet's description of the impact of print technology on an earlier period fits him perfectly:

> (…) Without the print media, these neophyte religious authorities—the new authorities, as I will call them—would have found no audience. Nevertheless, the transition from a classroom and pulpit culture to a printing press culture made their lack of traditional credentials unimportant. The new technology enabled *authors* to become *authorities* simply by offering the reader persuasive prose and challenging ideas. A Muslim in Egypt could become a devoted follower of a writer in Pakistan without ever meeting anyone who personally knew him, or knowing whether or how he was qualified to write about the faith.[96] [emphasis in the original]

Unlike his Yemeni counterparts, Riḍā did not bear the title of *muftī*. Nor did he claim to be a *muftī* in any capacity. His opinions, whether religious or temporal, were not "officially" endorsed by anyone. His case is all the more interesting for being exceptional. The requests for *fatwā*s received by Riḍā did not come exclusively from Egypt, Syria and other Arab lands. Muslims in distant lands like Canada (where Muslims were a minority) or the Caucasus and Southeast Asia (where Muslims were a majority) sent in questions, even though it might take many months to receive answers.[97] In a recent study of requests sent to *al-Manār* from Southeast Asia, Burhandin examined three themes: Islam and modernity,

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[93] *al-Manār* 31:10 (July 1931), 770–7, at 771–2.

[94] Messsick, "Media Muftis: Radio Fatwas in Yemen," in Masud, Messick and Powers, *Islamic Legal Interpretation*, 310.

[95] Ibid.

[96] Bulliet, *The Case For Islamo-Christian Civilization*, 81. On the impact of print technology on Muslims outside the Middle East, see Adeeb Khaled, "Printing, Publishing and Reform in Tsarist Central Asia," 187–200.

[97] *Al-Manār* influenced and served as an example for journals like *al-Imām*, published in 1906 in Malaysia. See Abd Rahim, "Traditionalism and Reformism: Polemic in Malay-Muslim Religious Literature," 93–104.

religious practices, and aspirations for religious reform. He concluded that "*al-Manār* created a new mode of discourse for Southeast Asian Islam in which the questioner (*mustaftī*) and the jurist (*muftī*) were not pupil and teacher, but fellow discussants of reform in societies undergoing similar challenges."[98] Riḍā's importance as a jurist did not stem from his membership in the official Ottoman religious hierarchy or from his unofficial role as a leader of prayer (*imām*) or preacher (*khaṭīb*) in a mosque. In fact, he did not use any means of communication with other Muslims besides the modern one of publishing a journal in which he could express his opinions, whether traditional or reformist, and in which he succeeded in receiving feedback from literate Muslims in areas where *al-Manār* could be distributed and read. In that sense, he did acquire juristic authority. His questioners did not insist on reading, or listening to, a *muftī* who had a formal status. They appreciated his religious knowledge and treated him with the respect due a recognized jurist.

Three *Fatwā*s

The three *fatwā*s translated below were issued by Riḍā at different times. The first was in reply to a question about Muslim dress. In his response, issued in March, 1904, he gave "liberal" interpretation of the subject, explaining that there is no special Muslim dress and that a Muslim may wear a hat, just as Europeans do, without fear of violating any Islamic rule or principle.

The second and third *fatwā*s both deal with the status of the Turkish nationalist movement as perceived by an Arab Muslim thinker at two different points in time. The second *fatwā* was issued in 1922 in response to a question about the Islam of the Turks. Riḍā was known to have been a supporter of Arab independence, or rather autonomy, within the Ottoman empire, both before and during World War I. In his response, he supported the Turks and their leader, Mustafa Kemal Pasha (later called Ataturk). Obviously, he did so because he thought they had fought bravely and effectively against Western Powers in their war of independence. He even described the Turks as better Muslims than the Arabs on that count

[98] Burhandin, "Aspiring for Islamic Reform: Southeast Asian Requests for *Fatwā*s in *al-Manār*," *ILS* 12:1 (2005), 9–26. On the impact of *al-Manār* on the Muslims of Russia, see Dudoignon, "Echoes of *al-Manār* among the Muslims of the Russian Empire," 85–116.

and repeated an opinion voiced by a Persian prince that Mustafa Kemal was the pride of Muslims everywhere in the world.

The third *fatwā* was published in 1924 after Mustafa Kemal and the Turkish nationalist leadership had abolished the caliphate in Istanbul and embarked on a policy of intensive westernization which, from Riḍā's perspective, bordered on de-Islamization in most aspects of public life. This policy included replacing the *Sharīʿa* and imposing a Western dress code on Turkish citizens. In this *fatwā*, Riḍā reversed his earlier opinion in support of Ataturk because, for him, the intentions (*maqāṣid*) of the Turkish nationalists were no longer to defend Islam but to attack it by taking measures to cancel its role in society. He now considered the Turkish leaders to be atheists who were following in the footsteps of communist Russia. Because their purpose in promoting Western dress was to spread unbelief and to destroy both the Islamic and the (true) Turkish national identity, he concluded that their actions represented unbelief.

1. *A "liberal" interpretation (from the Section on Questions and* Fatwās*)*[99]

> *Q[uestion] 1*—Dress and Religion—from Rā ʿAyn, Cairo
> Some People of the Book [viz., Christians and Jews] from England and the United States have converted to Islam but have not changed their dress (such as a western hat and trousers). Is their Islam valid? If you say it is valid, can you tell us whether your opinion is supported by doctrine that has been transmitted for generations? Our understanding of history indicates that when people from different nations converted to Islam, they were not required to change their dress, or to wear any clothes unique to Muslims. If you say the Islam of the new converts is valid, and that their wearing of a hat and trousers is acceptable, how is it that some people today are insisting that a Muslim is forbidden to wear a Western hat? In my opinion, forbidding such forms of dress means that Islam is a matter of appearance, rather than performance, or perhaps both. If so, conversion to Islam by people from England and America is not valid unless they change their dress. However, this change obviously would complicate things greatly, and it might prevent Islam from spreading among people in those cases where custom dictates that they should not abandon wearing hats and the like.

[99] *al-Manār* 7:1 (18 March 1904), 24–6.

There is one more thing: We see tens of millions of Muslims dressed in Western clothes. If it is true that such dress is forbidden, and that Islam is a matter of dress, or of dress and practice, how are these Muslims to be judged? Should those who advocate such opinions conclude that these Muslims are apostates, even though Muslims never mentioned this matter when they called people to adopt Islam? Early Muslims were merely required to recite the profession of faith (*shahāda*). There is a *ḥadīth* from the Prophet that says, "Anyone who says 'There is no god but God' shall be safe in his life and his property, unless rightfully judged [according to his actions]. And God shall be his ultimate judge." Those Muslims who wear trousers also proclaim, "There is no god but God," and they perform the prayer and pay alms (*zakāt*). So what is your opinion about all of this? We appreciate your answer.

A[nswer]: There is no evidence in the Qur'ān, the Prophet's practice (*sunna*), or the pronouncements of the Imāms, requiring a specific dress for Muslims. To the contrary, there is evidence that no such dress is required. You can see this in the [earlier] opinions we published on this topic.[100] Those who argue that wearing Christian style-hats is contrary to Islam know no more about Islam than an ordinary cobbler. You yourself mentioned that those who converted to Islam in the early ages were not required to change their dress habits. Further, we state that the Prophet's Companions used to wear whatever clothes they won [as booty] in their battles against pagans, fire-worshippers and People of the Book. In fact, even the Prophet (pbuh) wore some of those clothes, and we have already mentioned that in the past. If God had wanted us to wear a special dress as a form of piety, he would have selected such a dress and required us to wear it. Inasmuch as uniform Islamic dress was not a new command from God, it behooves us to consider that Muslims used to dress in a manner similar to that of the People of the Book, but did not wear what pagans (non-believers) did. Islam places a Rūmī [Greek] or a Russian who believes in the Book of God above a Hāshimī or Qurashī non-believer. In addition, Muslims never adopted one single uniform during any period. So how can we tell which of their customs was the proper Islamic form of dress and which was the form of dress used by non-believers and apostates?

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[100] Riḍā may be referring here to one of his earlier *fatwās* entitled, "wearing the hat or copying Christians" (*Lubs al-qalanṣwa al-ma'rūfa bi'l-burnayṭa aw al-tashabbuh bi'l-naṣārā*), *al-Manār* 6:18 (5 December 1903), 710–16. In this *fatwā* he made the point that wearing what is necessary is permissible even if it originates with non-Muslims, so long as the garment does not symbolize a non-Islamic belief. Muslims can adopt the customs (*'ādāt*) of non-Muslims if they benefit thereby, i.e. if there is a public benefit or interest (*maṣlaḥa)* in their doing so.

You were also correct when you mentioned the problems arising from introducing the concept of a single uniform dress in Islam. The most significant problem is that those people who would find it difficult to change their manners of dress would not be able to accept Islam. I also say that any rational nation will sniff at a faith that looks at forms of dress as a pillar of the faith or as required conduct. If Europeans or Americans were told that Islam requires those who adopt the faith to wear a certain loose shirt (*farjiyya*) [*sic*] with loose sleeves, a long overcoat (*jubba*), and yellow shoes that leave most of the foot uncovered, they would reply, "This faith is suitable only for the lazy and the unemployed who live in hot climates. It is not appropriate for those who labor actively, and it satisfies neither rational minds nor good taste."

As for the *ḥadīth* that says, "Whoever adopts the appearance of a group of people will become one of them," it is not a sound *ḥadīth*. Even if it were sound, it would not support the position of those who argue about dress. What the *ḥadīth* really means is that when a person takes the trouble to copy the ways of some group, he becomes affiliated with people like them. An individual who imitates the attitudes and actions of virtuous people will be affiliated, in the eyes of the public, with the virtuous, even if his behavior is insincere. The opposite holds true as well. This imitation requires the adoption of characteristics specific to that group of people. Merely putting on the clothes worn by brave warriors, or by generous wealthy people, does not make a person a member of such a group. Thus, the meaning of the *ḥadīth* is similar to the [unidentified] verse that says:

Try to copy the ways of the virtuous, even if you are not one of them;
Imitating the virtuous is a step towards virtue.

2. *In Support of Mustafa Kemal (1922)*

A. *Background*

Following World War I, relations between the Arabs and the Turkish Committee of Union and Progress, which had ruled the Ottoman empire since 1908–09, became strained. This may explain why, in 1922, ʿAbd al-Raḥmān Dassūqī, an Egyptian living in Canada, asked Riḍā for a *fatwā* about the Islam of the non-Arabs in general, and the Islam of the Turks in particular.

Riḍā was interested in the problem for two reasons. First, he hoped to engineer an Arab-Turkish alliance against Western powers at a point in time when the Turks, under the leadership of Mustafa Kemal Pasha, were scoring a series of victories in their war of independence. Second, he may

have been trying to correct a misimpression that during World War I, the call for the establishment of an Arab Qurashī caliphate constituted treason against the Ottoman caliphate and a claim of Arab superiority over non-Arab Muslims. Although Sharīf Ḥusayn opposed the Istanbul government's centralization policies, which sought to undermine his direct rule in the Hijaz,[101] and he may have perceived World War I as a good opportunity to distance himself from the central government, this was not the position of the majority of the Arab Syrian and Iraqi Muslim elite, like Riḍā. In fact, while Riḍā and other Arabs did support the creation of an Arab caliphate during World War I, they did so because they anticipated that the Allies were going to win the war. What strongly influenced them was the Ottoman defeat in the war with Italy over Tripolitania (the last Ottoman province in North Africa) in 1911 and the Ottoman defeat in the Balkan wars of 1912–13. Thus, some writers (including Riḍā) interpreted the Arabs' moves during the war as a preemptive measure designed to protect the Arab-Ottoman Asiatic lands, that is, Syria, Iraq, the Arabian Peninsula, and particularly the Hijaz, the birthplace of Islam and location of its most sacred sanctuaries, from falling under European rule in the likely event of Ottoman defeat.[102] This may be inferred from Riḍā's statement in support of Sharīf Ḥusayn's declaration of independence in 1916:

> Sharīf [Ḥusayn] has rendered the greatest service to Islam. Foreseeing the possible destruction of the [Ottoman] state, he became afraid that the *Ḥaram* of God and His prophet and the outer regions of the Arabian Peninsula [viz., Syria and Iraq] might be among the areas that would fall outside Islamic sovereignty (. . .) In declaring independence, he put the Hijaz under a purely Islamic authority that could lead to a large Arab Islamic state.[103]

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[101] Kayali, *Arabs and Young Turks: Ottomanism, Arabism, and Islamism in the Ottoman Empire*, 144–73.

[102] According to one source, the Syrian Muslims preferred that the Ottoman state remain neutral in the war, and they were upset when it entered because they were pessimistic about the outcome. See al-Khūrī al-Maqdisī, *Aʿẓam ḥarb fi'l-tārikh wa kayfa marrat ḥawādithuhā*, 32.

[103] Riḍā, "Arā' al-khawāṣṣ fi'l-mas'ala al-'arabiyya wa istiqlāl al-sharīf fi'l-Ḥijāz," *al-Manār* 19:3 (29 August 1916), 144–68, at 167.

B. *Translation: Non-Arab Islam in general and Turkish Islam in Particular*[104]
From the undersigned Ḥusayn ʿAbd al-Raḥmān Dassūqī (in Canada).

> *Q[uestion]* Your eminence: It is my honor to pose [this question] for your consideration [so that] we might take from you a [guiding] principal for ourselves. You are equipped with that which upholds the truth, vanquishes ignorance, and gladdens hearts. May you be rewarded, and may the Almighty raise you up.
>
> Your eminence: My question to you concerns the Turks and the non-Arabs: What are they? Are they Muslims, as they claim? Are they truthful, in private and in public? Alternatively, are the Turks in particular, as some claim nowadays, non-Muslims? (God forbid such a thing!) There is a disparity between what we know of them and what we have been hearing nowadays about them from those whom we consider dignified and righteous people. Among the latter group, the honorable [name deleted] wrote to me about this subject in a letter: "Those people [namely, the Turks] are the enemies of Islam and we should have no concern either for them or for this Tartar Mustafa Kemal Pasha." He added, "The Turks are the cause of Islam's decline to its sorry state. [The Ottoman] Sultan Muḥammad the Conqueror contracted an alliance with [King] Ferdinand [of Spain] to kill the Arabs of Andalusia, and he closed the escape routes and sea lanes, preventing any brotherly assistance from reaching them, so that the Andalusian Arabs were all killed, etc." [My honorable friend] also said about the [Ottoman] Sultans ʿAbd al-Majīd and Maḥmūd: "They tolerated religious dissent, rather than prohibiting it, and exchanged their dress for European clothing. Such tight clothing hinders Muslims from performing ablution." (God is greatest) [*sic*]. He said that Sultan Selīm "was the first blood-thirsty caliph; he destroyed the Fatimid-ʿAbbasid [sic] caliphate in Egypt, and tore open the wombs of pregnant mothers to kill unborn children and prevent the Fatimids from reclaiming the imaginary [sic] caliphate." God forbid such actions, which were unknown to me, if it is true that they actually took place. How was it possible for Muslims to consider Selim the Commander of the Faithful (*Amīr al-Muʾminīn*) and the vice-regent of God (*khalīfat Allāh*) on earth? My honorable friend claimed, further that the Turanians' first actions were to kill the Arabs and to alter the Qurʾān and that they entered [World War I] for this purpose. My friend swears to the truth of this claim. According to him, the *ʿulamāʾ* knew all about this, just as they knew their noble religion. [But] their ongoing silence has led us into the present sad condition.
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> Because I knew nothing of this before, I am seeking an answer from you to relieve my conscience from the torment of such news. I am hoping that

[104] *al-Manār* 23:6 (July 25, 1922), 431–5.

you will reply with the generosity which the Lord of the Worlds has granted you. God bless Muḥammad, our noble prophet, and grant salvation to him and to his pure family and Companions. I am requesting a *fatwā* from you in answer to my question. It is immaterial whether [your reply] is communicated to me privately or published in *al-Manār*. What is important is that this matter is clarified, and, God willing, I may acquire faith through your faith. May God, the Prophet, and the believers be pleased with you and reward you for the service you are rendering, and may your *fatwā* bring us wisdom and conclude this discussion.

A[nswer]: You should know, oh sincere and devoted Muslim, that the Islam of non-Arab peoples, such as that of the Turks, Persians, Afghans, Tartars, Indians, Chinese, Malaysians and others, is like the Islam of the Arabs. In this age, Arabs can no longer claim superiority over the Turks or other non-Arabs in any of the Islamic [religious] sciences or in piety. In fact, the majority of Muslims, both Arab and non-Arab alike, believe the opposite, so much so that when I was in Europe I heard a Persian prince say: "If it were not for Mustafa Kemal Pasha, every Muslim on earth would feel humiliated." However, non-Arab Muslims acknowledge that Arab Muslims are superior to them in one respect, namely, the Seal of the Prophets of God (peace be upon him) and most of his Companions (may God be pleased with them) were the most sincere (*ṣamīm*) Arabs. It was they who [first] upheld the religion of God, as it was revealed; God guided those Arabs who chose to be guided through the Prophet and his Companions, and through their sons, and through their descendants. After that, non-Arabs shared with the Arabs in recording the [religious] sciences of Islam, the arts of its language, the establishment of Islam's temporal power (*mulk*), and the upholding of its word.

As for the strife over rule (*mulk*) and the caliphate, and the bloodshed that followed, the Arabs kindled its first flames. The Arabs were the ones who caused the Grand Imamate (*al-imāma al-kubrā*) to deviate from the course laid down for it by the Book of the Almighty God and the teachings of His Prophet. That course was the election by "the people who loosen and bind" (*ahl al-ḥall wa'l-ʿaqd*) of whomever among the leaders of the Quraysh had the capability and the qualifications of knowledge and piety. The Arabs transformed the Imamate into a powerful kingship based on group solidarity (*ʿaṣabiyya*) which they then neglected and failed to control [effectively]. Some of the ʿAbbasid caliphs began to rely on the *ʿaṣabiyya* of the Persians, and later they abandoned that for Turkish *ʿaṣabiyya*. This led eventually to the loss of the caliphate and Islamic sovereignty. Even if some of the Turkish sultans acted poorly in consolidating their rule, the Arabs had set a precedent for them. The Umayyads attacked Mecca, demolished the holy Kaʿba, and conquered Medina. The Umayyads and the ʿAbbasids who succeeded them oppressed the family of the Prophet (peace be upon him) and executed many members of the Prophet's family (*ahl al-bayt*) and others because of suspicion of political intrigue.

As for innovations (*bidaʿ*) and deviation from religion, these have been common among all Muslim peoples, both past and present. Thus, those who are [in fact] faithful to the Islamic heritage and who have urged other Muslims to hold fast to it have been charged with heresy. For example, this is the case when the Meccans and the Syrians, as well as other Muslims, label the people of Najd (i.e., the Wahhābīs) "innovators" and consider themselves to be "orthodox" (Sunni).

Know also, sincere questioner, that politics caused some Arabs to denounce the Turks in recent years. The party responsible for this [denunciation] was the Committee of Union and Progress, which has caused dissension by encouraging nationalistic Turanian blood group solidarity. I have no doubt that some of its leaders are apostates, and that they fought Islam in order to weaken its spiritual authority, with the eventual aim of undermining its political power. I also have no doubt that they published many books denigrating Islam, seeking to turn the Turks away from it. Many of the Europeanized Turks are apostates who have accepted such propaganda. I tried to expose these matters in order to forbid evil and promote good, and to warn against the consequences of [religious] strife, lest it jeopardize the [Ottoman] state, which, despite its weakness, was the strongest protector of the community of Muslims (*millet*).[105] I warned the Turkish officials of this [danger], personally and have written of it in *al-Manār* and in Turkish newspapers in Istanbul. In fact, my fears have materialized. If it were not for this strife in Istanbul and elsewhere, which has brought wrath upon thousands of Arabs, both young and old, the atrocities committed by Jamal Pasha in Syria during the Hijazi revolt would never have taken place. The Hijazi revolt is one of the causes of the misfortune of the Islamic community (*umma*), and it has done more harm to the Arabs than to the Turks.

Furthermore, I want to tell you that there were some apostates among the young Arabs who rebelled and fought against the Turks, just as there were apostates among the Turks themselves, since both groups were brought up [and educated] in the same schools. As I mentioned earlier, when I advised those [young Arabs] who fled to the Hijaz during the [Arab] revolt to respect

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[105] Under Ottoman rule, "*millet*" was used to refer to non-Muslim communities. Riḍā used it here for a reason. This *fatwā* was written after a French Mandate had been established over Syria and Lebanon, and Muslims had begun to ask Mandate authorities for the same treatment accorded to Christian and Jewish communities under Ottoman rule. In particular, Muslims wanted autonomous control of religious endowments (*awqāf*), with which the French had begun to tamper. As early as 1918, the Muslims of Beirut asked for the establishment of a Muslim millet council (*majlis milli*). In 1928, this request was granted: The Supreme Islamic Sharʿī Council (*al-Majlis al-Islamī al-sharʿī al-aʿlā*). In *al-Manār* (10 February 1928), 715–17, Riḍā wrote an article entitled, "The *millet* councils: why can't we enjoy in our lands after authority over them was transferred to others what others enjoyed in them under our authority?"

the House of God [viz., the Kaʿba] and refrain from displaying their apostasy there, the King of the Hijaz became angry with me.

You also should know that after their defeat in World War I, the [Turkish] Unionists realized their mistake. Some of the Unionists whom I met in Europe have admitted that to me, and they are now working to revive the common Islamic bond (*al-jāmiʿa al-islāmiyya*). Both the religiously observant and the non-observant among them are striving for such solidarity. Even Jamal Pasha, the most criminal and fanatic of the Turanian nationalists, has served the new Islamic republic of Afghanistan with great distinction. I should tell you, furthermore, that the Turkish people were enraged at the Unionists during the war. Not only did they show their disapproval, but they also made up their minds to openly oppose and resist the Unionists. In fact, the majority of the Turks were so enraged by the Unionists that some of the [Turkish] faithful (*muʿminīn*) in Europe assured me that had the Ottoman state prevailed in the war, it would have faced an internal rebellion.

In conclusion, the majority of the Turks are *muqallid*[106] Muslims, like the Arabs. Within both peoples, there are independent (*mustaqillūn*) *ʿulamāʾ* as well as *ʿulamāʾ* who follow a particular school of Islamic law (*mutamadhhibūn*). Within both peoples you will find apostates and heretics, pious and blasphemous folk. The Turks have proven to be better than the Arabs at safeguarding national independence and sovereignty, and in working for Islamic unity. It is useless for either of the two groups to search for shortcomings, [whether they are to be found] in the past or present, in an effort to discredit the other group. This is harmful to both groups and benefits only their [mutual] enemies. There is no need, then, to scrutinize Sultan Muḥammad the Conqueror's reluctance to come to the aid and defense of the Andalusian Muslims, nor should we ask whether he actually helped to slaughter them. Nor should we dig into the ruthlessness of Sultan Selim, the Ḥajjāj of the Turks,[107] and his predilection for bloodshed. Since he augmented the nation of Islam and subdued its enemies, he is preferable to our own [Arab] Ḥajjāj. We should not criticize Sultan Maḥmūd [II] for replacing official Ottoman dress with European clothing, because such criticism is patently unfair: the previous Ottoman dress was not a religious one, and religion has never dictated any particular dress.

The truth about the prohibition against imitation of others is that, according to Islam, our sins come from ourselves, not from following others, particularly in something that is [normally] indifferent (*mubāḥ*), such as [any form of] dress. We cannot consider something to be an "imitation" unless

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[106] *Taqlīd* implies unreasonable and unthinking acceptance of (religious) authority. See *EI*[2], s.v. "Taḳlīd."

[107] al-Ḥajjāj (41–95/661–714), the Umayyad governor of Iraq from 75/694 to 95/714, was famous for ruthlessly putting down any rebellion against the Umayyads. *EI*[2], s.v. "al-Ḥad̲j̲d̲j̲ād̲j̲ b. Yūsuf."

there is intention to resemble the thing imitated. This [definition] does not fit the action taken by Sultan Maḥmūd [II], who [intended] to institute military reform and [thereby] save the nation from the anarchy of the Janissary troops who had almost overrun it. The dress that he had chosen did not impede prayer. Rather, what prevented people from praying were the tight-fitting trousers, like those worn by Egyptian policemen, which were introduced later. (I have already rendered an opinion on the issues of dress and imitation elsewhere.)

As for the accusation that Sultans Maḥmūd [II] and ʿAbd al-Majīd permitted religious dissension, I do not know where your source got this information. You should have asked him for evidence, since both sultans are well-known to have been good Muslims. In fact, the Turks considered ʿAbd al-Majīd a model of religious piety according to the general understanding of Islam among Turkish and Arab Muslims. Thus, it is not to our advantage, at this time, to dig up graves and examine peoples' hearts, nor should we scrutinize history on this subject. This is the easiest way for the foreigner to conquer both groups, particularly when the intent [of such scrutiny] is to spread hatred and enmity between the two largest Muslim peoples. I believe that this is an appropriate answer. May peace be upon the followers of righteousness and upon those who favor truth over their worldly inclinations.

3. *In Opposition to Mustafa Kemal (1924)*

A. *A* fatwā *written in opposition to Mustafa Kemal after the abolition of the caliphate in 1924*,[108] *in response to an unnamed person in Beirut who asked six questions, the third of which is as follows:*

Matters of clothing and dress

Q[uestion] 3: Is it forbidden or reprehensible for a Muslim man to wear a hat? If you say it is forbidden or reprehensible, what is the basis of your opinion? Is it permitted for a Muslim man to wear a European suit (jacket and trousers)? Is it permitted for a Muslim man to pray when he is wearing European dress that is not forbidden or reprehensible, whether he is an imam, a member of the congregation, a single individual at prayer, or delivering the sermon at the Friday service and the two feasts? Do Muslim men and women have a special dress that they should wear? If so, what is it made from and what does it look like? Would you please clarify this?

A[nswer] . . . in themselves, trousers and hats are neither forbidden nor reprehensible but permissible. But this dress can hinder, delay and complicate prayer: tight-waisted trousers prevent a complete prostration, and a hat, by

[108] "Fatāwā al-Manār," *al-Manār* 26:6 (18 October 1925), 421–4; continued in 26:7 (14 January 1926), 496–8.

its shape, prevents prostration altogether. When clothing restricts in this way, it is prohibited on account of its being harmful to religion and *sharīʿa*. The same applies if restrictive clothing hurts the stomach, like the girdle women use to tighten their waists. Dr. Snouck [Hurgronje], the famous Dutch orientalist who converted to Islam[109] and lived in Mecca for some years—our friend the *muftī* of Mecca and one of his mentors, al-Sayyid ʿAbdallāh al-Zawāwī, used to vouch for the sincerity of his Islam—said that his immediate experience in different countries showed him that Muslims who give up their dress and wear European clothing usually abandon prayer even though most of them loosen the dress in order to facilitate prostration when they wear it.

Moreover, our experience in Egypt shows us that people who give up the national dress of caftan, loose overcoat (*jubba*) and turban (*ʿamāma*) for European dress—and this includes most of the educated and cultured class and many others too—tend to sit in bars, drinking alcohol in public and openly frequenting places of dancing, licentiousness and adultery. Anyone who gives up his dress for the sake of these things will find his way hindered by God on high (…). Indeed, except for the hat, European dress has become part of the national dress in Egypt and other countries, and all public officials make a point of wearing it, except for religious scholars (*fuqahāʾ*). The hat is still particular to European and non-Muslim tradition, and Muslim men do not wear it, except for some who travel to European countries. They do so in order to deny their own tradition and to suggest that they are like the peoples of those countries. They excuse their action by saying that if they go to those countries wearing their national dress, they will be objects of ridicule and mockery, and they may even come to harm. But this excuse is worthless, as we know from our own experience. For we ourselves have visited Europe wearing our national dress, which is still the dress of learned men of religion in our country. We were not harmed or treated with any form of contempt. Certainly, we were looked at: People turned their faces towards us, especially when we prayed in public places, but they did so with the utmost courtesy, and we were indeed respected by those who knew us well.

The Prophet himself wore the Roman cloak and the Persian shawl in order to show that they were permitted. But he ordered his people to differentiate themselves from unbelievers in customs and dress, not only in religious matters. When he was in Mecca, he distinguished himself from the polytheists despite the fact that the Jews and Christians did not. When he was in Medina, he commanded that his followers have a different holy book than the holy books of the Jews and Christians. Likewise, he ordered them to dye their grey hair because the Jews and Christians did not do so (…) Thus, the point is that Muslims should have their own characteristics

[109] This information about Snouck Hurgronje proved incorrect.

and customs, and they should not follow those of other people. For independence in customs and other national characteristics give a nation more independence in its national-confessional essentials, such as religion, language and culture. They give it what is called a strong national culture. Thus, Muʿāwiya and others asked [the second caliph] ʿUmar [b. al-Khaṭṭāb] if they should adorn themselves before the people of Syria, who were used to seeing their Roman rulers in a magnificent display of dress and decoration. ʿUmar gave them an answer that signified, "We have come to teach them how we rule, not to learn from them." Therefore, he ordered the commanders of the armies of conquest to keep Arab customs and dress, and he forbade them from assimilating to non-Arabs.

[The *ḥadīth* collection] *Ṣaḥīḥ Muslim* reports on the authority of Abū ʿUthmān al-Nahdī: ʿUmar wrote to us when we were in Adharbayjān:

Oh ʿUtba b. Farqad, this effort is neither your own nor your father's or mother's [i.e. you have no authority over it]. Feed the Muslims while they travel as you feed yourself when you do. Take care not to live in luxury, not to wear the dress of those who associate partners with God and not to wear silk. The Prophet of God forbade the wearing of silk except like this . . . and the Prophet of God raised up his middle fingers and placed them like that! [indicating a tiny amount].

ʿUtba was the commander of ʿUmar's army there. Al-Nawawī said in the explanation of Muslim's *Ṣaḥiḥ*: "'Umar's meaning here was to urge them to live robustly and to hold to the way of the Arabs." In the *Musnad* of Abū ʿUwayna al-Isfarāyīnī and others, there is another tradition with a reliable chain of transmitters. It says, "Now then, avoid and get rid of slippers and trousers. You must dress like your father Ismāʿīl.[110] Beware of living in luxury and wearing the dress of non-Arabs. You must stay in the sun, for that is the bath of the Arabs. Be like Maʿādd,[111] be tough, cease riding, stand straight, and get rid of what is of heavy weight." He ordered them to get rid of the slippers and trousers they wore during the Prophet's time with his permission. He also gave his soldiers other orders concerning Arab dress and customs, so they would keep their character and not be assimilated to non-Arabs. Otherwise, instead of Arabicizing the non-Arabs they would have become like them. "Being like Maʿādd" refers to Maʿādd b. ʿAdnān, a man of extreme strength and fortitude, who preferred firmness in life to luxury and softness. When he said "cease riding," using the word *rukub*, the broken plural

[110] Ismāʿīl is the biblical Ishmael, who the Prophet Muḥammad connected with Abraham, at least in the early days of Islam. "At this period Ismāʿīl stands alongside his father in an attempt to build up the Kaʿba in Mecca." He is also "counted as the ancestor of the Northern Arabs and in consequence of the (subsequently) Arabized tribes." *EI²*, s.v. "Ismāʿīl."

[111] A name for the northern Arab tribes. See *EI²*, s.v. "Maʿādd."

of *rikāb* (like *kitāb* and *kutub*), he meant to cease riding with saddles. These orders and prohibitions are not a religious obligation for every Muslim. They belong to the political sphere of Islam, which demands such practices from the people of the Islamic community. Its leaders have the obligation of imposing them and they must be obeyed because these orders and prohibitions belong to the law of Islam and were made to strengthen and raise the status of the Islamic community (*umma*).

This Arab-Islamic policy has been adhered to in our age by the English people, especially in their colonies. The English strive to be outstanding and to be in the forefront. As a result, they have become the greatest of peoples in soul and the most intelligent in endeavor and ability. I once saw the director of freight (a member of the police) at Agra in India, a Mr. ʿAlya, wearing a British hat. I spoke to him about the significance of this and asked if there were any official regulations for wearing it. He replied, "The English officially forbid the Indians to wear this hat in order to prevent assimilation between the two peoples. Nobody can wear it without special permission, which is not freely given. I obtained permission only because it hurts my head to stay out in the sun all day."

An Egyptian newspaper published an article by a great German writer who found fault with Mustafa Kemal Pasha for constraining the Turkish people to change its national dress and especially to replace the *kalpak* (Busby) with the hat. He offered his criticism as a sincere friend, not a secret enemy. He said that it goes against Mustafa Kemal's aim of establishing Turkish nationalism, justifying his argument in the manner we have described above. He says that the *kalpak* is better looking and more dignified than the hat. Mustafa Kemal Pasha may not be the most learned person in matters of society, morals and national character, but in our opinion, he ought to know that holding on to national characteristics strengthens the nation. When one people imitates another that it regards as more advanced, its own traditional values are weakened and become contemptible in the eyes of its people. Correspondingly, the people who are imitated take on a higher status. We think that Mustafa Kemal is trying to destroy all the elements and characteristics of the Turkish people except its language, simply because they are Islamic or based on Islam. He wants to extract the Turkish people from Islam, if possible, the way you might extract a hair from pastry. And if that is not possible, he would extract the Turkish people from Islam the way you might extract a barbed thorn from wool or extract the soul from the body. Russian atheists and others who are spreading this idea among the Turks have investigated the possibility of replacing Islam with Turkish or Turanian values, to the point of worshipping the white wolf in the manner of the savage pagan ancestors of the Turks. Not finding this practicable, they opted instead to assimilate the Turks to the Franks, especially the Latin people [*sic*], the most corrupt of them in terms of religion and culture. This is being done on the pretext of civilization and modern progress, and it is being called Westernization, though we would call it Frankification. Some

Turks even prefer to marry Frankish women, whether according to Islamic law or in contravention of it. They prefer that to mixing their "distinguished and refined" blood with the blood of the "corrupt" Turkish people in order to reform them.

In all this, it seems that these unpatriotic leaders want to draw the Turkish people into every kind of physical, intellectual and spiritual corruption. They want to establish in Turkey another people, drifting back and forth among the medley of nations—a people whose spirit, blood, morals and doctrine are not its own. For example, the language known as Turkish was refined by Islam just as were its people, for Islam introduced into Turkish the use of Arabic and Persian nouns and verbs. But now they want to do to the language what they are doing to the people. After Europeanizing and westernizing it, there will be nothing left of the language of their Turkish ancestors. As they have decreed, the language is now being written in Latin letters except by a few. After that, who knows? Perhaps they will even change its name!

. . .

By this process of Latin Frankification, the Turks are losing whatever they still have of Islam's virtues and its religious-confessional bond. They have also lost their leadership of hundreds of millions of human beings. Even so, they will not be able to free themselves of the national inheritance that generations and centuries have impressed into their souls. Their first aim now is to free themselves from Islam on the pretext of modern progress. But nothing in Islam prevents the progress they are demanding. Islam is based on military power, wealth and order. Islam guides us to these [modern steps of progress]. Without Islam, the Arabs would not have been granted power and a civilization that was supreme among nations. These were the results of their seeking the right way, and the Arabs retained [their power and civilization] until foreigners took away their authority using the strength of barbarism. Likewise, Islam bestowed upon the Turks and others a civilization and a dominion that their ancestors had never possessed. There is no rival to Islam, and if they had understood Islam independently, through mastering its language and persevering in its law, they would have gained the rule of East and West alike. They would have surpassed all the Frankish peoples in science, art, industry and all other sources of power and authority, just as the Arabs had done before them. Yet these are the things they are demanding now by abandoning their remaining Islamic traditions. They are seeking to gain them through Frankish traditions in dress and immorality without having mastered the Franks' science and art and without having attained their power and wealth.

Concerning dress, the beginning of this *fatwā* shows that the *sunna* and the deeds of our ancestors were in keeping with the behavior of the most advanced nations of Europe regarding dress—but, permitting depravity and immorality destroyed all past civilizations, and it will destroy Europe's [civilization] too, as all its leaders and thinkers foretell. The world will know the

destiny of the Turks as Mustafa Kemal attempts to turn them into a new people in this way. We ask God on high to deliver them from the evil that will come from this. To summarize the question of wearing a hat and other European dress—it is permitted in principle, but it is forbidden in that it weakens the national-confessional bond and shows a preference for the ways of our grasping adversaries as opposed to the ways of the Islamic community. This is what the Europeans are aiming at in Turkey, Syria and Egypt. If, as we have explained in this *fatwā*, the purpose of wearing foreign dress by the Turkish atheists is to promote unbelief, then it is indeed unbelief.

CHAPTER TWENTY-TWO

ʿABD AL-RAZZĀQ AL-SANHŪRĪ PASHA (D. 1971)

Oussama Arabi

Life and Writings

A major contribution to Islamic law in modern times is the illustrious work of the Egyptian jurist ʿAbd al-Razzāq al-Sanhūrī Pasha (1895–1971), the architect of Egypt's New Civil Code of 1949, as well as the civil codes of Iraq (1953) and Syria (1949). By the time Sanhūrī was born in 1895, the codification and centralization of law were three-quarters of a century under way in Egypt and Ottoman Turkey. These modern changes in judicial structure and policy were adopted by the two Muslim polities in their turbulent and competitive encounter with expanding French, British and Russian powers. In particular, the conjunction of the French occupation of Egypt in 1798 and the formidable response of its undisputed ruler, Muḥammad ʿAlī al-Kabīr (1805–1848) laid the political, educational and juridical grounds for the new, rationalized and centralized Egyptian state.[1] Sanhūrī's contribution to Arab and Islamic jurisprudence for much of the 20th century was thus an outcome of the political and legal modernization in Egypt in the 19th century.

An important aspect of Sanhūrī's work is his adaptation of Islamic law and jurisprudence to modern political and legal realities. This aspect may be formulated as a question: How could the juridical and moral values of a pre-modern communal system be integrated into the new Middle Eastern and North African nation-states that followed upon the disintegration of the Ottoman empire? Sanhūrī's work on Islamic and state law, which provides a creative answer to this question, did not take place in a vacuum. Ottoman and Turkish jurists had provided the outlines of an historical synthesis between Islamic law and the modern state, both in

[1] For an account of Egypt's modernization, see al-Sayyid Marsot, *Egypt in the Reign of Muhammad Ali*. On legal centralization, see the section, "19th Century Egypt: Centralization and Rationalization of Justice," in Arabi, *Studies in Modern Islamic Law and Jurisprudence*, 5–18.

the 1877 codification of the Majalla of Civil Transactions and, earlier, for reasons of political expediency, in the wholesale adoption of European substantive penal, administrative and commercial law by Ottoman and Turkic-Egyptian state elites.

Sanhūrī was animated by two distinct and, at times, conflicting desires: that of a modern Egyptian jurist in the service of his state, and that of a Muslim jurist with a much wider cultural and political agenda. It was a difficult balance to maintain. Even in his decisive contribution to the consolidation of the nation-state in Egypt, the New Egyptian Civil Code of 1949, Sanhūrī never lost hope that Islamic law would make a comeback, achieving a universal application of its eternal values to the nations of the world in general and Muslim nations in particular. This hope contrasted sharply with Sanhūrī's actual work of codification, in which European civil codes were transplanted into the rising Middle East state structures in the wake of the demise of the Ottoman polity.[2] Conceptually, there is no obvious connection between Islamic law, the Divine Law of the Muslim Community, and the territorial political entities that sprang up as the successor states of the Ottoman empire. In Sanhūrī's hands, Islamic law entered the service of Middle Eastern nation-states—not just Egypt but also Iraq, Syria, Kuwait, and Libya—not as the religious law of Islam, but rather as a set of individual provisions that were incorporated into the various chapters of the civil codes produced by Sanhūrī at the command of nation-state elites.

The fragmentation of the Ottoman Islamic polity into nation-states echoes the disintegration of the Catholic cosmopolitan world. The rise of the Protestant merchant state, with its territoriality and national identity, was confirmed in the Peace of Westphalia (1668) that ended a 100-year period of religious strife in Europe. In the rising nation-states, avid mercantilism and savage capitalist development underwrote the legal doctrines of modern civil law, especially the notorious freedom of contract and its pronounced bias in favor of unbridled individual interest. Even scientific and technical creativity were subordinated to imperial greed and nationalist competition between the modern European powers, and public financing of military technology bore its poisoned fruit in massive human casualties, especially in the First and Second World Wars.

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[2] For an overview of Sanhūrī's juristic career and work in the codification of the Civil Laws of Arab states, see Hill, "Islamic Law as a Source of Comparative jurisprudence: Theory and Practice in the Life and Work of 'Abd al-Razzāq Aḥmad al-Sanhūrī," 146; also Hill, *Al-Sanhūrī and Islamic Law*.

The saga of Islam and its religious law in the contemporary world lies, to a significant degree, in the daunting encounter with nationalist aggression and unbounded material greed that jointly underlie the mass psychology and irrational behavior of modern societies and nation-states. In the face of such world-historical forces, no consistent outcome could be expected to result from the work of one or even a whole generation of jurists. Sanhūrī's achievement lies not in his consistency in adapting Islamic law to these great challenges but rather in his decisive contributions, which outlined the major tasks faced by Muslim jurists who seek to carry forward the message of mercy and mutual human recognition against the nationalistic and imperial savagery of the modern world.

Sanhūrī's intellectual formation was influenced by Islamic, French, Anglo-Saxon and German jurisprudence and enriched by his experience of modern Egyptian law and customary practice. He spent his formative years, 1910–1920, in Cairo, studying Egyptian, Islamic and French law at Egypt's Khedival law school. In this manner, Sanhūrī was exposed to the inherently pluralistic dimension of modern Egypt's legal system, one of the far-reaching achievements of Muḥammad ʿAlī's modernist state. The Khedival state also awarded Sanhūrī a scholarship in order to complete his legal education in France during the period 1920–1926. Thus he was directly exposed to the social and juridical currents of thought that permeated the European scene in the first quarter of the 20th century.

Sanhūrī's breadth of vision was enhanced by his close academic association with some of Europe's most original legal minds. During the 1920s he studied Western legal thought in a comparative perspective under the influence of the socialist-leaning and anti-formalist French jurists, Edouard Lambert and François Gény. Lambert, who was Sanhūrī's thesis advisor at the University of Lyon, was a leading figure in the European school of sociological jurisprudence, a historical approach to law that stresses its social purpose and changing character. Sanhūrī was also influenced by the socialist political affiliations of his French mentors, who saw in law and adjudication an important means to redress power relations and redistribute wealth in favor of the working and exploited classes.[3] This commitment permeated Sanhūrī's work in Islamic and civil law, blending

[3] I do not deal here with Sanhūrī's involvement in and contribution to 20th century Western legal debates, both as a doctoral student in France, and later in Egypt in his drafting of the New Civil Code. On the various intellectual and practical undercurrents that shaped Sanhūrī's work and their continuing influence, see Shalakany, "Between Identity and Redistribution: Sanhūrī, Genealogy and the Will to Islamize."

well with his Muslim legal spirit. He infused egalitarian principles into legal forms, drawing on Islam's universal message of the equality of human beings irrespective of race, social status, or gender, and in conformity with the religious duty to make laws that ensure equity and fairness in human affairs.

Sanhūrī's intellectual and juridical activity spanned a period of fifty years during which he produced a number of works. These include the following:

1. *Les restrictions contractuelles à la liberté individuelle du travail* (first doctoral dissertation at the University of Lyon) France, 1925;
2. *Le Califat, son évolution vers une société des nations orientales* (second doctoral dissertation at the University of Lyon) France, 1926;
3. "Le Standard Juridique," in *Recueil d'études sur les sources du droit en l'honeur de François Geny*, vol. II, *Les Sources générales des systèmes juridiques actuels*, Paris 1935;
4. "Le Droit musulman comme élément de refonte du code civil égyptien," in *Recueil d'études en l'honneur d'Edouard Lambert*, vol. III, Paris, 1938;
5. *Al-Wāsiṭ fi Sharḥ al-Qānūn al-Madanī al-Jadīd* (*The Intermediate Explication of the New* [Egyptian] *Civil Law*), 10 volumes, Cairo, 1952–1970;
6. *Maṣādir al-Ḥaqq fi'l Fiqh al-Islāmī, Dirāsa Muqārina bi'l Fiqh al-Gharbī* (*The Sources of Right in Islamic Jurisprudence: A Comparison with Western Jurisprudence*), 6 volumes, Cairo, 1954–59.

In what follows I consider two aspects of Sanhūrī's life-work: the ideological and the practical. In the first section, I outline the ethical and political ideals that animated his vision of the future of Muslim nations in modern times; these ideals and values would determine the constitutional framework for the implementation of a revitalized *Sharīʿa*; this is followed by a discussion of the Articles in Egypt's 1949 Civil Code that limit freedom of contract in favor of socially and economically weaker parties. The second section comprises two parts: (a) Sanhūrī's legal pluralism and comparative jurisprudence, as illustrated by his codification of Islamic legal material as Articles in the Iraqi Civil Law, in combination with notions and principles from modern French law; (b) a life-altering episode in Sanhūrī's political involvement with the Egyptian state, to wit, his presidency of the highest state court, *Majlis al-Dawla*, during a critical moment in Egypt's modern history, the aftermath of the 1948 War and the Free Officer's Revolution of July 23, 1952.

Against Aggressive Nationalism and Unfettered Capitalism: A Muslim League of Oriental Nations

In 1924, following the defeat of the Ottoman empire in World War I, the newly established Turkish Republic abolished the caliphate, thereby signaling the entry of Muslim polities into the Westphalian international system. Thus the nation-state was formally endorsed by the leading contemporary Muslim power, leaving a host of Muslim communities without leadership and under the colonial control of their *de facto* French and British occupiers. By the end of World War I, the Ottomans lost their Balkan and Near Eastern provinces, and European armies were on Turkish soil. In 1922, the nationalist general Mustafa Ataturk expelled the invaders and proclaimed Turkey a secular republic, abolishing the Sultanate and other imperial religious institutions; in 1924, Ataturk abolished the caliphate, the sultan's only remaining title. Until that date, the Ottoman caliphate had retained its symbolic authority as the highest religio-political institution in the Islamic world. Such a break with tradition, though largely ideological, aroused anxiety and concern about the fate and future of the Muslim polity among Muslim intellectuals around the world.[4]

This was the immediate context of Sanhūrī's book on Islamic governance, *The Caliphate, Its Evolution towards a League of Oriental Nations*, published in France in 1926. Sanhūrī's response to the crisis was to integrate the modern structure of the nation-state—a hard fact of international politics—into a renovated caliphate. He argues that a new Muslim caliphate should take the form of an Islamic League of Oriental Nations that would embody the positive developments in European political and social fields, while retaining a distinctly Islamic law and constitution. This

[4] The crisis in traditional Muslim thought on the caliphate reached its peak in the 1920s when the fight for the renovation of the structures of political power in Islam was undertaken by two opposing intellectual factions. Two landmarks in this regard were: (1) the publication in 1924 by the Azharite Sheikh, ʿAlī ʿAbd al-Rāziq, of his notorious volume *Islam and the Principles of Government* (*al-Islām wa uṣūl al-ḥukm*), in which he argued for the radical separation of religion and state in Islam, a starkly unorthodox position that brought upon him the ire of the Muslim *ʿulamāʾ* in Egypt and elsewhere, resulting not only in his resignation from religious office but also in his reclusion in deep silence for the remaining forty years of his life; (2) the "Caliphate Convention" in 1926 in defense of the caliphate and against its dissolution, held in Cairo by the Azhar *ʿulamāʾ* establishment. While recognizing the absence of the caliphate as a contemporary fact, the Convention affirmed the religiously binding character of the institution, in both its political and spiritual dimensions.

would achieve the double purpose of fidelity to the past and flexibility with respect to the future. Sanhūrī's underlying vision is captured in his 1951 Explanatory Memorandum of the new Iraqi Civil Code: "Thus the position of Islamic law is preserved, and the ties are maintained between the past, the present and the future."[5]

In an epoch of national liberation movements that rose in Oriental communities in opposition to Western colonial rule, Sanhūrī saw that an autonomous Islamic civilization is not doomed to reproduce the bigoted and highly aggressive nationalism that has had so many tragic consequences in modern European history. Oriental nations must utilize the autonomous political and legal culture in the body of Islamic *sharīʿa* in order to face the challenges of post-independence. In *The Caliphate*, Sanhūrī surveys the conditions of nationalist movements in twenty-five Muslim countries. He is apprehensive about the rise of European-style national identity among Muslims, and its corollary, the fragmentation of the traditional religio-political identity.[6] Historically, the caliphate has been the symbol of allegiance to a common humanity shared by all Muslims, a universal Muslim identity that risks being sacrificed to the forces of aggressive nationalism and economic competition that have dominated the development of nation-states in the West. Sanhūrī believed that the revival of this Islamic constitutional and political structure would avoid the danger of competing nationalisms and their war-oriented agendas.

The ideals motivating the call for a restoration of the caliphate stem from the cosmopolitan spirit of the Islamic faith, a spirit that circumvents the excesses of modern Western political identifications; this restoration is the hope of "every oriental who manages to reconcile his religious, national and racial identity with his attachment to his Grand Homeland, the Orient, and with his link to a still wider Homeland, that of Humanity."[7] Notwithstanding territorial, political and social divisions, a symbolic unity of religious and political authority has been maintained in Islamic theology and law. All Muslims are equal subjects under one ruler, the caliph, the successor of the Prophet Muhammad in the leadership of the universal Muslim community, the *umma*. In Sanhūrī's mind, these largely doctrinal and legal symbols are valuable cultural assets, even defining features of the future of Islamic civilization. In his vision of a restored caliphate,

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[5] Explanatory Memorandum to the Iraqi Civil Law, *al-Qānūn al-madanī*, no. 40, 2.
[6] al-Sanhoury, *Le Califat, son évolution vers une société des nations orientales*, 512.
[7] Ibid., Avant-propos, xv.

the caliph embodies the symbolic unity of the religious and political-legal domains, without hindering their separate functioning in practice.[8]

As a civilization, Islam has the ideological resources that support a specifically Muslim ideal of human belonging and identity in which basic subjective attachments revolve around a more universal and generous political community, the Islamic Homeland: "Islam is also civilization; those who abide by its articles of faith are the followers of the Religion; those who live by its culture are the citizens of the Homeland."[9] Thus the new caliphate will be informed by the European remedies against despotism, and by the principles of separation of powers, while not subject to their historical correlative: the citizen's primary allegiance to his nation-state. Whereas in the Western experience, the symbols of law and authority have been inscribed in the territorial nation-state, which leads to patriotic attachment to the Nation-Country, Islamic culture defines a different political and legal subject whose Homeland is not his particular nation-country but rather the Muslim world of the Orient,[10] the new political-legal structure of the caliphate. As for its substantive laws, the new *Sharīʿa* would not necessarily be identical to the old; rather, it would adapt its universal vocation of justice and compassion to the opportunities and dangers inherent in the socially and scientifically complex settings of modernity.

Sanhūrī insisted on the affinity between these Islamic universal norms and certain socialist principles that had surfaced in Europe in reaction to the egoistic individualism of the free-market economy and the excesses of contractual freedom. In entries in Sanhūrī's diaries dating back to the 1930s and 40s, his desire to modernize Islamic law is juxtaposed to his desire to establish a socialist party that will defend the interests of Egyptian workers and peasants.[11] In practice, he sought to reduce the nefarious

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[8] Ibid., 571.

[9] Ibid., Avant-propos.

[10] The term "Orient," as used by Sanhūrī, has no clearly defined geopolitical boundaries. Judging from his discussion of national liberation movements in African and Asian regions where Muslims are the majority, it may be surmised that Sanhūrī's "Orient" designates a large geographic and cultural expanse extending from West Africa to Indonesia.

[11] See *Al-Sanhūrī min khilāl awrāqih al-shakhṣiyya*, ed. Nadia al-Sanhūrī and Tawfīk al-Shāwī. These two aspirations of Sanhūrī's were largely programmatic, i.e., they constituted his general directives for the desired course of political and legal development in Egypt. The fact that he personally was not instrumental in bringing about some of these changes (socialist legislation), or that other changes never came to fruition in his lifetime (a full-fledged modernized Islamic law) does not prejudge their intrinsic relevance to modern Muslim societies. In fact, the new Egyptian Constitution of September 11, 1971,

imbalance latent in unlimited contractual freedom by introducing egalitarian provisions in the 1949 New Egyptian Civil Code: the latter "restricts the field of the autonomy of the will [in transactions]. The law recognizes such autonomy, and yet limits its scope to a reasonable circle whereby the will is balanced against justice and the public good."[12] In pre-revolutionary Egypt, material misery and social inequality were widespread and rampant (see below), and Sanhūrī attempted to reduce the destructive effects of these conditions by giving due consideration to "the side of the weaker party [in order] to protect him and restore economic balance to the values exchanged by the contractual relationship."[13]

Thus, the New Code provides legal protection against a number of abuses relating to unconscionable contracts, unforeseen events, and interest rates. Regarding flagrant exploitation, Article 129 stipulates:

> 1. If the obligation of one of the contracting parties is definitely unequal to his contractual accrued benefit or to the counter-value obtained by the other party, and it is apparent that the abused party would not have ratified the contract except due to an exploitation of his obvious credulity or rashness by the other party, the judge may, at the request of the abused party, void the contract or reduce the obligations of that party. 2. A lawsuit to that effect is permissible within a period of one year from the date of conclusion of the contract; otherwise it is not permissible.[14]

In order to cushion the negative consequences of unforeseen events, Article 147 provides the following:

> 1. The contract is legally binding on the contracting parties, and may not be contradicted or modified except with the agreement of both parties, or for reasons that are determined by the law. 2. However, if there occur exceptional events which could not have been anticipated and which render the contractual obligation difficult, if not impossible, to realize, to the extent

promulgated in the year in which Sanhūrī died, did initiate a legislative dynamic of Islamization: Article 2 states that "the principles of Islamic law (*al-sharīʿa al-islāmiyya*) are a main source of legislation," a first-time recognition of Islam's religious law in the body of an Egyptian Constitution. Nine years later, there was an historic amendment to this same Article 2, consecrating "the principles of Islamic law as "*the main source of legislation*" on Egyptian soil. For the complex implications and implementation of this Amendment, see Oussama Arabi, "Beyond Power: Neo-Shāfiʿism or the Islamic Constructive Metaphor in Egypt's High Constitutional Court Policy."

[12] Al-Sanhūrī, *Al-wāṣit fī sharḥ al-qānūn al-madanī al-jadīd (The Intermediary Explication of the New [Egyptian] Civil Law)*, 1:149, as quoted in Shalakany, "Between Identity and Redistribution," 221.

[13] Ibid.

[14] *al-Qānūn al-madanī*, 34.

> that it would result in detrimental loss to one of the parties, the judge may, after due consideration of the circumstances and the interests of both parties, reduce the demanding obligation to an acceptable limit; any agreement otherwise is null and void.[15]

As for interest in contracts, the New Code provides for rates lower than those allowed in the old code. Articles 226–227 read:

> If the object of the obligation is a sum of money the magnitude of which is known at the time of the lawsuit, and the debtor delays its payment, then he is obliged to pay the creditor a monetary interest for the delay: the rate of the interest is four percent in civil matters and five percent in commercial matters; these rates are effective as of the date of the lawsuit for the payment of debt . . . The contracting parties may agree on a different rate of interest (from the above) . . . on the condition that it does not exceed seven percent. If they agree on a higher rate, it should be reduced to seven percent, and the additional amount should be repaid to its owner.[16]

Of course, these provisions of the Civil Code did not begin to address Egypt's longstanding problems. Ironically, the revolutionary Free Officers who seized power in July 1952, and who eventually banned Sanhūrī from all state functions, introduced major economic and social changes in Egypt, including some socialist measures of land redistribution that Sanhūrī thought necessary to alleviate the destitution of Egyptian peasants. Even before the socialist nationalizations of the 1960s, the military government's achievements in the period between 1952 and 1956 were impressive. Thus an astute critic of the military regime, could safely acknowledge:

> Safe from any . . . interference, the strong authority settled the differences with London [evacuating the Suez base], carried out the land reform in an orderly manner . . ., opened the doors of Egypt to foreign capital . . ., stimulated industry by all the means . . . that lay within its own power, ousted the king from power with his clique of aristocrats, neutralized and isolated the landed bourgeoisie, . . . set up institutions, found the men who would best

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[15] Ibid., 38.

[16] Ibid., 59. Article 229 gives the judge the right to reduce the interest rate or eliminate it from the contract altogether; Article 232 prohibits compound interest, which was allowed in previous legislation (ibid., 59–60). The prohibition of interest on loans is a well-known principle in Islamic law, recognized by all legal schools, and based on an explicit Qurʾānic injunction forbidding usury: "God permitted sale (*al-bayʿ*) and prohibited usury (*al-ribā*)." (Q 2:275). Muḥammad ʿAbduh (d. 1905) and Rashīd Riḍā (d. 1936) were among a host of Muslim theologians and jurists who addressed this sensitive issue in an effort to alleviate its negative effects on economic activity; a classic treatment of the issue in the light of modern economic conditions is Rashīd Riḍāʾs, *Ḥaqīqat al-ribā al-muḥarram*.

> interpret the needs of industrialization, and reinforced the army and the machinery of the state.[17]

The price of implementing these drastic measures was the dismantlement of Egypt's liberal political and legal structure, which could not uphold the radical nationalization and land redistribution laws enacted by the revolutionary government. In 1954, Nasser confronted Sanhūrī, who was president of the highest judicial review Court, *Majlis al-Dawla*.[18] If history brought any consolation to Sanhūrī, the socialist Agrarian Reform Laws of the 1960s dispossessed the old propertied families of large portions of their estates, which were distributed to the poor peasantry. A new class of small land-holders and middle peasantry came into being in Nasserite Egypt. This was the most radical change in landed property in Egypt since the 16th century Ottoman conquest, which resulted in land tenure structures that favored the high-ranking military.[19]

True to the Islamic legal tradition, Sanhūrī's legal reforms recreated the basic structure of the *Sharīʿa*, albeit in modern terms. On the one hand, social life must be organized on a rational juridical basis, and order maintained within the requirements of justice; this is the great operational success of Muslim jurists and judges of various schools in their millenary enterprise of administering the disputes and judicial matters of multiple ethnic communities. On the other hand, Islamic law, like any other developed legal system, accepts the basic aggressiveness and capriciousness of human nature as an incontrovertible fact that constantly has to be held in check. Thus we find Sanhūrī formulating juridical material for the practical organization and control of social conflict, and at the same time pointing to the elusiveness of God's law despite all efforts to apply it. Sanhūrī repeatedly states that the time for the full implementation of *Sharīʿa* has yet to come, and that his work is merely a preparatory stage for its future role as the governing law of Muslim communities.

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[17] Anouar, *Egypt: Military Society, The Army Regime, the Left, and Social Change under Nasser*, trans. Charles Lam Markmann, 104.

[18] On the tragic conflict between Sanhūrī and Nasser, see the section "War, Revolution and the Political Demise of Sanhūrī," below.

[19] In Ottoman land law, the distribution of *miri* (state-owned) land to governors and military chiefs does not, legally speaking, confer property rights on them, as formally the land still remains the property of the Muslim Public Treasury (*bayt al-māl*). Thus it could be argued that the Free Officers were not confiscating privately-owned land in their Agrarian Reform, but simply reclaiming public land and redistributing it in the best interests of the Muslim community. For the Ottoman patterns of land tenure in the 16th century and their incorporation into Ḥanafī legal doctrine, see Johansen, *The Islamic Law on Land Tax and Rent*; see also Colin Imber's contribution to this volume.

Subjective Error in Islamic Contract Law: An Exercise in Comparative Jurisprudence

In his codification of Arab Civil laws, Sanhūrī used the techniques of legal pluralism to infuse general principles as well as practical maxims from French, German, Swiss, and Italian legal systems into the Articles of the Egyptian, Syrian, and Iraqi Civil Codes.[20] In addition, when incorporating technical material from the schools of Islamic law into the body of Arab Civil laws, he applied the tools of comparative legal analysis, merging this material with Western juridical notions. Sanhūrī believed that common misperceptions about the rigidity of Islamic legal thought are due to its treatment by historians who are unaware of the richness and flexibility of the *Sharīʿa*:

> Thus if some Orientalists, like Professors Hurgronje and Goldziher, have alleged that Islamic law is immutable and incapable of evolution, this is because they have viewed it as historians and not as jurists. . . . Islamic law is justly described by impartial jurists as one of the most . . . sophisticated juridical systems in the world. Indeed, it is the only system whose legal logic equals that of Roman law. It enjoys an incontestable flexibility and is susceptible of evolution . . . Islamic law has undergone considerable variation and could easily place itself at the level of contemporary civilization . . .[21]

Sanhūrī's treatment of subjective error in Islamic contract law shows his comparative jurisprudence at work. In his eyes, the danger of giving undue legal weight to subjective error lies in its threat to the viability and stability of bilateral transactions. It is always possible for one party to a contract to request nullification on the ground that he or she misunderstood its terms. Both Western and Islamic law confront this legal dilemma in their respective treatments of the legal effect of error on the validity of a transaction. Sanhūrī explains that Western jurists circumvent this threat by requiring the second party to the contract to be implicated in the first party's error. The requisite condition for invalidating a contract, if one of the parties misconstrues its terms, cannot be the mistaken party's claim to have committed an error: it is imperative that the other

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[20] The material in this section is adapted from my article "Al-Sanhūrī's Reconstruction of the Islamic Law of Contract Defects." The same material appears in Chapter 3 of my book, *Studies in Modern Islamic Law and Jurisprudence*. For another illustration of the method of comparative jurisprudence applied by Sanhūrī to Islamic law, see "Intention and Method in Sanhūrī's *Fiqh*," in Arabi, *Studies*, Chapter 7.

[21] al-Sanhūrī, "Le Droit musulman comme élément de refonte du code civil égyptien," 3:622.

party had, or might have had, knowledge of the error in question, direct or indirect, explicit or implicit. This knowledge is essential if the first party's claim is to have legal effect, without endangering the efficacy of contracts in general.[22] Sanhūrī appeals to the conditions stipulated in French law according to which the real intent of the parties determines the legal validity of the contract in case of error:

> Error has an effect on the validity of the contract if it is an essential error. Essential error is defined as that measure of error which, in the view of the party that committed it, would have made him abstain from ratifying the contract had he been aware of the error.[23]

Under these conditions, the real intent of a party to the transaction takes precedence over the stability of the transaction, and the contract is not binding if the other party is demonstrably implicated in the error. In modern French law, the defect in real intent is credited with full legal weight: it renders the contract invalid.

Sanhūrī reconciles Islamic and Western law with regard to the factors that govern the treatment of subjective error in contract. He formulates these factors in terms of a potential tension between the stability of transactions and the real intent of the parties involved. In this respect, the doctrine of the right of choice (*khiyār*) in contracts of sale is the most natural candidate in Islamic law for the desired comparison. *Khiyār* is the right of the buyer unilaterally to either cancel or ratify the sale transaction when certain conditions pertaining to the object being sold are judged inadequate. Muslim jurists place these conditions under three distinct headings: (1) *khiyār al-waṣf*, the right of choice due to the absence of a desired quality in the object; (2) *khiyār al-ruʾyā*, the right of choice upon visual inspection of the object; and (3) *khiyār al-ʿayb*, the right of choice due to a defect in the object. Sanhūrī reformulates these rules of Islamic law—which define the conditions under which a buyer has the right to rescind or ratify the contract of sale—as the elements of an incipient theory of error versus real intent. In his words:

> Islamic law . . . has a clear objective tendency. Hence error, which is psychological and subjective, is not accorded a unified treatment. The theory of error in Islamic law is fragmentary, scattered across its different categories. In one place figures the right of choice due to the absence of a stipulated

[22] al-Sanhūrī, *Maṣādir al-ḥaqq fi'l-fiqh al-Islāmī, dirāsa muqārina bi'l-fiqh al-gharbī,* 2:107.

[23] Ibid., 106.

> quality from the object; in another place the right of choice due to a defect in the object; and both are preceded by the right of choice upon seeing the object. At first it seems as if these notions are mutually independent, with no link between them. Yet they are closely related to the theory of error. In all these classifications the main concern of the jurists is to safeguard the stability of the transaction and its propriety, in so far as it expresses the true intent of the contracting parties. Its fragmentary character notwithstanding, the theory of error in Islamic jurisprudence is governed by two conflicting demands: the stability of the transaction and respect for the true intent, with the latter finding its way amidst predominantly objective standards.[24]

To better understand Sanhūrī's reformulation of Islamic law's categories of *khiyār* as the elements of an implicit theory of subjective error, it is essential to grasp its guiding purpose. From the outset of *Maṣādir*, Sanhūrī places his comparative jurisprudence beyond the purely descriptive and detached analysis of the structures of Islamic law. He explicitly states in the Preface that "we treat Islamic law using the methods of Western law." Thus his aim is not so much an objective explication of the historical doctrines of Muslim legists as it is the reconstruction of these doctrines in the light of European juridical notions. In particular, his reinterpretation of the three categories of the right of rescission in Islamic law is cast in terms of the modern French doctrine of error as a deformation of real intent. He is justified in this enterprise by the Muslim jurists' acceptance of the legal efficacy of subjective states like hesitation and remorse in rescinding or ratifying a sale. The Ḥanafī jurist al-Kāsānī (d. 587/1189) explains *khiyār al-ruʾyā*, the right of choice upon visual inspection of the object, as follows:

> The sale of an item not seen by the buyer . . . is not binding because ignorance about the qualities of the item affects the consent of the buyer, rendering it unstable. The instability in the consent of the buyer calls for the right of choice. For the buyer's objection to the sale due to remorse upon his seeing the object is permissible, allowing him to retract. The right of choice allows the possibility of retraction due to remorse upon seeing the object.[25]

Sanhūrī remarks that the three rights of rescission "are all related to the theory of error," while simultaneously recognizing the absence of a subjective theory of error in the work of Muslim jurists. Sanhūrī's reconstruction is designed to fill this gap, and it should be assessed in terms of its success

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[24] Ibid., 11.

[25] al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ* (Cairo: 1327–48 AH), 5:292, quoted in al-Sanhūrī, *Maṣādir*, 2:132.

in attaining its desired goal: to create a natural, i.e., a rationally justifiable place amidst the categories of Islamic law for the subjective notion of error as disruption of real intent.

Sanhūrī's comparative interpretations of the rulings of Muslim legists were incorporated into his codification of modern Arab Civil Laws, whether Egyptian, Syrian or Iraqi. The following Articles are from the new Iraqi Civil Code of 1951. Before the new Law drafted by Sanhūrī became effective, a codified version of an Islamic law of transactions, viz., the Ḥanafī Ottoman Majalla (1877), was the law of the land. The new Iraqi Civil Code evinces a pronounced legal pluralism, as stated by the draft committee headed by Sanhūrī in the Explanatory Memorandum of the draft proposal for the revision of the Iraqi Code:

> The provisions contained in this proposal have been taken from the Egyptian draft proposal, which is a selection from the most developed Western Codes and from the present Iraqi laws, in particular the [Ḥanafī Ottoman] Majalla . . . and from Islamic law. The overriding majority of these provisions derive from the different schools of Islamic law, with no preference given to any one particular school. Every effort has been made in the proposal to coordinate between its provisions, which stem from two main sources: Islamic law and Western law, resulting in a synthesis in which the duality of sources and their variance is almost imperceptible.[26]

The above reconstruction of subjective error in contract surfaces as Articles in the new Iraqi Civil Code of 1951 under the heading "Defects of the Will":

> Article 117–1. If there is an error about the object in a contract which stipulates its type, then if the type of the object is different [from the stipulated type], the validity of the contract depends on the stipulation, and the contract is nullified due to the violation of the stipulation. If there is no difference in type, but a desired quality is lacking in the object, the ratification of the contract is at the pleasure of the contracting party. . . .
>
> Article 118. No consideration is to be given to an assumption the erroneous nature of which is manifest. Thus the contract is voided: 1. If there is an error about a quality of the object which is regarded as essential by the contracting parties, or which should be so considered given the circumstances of the contract and the requirement of good will in the transaction; 2. If there is an error about the identity or quality of the contracting party, where this identity or quality is the only or main reason for the transaction. . . .

[26] *al-Qānūn al-madanī*, 35.

> Article 119. The party to a contract who commits an error cannot legally invoke that error unless the other party is victim to the same error or could have detected it easily.

Article 117 conforms to Sanhūrī's subjectivist analysis of the Muslim jurists' categories of the difference in type of object and the absence of a desired quality from the object: both categories of *ikhtilāf al-jins* and *khiyār al-waṣf* are mentioned as instances of the *generic notion* of "an error about the object in a contract," a notion that does not attain such generality in Islamic law. Also Clause 117–1 incorporates Articles 208 and 310 of the Ottoman Majalla in their entirety, with the notable difference that the new Iraqi provision treats of contracts in general whereas the Majalla provisions refer only to contracts of sale.[27] The marked affinity between the substance and formulations of Article 117 and those of classical Islamic law and the Majalla is due both to the historical circumstance that the Ottoman Ḥanafī Majalla was the law of the land until the promulgation of the new Iraqi Code, *and* to the conscious policy of Sanhūrī and fellow members of the draft proposal committee "to incorporate many of the rulings of the Majalla and [those of] Muslim jurists generally speaking, side by side with Western legal rules."[28]

The legal maxim introducing Article 118, "No consideration is to be given to an assumption the erroneous nature of which is manifest," *lā ʿibrata bi'l-ẓann al-bayyin khaṭ'uhu*, is another instance in which Islamic law accords full legal weight to subjective error when it is manifest. This maxim occurs as the thirty-third "universal rule" (*qāʿida kulliyya*) in the Shāfiʿī legist Suyūṭī's explication of forty such rules that underlie the entirety of *sharʿ*; among its multiple applications, Suyūṭī states that if a person pays a certain individual who he mistakenly thinks is his creditor, he has the right to recover his payment.[29] The same rule appears verbatim as Article 72 of the Majalla, in the "Introductory Chapter" dedicated to "Universal Rules."[30] Thus Article 118 subsumes errors that have legal effect on the validity of a transaction under a universal maxim of Islamic law.

Clause 118–1 stipulates that an erroneous assumption regarding an essential quality of the object renders the contract null and void. Although freedom from defects and visual inspection of the object are not explicitly mentioned, they normally count as essential conditions to be satisfied in

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[27] Ḥaydār, *Durar al-ḥukkām*, trans. Fahmī al-Ḥusaynī, 1:157–8.
[28] *al-Qānūn al-madanī*, 4.
[29] al-Suyūṭī, *al-Ashbāh wa'l-naẓā'ir*, 106.
[30] Ali Haydār, *Durar al-ḥukkām*, 1:64.

a contract. An error in any of these two respects that is recognized by Islamic law is an essential error in the sense explained by Sanhūrī (see above) as deriving from modern French law: an erroneous assumption concerning the wholeness of the object, or its qualities due to its absence, usually makes the contracting party abstain from ratifying the contract. While no right of rescission figures in the Article—the contract is simply voided—the real intent of the contracting party overrules his mistaken assumption, a consequence that Muslim jurists sought to defend in their rules proclaiming the rights of choice: *khiyār al-waṣf, khiyār al-ʿayb* and *khiyār al-ruʾyā*.[31]

Clause 118–2 applies the Islamic maxim about erroneous assumption to contracts in which the identity of the contracting party is a crucial legal consideration. In contracts of donation (*hiba*), testament (*waṣiyya*) and pre-emption (*shufʿa*), all of which involve the transfer of property to a specifically designated party, Islamic law invalidates the act if there is a mistake in the identity of that party. Thus al-Kāsānī:

> [A necessary condition for the validity of a testament] is the consent of the testator. For a testament is an offer of ownership (*ījāb mulk*)... and therefore requires consent, as in other cases of offers of property. Thus the testament of a false testator... is invalid because this circumstance distorts the consent [of both parties to the testament].[32]

Finally Article 119 is an explicit statement of the regulative principle that both parties to a contract must be implicated in the error committed by one of them in order for the error to be of legal consequence. This principle, borrowed from French law, is compatible with the general objective bias of Islamic contract law inasmuch as the provision places an external check on the subjective vicissitudes of error in favor of the stability of transaction.

War, Revolution and the Political Demise of Sanhūrī

Sanhūrī's encounter with the turbulent politics of the Egyptian state in the 1940s came to an abrupt halt in April 1954, when the Revolutionary Command Council (RCC)—Egypt's military government—issued a Decree prohibiting membership on the Administrative Court, *Majlis al-Dawla*,

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[31] Moreover, *khiyār al-ruʾyā* is accorded a distinct set of provisions—Articles 517 to 523—in the new Iraqi Code (*al-Qānūn al-madanī*, 121–2).

[32] al-Kāsānī, *Badāʾiʿ* (Cairo: 1327–48 AH), 7:335.

to any person who had been a minister or politician prior to the 1952 *coup*. The move was directed against the Court's power of judicial review over executive decisions, which the recent military government, jealous of its authority, regarded with suspicion.[33] Sanhūrī, then President of the Administrative Court, who served twice as minister under the Saadist governments in the 1940s, had no choice but to resign his position at the head of highest judicial body of the Egyptian state. Unfortunate personal experiences accompanied Sanhūrī's political fall. On March 29, 1954, supporters of Nasser and the radical wing of the RCC led a demonstration against the offices of the Administrative Court in Cairo, and Sanhūrī was injured by activists who assaulted the Court's offices. Despite its support for the 1952 Revolution (see below), *Majlis al-Dawla* was accused of harboring reactionary ideas because its members favored a return to parliamentary life and had taken a position against the continuation of the new regime. The RCC condemned the attack, but Sanhūrī refused to receive Nasser when the President came to the hospital to convey his regrets to Sanhūrī about the incident. The RCC restrictive Decree against the Administrative Court members and its president (Sanhūrī) was issued less than three weeks later.

Only four years earlier, in 1950, Sanhūrī had been at the height of his political career, having assumed the presidency of *Majlis al-Dawla*; he no doubt looked forward to a promising public life at the helm of the State's highest judicial body. The circumstances of his political demise shed

[33] A form of decentralized judicial review had existed in Egypt since 1946 when the State's Administrative Court, *Majlis al-Dawla*, was created to decide power abuses of the executive against state employees and ordinary citizens. In the 1930s and 1940s, ordinary Egyptian courts, working under the 1923 Constitution, applied an unsystematic form of judicial review, at times refusing to implement a certain statute because it was contrary to the Constitution, but without explicitly declaring it unconstitutional. In its vanguard Ruling of 1948 on Case No. 65, the Administrative Court established the precedent of constitutional control for the lower Egyptian courts; the court decides, "regarding the duties of the courts when faced with a law that is contrary to the text of the Constitution or its spirit: There is nothing in Egyptian legislation to prevent Egyptian courts from examining the constitutionality of laws, let alone decree-laws. . . . When the Constitution [of 1923] provided, in Art. 30, that the judicial power is exercised by the courts, it confides to them jurisdiction to interpret the laws and to apply them in the litigation arising from them. It follows that they have jurisdiction, in case of conflict between these laws, to determine the law which shall be applied." Cited in Hill, "Judicial Review in Egypt and the United States," 324–5. In 1969, the first Egyptian Constitutional Court was created as an independent judicial body enjoying exclusive jurisdiction over the constitutionality of laws and regulations on Egyptian soil; it was to be superseded by the present High Constitutional Court organized by the 1971 Constitution.

critical light on the stormy relations between law and government at that fateful juncture in Egypt's history.

Sanhūrī's troubles with the Executive started in 1950 when, as President of the Administrative Court, he tried to steer a middle course between the demands of power and the rule of law. Until March 1954, he and his colleagues on *Majlis al-Dawla* were relatively successful in containing the impending storm; this was no small feat given the Free Officers military *coup* of 1952, and the threat it posed to Egypt's parliamentary political system. But the historic conjuncture was heavily skewed against such fine-tuning. The coup was preceded by a decade of social turmoil and nationalist unrest against British interference in political life, which set the stage for the eventual radical orientation and policies of the *coup*. In a sense, only the radical nationalism of Nasser could provide answers to Egypt's festering problems, and thus his subsequent conflict with Sanhūrī's democratic constitutionalism may have been inevitable.[34]

The treaty of 1936, which allowed a significant British military presence in Egypt, was only the most apparent of a host of intractable social and political problems that King Farouk and traditional elites were unable to tackle amidst the rising tide of mass unrest during and after World War II. During the War, Egyptian nationalists, Islamists and leftists, at the forefront of which were populist Wafdists, Communists, and the powerful organization of the Muslim Brothers, organized opposition movements against the regime. World War II was followed in 1948 by the creation of the state of Israel on Egypt's eastern border, and the ensuing war and military defeat sent additional tremors through the Egyptian state and society.[35] While parliamentary governments decreed martial law and a state of emergency, segments of the military elite were brooding over

[34] Shalakany situates this conflict in a broader historical split within the European socialist movement: "[T]his schism should not lead us to think of Nasser and Sanhūrī in terms of a progressive left pitted against a conservative right. Both men were ideologically committed to leftist projects, although Sanhūrī's brand of leftism is best located in the European social-democrat tradition, while Nasser's relates more to an alternative radical/revolutionary strand." Shalakany, "Between Identity and Redistribution," 237–8.

[35] On May 15, 1948 the British mandate in Palestine ended, and British troops departed, with Arab armies moving in support of the Arab population of Palestine against the Jewish settlers. A state of emergency was declared in Egypt on that same day. Thousands of nationalist Wafdists, leftists and Muslim Brothers were arrested and detained in the incarceration center of El Tor on the Red Sea. On December 8, the government ordered the dissolution of the Muslim Brotherhood, the most powerful opposition grass-roots organization; on February 12, 1949 Ḥasan al-Bannā', the Brotherhood's leader and organizational genius, was assassinated.

the defeat and its meaning for Egypt's future. Between 1948 and 1952, the Muslim Brotherhood, nationalist, and left-wing movements brought to the fore their contending claims for reform against the successive governments, which reacted by curtailing the freedom of action and expression, using their wide executive privilege under martial law. Closer to the July 23 coup was the political unrest of January 25, 1952, when a British armored division stationed at the Suez Canal base, in response to continued attacks by nationalist guerillas, moved against the Government House in Ismailiya, killing 150 Egyptian policemen. The next day, demonstrations broke out in Cairo, Alexandria, and elsewhere in Egypt, a fire engulfed the commercial center of Cairo, and the army took control of the streets. A state of emergency was declared, thousands of nationalist militants were arrested, and the press was silenced.[36]

In this tense political environment, the Administrative Court championed constitutional rights and liberties, demanding the reversal of government decisions to close opposition newspapers.[37] When Sanhūrī assumed presidency of *Majlis al-Dawla* in 1950, the Court pursued with added rigor its mandate of testing the legality of executive decrees issued by the newly-elected Wafd government. The Executive did not back down, and the Wafd sought to obstruct the increasing effectiveness of the Administrative Court by proposing a law that would prohibit previous ministers from serving on the Court; as Sanhūrī had already served as minister in previous governments, the proposed law would have necessitated his resignation. Although this attempt by the Executive to undermine the autonomy of judicial oversight was unsuccessful, it signaled a latent tension between the government and the Administrative Court. Were it not for the 1952 revolution, however, it is doubtful that this tension would have broken into open confrontation two years later, in 1954.

At first, it seemed that the concerns and aspirations of the military elite of the 1952 Revolution were not opposed to those of the judicial elite at *Majlis al-Dawla*. Sanhūrī and the Free Officers shared a common perception of the failures and corruption of the Khedival regime: grievances due to flagrant social inequalities;[38] capitulation to foreign interests; the 1948

[36] Abdel-Malek, *Egypt: Military Society*, 16–17.

[37] Salim, *al-Niẓām al-qaḍāʾī al-miṣrī al-ḥadīth*, 282–6.

[38] Before the nationalizations of the early 1960s, Egyptian industry and agriculture suffered major ills: "The monopolist character of the Egyptian industrial economy was visible everywhere: in the sugar and cement industries, in distilleries, in chemical fertilizers, but above all within the group of industrial companies set up or brought together by the Bank Misr through a system of holding companies, which became the main body of the

military defeat and loss of Palestine; and sympathy to nationalist and socialist ideals. This ideological affinity surely contributed to the Court's support for the revolutionary government immediately after the *coup*. Uncharacteristically, the Court did not object to the government's suspension of all political parties, on the grounds that such an executive measure is justified under a state of emergency.

Majlis al-Dawla's endorsement of the Revolution became obvious less than a week after the *coup*, when the Court ruled on the legal mechanisms for the Regency Case in favor of the legitimacy of the revolutionary government. After the abdication of King Farouk, a Regency Council was formed to rule on behalf of the Crown Prince, a minor who, according to the Constitution, had to take an oath of allegiance before the parliament. Because parliament had been dissolved some months before the *coup*, the Administrative Court, with Sanhūrī presiding, had the option of recalling the dissolved parliament. However, the Court ruled that the oath of allegiance should be taken before the military government, thus recognizing its legitimacy.

At the time, Sanhūrī was looking forward to a productive relationship with the new regime, an expectation that materialized when the RCC appointed him to a new government committee charged with drafting a law on the upper limits of land ownership in Egypt.[39] Sanhūrī was elated. On August 12, 1952 he made the following entry in his diary: "Today is my birthday . . . it gladdens me most that today I will be attending the first committee meeting to discuss the future limitations on land ownership in Egypt. God has willed that I participate in this great and momentous project on this blessed day."[40] There was a real affinity between Sanhūrī's

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whole economy, represent[ing] 28 percent of total Egyptian banking capital . . . at the end of 1960 . . . The fact is that [the Second World] War, the source of gigantic profits for the Egyptian bourgeoisie, brought ruin to every worker's family. Certainly the national income had risen . . ., but the rise in prices put things back into their proper place: [compared to 1939] the real annual income of the average Egyptian in 1950–53 . . . had declined by 7 percent." In the countryside the inequalities were as horrendous: "In 1952, 6 percent of the landowners held 65 percent of the land under cultivation, a little knot of 250 lords—in the forefront of whom stood the royal family. . . . The average holding of a large proprietor was 3765 *feddans*, that of a small holder was 1.5 *feddans*." Anouar, *Egypt: Military Society*, 14–16.

[39] Shalakany, "Between Identity and Redistribution," 238.

[40] *al-Sanhūrī min khilāl awrāqih*, 381. Shalakany writes: "By the same token, Nasser's initial attitude towards Sanhūrī and the *Majlis* was very promising . . . . In one of his first statements about the officers' movement and the *Majlis*, Nasser described the two as allies in the struggle against the corrupt old regime, and the *Majlis* 'therefore never lost the affection of the people, something which the revolution has always appreciated.'" Ibid., 239.

socialist vision for Egypt and the military elite's first steps towards the nationalization of private industry and agrarian reform, as witnessed in the Preamble (Decree of August 2, 1960) to the first Five-Year Plan. The Plan finds its *raison d'être* in "the incapacity of private industry to improve the national income in the proportions and the time made imperative by the growth of the population." The aim of the Plan is:

> To provide for a balanced development of the national economy . . . If the national economy were not subjected to planning, the gap [in wealth and income between the two extremes of society] would continue to widen and would entail the division of our society into two distinct classes: a minority class, which would steadily diminish, owning the income from production, and another class, whose members would constantly rise, enjoying only an infinitesimal share of the income from production. It would be superfluous to emphasize the serious repercussions that such a situation would produce in the social structure.[41]

History, however, soon overtook the actors, pitting Sanhūrī against Nasser as advocates of policies that clashed, not over the ends of social and economic reform, but rather over the means to those ends. The similarity of purpose between them makes all the more critical their disagreement on the means. While Sanhūrī saw the Revolution as a temporary measure needed to put constitutional government on the required track of wealth redistribution and social justice, the radical Free Officers had no trust in liberal institutions as a means of effecting the necessary changes in Egypt's economic and social structure. Among the Free Officers, General Mohammad Naguib called for the return of civilian rule and a democratically elected government, while Nasser pushed for the radical alternative. The moment of truth came in March 1954, when the struggle for power between the radical and constitutional wings of the RCC broke into the open. Naturally Sanhūrī supported Naguib's liberal alternative. Nasser prevailed and on March 29, 1954, some of his supporters led a demonstration against the offices of the Administrative Court. The demonstration ended in the assault on Sanhūrī and signaled the end of his political career.

Sanhūrī was forced to resign from the presidency of *Majlis al-Dawla* by virtue of a Decree that came into force on April 15, 1954 prohibiting all pre-1952 state officials from holding government posts. He now abandoned the political scene, devoting himself to writing his *magnum opus, al-Wāṣit*, a ten-volume commentary on the new Egyptian Civil Code, which became

[41] As cited in Anouar, *Egypt: Military Society*, 132.

the bread and butter of law students, lawyers and judges all over the Arab world. Eight volumes of *al-Wāṣit* had appeared by 1969, when illness prevented Sanhūrī from completing the project. He died two years later.

What appears as futile utopianism in Sanhūrī, viz., his swimming upstream against the tide of aggressive nationalism, mercantile egoism, and authoritarianism is in fact a reflection of a basic structure of Islamic law. The universal ethical ideals of the law are bound to enter into conflict with the powerful human drives towards aggression, waywardness, and greed, all condemned by the Qur'ān in the strongest terms. It is no coincidence that Sanhūrī was inspired by the great socialist movements of modern European history that responded to these perversions of the human soul, which have been appallingly accentuated in modern times. Sanhūrī's universal egalitarian vision and his lifelong service to the Arab people are a clear statement of a great Muslim jurist's protest against the perverse aspects of modernity.

CHAPTER TWENTY-THREE

ḤASAN AL-TURĀBĪ (1932–)*

Aharon Layish

Life and Times[1]

Ḥasan ʿAbdallāh al-Turābī was born in Kasala, on the border between Sudan and Ethiopia, in 1932. His family came from a deep-rooted Sufi background. One of his ancestors, Shaykh Ḥamad al-Naḥlān b. Muḥammad al-Budayrī (d. 1705), was a well-known Sufi. Ḥasan al-Turābī received both an Islamic orthodox and Sufi education; the latter may well have affected his legal thought, although there is no evidence that he was affiliated with a Sufi tradition. Moreover, while engaged in launching his plan for an Islamist state in Sudan, al-Turābī did not hesitate to confront the Sufi orders. In his view, Sudanese adherence to the Sufi orders is one of the reasons for the failure of the movement of renewal (*tajdīd*) in Islam.[2]

Ḥasan al-Turābī received a traditional Muslim education from his father, a *qāḍī* in a *sharīʿa* court, and this may be the main source of his knowledge of Islamic law. It seems that al-Turābī never attended a religious institution, nor did he have close contacts with contemporary *ʿulamāʾ*; he was an autodidact in Islamic studies. Al-Turābī received a standard modern education at the Ḥantoub secondary school alongside other personalities in Sudanese politics who later became famous, such as Jaʿfar al-Numayrī and Muḥammad Ibrāhīm Naqḍ, Secretary General of the Sudanese Communist Party. Al-Turābī was influenced at an early age by members of the Society of Muslim Brothers (*jamʿiyyat al-ikhwān al-muslimīn*) who had

* This essay is a revised and extended version of an argument initially presented in Layish and Warburg, *Reinstatement*, 79–94, here provided with a biographical introduction and excerpts from al-Turābī's works. I thank my colleague Gabriel Warburg for introducing me to Sudanese studies.

1 Unless otherwise indicated, this section is based on Weissbrod, *Turabi*, 13–22; Warburg, *Islam, Sectarianism and Politics in Sudan*, 179–83; Burr and Collins, *Revolutionary Sudan*, xiii–xv, 5–6; Layish and Warburg, *Reinstatement*, 14–17; Woodward, "Ḥasan al-Turābī."

2 Al-Turābī, *Tajdīd al-fikr*, 98.

fled from Egypt in order to avoid legal prosecution. In 1949 the Muslim Brothers founded a branch at the Gordon Memorial College, which later became the highly influential University College of Khartoum, affiliated with the University of London. The Muslim Brothers had a profound influence on the students of University College.[3] In 1955 (alternatively, 1952; Burr & Collins, 5) al-Turābī graduated from Khartoum University College. Al-Ṣādiq al-Mahdī, the Acting Imām of the Anṣār (an activist, revivalist, Islamic movement) and Head of the Umma party, was one of his contemporaries at the College, and both of them later studied abroad. Their relationship was strengthened after al-Turābī married al-Ṣādiq's sister.[4] Al-Ṣādiq seems to have been al-Turābī's closest colleague; and there are substantial similarities between their legal methodologies.[5] In 1957 (alternatively, 1961; Burr and Collins, al-Turābī received his Master of Law degree from London University. After spending some time in Sudan, he studied in Paris, where he received his doctorate in law from the Sorbonne. His dissertation was on the emergency powers of the executive according to English and French constitutional law. Al-Turābī has a good command of both English and French.

As a student at Khartoum University, al-Turābī joined the Islamic Liberation Movement (ILM) (*ḥarakat al-taḥrīr al-islāmiyya*) and was subsequently elected to its executive. His reputation as a Western-oriented professor of law and Dean of the Law Faculty at Khartoum University College served his political career. His entrance into national politics coincided with General ʿAbbūd's downfall. Since 1964 al-Turābī has been the leader of the Muslim Brothers, and he was the unofficial ideologue of the 1989 Islamist military coup.

In 1965, al-Turābī founded the Islamic Charter Front (ICF) (*jabhat al-mīthāq al-islāmī*), which comprised several Islamic organizations and movements, first among them the Muslim Brothers. The ICF promoted the idea of an Islamic constitution for Sudan and al-Turābī was its secretary general until 1969, when it was disbanded, alongside other political parties in Sudan, following Jaʿfar Numayrī's military coup. Subsequently al-Turābī was arrested and spent several years in jail, where he wrote his first two books, *al-Ṣalāt ʿimād al-dīn* (1972) and *al-Īmān wa-athāruhu ʿalā*

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[3] For further details, see Lowrie, *Islam, Democracy, the State and the West*, 11; Abdelmoula, "Ethnicity, Religion, and Human Rights in the Sudan," 43ff.

[4] As a reflection of a political alliance, in the 1960s, between the Umma party and the Islamic Constitutional Front, al-Turābī's party.

[5] See Layish and Warburg, *Reinstatement*, 87–9.

ḥayāt al-insān (1974). Following the "National Reconciliation" between the Muslim Brothers and Numayrī in 1977, which resulted in the former's entering the government, al-Turābī filled several public positions, most of them of a legal nature. In 1977 Numayrī appointed him to preside over a committee charged with the task of proposing a "revision of the laws so as to make them compatible with the *sharīʿa*" (*lajnat murājaʿat al-qawānīn li-tatamashshā maʿa al-sharīʿa*). Between 1979 and 1982 al-Turābī was the Attorney General, and in 1983 he was the President's Adviser on Foreign and Legal Affairs. He was dismissed from this office in March 1983 when Numayrī dissolved his political alliance with the Muslim Brothers, and he was imprisoned shortly before Numayrī was overthrown in April 1985.

After Numayrī's downfall, al-Turābī established the National Islamic Front (*al-jabha al-islāmiyya al-qawmiyya*), which, between December 1988 and March 1989, was part of the coalition under al-Ṣādiq al-Mahdī. During that period al-Turābī served in several official positions (Attorney General, Minister of Justice and Minister for Foreign Affairs). In 1996 al-Turābī was elected Speaker of the Parliament. In May 2000 he was removed from his position as Secretary-General of the Popular National Congress (*al-muʾtamar al-shaʿbī al-waṭanī*), and in August 2000 he founded his own PNC.[6]

Al-Turābī has played a central role in the pan-Islamic movement. In 1991 he founded the Arabic-Islamic Popular Conference (*al-muʾtamar al-shaʿbī al-ʿarabī al-islāmī*), an international pan-Islamic organization that combines Islamic and Arab political movements, especially those that are in opposition to orthodox Islam (the Egyptian and Saudi Arabian movements did not join the organization), and since then has been its general secretary.

Al-Turābī was a key figure behind the Numayrī regime's experiment with Islamist legislation. The 1977 committee for the revision of the Sudanese statutes with regard to their compatibility with the *sharīʿa*, under al-Turābī's chairmanship, drafted several bills. In 1983 Numayrī appointed a new commission headed by ʿAlī ʿUthmān Ṭāhā. The acts drafted by this commission (the "September Laws") were profoundly influenced by al-Turābī's ideas on Islamic law and legal methodology. This is particularly the case with the Judgments (Basic Rules) Act, 1983, apparently drafted by al-Turābī himself. This statute, which provides the court with "the order of priorities" to be applied in cases of lacunae

[6] See further Burr and Collins, *Revolutionary Sudan*, 277–80.

in the Islamist legislation, reflects in detail al-Turābī's legal methodology. Al-Turābī also drafted the new penal code of 1999.[7]

Al-Turābī is the leader of an Islamic political movement that operates on both the national and international levels, and he is one of the most important and original Islamic thinkers and ideologues of his generation. He is a prolific writer who has published an impressive number of books and articles, in Arabic and English, on a variety of subjects, such as the Islamic heritage, Islamic society and state, renewal and reform in Islam, Islamic law and methodology, Islam and democracy, secularism, Islam and the West, and the status of women.[8]

The present essay examines al-Turābī's contribution to the development of a contemporary Islamic legal methodology. The intellectual movement initiated by al-Turābī may be defined as a liberal reformist (*iṣlāḥī*) attempt to find solutions for Sudanese problems through a modern version of the doctrine of *tawḥīd*,[9] a new legal methodology (*uṣūl al-fiqh*) and a corpus of positive law (*furūʿ*).[10]

Al-Turābī's literary style is direct and to the point, and his presentation is based on rational arguments stated in simple language and devoid of embellishments; he seldom resorts to citations from Qurʾān or *ḥadīth* to support his arguments. The style and exposition of al-Turābī's English lectures and publications have been drafted for a Western audience, with a view to securing its empathy.[11] His most famous books are *Tajdīd al-fikr al-islāmī* (The renewal of Islamic thought) (1985) and *al-Ḥaraka al-islāmiyya fī 'l-sūdān* (The Muslim [Brothers'] movement in the Sudan) (1991). Although al-Turābī is not an *ʿālim*, he seems to be well versed in the *sharīʿa*. Lack of a formal *sharʿī* education, however, may account for his practice of not providing references to legal treatises in his work.[12]

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[7] Cf. Layish and Warburg, *Reinstatement*, 75–9, 91–2, 284–6, 296, 302.

[8] For a list of his publications, see Weissbrod, *Turabi*, 171f.; Layish and Warburg, *Reinstatement*, 314f.; see also Hallaq, *History*, 226 fn. 45.

[9] *Tawḥīd*, a theological term that signifies the unity of God, has been extended by al-Turābī to the mundane-political sphere (the unity of the Muslim community) and to the legal sphere. For details, see al-Turābī, *Qaḍāyā al-tajdīd*, 33, 274; idem, *Manhajiyyat al-fiqh*, 10–11; idem, *Islamic State*, 241, 243, 247; El-Affendi, *Turabi's Revolution*, 169–70; Moussalli, "Hasan al-Turabi's Islamist Discourse," 55–62; Weissbrod, *Turabi*, 35; Sidahmed, *Politics and Islam in Contemporary Sudan*, 128.

[10] Al-Turābī has recently begun writing a new commentary on the Qurʾān, based on *ijtihād* and his doctrine of *tawḥīd*, in which he seeks to bring the understanding of the text into conformity with modern conditions. See Layish and Warburg, *Reinstatement*, 79–80.

[11] Cf. Burr and Collins, *Revolutionary Sudan*, 94–5.

[12] This may be due also to the fact that his publications are based on lectures. See, e.g., al-Turābī, *Qaḍāyā al-tajdīd*, 149 (Chapter 3: Renewal of Islamic Thinking).

Al-Turābī's project to modernize legal methodology seems to have been inspired by both Islam and the West. He derives inspiration from both classical and modern Islam; and he has been exposed to literature on Qur'ān and *sunna*, the exegesis (*tafsīr*, *shurūḥ*) of all schools of law, Islamic popular culture—including the celebration of the Prophet's birthday—and the Forefathers (*al-salaf*) and mysticism. He claims to have been influenced by modern Islamic schools of thought, reformist *salafī* movements across the Muslim world, in particular the Egyptian Muslim Brothers (such as Ḥasan al-Bannā', Muḥammad al-Ghazālī, Sayyid Quṭb) and the Pakistani Sayyid Abul-Ala Maudoodi.[13] He views Khumeini's revolution as "perhaps the greatest event in contemporary Islamic political history."[14]

Al-Turābī does not seem to have been influenced by Muḥammad Aḥmad al-Mahdī's legal methodology. The Mahdī rejected consensus (*ijmāʿ*) and analogy (*qiyās*) and replaced them with the Prophet's inspiration (*ilhām*), and he ignored all schools of law (*madhāhib*).[15] In fact, the Mahdī is hardly mentioned in al-Turābī's writings, and his references to the Mahdī occur mainly in a political context.[16]

Al-Turābī also has been inspired by several European trends of thought, religious and non-religious, ranging from democratic, liberal and rational philosophy to materialist and Communist ideas and ideologies.[17] He maintains that the time is ripe for ideological transformation, since the present generation of young Islamic elite has received a Western education.[18] Moreover, some of the *ʿulamā'* have gone so far as to adopt foreign and even left-wing, ideas.[19] At the same time, al-Turābī is ambivalent toward the West; he accuses Western imperialists of causing the destruction of Muslim institutions and replacing the *sharīʿa* and the theory of Islamic law with statutory (*waḍʿiyya*) legislation and Western legal methodology. He would prefer a reopening of the door of *ijtihād* rather than the

[13] Al-Turābī, *al-Ḥaraka*, 153–4, 204, 225–6, 239–41. Cf. Abdelmoula, "Sudan: Islamic Fundamentalism," 16ff.; El-Affendi, *Turabi's Revolution*, 152–3; Wiessbrod, *Turabi*, 138 fn. 60; Mitchell, *The Society of the Muslim Brothers*, Index; Hourani, *Arabic Thought in the Liberal Age*, 37, 149, 230.

[14] Al-Turābī, *al-Ḥaraka*, 242.

[15] Layish, "The Legal Methodology of the Mahdī in the Sudan, 1881–1885."

[16] Al-Turābī, al-Ḥaraka, 22, 150, 236. Cf. El-Affendi, *Turabi's Revolution*, 152–3; Jacobs, "The Sudan's Islamization," 206.

[17] Al-Turābī, *al-Ḥaraka*, 204, 217, 226, 242–3; Abdelmoula, "Sudan: Islamic Fundamentalism," 41, 45–6; El-Affendi, *Turabi's Revolution*, 49.

[18] Al-Turābī, *Ḥiwārāt fī 'l-islām*, 37.

[19] Al-Turābī, *al-Ḥaraka*, 152–3.

adoption of Western legal systems. The Muslim response the Western "cultural assault,"[20] he declares, has culminated in an Islamic awakening that seeks to bring about the emergence of a reformist movement which, in al-Turābī's view, can be compared to the Reformation in Christianity.[21]

Legal Methodology[22]

Al-Turābī maintains that a new legal methodology is required for an Islamic renaissance:

> The need for a legal methodology (*manhaj uṣūlī*) as an instrument for launching an Islamic renaissance (*nahḍa*) has become today an absolute necessity. It is our conviction that the traditional (*taqlīdī*) science of legal methodology (*ʿilm al-uṣūl*), in which we seek guidance, is no longer sufficient to meet our modern requirements, since it reflects the historical circumstances in which it developed and crystallized, and the nature of the legal issues that [formerly] preoccupied legal research.[23] [...] Our ancient legal methodology, having flourished commendably [in past centuries], has ended up in a state of futile stagnation (*jumūd*) as a result of the deterioration of genuine religious life; no science of law (*fiqh*) has [since then] developed or emerged.[24]

In al-Turābī's view, zealous adherence to the schools of law was the main cause for the failure of a movement of renewal (*tajdīd*) in Islam.[25] Since the consolidation of classical legal methodology, circumstances have changed and the boundaries of human knowledge have expanded considerably.[26] Al-Turābī maintains that the *sharīʿa* displays a remarkable measure of flexibility, such that Islam can be accommodated to any time and place.[27] Moreover, he advocates the utilization of European experimental, social and natural sciences and, in particular, European legal methodologies

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[20] Cf. Layish, "The Contribution of the Modernists," 273.

[21] Al-Turābī, *Ḥiwārāt fī 'l-islām*, 26–7, 43–4; idem, *al-Ḥaraka*, 18–22; idem, *Qaḍāyā al-tajdīd*, 204, 246; idem, *Tajdīd al-fikr*, 98; idem, *Manhajiyyat al-fiqh*, 5. Cf. al-Ghannūshī and al-Turābī, *al-Ḥaraka al-islāmiyya wa'l-taḥdīth*, 15.

[22] For a short critical analysis of al-Turābī's legal methodology, see Hallaq, *History*, 226–30.

[23] Al-Turābī, *Qaḍāyā al-tajdīd*, 195.

[24] Ibid., 201; cf. idem, *Manhajiyyat al-fiqh*, 5.

[25] The other cause was adherence to the Sufi orders; see al-Turābī, *Tajdīd al-fikr*, 98.

[26] Al-Turābī, *Qaḍāyā al-tajdīd*, 191.

[27] Cf. Muḥammad Shaḥrūr ("[the *sharīʿa* is] *ṣāliḥ li-kull makān wa-zamān*"); cited in Hallaq, *History*, 248.

(*manāhij al-fiqh*).[28] By adhering to the body of legal treatises (*mutūn)*, commentary (*shurūḥ*) and super-commentary (i.e., marginal gloss) (*ḥawāshin*) of the schools of law, traditional *fiqh* detached itself from its origins and consequently failed to adapt itself to the goals (*maqāṣid*) of life.[29]

According to al-Turābī, historical *fiqh* has stagnated, resulting in the closing of the door of independent legal reasoning (*ijtihād*). It is commonly accepted that no one after the generation of the Forefathers (*al-salaf*) is authorized to propose an independent view, the assumption being that free exercise of the mind will generate errors and cause division among the people. At all events, the stagnation of legal methodology has caused serious damage to Islamic substantive law (*furūʿ*).[30] Hence, reopening the gate of *ijtihād* is essential for adapting traditional *sharīʿa* to changing conditions.

> [Due to the West's impact on the Islamic world], broad cracks have developed in our life that make it incumbent on the contemporary jurists of Islam to undertake a new *ijtihād* with a view to devising new legal rules (*aḥkām*) or adjusting the ancient rules formulated by the jurists of past generations [to the contemporary generation]; the adjustment should be in conformity with place and time.[31]

In fact, al-Turābī maintains that Muslims were never inhibited about exercising a measure of *ijtihād*.[32] In his view, the new *ijtihād* will operate on same level as legal methodology (*uṣūl al-fiqh*) and substantive law (*furūʿ al-aḥkām*),[33] and it will serve as a means for bringing about a renewal that will constitute a genuine legal revolution (*thawra fiqhiyya*).[34]

The concern that personal *ijtihād* will result in legal innovations that have no basis in earlier doctrine[35] points to the need for striking a balance

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[28] Al-Turābī, *Ḥiwār*, 22; idem, *Qaḍāyā al-tajdīd*, 272. Cf. El-Affendi, *Turabi's Revolution*, 172–3; Abdelmoula, "Sudan: Islamic Fundamentalism," 43; Moussalli, "Hasan al-Turabi's Islamist Discourse," 53.

[29] Al-Turābī, *al-Ḥaraka*, 210.

[30] Ibid., 216; idem, *Qaḍāyā al-tajdīd*, 231ff., 242; idem, *Manhajiyyat al-fiqh*, 5. Cf. El-Affendi, *Turabi's Revolution*, 171.

[31] Al-Turābī, *Naẓarāt*, 156. Cf. Peters, "*Idjtihād* and *Taqlīd*," 139f.

[32] Al-Turābī, *Ḥiwār*, 6; Lowrie, *Islam, Democracy, the State and the West*, 85; al-Ghannūshī and al-Turābī, *al-Ḥaraka al-islāmīya wa'l-taḥdīth*, 56; cf. Hallaq, *History*, 230; Abdelmoula, "Sudan: Islamic Fundamentalism," 43; Sidahmed, *Politics and Islam in Contemporary Sudan*, 128–9.

[33] Al-Turābī, *al-Ḥaraka*, 216.

[34] Al-Turābī, *Qaḍāyā al-tajdīd*, 218; idem, *Manhajiyyat al-fiqh*, 5 (*thawrat al-ijtihād*). Cf. El-Affendi, *Turabi's Revolution*, 170–2.

[35] Al-Turābī, *Qaḍāyā al-tajdīd*, 217; idem, *Tajdīd al-fikr*, 93.

between *taqlīd* and *ijtihād*.[36] Al-Turābī makes a clear distinction between legal rulings that are the product of human (*basharī*) *ijtihād*, and basic principles (*uṣūl*) that constitute the "mothers" of the definite, enduring meanings of religion" (*ummuhāt maʿānī al-dīn qaṭʿiyyāt muḥkamāt*). The former can be accommodated to the requirements of the present, whereas the latter are eternal and immutable.[37] In the domain of religious practices and personal status, the extant legal rules leave sufficient scope for adaptation to modern times without resorting to *ijtihād*. By contrast, a comprehensive *ijtihād* is mandatory in the domain of public law.

> An extremely wide-ranging *ijtihād* is essential today. [...] Broadly speaking, this *ijtihād* should address the domain of public life [i.e., public law], which has previously been neglected. In the domain of religious rites (*ʿibādāt shaʿāʾiriyya*), for instance, the extant legal material (*al-mādda al-fiqhiyya*) [that is, substantive law] allows us sufficient scope [for maneuvering without resorting to *ijtihād*] [...] Our main efforts should be addressed to the domain of public life [i.e., public law] and to the development of basic legal principles (*uṣūl fiqhiyya*) that will be in harmony [with the modern requirements of public law], starting with principles of interpretation (*uṣūl tafsīriyya*) [that do not change substantive law and continuing] down to the broad principles of *ijtihād*.[38] [...] Domains pertaining, e.g., to the political system (*ḥukm*), the economy and foreign relations, have been neglected by them [i.e., the Muslims of past centuries]. Our main concern should be to address these issues, with a view to formulating legal rules and deriving (*istinbāṭ*) substantive rules (*aḥkām farʿiyya*)[39]

The qualifications for exercising *ijtihād* include, in addition to a good knowledge of the *sharīʿa*, a command of the Arabic language, acquaintance with the Muslim legacy and familiarity with the natural and social sciences. For this purpose al-Turābī recommends the founding of a research institute for *ʿulamāʾ*. The qualifications required of the modern *mujtahid* differ from those required of the conventional *ʿālim*; what is needed at present is a kind of Western-inspired intellectual engaged in deriving law from the sources by using modern methods of research.[40]

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[36] Al-Turābī, *Qaḍāyā al-tajdīd*, 269–71.

[37] Al-Turābī, *Manhajiyyat al-fiqh*, 7. This distinction was made previously by Muḥammad Rashīd Riḍā; see Hallaq, *History*, 216.

[38] Al-Turābī, *Tajdīd al-fikr*, 97; cf. ibid., 75–6.

[39] Al-Turābī, *Qaḍāyā al-tajdīd*, 202. Cf. Hallaq, *History*, 227.

[40] Al-Turābī, *Qaḍāyā al-tajdīd*, 212, 214, 216, 222; idem, *Tajdīd al-fikr*, 93. Cf. Hallaq, *History*, 230.

Al-Turābī's legal methodology (*manhaj al-aḥkām* or *uṣūl al-fiqh*) is based on the following sources, in this order:[41]

Qurʾān and sunna

The heritage of legal methodology (*al-turāth al-uṣūlī*) consists first and foremost of the basic legal sources of substantive law (*aṣl al-uṣūl liʾl-aḥkām*): the *sharīʿa*, as embodied in Qurʾān and *sunna*, the "mother" of all legal sources, designated as *uṣūl waḍʿiyya*, the legal sources of *sharʿī* positive law[42] that are shared by the entire community. Al-Turābī maintains that social conditions in Sudan call for a radical change in worldview that will bring about a comprehensive "cultural revolution," yet without infringing on the legal sources and positive law derived from them.[43] The *mujtahid*, in seeking a solution to any given problem, should start with the textual sources and proceed with the rules of interpretation. His goal should be to expand the scope of the options available to him in the process of deriving law. Statutory laws (*qawānīn waḍʿiyya*) adopt the literal (*ẓāhir*) interpretation of the text while ignoring the intentions (*niyyāt*), incentives (*dawāfi*) and goals (*maqāṣid*) that underlie those laws. Sufism (*taṣawwuf*), by contrast, adopts the inner (*bāṭin*) meaning of the text. These two approaches, al-Turābī suggests, must be brought into balance with one another:

> The sound methodology (*manhaj*) is the doctrine of unity (*tawḥīd*) and a balance between the exoteric (*ẓāhir*) and the esoteric (*bāṭin*), between the letter of the legal text (*ḥarf al-naṣṣ al-ḥukmī*) and its spirit [inner essence] (*rūḥ*).[44]

The balance envisioned here is in fact one of the manifestations of al-Turābī's doctrine of *tawḥīd*;[45] his reference to the Sufi doctrine in a legal context suggests that Sufism has been a source of inspiration for his legal thinking.[46] Al-Turābī maintains, however, that the positive law

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[41] Al-Turābī, *Qaḍāyā al-tajdīd*, 272–4. Cf. Moussalli, "Hasan al-Turabi's Islamist Discourse," 54–5; Abū Jābir, *Ḥasan al-Turābī*, 66ff.; Sidahmed, *Politics and Islam in Contemporary Sudan*, 128.

[42] Not to be confused with the technical term *waḍʿiyya*, which signifies statutory law (*waḍʿ al-bashar*); see al-Turābī, *Qaḍāyā al-tajdīd*, 249–50; see below.

[43] Al-Ghannūshī and al-Turābī, *al-Ḥaraka al-islāmīya waʾl-taḥdīth*, 74.

[44] Al-Turābī, *Qaḍāyā al-tajdīd*, 201, 258–9; see also ibid., 272–4; idem, *al-Ḥaraka*, 22; Abdelmoula, "Sudan: Islamic Fundamentalism," 39. Cf. Schacht, *Introduction*, Glossary.

[45] For other manifestations of this doctrine within a legal context, see al-Turābī, *Manhajiyyat al-fiqh*, 10–22.

[46] Elsewhere al-Turābī notes that *sharʿī* legal methodology severed its connection with Sufi doctrine as well as with *kalām* or scholastic theology; al-Turābī, *Qaḍāyā al-tajdīd*, 274.

embedded in the textual sources (*nuṣūṣ*) dealing with daily life is limited in scope, and the principles of exegesis (*qawāʿid tafsīr*) are inadequate for providing solutions for all eventualities.[47]

Consensus

Al-Turābī maintains that since Qurʾānic verses of a legal nature are "quite rare," the substantive law should be formulated by means of consensus (*ijmāʿ*). In historical perspective, *taqlīd* and *jumūd* (stagnation) lie at the basis of zealous adherence to the law schools, and this in turn has hampered the individual's freedom and blocked his creative *élan* for the development of law.[48] The doctrine of *ijmāʿ* embodies the notion of sovereignty (*sulṭān*) of the Muslim community (*jamāʿa*) by means of its representatives, the *ʿulamāʾ*. *Ijmāʿ* is the culmination of a process of consultation (*shūrā*). In fact, al-Turābī regards *shūrā*, consultative assembly, as a mechanism for reconciling differences of opinion (*yajmaʿ aṭrāf al-khilāf*), resembling the function of *ijmāʿ*. Once agreement has been reached on a certain point, this becomes a binding (*lāzim*) legal rule. In actuality, *ijmāʿ* has become a synonym for *shūrā*. According to al-Turābī, *ijmāʿ* is essentially a form of democracy. Indeed, he treats "*shūrā*" and "democracy" as synonyms, although he admits that there are essential differences between the two, the most important being that in Islam democracy cannot be separated from religion.[49]

Al-Turābī's understanding of consultation as a democratic process and of consensus as an instrument for expressing the will of the people may have been inspired by Riḍā.[50] In any case, his definition of democracy is not compatible with liberal democracy, since it lacks such vital elements as freedom of religion (as in the case of apostasy). At best, we are dealing here with "illiberal democracy." In al-Turābī's own words: "I do not refer to Western democracy, but rather to democracy in the literal sense, namely

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47 Al-Turābī, *Qaḍāyā al-tajdīd*, 203–4.

48 Ibid., 272; idem, *Ḥiwārāt fī ʾl-islām*, 45–6; idem, *Ḥiwār*, 5; cf. al-Ghannūshī and al-Turābī, *al-Ḥaraka al-islāmīya waʾl-taḥdīth*, 61, 72; Abdelmoula, "Sudan: Islamic Fundamentalism," 43.

49 Al-Turābī, *Qaḍāyā al-tajdīd*, 193; idem, *al-Shūrā*, 11–15; idem, *Tajdīd al-fikr*, 71; idem, *Islamic State*, 243–4; Hallaq, *History*, 229–30; Weissbrod, *Turabi*, 34–6; Abū Jābir, *Ḥasan al-Turābī, Riḍā, al-Khilāfa*, 53.

50 See Riḍā, *al-Khilāfa*, 57–61 (*ahl al-ḥall waʾl-ʿaqd*), 80 (*majlis al-shūrā al-ʿāmma*); cf. Hourani, *Arabic Thought in the Liberal Age*, 6, 144 (Muḥammad ʿAbduh), 234 (Rashīd Riḍā), 300; Hallaq, *History*, 216 (Riḍā), 223 (Khallāf), 261; Layish, "The Contribution of the Modernists," 226.

the rule of the people."[51] The traditional mechanism of *ijmāʿ* rests on the consensus of the jurists within each of the Sunnī schools rather than on that of ordinary people.[52]

Analogical Reasoning

Because the scope of positive law in Qurʾān and *sunna* is limited, al-Turābī maintains, traditional analogy (*qiyās*), that is, the derivation of new rules from textual sources, cannot meet the requirements of a modern society that has been exposed to the "cultural assault" of the West. In classical doctrine, *qiyās* is based on the effective cause (*ʿilla*) or *ratio legis* that lies behind the original ruling in the textual sources.[53] Although this procedure may be appropriate for updating marriage law, morals and religious rites, for the broad domains of religion—apparently referring to public law—a more expansive type of *qiyās*, one that takes the general public interest into consideration without being restricted by or bound to Qurʾān and *sunna*, is required:

> Broadly speaking, traditional analogy does not meet our requirements since it operates under the oppressive impact of deceptive logical norms imposed on Muslims during the first cultural assault (*al-ghazw al-thaqāfī al-awwal*);[54] it left a profound impression on Muslims that can only be compared to contemporary modes of modern [Western] thinking. […] The restricted [classical] analogy [by the textual sources] may be appropriate, in terms of perfection, to the basic principles of interpretation (*uṣūl tafsīriyya*) for elucidating [i.e., updating] marriage law, morals (*ādāb*) and religious rites (*shaʿāʾir*). However, for the broad domain of religion [that is, the domain of public law, classical analogy] is hardly useful; a natural (*fiṭrī*) *qiyās* independent of the stipulations [set by traditional *qiyās*, i.e., dependence on the textual sources] is required.[55]

Secondary Mechanisms

Al-Turābī maintains that once the textual sources and the rules of interpretation have been exhausted, the *mujtahid* should use (1) *maṣlaha*, public interest, and (2) *istiṣḥāb*, a secondary principle of legal evidence

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[51] Al-Turābī, *Ḥiwārāt fī ʾl-islām*, 45.

[52] Cf. Zakaria, "The Rise of Illiberal Democracy," 22ff.; Weissbrod, *Turabi*, 23ff.; *EI²*, s.v. "Idjmāʿ" (M. Bernard); Schacht, *Introduction*, 60ff.; Coulson, *A History of Islamic Law*, 76–7.

[53] See Hallaq, *Sharīʿa*, 504, 506–7.

[54] The reference seems to be to Greek philosophy, especially logic, during the formative period of Islamic law; cf. Layish and Warburg, *Reinstatement*, 85.

[55] Al-Turābī, *Qaḍāyā al-tajdīd*, 204, 205, respectively.

recognized by the Shāfiʿī school according to which the validity of a legal norm stands so long as there is a presumption of continuity of the state of affairs that gave rise to its underlying rationale.[56] Regarding the former, al-Turābī refers to the *al-maṣāliḥ al-mursala* within the context of expansive *qiyās*:

> As to [the method of] expansive (*ijmālī*) analogy [...] or analogy based on public interest (*qiyās al-maṣāliḥ al-mursala*),[57] it ranks higher [than traditional *qiyās*] in terms of research into the object [i.e., the essence] of the law (*manāṭāt al-aḥkām*). Thus if the totality of religious law is related (*mansūba*) to [i.e., confronted with] the totality of reality (*al-wāqiʿ*), then the [former has to] give way to the [latter, which leads one] to conclude that [the renunciation took place due] to general public interest (*maṣāliḥ ʿāmma*).[58]

In his view, the combination of *istiṣḥāb* and *maṣāliḥ mursala* provides a comprehensive legal methodology for introducing reforms, presumably through statutory legislation, in the domain of public law.

Of course, the equation between *qiyās* and *al-maṣlaḥa al-mursala* effectively diminishes the importance of traditional analogical reasoning as a legal source for deriving law by way of *ijtihād*, on the one hand, and provides the *mujtahid* with a vital instrument to introduce reforms without being bound to Qurʾān and *sunna*, on the other.

Al-Turābī attempts to transform *istiṣḥāb* into an instrument for adapting the *sharīʿa*, especially in the domains of family law and religious practices, to the requirements of modern society. In traditional law the principle is applicable to specific cases. Al-Turābī broadens its scope—*istiṣḥāb wāsiʿ*—in an effort to transform it into a general principle.

> According to the doctrine of *istiṣḥāb*, the guiding principle is that all things and acts are [presumed to be] permitted, that legal obligation is not mandatory (*barāʾa min al-taklīf*), that everything a Muslim is capable of doing is [presumed to be guided by his] intention to act for the sake of God by way of acceptable worship (*ʿibāda*), that whatever one derives from the pleasures of this worldly life is [presumed] to be forgiven (*ʿafw*), left behind as a heritage (*matrūk*) [i.e., counted] in his favor or against him. [All these presumptions are valid] unless they contradict a textual source (*naṣṣ*), in which case

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[56] Ibid., 208–9, 262–3; on *istiṣḥāb*, see further Hallaq, *History*, 113–15; idem, *Sharīʿa*, 120–1; Coulson, *A History of Islamic Law*, 92–3.

[57] Al-Turābī, *Tajdīd al-fikr*, 83–4; cf. Hallaq, *History*, 228–9. On *maṣāliḥ mursala*, see Kerr, *Islamic Reform*, 70.

[58] Al-Turābī, *Qaḍāyā al-tajdīd*, 207.

> the forgiveness or allowance with respect to any specific act is rejected [i.e., is deemed null and void].[59]

Other mechanisms mentioned by al-Turābī in this context are a decree by the ruler (*amr al-sulṭān*), probably referring to the doctrine of *siyāsa sharʿiyya*; a discretionary opinion inconsistent with strict analogy (*istiḥsān*); and necessity (*ḍarūra*), which he deems indispensable as a "social instrument"—in the event of difference of opinion—for the adjustment of legal norms to changing circumstances.[60] The reference to the ruler's decree points to al-Turābī's intention to introduce reforms by means of statutory legislation. *Siyāsa sharʿiyya* is needed to legitimize this course of action in *sharʿī* terms. The doctrine of *ḍarūra* is virtually synonymous with *maṣlaḥa*.[61] Al-Turābī also invokes the doctrine of intention (*niyya*) as an instrument for interpreting Qurʾān and *sunna*, thus stressing his preference for "the spirit of religion" over the literal meaning of the text.[62]

The Humanities and the Experimental Social and Natural Sciences

Al-Turābī lays special emphasis on the adoption of Western legal methodologies. To this end he advocates initiating a comparative analysis of legal methodologies that will take into consideration Islamic values (*qiyam*) and norms (*sunan*).[63] In his view, such a synthesis has a precedent in Islamic history. Thus he maintains that traditional *qiyās* was strongly inspired by the "first cultural assault," i.e., Greek philosophy.[64]

According to al-Turābī, Sudan can benefit greatly from the legal experience of the West in dispensing justice. He regards international law as an essential part of the *sharīʿa*, and he strongly recommends the integration of Western social and comparative legal methods into the new Islamic legal methodology. Statutory legislation (*tashrīʿ*) requires, in his view, a thorough knowledge of the social and natural sciences.[65]

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[59] Al-Turābī, *Tajdīd al-fikr*, 84–6. The citation is from p. 85; cf. Hallaq, *History*, 228–9.

[60] Al-Turābī, *Qaḍāyā al-tajdīd*, 262–3; idem, *Naẓarāt*, 152. Cf. Hallaq, *History*, 230–1; Schacht, *Introduction*, Glossary, s.v. *siyāsa sharʿiyya*; *EI*[2], s.v. "Siyāsa, pt. 3" (Vogel).

[61] Cf. Hallaq, *History*, 218. On *maṣlaḥa* and *istiṣlāḥ* in modernist theories, see Hallaq, *History*, 214–17 (Riḍā), 221 (Khallāf), 225 (al-Fāsī), 233 (ʿAshmāwī), 261.

[62] Al-Turābī, *Manhajiyyat al-fiqh*, 6.

[63] Al-Turābī, *Qaḍāyā al-tajdīd*, 273. Cf. El-Affendi, *Turabi's Revolution*, 173.

[64] Al-Turābī, *Qaḍāyā al-tajdīd*, 202–4. Cf. Weissbrod, *Turabi*, 36; Schacht, *Introduction*, 19–22; Coulson, *A History of Islamic Law*, 27ff.

[65] Al-Turābī, *Qaḍāyā al-tajdīd* 253, 255, 257; idem, *Ḥiwārāt fī 'l-islām*, 53. Cf. Viorst, "Sudan's Islamic Experiment," 53.

> It is possible to benefit from the human experience (*tajārib bashariyya*) [of the West] and its [legal] practices (*aʿrāf*) in dispensing justice.[66] [...] I strongly believe that to some extent Muslims already followed that course in the past even though we do not share [the views] expressed by Orientalists. [...] Whatever the case may be, the world today is interlocked (*mawṣūl*); societal patterns (*anmāṭ*) will converge before long, and [Western] comparative law inevitably will become integrated within our legal methodology; we shall firmly establish its [i.e., Western comparative law's] adoption [...]. The pursuit of *sharʿī* law (*fiqh al-aḥkām*) and statutory legislation (*tashrīʿ*) requires also an acquaintance with the modern world [...]; hence it is required that a [Muslim] jurist (*faqīh*) obtain education in psychology and the social and natural sciences to an extent that will enable him to derive divine law (*tanzīl al-aḥkām*) [from Qurʾān and *sunna*] while being fully attentive [to the Western sciences].[67]

Al-Turābī does not, however, provide concrete suggestions as to how the social and natural sciences can shape the legal norms.[68]

Reforms based on the new legal methodology, al-Turābī maintains, should be carried out by means of statutory legislation with the cooperation of qualified *ʿulamāʾ*:

> [Changing circumstances] require [the exercise of] revolutionary *ijtihād* by means of jurists (*ijtihād fiqhī*). This task, however, is not incumbent on Muslim jurists alone; it should be entrusted simultaneously to the state; in order to obtain extensive *ijtihād* the state must be involved. To this end the state should make available a sizeable number of *mujtahid*s and *ʿulamāʾ* capable of teaching and inculcating the methods (*mawāzīn*) of the *sharīʿa*.[69]

The Sharīʿa State

According to al-Turābī, a "*Sharīʿa* state" is one in which the *sharīʿa* is applicable. In such a state, the legislature has no absolute authority with respect to formulating the state's laws, since the source of legal authority is vested exclusively in the *sharīʿa* which, in turn, represents the sovereignty of God and hence constitutes of the state's basic norm. This implies

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[66] It is interesting to note that al-Turābī uses legal terms pertaining to justice that have different connotations in a Western and an Islamic milieu. While discussing *istiṣḥāb*, he refers to *ʿadl*, *qisṭ* and *wijdān mukhliṣ* in a Qurʾānic context (see al-Turābī, *Tajdīd al-fikr*, 85). The Sudanese Judgments (Basic Rules) Act, 1983, absorbs the English-inspired terms "justice" (*ʿadl*), "equity" (*qisṭ*) and "good conscience" (*wijdān salīm*); see Layish and Warburg, *Reinstatement*, 133–7.

[67] Al-Turābī, *Qaḍāyā al-tajdīd*, 253 and 257, respectively.

[68] On the reinterpretation of Qurʾān and *ḥadīth* in light of the natural sciences in Muḥammad Shaḥrūr's legal methodology, see Hallaq, *History*, 245–6.

[69] Al-Turābī, *Naẓarāt*, 157; cf. Hallaq, *History*, 230, 253 (Shaḥrūr).

that the legislator is subject to the normative control of the *sharīʿa*, in the sense that to be valid, a legislative act must be compatible with the *sharīʿa*. For this reason the *ʿulamāʾ* should be called in as advisers in the process of legislation. The *ʿulamāʾ*, however, should be familiar not only with the *sharīʿa* but also with the social and natural sciences and philosophy.

> A legal norm (*ḥukm*) [in the state] is absolutely bound by the *sharīʿa*, as is manifest in the constitution.[70] There is, however, a difference [between the *sharīʿa* and the constitution], in that the former is a kind of detailed and elaborated constitution (*dustūr mufaṣṣal*). Since *shūrā* is one of the basic foundations (*arkān*) of the *sharīʿa*, anyone desiring to attain a key position [in the country] cannot do it otherwise than through the channel of the *sharīʿa*. The basic difference between *shūrā* and democracy [...] is that the *sharīʿa*'s comprehensiveness and completeness does not leave the legislator much scope to complement [the *sharīʿa* by means of statutory legislation]. Since this is the case, the power of the legislative authority in the *sharīʿa* state—be it an assembly (*majlis*), a parliament or the like—is not absolute in its legislative function because the decisive influence with respect to formulating a legal norm rests with the *sharīʿa*, not with human beings. Nevertheless, besides clear, unambiguous (*ṣarāḥa*) legal rules that permit of no interpretation, there are other [ambiguous] rules that [may be developed] by means of *ijtihād*.[71]

Al-Turābī identifies *ahl al-ḥaqq* [*al-ḥall*] *wa'l-ʿaqd*, jurists authorized to issue religio-legal permissions and prohibitions,[72] with *ahl al-shūrā*, representatives of the *umma*. In his view, the latter's functions should be fulfilled at the present time by a parliament or consultative council. However, a distinction should be made between the powers of consultative bodies and those that have been delegated to rulers by virtue of their constitutional and administrative rank.[73] He seems here to be referring to *siyāsa sharʿiyya*, the ruler's power to resort to administrative measures within the boundaries of the *sharīʿa*. He does not rule out the possibility that legal issues decided by a consensus of Muslims will be submitted for endorsement by "legislative consensus" (*ijmāʿ tashrīʿī*). In other words, this amounts to an attempt to integrate *ijmāʿ* into statutory legislation.[74] Such an institutionalized *ijmāʿ* obviously would not be the same as the classical *ijmāʿ* of independent jurists. Al-Turābī argues that it was the

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[70] The reference is to the *sharīʿa* as a source of law in the constitution.
[71] Al-Turābī, *Ḥiwārāt fī 'l-islām*, 45; cf. idem, *Islamic State*, 242, 245.
[72] Cf. Riḍā, *al-Khilāfa*, 70, 79; Layish, "The Contribution of the Modernists," 265ff.
[73] Al-Turābī, *Qaḍāyā al-tajdīd*, 225; Turabi, *Islamic State*, 243, 248.
[74] Al-Turābī, *Tajdīd al-fikr*, 87.

absence of a governmental agency charged with unifying the legal system that caused the closing of the door of *ijtihād*.[75] He adds that statutory legislation based on sound legal opinions and sanctioned by the ruler, which implies statutory *ijtihād* to the exclusion of individual *ijtihād*, is an appropriate solution for those who fear—referring here to orthodox *ʿulamāʾ*—that uncontrolled *ijtihād* will bring about methodological chaos and severe differences of opinion within the schools, as well as innovations incompatible with the doctrine of the Forefathers (*al-salaf*):

> One might claim that this state of affairs [...] is a source of severe danger. If we promote freedom of *ijtihād* within the relatively broad scope of those who are qualified and if we [moreover] add to the established principles of interpretation (*uṣūl tafsīriyya*) broad principles relating to *ijtihād* such as *maṣāliḥ* and *istiṣḥāb*, this will cause further differences of opinion among the schools. For this reason, we have already provided an unequivocal answer to this issue by clarifying that the role of the leader of the community (*sulṭān al-mujtamaʿ*) is to rely on sound personal opinions and to sanction them as statutorily binding (*qānūn mulzim*) to the exclusion of the rest of individual *ijtihād*. True, alertness with respect to the consequences of [unrestrained] freedom of *ijtihād* has been fairly well established among us. This is evident from the fact that even in circles favorable to opening the door of *ijtihād*, one can find people whose anxiety is extreme when they come across a new personal opinion not traceable to one of the Forefathers.[76]

Al-Turābī opposes the idea of establishing an institutionalized council for issuing *fatwā*s (*majlis iftāʾ*) and prefers to see the *ʿulamāʾ* integrated into a parliament and participating in the process of legislation.[77] He notes that, in any case, *qāḍī*s and jurists prefer to apply statutory provisions rather than resort to personal opinion.[78]

The main function of *shūrā*, according to al-Turābī, is to incorporate—through the work of jurists—legal doctrines culled from various schools and jurists into statutory codification (*taqnīn*). In other words, the *ʿulamāʾ* should participate in the process of state codification and legislation.[79]

> Never mind the abundance of sources of law (*uṣūl fiqhiyya*) applied [in legislation], or that the legal opinions pertaining to substantive law (*fatāwin farʿiyya*) deriving [from these sources] are profoundly different from one

[75] Turābī, *Islamic State*, 246.
[76] Al-Turābī, *Qaḍāyā al-tajdīd*, 216–17; cf. idem, *Manhajiyyat al-fiqh*, 6.
[77] Lowrie, *Islam, Democracy, the State and the West*, 39.
[78] Al-Turābī, *Qaḍāyā al-tajdīd*, 267.
[79] Ibid., 193, 211, 215; idem, *Tajdīd al-fikr*, 90; idem, *Islamic State*, 246; Weissbrod, *Turabi*, 47; cf. Hallaq, *History*, 222 (Khallāf), 253 (Shaḥrūr).

> another; the abundance of options available to the *shūrā* of the Muslims and the mass of the [legal] material at their [i.e., the *ʿulamāʾ*'s] disposal in the process of preparing their legal rulings [i.e., statutory provisions] indicate that a clear public interest (*maṣlaḥa*) is involved.[80]

Al-Turābī maintains that literary texts (*muṣannafāt*), such as private compilations of legal rules for practical purposes, *fatwā*s and exegetical treatises, articulated in clear language, are equivalent to a modern corpus of statutes (*mudawwanāt qānūniyya*) [sic!]. His recommendation that the ruler of the country should monitor the *sharʿī* system[81] seems to imply imposing a codified *sharīʿa* on the state and society by virtue of the doctrine of *siyāsa sharʿiyya*. Al-Turābī further recommends the eclectic expedient (*takhayyur*), widely practiced in modern reformist legislation, as the main method for codifying the *sharīʿa* by means of statutory legislation. He argues that although the Mālikī school is dominant among the *ʿulamāʾ*, the tolerance of the Sudanese people and their open-mindedness toward other schools makes them ready to treat them equally and without zealous adherence to a particular law school:

> The people of Sudan, due to their school tolerance (*tasāmuḥ madhhabī*), accept Shāfiʿī and Ḥanafī legal authorities [in matters pertaining] to *jihād*, Sufi orders and the appointment of *qāḍī*s and *muftī*s; they have at the present time abandoned zealous adherence to a law school (*ʿaṣabiyya madhhabiyya*); Sunnī *fiqh* has spread among them all [without distinction between the schools].[82]

Differences of opinion between the schools should be regarded as a blessing, since the variety of legal options and the abundance of legal material available to the *shūrā* and the jurists can be used for the public benefit.[83] Al-Turābī advocates launching a comparative study of all schools with a view to reaching an authentic perspective on the legal methodology of the *sharīʿa*.[84]

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[80] Al-Turābī, *Qaḍāyā al-tajdīd*, 211. This statement suggests that the variety of legal views is a blessing; see below.

[81] Al-Turābī, *Qaḍāyā al-tajdīd*, 215–16. Cf. Fadel, "The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*."

[82] Al-Turābī, *al-Ḥaraka*, 152. Cf. Peters, "*Idjtihād* and *Taqlīd*," 141, 143.

[83] Al-Turābī, *Qaḍāyā al-tajdīd*, 211.

[84] Al-Turābī, *al-Ḥaraka*, 215; Lowrie, *Islam, Democracy, the State and the West*, 83.

Conclusion

In order to bring about an Islamic renaissance, al-Turābī proposes a new legal methodology that combines classical Islamic legal theory and Western legal principles. This methodology should be applied by means of legislative *ijtihād* (*tashrīʿ ijtihādī*), in which the doctrine of public interest, unaddressed in the textual sources of Qurʾān and *sunna* (*maṣlaḥa murṣala*), has been elevated in practice, though not formally, to an independent source of law. Specific domains of the *sharīʿa*, especially public law, are to be accommodated to changing conditions by means of statutory codification, the main instrument being the eclectic expedient (*takhayyur*), and imposed on society by means of *siyāsa sharʿiyya*. In order to legitimize this reform al-Turābī expects the *ʿulamāʾ* to serve as advisers in the process of *ijtihād* and even to join the parliament and form a kind of statutory consensus (*ijmāʿ*), which implies that they may veto any legislative initiative on the grounds of incompatibility with the *sharīʿa*.

Al-Turābī's legal methodology is not a crystallized and comprehensive theory of law; it is articulated in vague terms, leaving much room for speculation; no references to the textual sources of Qurʾān and *sunna*, or to classical and contemporary modernist legal literature are provided to support his thesis or to identify his sources of inspiration.[85]

Broadly speaking, al-Turābī has succeeded in putting his legal methodology into practice. The reinstatement of Islamic law in Sudan under Numayrī is based on al-Turābī's legal methodology. Various domains of the *sharīʿa* have undergone statutory codification, and the Judgments (Basic Rules) Act, 1983, probably drafted by al-Turābī, guides the courts, in the event of a lacuna in the Islamist statutes, on how to exercise *ijtihād* on the basis of Islamic and Western sources and legal principles, in a specified order.[86]

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[85] Cf. Hallaq, *History*, 229, 231; an-Naʿim, *Toward an Islamic Reformation*, 39–40.

[86] Thus Section 3(b)(vi) of the Judgments (Basic Rules) Act, 1983 provides that in the event of a lacuna in the law the judge shall take custom into account in transactions in a manner not contravening *sharʿī* rules or the principles of natural justice (*ʿadāla fiṭriyya*). Subsection (vii) provides that the judge shall consider the notion of justice as prescribed by human laws and the rules of equity (*qisṭ*) enshrined in good conscience (*wijdān salīm*). Subsection (v) provides that the judge, in the absence of a provision in Qurʾān and *sunna* and after having exhausted *ijtihād*, may resort to judicial precedents (*sawābiq al-ʿamal al-qaḍāʾī*) in Sudan, as long as they are not in contradiction of the *sharīʿa* or *sharʿī* legal opinions and principles. For further details, see Layish and Warburg, *Reinstatement*, 136, 138.

Hallaq distinguishes between two basic types of legal methodology: religious utilitarianism and religious liberalism. Methodologies of the first type use the doctrine of *maṣlaḥa*, public interest, as the main instrument for reform, while those of the second adopt a rational approach that takes into account changing circumstances in time and place.[87] According to Hallaq, al-Turābī's legal methodology belongs to the first type, due to his theological debt to ʿAbduh's doctrine and to his legal theory, which combines basic Islamic values with a modern version of substantive law couched in terms of public interest.[88]

One wonders, however, whether al-Turābī's legal methodology merits evaluation within a *sharʿī* context. First, al-Turābī is not an *ʿālim*, and he holds that anyone with an academic degree in the natural or social sciences who possesses an adequate knowledge of the Islamic heritage and the *sharīʿa*, and has a good command of the Arabic language, is qualified for *ijtihād*. In fact, al-Turābī presents a liberal interpretation of Islam[89] from the viewpoint of a Western-oriented legal expert and social scientist capable of reflecting on Islam simultaneously from within and from outside. The inclusion of Western sources of law, such as natural justice (to be distinguished from God's justice) and legal precedent (in the state judiciary), in al-Turābī's legal methodology, as embodied in the aforementioned 1983 Act, is incompatible with orthodox *sharīʿa*. Al-Turābī mobilizes traditional Islamic mechanisms in an effort to obtain *sharʿī* legitimacy for his reformist legal theory. Considering his legal education, there can be no doubt that al-Turābī is fully aware that statutory codification of the *sharīʿa* entails its transformation from a jurists' law into statutory law, with all the consequences that follow.[90] However, he does not make this distinction between *sharīʿa* and statutory law, probably for tactical reasons. He strongly believes that codified *sharīʿa*, based on a synthesis of Islamic and Western principles of law and sanctioned by newly recruited *ʿulamāʾ*, is the only remaining option for triggering a renaissance in Muslim society.

In some respects al-Turābī's legal methodology resembles the legal theory of Zia Gökalp (d. 1924), an outstanding Turkish thinker in modern times. Gökalp regards Islam as a historical phenomenon subject to changing social circumstances. He uses rational and sociological tools for the

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87 For further details, see Hallaq, *History*, ch. 6.
88 Ibid., 214, 228.
89 Woodward, "Ḥasan al-Turābī," 241; cf. Weissbrod, *Turabi*, 129–30.
90 Cf. Layish, "The Transformation of the *Sharīʿa* from Jurists' Law to Statutory Law."

purpose of introducing reforms in Islam by means of secular legislation.[91] In his theory of the *şeriat*, Gökalp distinguishes between two sources of law: (a) *nas* (*naṣṣ*)—the divine revelation in the Qur'ān—and *sunna*, neither of which is subject to change under any circumstances; and (b) *örf*, the custom of the Muslim community, which is subject to change. He advocates the promotion of a science of "the social roots of the theory of sources of law" (*içtimaî usul-ü fikih*) and the introduction of extensive reforms in family law.[92] Al-Turābī makes a similar distinction between religious practices (*ʿibādāt*) and personal status (probably because of their intensive treatment in the Qur'ān) on the one hand, and public law on the other. While the former can be accommodated to changing conditions only by means of interpretation, that is, without infringing on the substantive law, the latter is amenable to reform by mean of "legislative *ijtihād*." Al-Turābī calls for the foundation of a research institute to train *ʿulamāʾ* to carry out reforms. Both al-Turābī and Gökalp have Islamic and Western backgrounds, and both were influenced by Sufism during their formative period. One can't help wondering whether the Sufi experience affected their legal methodologies by promoting a humanistic approach to law.[93]

It is doubtful that al-Turābī's legal methodology has had any impact on the theory of Islamic law, for the simple reason that he is acting outside the framework of the *sharīʿa*. On the other hand, there is no question that al-Turābī is the living spirit behind the legal experiment in Sudan under Numayrī which has had a major effect on the *status* of Islamic law in that country.[94]

The introduction of legal methodologies by figures other than qualified *ʿulamāʾ* indicates that the *ʿulamāʾ* have lost control of *sharʿī* discourse and that the issue of modernizing Islamic law and adapting it to changing circumstances has become the concern of various sectors of society. Because such a discourse lacks *sharʿī* legitimacy, it cannot be regarded as a development within Islamic law.

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[91] Heyd, *Foundations of Turkish Nationalism*, ix, 82–3; Berkes, *The Development of Secularism in Turkey*, 383.

[92] Heyd, *Foundations of Turkish Nationalism*, 85–8, 94ff.; Berkes, *The Development of Secularism in Turkey*, 383. However, Gökalp went furthest by suggesting the separation of religion and state with a view to transforming Islam into a purely ethical religion; see Heyd, *Foundations of Turkish Nationalism*, 82, 85, 87, 101; Berkes, *The Development of Secularism in Turkey*, 383.

[93] Cf. Heyd, *Foundations of Turkish Nationalism*, 23, 82.

[94] For an assessment of the legal experiment, see Layish and Warburg, *Reinstatement*, ch. 5.

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