

STUDIES  
IN ISLAMIC LAW  
AND SOCIETY

EDITED BY

RUUD PETERS AND BERNARD WEISS

VOLUME 1



ISLAMIC LAW  
AND THE STATE

*The Constitutional Jurisprudence  
of Shihāb al-Dīn al-Qarāfi*

BY

SHERMAN A. JACKSON



E.J. BRILL  
LEIDEN · NEW YORK · KÖLN  
1996

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**Library of Congress Cataloging-in-Publication Data**

Jackson, Sherman A.

Islamic law and the state : the constitutional jurisprudence of  
Shihāb al-Dīn al-Qarāfi / by Sherman A. Jackson.  
p. cm. — (Studies in Islamic law and society, ISSN 1384-1130  
; v. 1)

Includes bibliographical references and index.

ISBN 9004104585 (cloth : alk. paper)

1. Constitutional law (Islamic law)—History. 2. Qarāfi, Aḥmad  
ibn Idrīs, d. 1285. 3. Islam and state—Egypt—History. 4. Islamic  
law—Egypt—History. I. Title. II. Series.  
LAW<ISLAM 7 Jack 1996

95-46227  
CIP

*To my Mother  
and to the memory of  
my Father*

**Die Deutsche Bibliothek - CIP-Einheitsaufnahme**

Jackson, Sherman A.:

Islamic law and the state : the constitutional jurisprudence of  
Shihāb al-Dīn al-Qarāfi / by Sherman A. Jackson. —Leiden ;  
New York ; Köln : Brill, 1996  
(Studies in Islamic law and society ; Vol. 1)  
ISBN 90-04-10458-5  
NE: GT

ISSN 1384-1130  
ISBN 90 04 10458 5

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## ACKNOWLEDGMENTS

I would like to thank, first and foremost, my former teacher and advisor, Professor George Makdisi, who first suggested back in 1987 that I work on al-Qarāfi as a Ph.D. dissertation at the University of Pennsylvania. Professor Makdisi's support, encouragement and openmindedness continue to be a source of inspiration for me. I have learned much from him both as a teacher and a scholar. I would also like to thank Professors Farhat Ziadeh and Bernard Weiss, both of whom were kind enough to read my entire manuscript and offer some valuable comments and queries. Dr. Adel Allouche and Dr. Christopher Melchert made some valuable comments and criticisms on earlier drafts of the historical sections of my work, which forced me to sharpen some of my ideas and conclusions on Ayyūbid and Mamlūk history. I would like to thank Professor Fedwa Malti-Douglas for her continued support as department chair. Finally, I would like to acknowledge my debt and sincere gratitude to my family for all of their support and encouragement and for simply putting up with me throughout this entire ordeal.

## INTRODUCTION

No work on Islamic political theory has adequately dealt with the problem . . . of the relationship of political theory to the historical realities. . . . In the history of political theory in Islam there is thus a wide and virtually uncultivated field to which it is to be hoped some young scholars will ere long devote themselves. It is a difficult field, for the theorists must be looked at in their historical context, and the student must also be aware of the points on which debate concentrated at any given time. In the course of such a study more will be learnt about Islam in general than about its effective political concepts.

—W. Montgomery Watt<sup>1</sup>

Of all the themes and isms confronting the modern Muslim world, few, if any, have informed its discourse or its history as much as the idea of the nation-state.<sup>2</sup> Even over the efforts of such early pan-Islamists as Jamāl al-Dīn al-Afghānī, Rashīd Riḍā or even less known figures like Muḥammad Ḥusayn Khidr,<sup>3</sup> who essentially questioned the ideological propriety of a construct whose realization would inevitably divide Muslims along strict geographical lines, the idea of the nation-state has emerged as a veritable *Grundnorm* in modern Muslim political and religious discourse. No longer is the question seriously raised whether Islam can legitimately countenance such concepts as territorial boundaries, state sovereignty or even citizenship. Islamists are now generally content with thinking about and pursuing the means, mechanisms and substantive modifications by means of which the nation-state can be made Islamic. This trend was

<sup>1</sup> *Islamic Political Thought* (Edinburgh: Edinburgh University Press, 1977), 104.

<sup>2</sup> See, e.g., the discussion of C. Mallat, *The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and Shi'i International* (Cambridge: Cambridge University Press, 1993), 23ff.

<sup>3</sup> Riḍā was the author of *al-Khilāfah aw al-imāmah al-uẓmā*, which appeared sometime between 1922 and 1923. Khidr, meanwhile, authored *Naqḍ al-Islām wa uṣūl al-ḥukm*, a rather acerbic, if at times articulate, response to 'Alī 'Abd al-Rāziq's famous *al-Islām wa uṣūl al-ḥukm*, which appeared in 1926 and denied the legal (read religious) necessity of the caliphate.

of course consummated by the success of *āyat Allāh* Khumaynī's Islamic revolution in Iran. For, not only did Khumaynī and his revolutionaries prove that Islamization of the nation-state could be achieved, their success, precarious though it may have been, terminated, once and for all (or for at least the foreseeable future) the debate over whether or not such Islamization should be attempted. As a result, many Muslims have come to see in the establishment of the modern "Islamic state" what F. Fukuyama has termed in another context the End of History.<sup>4</sup>

At bottom, Islamization of the nation-state comes down to rendering Islamic law the law of the state. In short, the Islamic state is a nation-state ruled by Islamic law.<sup>5</sup> This proposition, however, simple and straightforward though it may be, has not proved so easily translatable into reality, even in cases where Islamists have been successful at seizing power, as obtained, for example, in Iran.<sup>6</sup> I am speaking here not of the practical difficulties involved in attempting to habituate a population to a new legal order on the heels of a revolution (which may involve, *inter alia*, retribution for past misdeeds, redistribution of allegedly ill-gotten wealth or sniffing out pockets of clandestine loyalists to the *ancien régime*). Nor am I speaking of the difficulties involved in trying to change or modify the substance of Islamic law in order to render it more suitable to the realities of a radically changed world. I am speaking, rather, of a particular ideological difficulty that results from a fundamental conflict between the theory underlying the nation-state and that of the Islamic legal tradition. In a nation-state, the state is itself the only true repository of legal authority, the monopolization of which, by definition, it ever so zealously guards. Every legislative, interpretive and executive function is carried out by

<sup>4</sup> See, e.g., his *The End of History and the Last Man* (New York and Toronto: The Free Press and Maxwell Macmillan Canada, 1992). Fukuyama's thesis was essentially that the end of the twentieth century has brought the decisive triumph of capitalism and liberal democracy as economic and political ideals. This constitutes the "end of history," in that it marks the end of humanity's ideological evolution in its search for the optimal economic and political order. Whereas previous systems and ideologies contained fundamental flaws which rendered them temporary *modi vivendi*, Western liberal democracy has emerged as the final form of human government, mankind's long-awaited *terminus ad quem*.

<sup>5</sup> See, e.g., E.I.J. Rosenthal, *Islam and the Modern National State* (Cambridge: Cambridge University Press, 1965), 89; Mallat, *Renewal*, 25. We shall ignore for the moment such contradictions as discriminating among Muslims according to whether or not they are citizens of a particular 'Islamic' polity.

<sup>6</sup> See Mallat, *Renewal*, 72-107.

individuals who receive some formal authorization or recognition from the state. This applies a bit less of course to Civil Law countries where private legal scholars or jurists have a significantly greater impact on the substance of the law than they do in the Common Law tradition. But even here it has been observed that "Unless some jurists are officially 'licensed' to give particularly authoritative opinions, as seems to have happened in the early Roman Empire, no opinion of an individual jurist *qua* jurist can be binding."<sup>7</sup> As such, the authority to determine what is and what is not legally binding remains the exclusive preserve of the state. Within its territorial boundaries, there can exist no other authority to which citizens can turn for legal interpretations that endow them with actionable rights or relieve them of otherwise binding legal obligations. In short, the ability to restrict legal authority in this fashion is part and parcel of the very meaning of state sovereignty.

By contrast, legal authority, or the ability to declare what is and what is not law, is not, in the tradition of classical Islamic law, the exclusive preserve of the state. It is acquired, rather, in the first instance, informally by way of reputation (or formally, according to Shi'ite tradition, by designation) and then via grants of authorization from individual teacher to student. This process of acquiring and passing on legal authority takes place totally outside the apparatus of the state. In the words of Professor George Makdisi: "Ni le calife, ne le sultan, ni leurs viziers, ni personne d'autre ne pouvait conferer cette . . . [autorité], ou obliger le professeur de droit à la conferer".<sup>8</sup> As such, even where the state conferred upon certain individuals the title and authority of judge, for example, this could not obliterate (nor in theory diminish) the authority of those jurists who remained outside of government. The idea, thus, of state sovereignty entailing the exclusive right to determine what is and what is not law, or even what is and what is not an acceptable legal interpretation, is at best, in the context of classical Islam, a very violent one.

The case of the Islamic Republic of Iran is particularly instructive in highlighting the hidden depth and tenaciousness of this conflict. The modern Shi'ite tradition consists essentially of one school of law,

<sup>7</sup> A. Watson, *The Making of the Civil Law* (Cambridge, Mass: Harvard University Press, 1981), 173.

<sup>8</sup> "La Corporation à l'époque classique de l'Islam," *The Islamic World, From Classical to Modern Times; Essays in Honor of Bernard Lewis* ed. E. Bosworth et al. (Princeton: The Darwin Press, 1989), 206.

the Ja'fari school. This renders Iran far more legally homogeneous than its Sunni counterparts, especially in the aftermath of the 18th century triumph of *Uṣūlism* over *Akhbārism*.<sup>9</sup> At the same time, Shī'ism has a much more formally constituted hierarchy (*hujjat al-islām*, *āyat Allāh*, etc.) which would seem to add to its ability to manage intramural conflict. Yet, as Chibli Mallat points out in his recent study of the constitutional history of post-revolution Iran, the fact that the *marja'* (leading scholar among those holding the rank of *āyat Allāh*) is now understood to be not simply a leading authority within the Shī'ite community but *the* leader of the Shī'ite state virtually obliterates the authority of other jurists who hold the same rank and title of *āyat Allāh* by binding the Iranian laity to the views of the leader of the Shī'ite state.<sup>10</sup> There is, in other words, a perduring conflict between the authority derived from traditional repositories within the Shī'ite tradition and authority based on the idea of the sovereignty of the (Islamic) state.<sup>11</sup>

In the Sunni world the situation is even more complicated. For Sunnism retains, albeit in emaciated form, the main features of a classical edifice that included not one but four schools of law with no formal hierarchy or superstructure (i.e., Imāmate or *marja'īyah*) comparable to that of Shī'ism. Classical Sunnism is based, in fact, on the idea that in the absence of a unanimous consensus (*ijmā'*) among the community of authorized (but still private) jurisconsults, there is no authority capable of eliminating or resolving differences of opinion concerning the correct interpretation of the law. As such, where the jurists' interpretive efforts result in disagreement, this has simply to be left standing, presenting the community at large with a multiplicity of authoritative legal options. This explains why in recent decades the Sunni world has witnessed an extremely telling and interesting phenomenon. In those countries where a return to the *sharī'ah* is being actively pursued, there is a marked tendency toward the codification of Islamic law.<sup>12</sup> The ostensible aim behind this trend

<sup>9</sup> Mallat, *Renewal*, 28–35. For a more detailed treatment of the *Uṣūlī-Akhbārī* split, see D. Stewart, "Twelver Shī'i Jurisprudence and its Struggle with Sunnī Consensus," Ph.D. diss., The University of Pennsylvania, 1991, 69–95.

<sup>10</sup> Mallat, *Renewal*, 54.

<sup>11</sup> See, again, Mallat, *Renewal*, 75–78.

<sup>12</sup> See, e.g., W. Ballantyne, "A Reassertion of the Shari'ah: The Jurisprudence of the Gulf States," *Islamic Law and Jurisprudence: Studies in Honor of Farhat J. Ziadeh*, ed. N. Heer (London and Seattle: University of Washington Press, 1990), 149, 159 and pas-

is of course to overcome the unwieldiness and ambiguity of classical Islamic law by reducing the multitude of authoritative legal interpretations to a single standardized code. While, on its face, this may appear to be a rather safe and practical solution to a very real and unignorable problem, as the late Professor Joseph Schacht so keenly pointed out, "Islamic law, being a doctrine and a method rather than a code . . . is by its nature incompatible with being codified, and every codification must subtly distort it."<sup>13</sup> On such an observation, it would appear, as one scholar has suggested, that those Muslims who advocate codification are either willing to abandon certain characteristics of classical Islamic law or are simply unaware of the inherent contradiction between codification and the traditional *sharī'ah*.<sup>14</sup> At any rate, the problem is clearly manifested. For at stake in any decision to codify is, again, the issue of sovereignty and the broader question of the relationship between Islamic law, the *fuqahā'* and the state. For any attempt to codify must necessarily seek to replace the authority of the jurists (or at least a sizeable segment of them) with the state's prerogative to determine and standardize the law. The state, in other words, and we are speaking here of the modern Islamic state, displaces, for all intents and purposes, the *fuqahā'* as the main, indeed, the exclusive repository of legal authority.

Beyond the immediate goal of simplifying or standardizing Islamic law, there are a number of other forces that contribute to the trend toward codification. To begin with, modern states aspiring to become 'Islamic' remain—paradoxically if understandably—unwilling to relinquish the power they gained over law as a result of the colonial experience.<sup>15</sup> At the same time, the idea that government enactments are what essentially make "law" has become so entrenched in modern culture—including modern Middle Eastern Muslim culture—that the arguments of those who oppose codification, either as a distortion of the traditional *sharī'ah* or as being non-essential to the process of Islamization, are invariably deemed obscurantist and fall upon deaf ears.<sup>16</sup> To this may be added the fact that so many legal practitioners

sim; A.E. Mayer, "The Shari'ah: A Methodology or a Body of Substantive Rules," *ibid.*, 177–98.

<sup>13</sup> "Problems of Modern Islamic Legislation," *Studia Islamica* 12 (1960): 108, cited in Mayer, "Shari'ah," 177.

<sup>14</sup> Mayer, "Shari'ah," 178.

<sup>15</sup> Mayer, "Shari'ah," 182–83.

<sup>16</sup> Mayer, "Shari'ah," 192.



in the Muslim world have been trained in modern Western systems of law and legal thinking that there has emerged an almost natural inclination toward codification.

Codification is of course a modern phenomenon for the Muslim world. Not since the failed attempt by the 'Abbāsid secretary of state, Ibn al-Muqaffa' (d. 142/759) has Islam witnessed any serious attempts in that direction. Even the Ottoman 'civil code', the so-called *Majallah* (*Mejelle-i ahkam-i 'adliyye*), which might appear at first blush to contradict this claim, must be considered a modern product, not being promulgated until 1877 and this under heavy European influence.<sup>17</sup> Yet, beneath the surface of the medieval "jurists' law," especially following the so-called settling down of the *madhhabs* or schools of law, there lurked the possibility of the emergence of an order whose operation would produce effects similar if not identical to those of codification. For, where the state, or central power, chose to erect its government on the doctrines and personnel of a particular school of law, the net result would be the inevitable displacement (or at least marginalization) of views other than those of the school in power. Under such an arrangement, the power advantage enjoyed by the incumbent *madhhab* would at the very least confer a palpably added authenticity upon its views. At most, this advantage would confer upon these doctrines ultimate and, indeed, exclusive authority.

This manner of speaking will prove reminiscent to many of the symbiosis that developed between the Ottoman state and the Hanafi school of law, a nexus which by the 10th/16th century was fully operative. For the most part, however, the Ottoman 'achievement' has been viewed as a fundamental break with the "medieval" Muslim past. This is clearly reflected in the fact that the Ottomans are commonly perceived as the *terminus ad quem* of "classical Islam," which perception has resulted in a rather vague though extremely operative delineation between classical and post-classical Islam (which continues to inform the manner in which Islamic religious and intellectual history is both studied and taught). Similarly reflective of this perception of the Ottomans, from a slightly different vantage-point, is the fact that, outside Turkey, they continue to play virtually no role whatever in inspiring Islamic movements of any persuasion, modernist, reformist, fundamentalist or other. What this suggests is that in the minds of most Muslims the Ottomans are simply not sufficiently

<sup>17</sup> J. Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 92.

representative of the classical tradition, the real fountainhead of inspiration from which modern Islam draws its force. To be sure, the perduring antagonism between pre-Ottoman 'states' and the 'ulamā' is as readily acknowledged in Western scholarship as it is at al-Azhar or among educated classes from Fez to Kuala Lumpur. But generally speaking, for the state to identify with a particular school to the point of producing a legal order that marginalizes the views of the remaining *madhhabs* is perceived as a post-classical phenomenon. As such, both the extent to which pre-Ottoman jurists recognized such a liability, as well as the precise mechanisms they developed to mitigate its effect, has remained largely outside the purview of modern scholarship. One may, of course, hold up as an exception to this claim such conclusions as that of Professor W. Montgomery Watt to the effect that the classical jurists' adoption of *taqlid* was largely an attempt to guard the religious law from the encroachments of the central power.<sup>18</sup> But this is very different, as the following pages will show, from the problem of having to confront not simply the state or ruling class but the claims and policies of those from the religious class, i.e., the 'ulamā', who come to constitute the former's government or to exercise considerable influence thereupon.<sup>19</sup> It is this latter problem, as it relates to classical, pre-Ottoman Sunni Islam, that constitutes the main focus of the present study.

The present work is a study of the constitutional jurisprudence of a great but heretofore unheralded jurist of Ayyūbid-Mamlūk Egypt, Shihāb al-Dīn al-Qarāfī. It is based primarily on a monograph, *Kitāb al-iḥkām fī tamyiz al-fatāwā 'an al-aḥkām wa taṣarrufāt al-qādī wa al-imām* (The Book of Perfecting the Distinction between Legal Responsa, Judicial Decisions and the Discretionary Actions of Judges and Caliphs). This work, written sometime around the year 660/1262, shortly after the fall of Baghdād and the ascension of Baybars I to the sultanate in Egypt, was primarily a scholarly protest against certain abuses of power and its confluence with authority in the early Mamlūk state. Chief among these were the exclusivist policies of the lone chief justice of the capital at Cairo, Tāj al-Dīn b. bint al-A'azz, who refused to implement rulings handed down by judges from other schools

<sup>18</sup> See Watt, *Islamic Political Thought*, 73-74.

<sup>19</sup> On what I hold to be the distinction between the state and government, see below 69.

whenever these contradicted his Shāfi'i view.<sup>20</sup> Al-Qarāfi, as a member of the Mālikī school, a political minority in Cairo at the time, responds to this situation by propounding a theory designed to preserve the integrity of his and, by extension, all of the *madhhabs*, regardless of any power differential that might separate one school from the next. To this end, he attributes to the *madhhabs* what I refer to as "corporate" status, by virtue of which the views of all the schools are protected as constituents of the larger edifice of orthodox Sunni law. On this construction, the *madhhab* not only emerges as the sole repository of legal authority, it is sustained as a private association of Muslims around whose legal doctrines towers an inviolable wall.

But the problem involving chief judge Ibn bint al-A'azz reflected only one aspect of the much larger question of the relationship between Islamic law, the legal community, and the Muslim state, particularly in those instances, such as obtained in 7th/13th century Egypt, where the state filled its government with personnel from one *madhhab* to the near exclusion of the rest. For such an arrangement placed the doctrines of the remaining schools at the risk of being inducted into the museum of great legal ideas with little to no practical application on the ground. Against this threat, al-Qarāfi turns again to his corporate *madhhab*, which not only confers a measure of protection upon the views of its adherents but also grants the latter the right to act upon their doctrines and to claim exemption from certain public policies that violate the view of their school. In this capacity the *madhhab* becomes in effect al-Qarāfi's constitutional unit and the vehicle by means of which he seeks to establish and defend a modicum of individual rights, even as he seeks to impose certain limits on the nature and scope of state and governmental authority.

Yet, if the *madhhabs* are to be recognized as corporate entities and the sole repository of legal authority, they must also be seen as conduits through which the state, as the executor of the religious law, may legitimately exercise its power, whatever school it happens to favor. Similarly, if the legal conclusions of the *madhhabs* are to be treated in effect as protected speech, then, given the nomocratic nature of Islam, the *madhhabs* themselves must be recognized for the massive ability they confer upon the 'ulamā', including those outside of

<sup>20</sup> For a more detailed treatment of this problem, see below, 145-47

government, to influence the minds and behavior of their lay constituency, in effect placing the latter before an unimpeachable religio-legal authority. Given the inevitable power differential among the schools, both of these factors would engender a number of palpable liabilities, especially if the scope of the *madhhab's* authority remains poorly or undefined. On this recognition, al-Qarāfi sets out to establish clearly defined jurisdictional limits for the *madhhabs*. And since the latter are essentially *legal* (as opposed to social or scientific) associations this amounts to the imposition of limits on the notion of law as an overall construct. Otherwise, in al-Qarāfi's view, to turn to the *sharī'ah* as the guarantor against government abuse without, at the same time, imposing limits on the concept of law and the jurisdiction of the *madhhabs* would be to run the risk of exchanging one form of tyranny for another.

In the main, this study revolves around three distinct but related concepts: constitutionalism, tyranny and power. In using the term, "constitutionalism," I restrict myself to the value of and mechanisms for promoting and sustaining the rule of law. This assumes its own particular meaning in the context of Islamic law, not to mention Islamic law in its medieval or classical guise. For not only does classical Islamic law share with other systems the desire to ensure that the policies imposed on the community are legal, it confronts the additional problem of having to accommodate multiple, equally authoritative interpretations of what the law is. This becomes additionally problematic under circumstances wherein these divergent interpretations are backed by differential levels of power. It is this very problem of how to maintain the rule of law in the face of multiple, equally authoritative legal interpretations backed by differential levels of power that defines the main objectives behind al-Qarāfi's constitutionalism.

"Constitutionalism" as I use the term does not take into account such issues as the legitimate means of coming to rule, or whether one who punches his way to the throne by force becomes thereby a legitimate ruler. Nor does it take into its purview the problem of making sure the law is equally applied to the ruler. The reason for this is simple: al-Qarāfi belongs to that tradition of medieval jurists who largely ignored politics at the top and focused instead on the interests and activities of those beneath that uppermost sliver. While he is conspicuously silent, for example, in the face of the chaos and mayhem that raged during the interregnum between the Ayyūbids and

the Mamlūks,<sup>21</sup> or about such excesses as Baybars' hanging a courtier accused of drinking wine, he finds time to address indiscretions that occur at a slighter lower level. To take just one example, Ibn Taghribirdi reports that the early Mamlūk soldiers engaged in a practice of forcibly confiscating individuals' property on the pretext that it was being taken as a loan.<sup>22</sup> In al-Qarāfi's *Tamyiz* one reads the following:

[If a mufti is asked], "Is it permissible to appropriate the property of another on grounds that it is being taken as a loan?" and the mufti perceives that his response is likely to be taken as an excuse to seize someone's property with the intention of returning it to him in the future—that is, if the idea should subsequently appeal to the perpetrator—the mufti should respond as follows: "If he takes (this property) with the owner's permission, according to the provisions of the law, without force and without coercion, it is permissible; if not, it is not. . . ."<sup>23</sup>

This asymmetry in attitude vis-à-vis politics at the top, on the one hand, and the interests of the community, on the other, extends to al-Qarāfi's constitutional ruminations. Rather than see this, however, as just another example of typically passive medieval Muslim thought, it might be useful to consider the possibility that this had more to do with the vantage point from which al-Qarāfi wrote than to any unwillingness on his part to confront power per se. Just how salient a suggestion this might be measured by way of a comparison between such works as *al-Aḥkām al-sultāniyah* of al-Māwardī and Abū Ya'lā or Ibn Jamā'ah's *Taḥrīr al-aḥkām fī tadbīr ahl al-islām* and *al-Siyāsah al-shar'iyah* of the redoubtable Ibn Taymiyah, a man known for virtually everything but passivity. Here we find that while al-Māwardī, Abū Ya'lā and Ibn Jamā'ah all focus on the caliphate (the latter adding the sultanate) and power at the top, with Ibn Taymiyah, the emphasis shifts from the Imāmate and legitimate rule to the community at large and its relationship to the divine law. For him, the vitality and survival of Islam depend not on the existence of a legitimately established state but on the effective operation of the *sharī'ah*.<sup>24</sup> Now, in contradistinction to al-Māwardī, Abū Ya'lā

<sup>21</sup> See below, 35–52 for a summary of that period.

<sup>22</sup> *Al-Nujūm al-zāhirah fī mulūk miṣr wa al-qāhirah*, 16 vols. (Cairo: al-Mu'assasah al-Miṣriyah al-ʿĀmmah li al-Taʿlif wa al-Nashr, n.d.), 7:23.

<sup>23</sup> *Tamyiz*, 258.

<sup>24</sup> See, e.g., E.I.J. Rosenthal, *Political Thought in Medieval Islam: An Introductory Outline* (Cambridge: Cambridge University Press, 1958), 52ff., 60.

and Ibn Jamā'ah, Ibn Taymiyah shared with al-Qarāfi the fact that he belonged to a politically disadvantaged school and did not serve nor aspire to serve in government.<sup>25</sup> This in turn placed a certain distance between politics at the top and his concerns and aspirations as a jurist. What I am suggesting here is that what may appear in a thinker like al-Qarāfi (or Ibn Taymiyah) to be a manifestation of political passivism may in reality reflect little more than the attitude and aspirations of what might be called non-establishment '*ulamā'*'. This attitude, though perhaps passive or even insouciant vis-à-vis politics at the top was in no way so when it came to the *sharī'ah* and the rule of law. As such, in focusing on the rule of law as this relates to the broader community, al-Qarāfi should not be classified as just another political passivist, or if so, only in a very qualified sense.

My definition of constitutionalism informs my use of the term and concept of tyranny. Tyranny, as I use the term, is not the equivalent of cruel or overtly oppressive rule; nor does it refer to the absence of valid delegations to power; nor does it highlight the absence of means and mechanisms for effecting orderly transfers of power from one régime to the next; nor is it synonymous with anarchy or lawlessness. Tyranny, on my usage, refers, rather, to the tendency to appropriate law or the authority that backs it to the end of making false or mistaken claims of legal authority for one's own ideas or of denying individuals rights and 'freedoms' to which they as members of the Community would otherwise understand themselves to be entitled.<sup>26</sup> This (mis)appropriation need not be brutal, mean-spirited or even conscious. It is a tendency, however, that results from the fact that Islamic law is, on the one hand, extremely broad in scope and, at the same time, backed by a power-wielding Muslim state. This lends a certain force to the assumption that the state's jurisdiction is as all-encompassing as that of the religious law. As such, if in determining which interpretation of the law is to be imposed on the Community the state or its government is assigned or assumes the role of final arbiter, then those who disagree with government must inevitably find

<sup>25</sup> They also share the fact that they are writing after the fall of Baghdād; but this would not seem to have been an important factor for al-Qarāfi, as Egypt had not known a Sunni caliph for more than half a millennium.

<sup>26</sup> Cf., A.K.S. Lambton, *State and Government in Medieval Islam* (Oxford: Oxford University Press, 1981), 315.

themselves in the position of having to acquiesce not only in the face of legal interpretations with which they disagree but also in the face of government's claim to the right to carry law and legal sanctions into whatever areas of life it sees fit.<sup>27</sup> This latter liability applies as well to private jurists and what they pronounce in the form of *fatwās*, particularly in light of the corporate status attributed to the *madhhabs*. For this corporate status would tend to aid those who seek (consciously or otherwise) to blur the distinction between law, strictly speaking, and personal discretion. Tyranny, then, as I use the term, relates to the extremely broad scope of Islamic law and the resulting propensity it bears for lending itself to swollen and unassailable claims to legal authority. In the end, the problem for al-Qarāfi becomes his recognition of how easily the maxim, "Where law ends, there begins tyranny," can be inverted into the truism, "Where law begins, so do the avenues to tyranny".<sup>28</sup>

By power I refer in this study not simply to the brute force usually associated with coercion or political fiat. Nor do I use the term as a synonym for authority. Authority, as I conceive of it, refers to the ability to elicit obedience on the belief that the authority figure has the right to be obeyed. Power, on the other hand, relates to the ability to force obedience, regardless of what is believed concerning the power-wielder's right to be obeyed.<sup>29</sup> To be sure, there is an intimate association between power and authority, the relationship between the two being dialectical and often confluent. It is, or so it seems, in the very nature of power, or perhaps of those who possess it, that it is often confused with authority and on many occasions collapses into the latter. This is perhaps power in its highest, most coveted form. And it is primarily to power in this form, i.e., that which disguises itself as authority, that I refer in the present study.

<sup>27</sup> For a telling manifestation of this problem in modern Shi'ite Islam, see the important discussion of C. Mallat, *Renewal*, 89–106, where Khumayni's modified (i.e., broadened) version of *velayat -e faqih* is treated.

<sup>28</sup> See Chapter Six below.

<sup>29</sup> I rely here on the distinction enunciated by Professor George Makdisi in "Authority in the Islamic Community," *La notion d'autorité au moyen âge: Islam, Byzance, Occident*, ed. D. Sourdel and J. Sourdel-Thomine (Paris: Universitaires de France, 1982), 117–26. I am aware that the issue of the precise relationship between power and authority remains controversial, particularly among social scientists. See, e.g., S. Lukes, "Power and Authority," *A History of Sociological Analysis*, ed. T. Bottomore and R. Nisbet (New York: Basic Books, Inc., 1978), 633–76.

Professor Wael Hallaq has made the point that the range of possible interpretations of Islamic law is limited by "the unalterable proposition of the divine origins of the law." According to him, "This basic but crucial fact restricts, on the one hand, the range of possible interpretations, yet allows, on the other hand, a wide spectrum of interpretive possibilities within the divine limitations of the law."<sup>30</sup> Al-Qarāfi, meanwhile, seems to perceive that the divine origins of scripture impose absolutely no limitations whatever on the range of possible interpretations, unless by divine origins one intends to imply that God's speech is more univocal than the speech of others. Otherwise, there is little that limits the range of possible interpretations other than the ability to back them with some recognizable form of authority, be it the assent of the majority, precedent or association with the views of the ruling class. Beneath this recognition lies the more basic fact that it is often not at all the actual substance of an interpretation that gains it acceptance but rather something additional that comes to it from without. In modern times, this problem has been more squarely confronted by proponents of the Critical Legal Studies movement, who point to the fact that legal theories and purported methods of interpretation all too often provide inadequate explanations for the actual content of legal doctrines and fail, furthermore, to supply the real reasons for their acceptance within the legal community at large.<sup>31</sup> It is on a similar recognition that power and its confluence with authority come to constitute such a concern for al-Qarāfi in 7th/13th century Egypt. For, whereas in theory all of the Sunni schools were recognized as equally authoritative, the fact that they were not all equidistant from the source of power (i.e., the state) inevitably conferred an added authenticity upon the views of some, peripheralizing where not obliterating those of others. This added measure of authority constituted, in al-Qarāfi's view, an ill-gotten advantage in that it reclined upon an alien, non-legal (not to be confused with illegal) source. In recognition of this, one of the central aims of his constitutional jurisprudence becomes the mitigation if not elimination of the effects of power in this most subtle and inscrutable form.

<sup>30</sup> "Uṣūl al-Fiqh: Beyond Tradition," *Journal of Islamic Studies* 3:2 (1992): 178.

<sup>31</sup> See, e.g., H. Davies and D. Holdcroft, *Jurisprudence: Texts and Commentaries* (London, Dublin, Edinburgh: Butterworths Press, 1991), 472ff., esp., e.g., 478, where it is stated, "CLS writings reject the view that legal doctrines can determine the outcome of a case".

The political situation in 7th/13th century Cairo (which I shall treat in further detail in chapter two) provided the immediate context within which al-Qarāfi developed his thought. There is, however, a broader backdrop against which his constitutional jurisprudence must also be read. This includes the running history and evolution of the Muslim legal tradition as a whole, particularly through its transformation from the régime of *ijtihād*, in the formative period, to the régime of *taqlīd*, in what I shall refer to as the post-formative era. Al-Qarāfi represents in fact what I consider to be a fine specimen of what might be called post-formative jurisprudence, that is, as a conscious and distinct phase in the development of the Islamic legal tradition.<sup>32</sup> Among the most important consequences of the transformation from *ijtihād* to *taqlīd* is the shift in the basis of legal authority from that of the individual jurist to that of the school of law or *madhhab* as a whole. This has the additional effect of conferring upon the *madhhab* a semblance of authority formerly the preserve of the unanimous consensus (*ijmāʿ*) of the jurists. This is the legacy that al-Qarāfi inherits from his recent past. And, rather than react against it, he readily appropriates it to his own use and takes it as the basis upon which he erects his legal, including his constitutional, edifice.

At its origins, Islamic law represents what has been described as an extreme case of jurists' law. It was not the creation of the early Muslim state or central power but evolved out of the efforts of private specialists acting, in many instances, in conscious opposition to the latter.<sup>33</sup> In time, these private specialists began to organize into associations or schools identified along geographical lines, e.g., the school of 'Irāq, the school of Medina, the school of Syria, etc. In the 3rd/9th century, these geographical schools collapsed into personal schools, whence the school of Abū Ḥanīfa, the school of Mālik, the school of al-Thawrī, etc. In that same century some five hundred personal schools are said to have dwindled out of existence, leaving an amalgamation of some eight or so major schools, including the Ḥanafī, Mālikī, Shāfiʿī, Ḥanbalī, Dāʿūdī or Zāhirī, Thawrī, Awzāʿī and Jarīrī schools. The Thawrī, Awzāʿī, and Jarīrī schools subsequently dwindle off. And the last member of the Zāhirī school dies in Baghdād in the year 475/1082. This left the number of permanent Sunni schools at four.<sup>34</sup>

<sup>32</sup> By "post-formative" I refer to the period after the 6th/12th century. For a more detailed explanation, see below, 77–78.

<sup>33</sup> See J. Schacht, *Introduction to Islamic Law*, (Oxford: Clarendon Press, 1964), 5.

The most plausible description of this first phase of the *madhhab*'s development has been eloquently presented by Professor George Makdisi,<sup>35</sup> according to whom the primary reason behind the initial amalgamation of schools was the desire on the part of Traditionalist jurists to close ranks in order to combat the speculative rationalism of the Muʿtazilite theologians who had succeeded in gaining government support and implementing the Great Inquisition (*mihnah*) in which jurists were beaten, jailed, or even killed unless they conceded the doctrine of the created nature of the Qurʾān (*khalq al-qurʾān*).<sup>36</sup> For the Traditionalists, knowledge about God, even as His law, was procured not through speculative inquiry but through earnest study of what He had imparted about Himself via revelation. Right theological investigation was thus indistinguishable from juridical investigation. And in order to defend juridical theology and the primacy of law over speculative theology and ethics,<sup>37</sup> the jurists began to amalgamate into larger blocs, the better to resist their common enemy.

The Great Inquisition lasted for fifteen years (218–34/833–48), through the successive reigns of three 'Abbāsid caliphs, al-Ma'mūn, al-Mu'taṣim, al-Wāthiq, and two years of a fourth caliph, al-Mutawakkil, who instituted a counter-ukase. Professor Makdisi sees in this failed attempt a decisive turning point in the history of Islam. The 3rd/9th century Muʿtazilite debacle marked the triumph of Traditionalism and the juridical approach over speculative theology and Rationalism. From that point on, "[A]ny system of thought, in order to survive, had to be affiliated with one of the schools of law. A theological system, in order to be sanctioned as legitimate, to propagate its doctrine, to provide for its perpetuation, had to be adopted by a

(Edinburgh: Edinburgh University Press, 1981), 2–4. This list of personal schools is not exhaustive; indeed, on their way from five hundred to the eight or so mentioned, the number of personal schools had to have amalgamated into a higher number. On another front, C. Melchert has presented a more nuanced picture of the early development of the schools, concluding, for example, that they were originally divided among the adherents of *ra'y*, or personal opinion, and the adherents of hadith. See his "The Formation of the Sunni Schools of Law Ninth-Tenth Centuries C.E.," Ph.D. diss., The University of Pennsylvania, 1992.

<sup>35</sup> *Rise*, 2–9.

<sup>36</sup> *Rise*, 7.

<sup>37</sup> The Muʿtazilites also engaged in speculative ethics and argued that good and evil (*al-ḥusn wa al-qubḥ*) could be known by human reason, independent of revelation. See G. Hourani, "Islamic and non-Islamic origins of Muʿtazilite ethical rationalism" *International Journal of Middle East Studies* 7 (1976): 50–67.

legal system."<sup>38</sup> Law, in other words, not theology, became the legitimizing agency in Islam and the highest expression of its genius.

The end of the Inquisition also marked the beginning of the professionalization of the schools of law.<sup>39</sup> The system subsequently erected included not only a mechanism for maintaining mutual recognition among existing schools but also a mechanism that effectively prevented the emergence of any new schools. This was an apparent innovation in *uṣūl al-fiqh* which broadened the concept of consensus (*ijmāʿ*). According to this understanding, the object of consensus did not have to be a single, solitary view; it could be two views, or perhaps even three. But be its object singular or plural, consensus not only established the orthodoxy of the agreed-upon view or views, it proscribed and invalidated all extraneous conclusions. This expanded notion of consensus appears to have made its appearance sometime around the latter half of the 4th/10th century.<sup>40</sup> In *al-Muʿtamad fī uṣūl al-fiqh* of Abū al-Ḥusayn al-Baṣrī (d. 436/1044) it appears, full-blown, under the heading: "Concerning That Which Has Not Been Considered Consensus While In Point Of Fact It Is" (*fīmā ukhrija mina ʿl-ijmāʿi wa huwa minh*):

Know that if the scholars of one generation are divided on a question into two distinct and contradictory views, this implies their agreement to the effect that all other views besides these two are invalid.<sup>41</sup>

<sup>38</sup> G. Makdisi "Ashʿari and the Ashʿarites in Islamic Religious History," *Studia Islamica* vol. 17 (1962): 46.

<sup>39</sup> See G. Makdisi, "La Corporation à l'époque classique de l'Islam," *The Islamic World, from Classical to Modern Times: Essays in Honor of Bernard Lewis*, ed. C.E. Bosworth et al., (Princeton: The Darwin Press, Inc., 1989), 203–04: "C'est donc à partir de cette époque, vers la fin du troisième/neuvième siècle—début du quatrième/dixième siècle, que les *madhhabs* commencèrent à se professionnaliser dans leur organisation, surtout pour l'enseignement du droit, depuis l'apprentissage jusqu'à la maîtrise de leur profession juridique."

<sup>40</sup> I am not able to say exactly how far back this doctrine goes. Between *al-Risālah* of al-Shāfiʿī (d. 204/819), where even the concept of consensus itself is significantly narrow, and the next major work on *uṣūl al-fiqh*, *al-Mughni* of the Muʿtazilite ʿAbd al-Jabbār (d. 410/1019) there is a two century hiatus. The *al-Muqaddimah fī uṣūl al-fiqh* of Ibn al-Qaṣṣār (d. 397/1004) Mss. [170] 5786, catalogue no. 2, al-Azhar collection, appears sometime during the latter part of this two hundred year gap, but this work is only an introduction and treats its topics in a rather cursory fashion. The exclusion of this expanded notion of consensus from this work cannot be taken, therefore, as proof that its author was unaware or unsupportive of it.

<sup>41</sup> Abū al-Ḥusayn al-Baṣrī, *Kitāb al-muʿtamad fī uṣūl al-fiqh*, 2 vols. ed. Muḥammad Ḥamid Allāh (Damascus: al-Maʿhad al-ʿIlmi al-Faransi li al-Dirāsāt al-ʿArabīyah, 1383/1964), 2:505. Interestingly, al-Baṣrī cites the Zāhiris as the only group who disagreed with

The ultimate effect of this doctrine would be to render it possible for the number of schools to decrease but impossible for any new schools to come into existence; for the latter occurrence would imply that the consensus holding that only the existing views were correct was itself incorrect. It is perhaps a testimony to the utility of this doctrine and the speed with which it spread<sup>42</sup> that, while it appears sometime in the latter half of the 4th/10th century, by the latter half of the 5th/11th century the total number of schools would be permanently reduced to four.

By the last quarter of the 5th/11th century, then, the *madhhabs* had settled down to four, all equally orthodox, all mutually recognized. In all of this, however, the individual jurist remained autonomous in his interpretation of the law. This is reflected in the opinions of a number of scholars from the 5th/11th, 6th/12th and even 7th/13th centuries: e.g., the Shāfiʿī, al-Māwardī (d. 450/1057); the Ḥanbalites, Abū Yaʿlā (d. 458/1065), Ibn ʿAqīl (d. 513/1119) and Ibn Qudāmah (d. 620/1223); the Shāfiʿī, ʿIzz al-Dīn b. ʿAbd al-Salām (d. 660/1262). All of these scholars insisted that, once qualified, each individual jurist was duty-bound to exercise independent *ijtihād*. Al-Māwardī would even go on to state that it was permissible for a Ḥanafī to appoint a Shāfiʿī as judge, because judges had the right to rule according to their own *ijtihād*, and, once appointed, it was not incumbent upon a Shāfiʿī judge to follow the opinions of his Ḥanafī principal.<sup>43</sup> This held all the more, according to al-Māwardī, considering that judges were not even bound to the views of their own *mujtahid*-Imāms.<sup>44</sup>

But the threat of the Muʿtazilites (again, the ostensible impetus behind the initial amalgamation of the schools) had been that they

this doctrine. See *ibid*, 2:505–8, esp. 508. See also 2:506ff., where it is stated that al-Baṣrī's Muʿtazilite teacher, ʿAbd al-Jabbār (d. 410 a.h.), also agreed with this doctrine.

<sup>42</sup> This doctrine is also repeated in a slightly more emphatic tone by Imām al-Ḥaramayn al-Juwaynī (419/1028–478/1085). See *al-Burhān fī uṣūl al-fiqh*, 2 vols. ed. ʿAbd al-ʿAzīm al-Dīb (Cairo: Dār al-Anṣār, 1400/1980), 1:706–9. It is interesting that al-Juwaynī's star pupil, al-Ghazālī (d. 505/1111), who was a staunch proponent of the right and, indeed, the duty of *mujtahids* to pursue their studies independently, did not confront this question directly. The most definitive statement of his that I could find was one made in passing in which he appears to defer to the doctrine. See *al-Mustasfā min ʿilm al-uṣūl*, 2 vols. ed. Muḥibb al-Dīn b. ʿAbd al-Shakūr (Būlāq: al-Maṭbaʿah al-Amīriyah, 1322/1905), 1:207: *fa inna ʿl-khilāfa fihā [al-mujtahadāt] maqrūnun bi tajwīzi ʿl-khilāfi wa taswighi ʿl-akhdhi bi kulli madhhabin mina ʿl-madhhabayn*.

<sup>43</sup> Abū al-Ḥasan ʿAli b. Muḥammad b. Ḥabīb al-Māwardī, *al-Aḥkām al-sulṭāniyah*, ed. Muḥammad ʿAbd al-Qādir (Būlāq: Maṭbaʿat al-Waṭan, 1298/1880), 64.

<sup>44</sup> Al-Māwardī, *Adab al-qādi*, 2 vols., ed. Muḥyī Hilāl Sirḥān (Baghdād: al-Irshād Press,

sought to legitimize speculative rationalism, which was bound, in the end, to lead to the overriding of scripture by human reasoning. The object behind the initial amalgamation of the *madhhabs* (in the 3rd/9th century) was thus limited to establishing the primacy of law and the juridical approach; there was no interest in binding jurists to any specific body of legal rules. Indeed, to be a member of a *madhhab* in this early period meant simply to accept the primacy of law as an ideal (i.e., to give primacy to the question, "What is God's will?" as opposed to, "What is God's nature?") subscribing, meanwhile, to broad, still open-ended legal principles and methods attributed to one of the Imāms or ancient authorities.<sup>45</sup> In terms of concrete rules, a jurist could and often did contradict the view of his *mujtahid*-Imām.<sup>46</sup> With al-Qarāfi in the middle of the 7th/13th century, however, *madhhab* has come to constitute not merely a broad method of legal reasoning but a specific body of concrete legal rules. At the same time, *taqlīd*, as the institution relied upon by the *madhhab* to sustain and perpetuate itself, emerges as the dominant hegemony. This marks the second phase in the development of the *madhhab*, one that witnesses the ultimate ascendancy of the régime of *taqlīd*.

It was under this régime of *taqlīd* that al-Qarāfi lived and operated. This should not be taken to mean that he was an advocate of *taqlīd* per se in any active or positive sense; in fact, the institutionalization of *taqlīd* had already preceded him in time. But al-Qarāfi saw in *taqlīd* a way to a number of distinct and important advantages, as well as a means of avoiding a number of palpable liabilities. As such, he turns out to be more or less a supporter rather than an opponent of *taqlīd*, unlike, say, the later Ibn Taymīyah or even his own mentor and contemporary, Ibn 'Abd al-Salām.<sup>47</sup> This does not render him, on the other hand, an opponent of *ijtihād*; he certainly does not look upon

1391/1971), 1:644–45. For citations from other scholars of this period who held this view, see also below, 152–57.

<sup>45</sup> None of the early Imāms, save al-Shāfi'i, wrote works on legal methodology. Their method, it seems, was, however, deduced from the aggregate of their opinions on individual questions. A good example of this can be seen in *Muqaddimah fī uṣūl al-fiqh* of Ibn al-Qaṣṣār al-Baghdādi, fol. 2 recto ff., where he systematically deduces "Mālik's method," (*madhhab mālik*) from various opinions of Mālik on individual questions of positive law (*furū'*).

<sup>46</sup> See, for example, W. Hallaq, "Was the Gate of Ijtihad Closed," *International Journal of Middle East Studies* 16 (1984):111, where the author cites a number of followers of individual *madhhabs* who openly contradicted the views of their eponyms. Note, however, that all of these scholars died in the 4th/10th century.

<sup>47</sup> See below, 11–12, e.g., on the Shāfi'i contemporary, 'Izz al-Din b. 'Abd al-Salām.

the latter as a violation of a divinely sanctioned order; nor does he at any time refer to any "closing of the door of *ijtihād*". But al-Qarāfi appears unable to ignore the fact that content alone would not be sufficient to see an interpretation through. This would require, rather, something exterior, namely, the type of authority that could be readily conferred by the *madhhab*. As such, even when he himself engages in what might be properly deemed *ijtihād*, this is often disguised and presented as the 'correct' rendering of the *madhhab*, frequently taking the form of what I refer to in chapter three as "legal scaffolding," the primary aim of which is to circumvent or remove the problematic aspects of existing doctrine while maintaining conspicuous links between one's own interpretations and the authorities of the past.

The fact that it is not necessarily the content of a view that gains it acceptance but rather the authority to which it is able to attach itself has not, in my view, been duly recognized by modern scholars of Islamic law. Nor has it been acknowledged by modern Muslim proponents of fresh and unmediated interpretation of scripture, what is often referred to as the "reopening" of the hallowed gate of *ijtihād*. This not only informs the modern debate around *ijtihād* and *taqlīd*, it also injects a distinct bias into our reading of medieval Muslim thought and institutions. Given, for example, what has become the wholly negative connotations of *taqlīd*, few medieval jurists who might be said to have supported the institution, even tacitly, would be deemed capable of producing anything of substantive value in terms of a philosophy or interpretation of the law. This is not to deny the occasional acknowledgment by certain scholars such as Schacht of a continuous flow of creative energies throughout the medieval period.<sup>48</sup> But the fact remains that the general picture evoked by the very mention of *taqlīd* is one of crippling and ubiquitous stagnation. This, I think, is unfortunate and ignores the possibility that medieval jurists did not see in *ijtihād* the panacea it has come to represent to their modern descendents. This perspective, though perhaps counterintuitive on its face, becomes easier to appreciate when one considers the fact that from the late Fazlur Rahman to Muḥammad Arkoun to even a Faṭīma Mernissi, *ijtihād* continues, even in our own times, virtually unabated. Yet, the results of these efforts in terms of their actual impact on the shape of the law remains almost non-existent. The reason for this, I submit, is not that the content of the conclusions

<sup>48</sup> See, e.g., below, 75.

reached lack in all cases attractiveness or even credibility; the reason is that these scholars have been unsuccessful in attaching themselves to recognizable authorities. One need only imagine the impact of such views as theirs being taken up and advocated by the likes of a Shaykh 'Abd al-'Azīz b. 'Abd Allāh b. Bāz of Saudi Arabia, Shaykh Yūsuf al-Qaradāwī (now) of Qatar or Shaykh Muḥammad al-Ghazālī of Egypt, men clearly identified with the tradition of classical Islamic law.<sup>49</sup> What I am suggesting here, and I elaborate on this further in chapter three, is that if authority, as opposed to content, is accepted as the force that backs legal interpretations, then *taqlīd* and the functional authority of the *madhhabs* might be looked upon in a much different, perhaps even positive, light. At the very least, medieval Muslims might be understood for what they actually sought from these institutions, instead of being condemned as myopic and sleepy epigones at whose hands Islam was delivered unto a darkness from which it has yet to emerge. In addition to changing our understanding of the relationship between *ijtihād* and *taqlīd*, greater emphasis on authority, as opposed to content, might provide additional insight into a number of other legal phenomena (some of which I discuss in chapter three) heretofore little or poorly understood. Finally, if I am correct in assuming this functional distinction between content and authority and if the *madhhabs* are no longer understood by Muslims to operate as the sole or even main repository of legal authority, one of the aims of modern scholarship might be to identify more precisely those loci that have come to operate as alternatives to the *madhhab* and to describe in more detail the scope, nature and various manifestations of the competition that results therefrom. As has already been noted, among modern proponents of Islamization both reformists and fundamentalists tend to accept the (modern) Islamic state as the repository of legal authority. This, though for obviously different reasons, appears to be the tendency among so-called modernists as well.<sup>50</sup> Yet, despite this general trend, the fact remains that the history of Sunni Islam in the

<sup>49</sup> It is tempting to suggest that this is exactly what the early Mu'tazilites came to recognize, as a result of which they infiltrated the schools of law and were successful in having a number of their views absorbed into the body of Muslim legal science where their impact continues to be felt to this day.

<sup>50</sup> See, e.g., F. Rahman's "Islamic Modernism: Its Scope, Methodology and Alternatives," *International Journal of Middle East Studies* 1 (1970): 317-33. In Rahman one detects the tendency to look to the state as a proponent of progress and as a counter to the lingering authority of traditionally-minded 'ulamā', who, in his view, stand in the way of progress.

modern world has been and will very likely continue to be, at least for the foreseeable future, informed by Muslim attempts to come to terms with the greatly diminished yet perduring authority of the traditional *madhhabs*. As such, it would seem only proper to try to come to a better understanding of the source of the *madhhab*'s tenacious hold over the Muslim mind. After all, of all the institutions Islam produced throughout its fourteen hundred year history, it is the *madhhab* that emerges as the most permanent. At any rate, it is in the context of what I described above as the functional distinction between content and authority and the desire to preserve the school of law as the alternative to both the state and especially government (qua government)<sup>51</sup> as the repository of legal authority that one is to understand al-Qarāfī's relationship with the *madhhab* and the institution of *taqlīd*.

Under the régime of *taqlīd* the *madhhab* was effectively endowed with the ability to validate its own views, independent of the unanimous consensus of the remaining jurisconsults, despite the fact that it was purportedly this very consensus that initially validated the *madhhabs* themselves. Under this new order, the old *ijmā'* is not only marginalized but reduced, for all intents and purposes, to a practical fiction, a rather thinly veiled mobilization of biases, tantamount in effect to such modern constructs as "the American people," or "world opinion". This is not to deny that views validated or invalidated by past consensus would remain so. But in terms of its effect on contemporary and future debates, no *madhhab* would, as a general rule, acknowledge any authority higher than the school of law. As such, consensus would be invoked largely as a means of lending authority to commonly shared sentiments or for the purpose of bolstering otherwise weak arguments by appealing to the more ascriptive and ersatz authority of the past. Or, when all else failed, consensus might be called upon as a means of muscling miscellaneous mavericks, hubristic dissenters and would-be iconoclasts into line.<sup>52</sup>

This new relationship between the *madhhab* and *ijmā'* emerges with a somewhat unexpected clarity in some of the writings of later jurisprudents. A good example of this can be seen in the Ḥanafī jurist, Ibn Amīr al-Ḥajj (d. 879/1474), in his defense of tacit consensus (*ijmā'*

<sup>51</sup> On what I understand to be the distinction between the state and government, see below, 69, 142-43, 190-92.

<sup>52</sup> Thus, for example, at one point al-Qarāfī protests that he "believes the position of his opponents to be in violation of consensus." See *Tamyīz*, 241.



*sukūti*). Generally speaking, tacit consensus occurs when one jurist issues an opinion and the remaining jurisconsults remain silent. The assumption here is that, given the opportunity to respond, the remaining scholars would keep silent only if they found no objections to the original opinion. Their silence is taken thus as a vote of approval, whence the term *ijmā' sukūti* (consensus known by silence). However, according to Ibn Amīr al-Ḥajj, the silence of the remaining jurisconsults is probative only if the initial opinion appeared during that time in Islamic history that was

before the settling down of the *madhhabs*. This is in order to preclude situations wherein a *muqallid* issues a *fatwā*, and those who disagree with it remain silent due to their knowledge that he simply subscribes to a *madhhab* other than their own. For example: a Shāfi'ī issues a *fatwā* invalidating the ablution of one who touches his phallus; a Ḥanafī's silence in the face of such a claim would not be an indication that he agrees with it, owing to his knowledge that the *madhhabs* have settled down and become established and that there are (irreconcilable) differences among the schools of law.<sup>53</sup>

From the time Islam spread into the various regions, *ijmā' sukūti* constituted the most, if not the only, really viable form of consensus. This is clear from the arguments of such critics of *ijmā'* as Ibn Ḥazm (d. 456/1064) and his ilk. Even Aḥmad Ibn Ḥanbal, who accepted *ijmā'*, is still noted for his famous dictum: "Whenever a man claims consensus he lies; for there may be dissenters of whom he is unaware and of whom he did not take notice. Let him say simply, then, that he knows of no disagreement."<sup>54</sup> The only truly verifiable form of consensus, in other words, was the absence of any known disagreement. With the settling down of the *madhhabs*, however, even this would take on a changed meaning, as is clearly indicated by the statement of Ibn Amīr al-Ḥajj. That al-Qarāfi should recognize the benefits of this new relationship between the *madhhabs* and consensus stands to reason, given not only his position as a Mālikī in Shāfi'ī-dominated Cairo but also his perspective as an Ash'arī, who, in rejecting Mu'tazilite objectivism, recognized that all views contained a subjec-

<sup>53</sup> Ibn Amīr al-Ḥajj, *al-Taqrīr wa al-taḥbīr*, 3 vols. (Beirut: Dār al-Kutub al-'Ilmiyah, 1403/1983), 3:106. (Emphasis added) The phrase, "settling down of the *madhhabs* (*istaqarrati 'l-madhāhib*)" occurs earlier in al-Māwardī's (d. 450/1058) *Adab al-qāḍī*, 1:645.

<sup>54</sup> Cited in Muḥammad Abū Zahrah, *Tārīkh al-madhāhib al-islāmīyah* (Cairo: Dār al-Fikr al-'Arabī, n.d.), 276.

tive element and, as such, whenever one view 'triumphed' over another, there was a sense in which this constituted little more than one subjective perspective gaining ascendancy over another.<sup>55</sup> And here it would be difficult to ignore the potential role of power and its dreaded confluence with authority. For where a Shāfi'ī chief justice succeeded, e.g., in overturning a Mālikī judge's ruling, this was clearly not because the former's school had defeated the latter's in open competition; this was simply because the Shāfi'īs were in power. Meanwhile, the *madhhab*, in its corporate form, serves the function of levelling the playing field by allowing minority views to stand even in the face of overwhelming opposition. It is in this capacity and in recognition of this fact that the *madhhab* emerges as the constitutional unit in al-Qarāfi's nomocratic scheme.

There were, however, a number of problems and liabilities associated with *taqlīd* and the corporate status of the *madhhab*. These shall be discussed in detail in chapter four. There it will be seen—and this is one of the major attractions of al-Qarāfi's work—that not only is al-Qarāfi aware of the potential advantages of *taqlīd*, he is also cognizant of some of its less conspicuous drawbacks and disadvantages. As such, he looks for ways to compensate for and or circumvent them. In sum, *taqlīd* and the corporate *madhhab* are not, in his understanding, trouble-free panaceas; they constitute, rather, practical *modi vivendi*, integral, in the final analysis, to his constitutional jurisprudence and the preservation of the rule of law.

There exists at present a substantial body of scholarship on constitutional thought in medieval Islam. These studies range from brief chapters in general manuals to more detailed journal-articles and monographs. While it is beyond the scope of the present work to attempt an exhaustive review of this literature, a number of dominant characteristics and approaches allow for some general comments. One may begin with the observation of M.H. Kamali to the effect that most works on Islamic constitutional law can be placed into one of two categories: (1) the normative-juristic approach; and (2) the historical approach. To these may be added a third approach, what I shall call the diachronic-theoretical approach. This taxonomy is neither precise nor exhaustive. Indeed, overlap born of eclecticism renders such

<sup>55</sup> See below, 31–32.

precision virtually impossible. For example, H.A.R. Gibb's "Some Considerations on the Sunni Theory of the Caliphate,"<sup>56</sup> is, as its title indicates, theoretical, but it also includes an important historical dimension. Similarly, certain idiosyncracies found in a particular medieval author will often engender an equally idiosyncratic modern approach, aspects of which would have to be ignored or reinterpreted in order to fit it into any of the above categories. A good example of this might be E.I.J. Rosenthal's treatment of Ibn Khaldūn's ideas on Islamic law and the state.<sup>57</sup> Inevitable, however, though such exceptions may be, the above categorization remains, I believe, both useful and reasonably representative.

The first approach, the normative-juristic approach, appears to be that favored by the majority of modern Muslim writers. Here the emphasis is away from the historical record and more toward revisionist interpretations of the sources of Islamic law, the Qur'ān and hadith, and to a lesser extent the example of the Rightly Guided (*Rāshidūn*) caliphs. The attempt here is largely to establish the extent to which the principles and concepts contained in the primary sources of Islamic law comport with the demands and desiderata of modern political life. The implied conclusion is that, regardless of the historical record, the only constitutional theory to which Muslims must consider themselves bound is not incompatible with the demands and aspirations of modern democracy. An example of such works would be M.H. Kamali's "The Limits of Power in an Islamic State".<sup>58</sup> Other studies inclusive of this approach would be F. Hassan's *The Concept of State and Law in Islam*<sup>59</sup> and K. Faruki's *The Evolution of Islamic Constitutional Theory and Practice from 610 to 1926*.<sup>60</sup> Among the advantages of this approach is that it cuts through the thicket of historical accretions and permutations, e.g., borrowings and influences from Greek, Persian and other extra- and pre-Islamic sources, many of which bear little to no relationship to Islam as a religion. This has the dual effect of freeing Muslim political thought from the shackles of its history, while opening the way to new and more functionally pragmatic interpretations of the sources. At the same time, however,

<sup>56</sup> In *Studies on the Civilization of Islam*, ed. S.J. Shaw and W.R. Polk (Boston: Beacon Press, 1962).

<sup>57</sup> *Political Thought*, 84–109.

<sup>58</sup> *Islamic Studies*, 28:4 (1989):323–52.

<sup>59</sup> (Washington D.C.: University Press of America, 1981).

<sup>60</sup> (Karachi: National Publishing House Ltd., 1391/1971).

the assumption that borrowings and influences from the modern West are somehow more authentically Islamic than those from earlier non-Islamic sources is at times disappointingly transparent and reflective of a double-standard.

The second approach, the historical approach, places greater emphasis on the performance of Muslim political institutions in history. Here the attempt is to separate the ideal from the real and to arrive at a more objectively historical understanding of Islam and politics, as opposed to the more ideological, religious reading proffered by Muslims. Representative of this approach would be H.A.R. Gibb's "Constitutional Organization,"<sup>61</sup> N.J. Coulson's "The State and the Individual in Islamic Law,"<sup>62</sup> W.M. Watt's *Islamic Political Thought*<sup>63</sup> and P.J. Vatikiotis' *Islam and the State*.<sup>64</sup> Among the advantages conferred by this approach is its tendency to do exactly what it sets out to, i.e., to separate the historical record from the theoretical claims and aspirations of Muslims. Among its weaknesses, however, at least in the present context, is its implied subscription to what the late A. Hourani referred to as the political-institutional approach to Muslim history, according to which "the underlying assumption [is] that society was molded by political power,"<sup>65</sup> and, as such, medieval rulers "act[ed] freely upon a mass of passive subjects".<sup>66</sup> This approach entails a heavy reliance on medieval Muslim historians whose primary focus was on power and the exploits of the movers and shakers at the top, to the near exclusion of "domestic politics," or the conflicts and hegemonies among other competing groups and classes in society. In this context, the writings of the 'ulamā' are assigned a rather marginal significance, being looked upon as containing empty theories or as a means of confirming the general picture given by the historians. It is, in the final analysis, the historians, despite the fact that they generally limit themselves to power politics, who tell us 'what really happened'. This is not to deny, and it would be naive to do so, the purely theoretical dimension of juristic writings or even the fact that the ideas of the

<sup>61</sup> In *Law in the Middle East*, ed. M. Khadduri and H.J. Liebesny (Richmond: William Byrd Press, 1975).

<sup>62</sup> *International and Comparative Law Quarterly* vol 6 (Jan. 1957): 49–60.

<sup>63</sup> (Edinburgh: Edinburgh University Press, 1968).

<sup>64</sup> (New York: Routledge, 1987).

<sup>65</sup> "History," *The Study of the Middle East*, ed. L. Binder (New York: John Wiley and Sons, 1976), 114.

<sup>66</sup> *Ibid*, 118.

'*ulamā*' are not fully representative of society as a whole. But it should serve perhaps as both a warning and a testimony to the extent and persistence of the assumptions underlying the historical approach that such a work as al-Qarāfi's *Tamyiz*, despite its clear subject matter, as indicated in its title (*The Book of Perfecting the Distinction between Legal Responsa, Judicial Decisions and the Discretionary Actions of Judges and Caliphs*), should remain not only peripheral to but almost completely absent from discussions on constitutional law since it was first edited and published back in 1938! To the charge that al-Qarāfi's work contains only theory and, as such, cannot be taken as an indication of what really happened, I would suggest that history itself not be limited to the attempt to measure the effects of theory on social and political reality but that it be made to include the effects of social and political reality on theory. On such a construction, al-Qarāfi's work would itself qualify as a valid historical artifact. Indeed, one would be justified in saying (in an historically meaningful sense) that it happened.

The third approach, the diachronic-theoretical approach, aims at studying the theories put forth by Muslim jurists, philosophers and other thinkers over the ages on issues relating to politics and political theory. Perhaps the best examples of this approach would be A.K.S. Lambton's *State and Government in Medieval Islam* and E.I.J. Rosenthal's *Political Thought in Medieval Islam*. These works provide critical textual analyses of a broad cross-section of theorists who write from a variety of perspectives and in different places and at different times. They provide a useful picture of the diversity and richness that characterize constitutional thinking in Islam, both in terms of the theories propounded as well as the issues with which the theorists concerned themselves. However, the fact that so many theorists are brought together in a single work makes it difficult to provide more than a cursory summary of the concrete historical circumstances out of which each author operated. As such, there is often a tendency to assume that writers write in response to abstract theoretical issues, e.g., the continuity and or integrity of the caliphate, as opposed to some of the more concrete issues connected with domestic politics and more local concerns.

The present work differs from previous studies both in terms of its overall historical outlook and its thematic approach. Most (if not all) studies on Muslim constitutional thinking take as their starting point the caliphate. As E.I.J. Rosenthal put it, "Political thought at first

centers around the caliphate and is, in fact, a theory of the caliphate, its origin and purpose."<sup>67</sup> This places the issue of legitimacy at the center of discussion, which in turn places a heavy emphasis on the early period, including the Sunni-Shī'ite schism through the rise of the early 'Abbāsids. Emphasis on the caliphate also informs the historical trajectory on which the development and performance of Muslim political institutions are seen. The Mongol holocaust and the fall of Baghdad mark the *terminus ad quem* of normative political history. What follows is seen as an interregnum, a tortuous parade of power politics, military rule and outright usurpation, a trend that reaches consummation in the *bahrī* Mamlūks at whose hands the caliph loses not only power but also effective authority, of which he remains shorn up to the rise of the Ottoman Turks.<sup>68</sup> This conceptualization of history situates al-Qarāfi in an epoch that was not expected to produce much in the way of constitutional thought. In fact, the single most important figure whose views have contributed most to our understanding of constitutional thinking in early Mamlūk Egypt is Badr al-Dīn Ibn Jamā'ah (d. 733/1333), who by all accounts capitulates to what is deemed the *status quo* and declares "military power pure and simple as . . . the essence of rulership."<sup>69</sup> It is indeed something of a testimony to the degree of contempt with which modern observers have looked upon the Mamlūk era as a whole that in castigating contemporary Arab rulers for their exploitative and despotic style of rule, the modern Muslim activist, Muḥammad Jalāl Kishk, could find no more truculent a mix of scorn to pour on their heads than to refer to them as "socialist Mamlūks!"<sup>70</sup>

This is not the perspective from which the early Mamlūk period is viewed in the present study. To be sure, as will be clearly documented in chapter two, this was a period of great chaos, turmoil and innovation. But the rise of Baybars I, under whose rule al-Qarāfi reached the height of intellectual maturity, ushered in an era of palpable if guarded optimism. It is in this context that al-Qarāfi develops the main features of his constitutional thought. And it is from this

<sup>67</sup> *Political Thought*, 3.

<sup>68</sup> See, e.g., P.J. Vatikiotis, *Islam and the State*, 21–22.

<sup>69</sup> H. Enayat, *Modern Islamic Political Thought* (Austin: University of Texas Press, 1982), 11. For more on Ibn Jamā'ah, see Rosenthal, *Political Thought*, 43–51; Lambton *State and Government*, 138–43. Note, again, however, that Ibn Jamā'ah deals primarily with politics at the top and is concerned primarily with the issue of legitimacy.

<sup>70</sup> See F. Ajami, *The Arab Predicament: Arab Political Thought and Practice Since 1967* (Cambridge: Cambridge University Press, 1982), 55.

perspective that his thought shall be treated in the present study.

On another level, I endeavor to treat al-Qarāfi's constitutionalism from what I hope will be considered the perspective of a legal historian. By this I mean that I attempt not only to deal with the technical aspects of his ideas and to treat these as particularly legal phenomena but also to place his views and theories in the overall context of the running history of the Islamic legal tradition as a whole. My efforts in this regard become most obvious in my discussion of such issues as *ijtihād*, *taqlid*, *madhhab*, "legal scaffolding," and the legal process. In particular, one will notice my debt to the views of the neo-American Legal Realist, Alan Watson, as set out in his *The Nature of Law and The Evolution of Law*. Of the three approaches outlined above, I rely on aspects of the normative-juristic and diachronic-theoretical approaches, to the near exclusion of the historical approach. The reason for this is that al-Qarāfi himself writes from a perspective largely alien to the latter tradition. As such, it is ill-suited to a treatment of his thought. In acknowledging, however, my debt to the normative-juristic approach, I do not mean that I return to the Qur'an and hadith in an effort to vindicate Muslim constitutional thought in the light of modern criteria. In a number of instances I simply stress certain views of al-Qarāfi hitherto considered alien to Islamic law. Examples of this can be seen in my discussion in chapter one of Ash'arite psychology and its impact on medieval Islamic legal and political thought and in some of my conclusions in chapter six on the relationship between Islamic law and the state. My debt to the diachronic-theoretical approach will be obvious, as I discuss in detail the theoretical content and underpinnings of al-Qarāfi's thought. I depart from this approach, however, in my attempt to read al-Qarāfi in light of the concrete historical circumstances, including domestic politics, that informed his agenda as well as his proposals. I have endeavored in this regard to remain mindful of Quentin Skinner's eloquent admonition about how easily historical contexts can be pillaged for facile explanations for why a thinker chooses the issues he chooses or why he arrives at the conclusions at which he arrives.<sup>71</sup> I can only hope that the precautions I have taken will prove sufficient to navigate my way around such pitfalls.

<sup>71</sup> See Q. Skinner, "Meaning and Understanding in the History of Ideas," *History and Theory*, vol. 8 no 1. (1969): 44ff.

This study is divided into six chapters. Chapter One is a biographical profile on al-Qarāfi, including a list of his teachers, his activities, proclivities and possible influences. I proceed, particularly in the early part of the chapter, on the understanding that al-Qarāfi is little known in the West. My aim, as such, is to provide enough detail to afford as intimate a familiarity with him as possible, the idea being that in doing so he might come to earn a more central place in Islamic legal studies. I also discuss in this chapter the significance of al-Qarāfi's Ash'arism and the relationship between Ash'arite theology and Islamic legal *cum* political thought.

Chapter Two is an overview of the history of Egypt in the 7th/13th century, including the rise of the Mamlūks, the relationship between the schools of law and the ideological conflict between Mālikism and Shāfi'ism in Egypt. The problem of Shāfi'i exclusivism in the judiciary is also situated in the context of this discussion. It should be noted, however, that my purpose in this chapter is merely to provide a sense, albeit as accurate as possible, of the historical factors that may have contributed to al-Qarāfi's perspective. As such, I have chosen not to include discussion of some of the more intricate historical problems (e.g., precise dates down to the day, the provenance and reliability of certain sources) for fear of losing my reader in details and undermining the very purpose of my chapter. Though I include the views and perspectives of a number of contemporary, medieval historians, e.g., Muḥyī al-Dīn b. 'Abd al-Zāhir and Shāfi' b. 'Alī, I have relied heavily on al-Maqrīzī's *Sulūk*. Though my use of this work goes beyond Collingwood's "scissors-and-paste" method, I am aware that in relying so heavily on *Sulūk* I run the risk of reproducing some of its mistakes and inaccuracies. These, however, should prove mostly minor and should not detract from the value of what is intended to be an overall summary of the historical context in which al-Qarāfi operated.

Chapter Three is a discussion of the *madhhab* as al-Qarāfi's constitutional unit. It is here that I present my views on the controversy surrounding *ijtihād* and *taqlid* and attempt to show some of the ways in which the Islamic legal tradition, particularly the *madhhab*, evolved by the time of al-Qarāfi. It is also here that I explain my use of the term "corporate" as it applies to the *madhhab*.

Chapter Four is a discussion of the limits of law and the jurisdiction of the *madhhab*. Here al-Qarāfi attempts to deal with some of the problems raised by *taqlid* and the corporate status of the *madhhabs*.

It is in this chapter, for example, that I present his views on the limits of law as an overall construct, and the distinction between proper and improper *taqlid*.

Chapter Five is a discussion of al-Qarāfi's solution to the specific problem of exclusivism in the judiciary. Here again I trace the evolution from *ijtihād* to *taqlid* as this relates to the judicial function. This is made necessary by the fact that al-Qarāfi himself assumes this context in analyzing and formulating his solution to the problem of the exclusivist policies of the lone Shāfi'i chief justice, Ibn bint al-A'azz.

Chapter Six deals with the relationship between Islamic law and the state. Here I discuss al-Qarāfi's attempts to impose limits on the scope of the state's legal jurisdiction. I also raise the issue of individual freedom and whether or not such a concept can actually be said to exist in Islamic law.

Needless to say, I have benefitted greatly from the efforts of many scholars during the course of this study. At the same time, I have found it necessary to challenge or revise the views of a number of them, some of whom are no longer present to defend themselves. In these instances I have tried to be fair and respectful. I can only hope, and this is my solemn wish, that my pen has not gotten the better of me.

## CHAPTER ONE

SHIHĀB AL-DĪN AL-QARĀFĪ:  
CURRICULUM VITAE

Time swore to reproduce the likes of him. You have broken your oath, O Time; so now expiate!

—Ibn Farḥūn

## I. General Profile

Shihāb al-Dīn Abū al-'Abbās Aḥmad b. Abī al-'Alā' Idrīs b. 'Abd al-Raḥmān b. 'Abd Allāh b. Yallīn al-Qarāfi was a Berber by origin, from the North African tribe of Ṣanhājah. According to his own testimony he was born in the year 626/1228,<sup>1</sup> apparently growing up in the district known as al-Qarāfah, just southwest of Ṣalāḥ al-Dīn's citadel in the old section of Cairo. His sobriquet, "al-Qarāfi," reportedly attached to him during his youth. Frustrated by his failed attempts to recall his proper name, a roll-caller at a school house simply decided to write "al-Qarāfi", after noticing that the youth used to approach the premises from the direction of al-Qarāfah.<sup>2</sup> While not confirming this particular story, al-Qarāfi does explain that he acquired this name because he lived for a time in al-Qarāfah, lest it be thought that he hailed from the Arab tribe of Banū Qarāfah, who had also settled in Egypt.<sup>3</sup> As for his death date, the sources list alternatively 682/1283 and 684/1285, the latter being the more commonly accepted.<sup>4</sup>

<sup>1</sup> Shihāb al-Dīn al-Qarāfi, *al-'Iqd al-manzūm fī al-khuṣūṣ wa al-'umūm* (Arabic Mss. no.16724, Dār al-Kutub al-Miṣriyah), fol. 48 verso. Elsewhere I have raised doubts about this date of birth, e.g., "From Prophetic Actions to Constitutional Theory: A Novel Chapter in Medieval Muslim Jurisprudence," *IJMES* 25 (1993): 87 (note 13); "The Second Education of the Muftī: Notes on Shihāb al-Dīn al-Qarāfi's Tips to the Jurisconsult," *The Muslim World*, vol. 82 no. 3-4 (July-Oct., 1992): 202 (note 5). *Mea culpa*.

<sup>2</sup> See Ibn Farḥūn (d. 799/1396), *al-Dibāj al-mudhahhab fī a'yān 'ulamā' al-madhhab* (Beirut: Dār al-Kutub al-'Ilmiyah, n.d.), 66.

<sup>3</sup> *Iqd*, 48 recto-verso.

<sup>4</sup> 684/1285 is the date given by the Mālikī biographer, Ibn Farḥūn, *Ibid.* However, the Shāfi'i historian and biographer, Khalīl b. Ayyub al-Ṣafādī (d. 764/1363) gives 682/1283. See *al-Wāfi bi al-wafāyāt*, 22 vols. ed. S. Dederling (Weisbaden: Fritz Steiner Press, 1392/1982), 6:234.

Western scholarship to date has taken only slight notice of al-Qarāfi. J. Schacht cites his work on legal precepts, *al-Furūq*, in the bibliography to *An Introduction to Islamic Law*.<sup>5</sup> In *A History of Islamic Law*, N.J. Coulson makes mention of al-Qarāfi, referring to him as "the great Egyptian Maliki jurist and mufti of the fourteenth [sic] century."<sup>6</sup> He also makes a few references to his works in, "The State and the Individual in Islamic Law".<sup>7</sup> In his interesting study, *The Herb*, Franz Rosenthal catalogues some of al-Qarāfi's views on the legal status of hashish.<sup>8</sup> Wael Hallāq makes an occasional reference to some of al-Qarāfi's contributions to legal theory.<sup>9</sup> And M.H. Kerr makes him the focus of his discussion of *qiyās* in *Islamic Reform*.<sup>10</sup> To date, however, there exist no comprehensive studies on al-Qarāfi or any aspect of his legal or political thought.<sup>11</sup> Perhaps the absence of an entry on him in the *Encyclopaedia of Islam* is a telling testimony to his perduring anonymity in Western scholarship.

During his lifetime, however, al-Qarāfi was hailed as one of the greatest scholars of his day. Leadership of the Mālikī school in Cairo is said to have devolved upon him (*intahat ilayhi ri'āsatu 'l-fiqhi 'alā madhhabi mālik*).<sup>12</sup> And, according to the testimony of the Mālikī chief justice, Taqī al-Dīn b. Shukr, "The Mālikīs and Shāfi'is all agreed that the greatest contemporary scholars in Egypt were three; al-Qarāfi in Old Cairo, Nāṣir al-Dīn b. al-Munayyir in Alexandria, and Taqī al-Dīn b. Daqīq al-ʿĪd in Fāṭimid Cairo (*al-qāhirah al-mu'izzīyah*)."<sup>13</sup> Al-Qarāfi's extant works reflect indeed a refreshingly subtle mind and

<sup>5</sup> (Oxford: Clarendon Press, 1964), 265.

<sup>6</sup> (Edinburgh: Edinburgh University Press, 1964), 143.

<sup>7</sup> *International and Comparative Law Quarterly* vol. 6 (Jan. 1957): 50, 53, 55, 57, 59.

<sup>8</sup> *The Herb: Hashish Versus Medieval Muslim Society* (Leiden: E.J. Brill, 1971), 108–10, 120–21, 124, 181–83, 190–92, and passim.

<sup>9</sup> See, for example, *Uṣūl al-Fiqh*, 180, 193–94; "On Inductive Corroboration, Probability and Certainty in Sunni Legal Thought," *Islamic Law and Jurisprudence: Studies in Honor of Farhat J. Ziadeh* (Seattle: University of Washington Press, 1990), 6, 10, 11 and passim.

<sup>10</sup> *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashīd Ridā* (Berkeley and Los Angeles: University of California Press, 1966), 66–75; see also *ibid.*, 86, 92, 193–94.

<sup>11</sup> I exclude here my own work on al-Qarāfi. There is also a Cairo University Ph.D. dissertation by ʿAbd Allāh Ibrāhīm Ṣalāh, *al-Imām Shihāb al-Dīn al-Qarāfi wa atharuhu fī uṣūl al-fiqh*, which, after repeated attempts, I was unable to obtain.

<sup>12</sup> *al-Dihāj*, 62.

<sup>13</sup> *Ibid.*, 65. There is some confusion about the name of this chief justice. According to al-Suyūṭī's list in *Husn al-muḥāḍarah*, 1:288, there is no Mālikī *qādī al-quḍāt* named Taqī al-Dīn b. Shukr; there is a Taqī al-Dīn b. Shās (d. 685/1286) and a Nafīs al-Dīn

an almost irreverent passion for knowledge. In his *al-Ajwibat al-fākhīrah 'an al-as'ilat al-fājīrah*, a refutation of certain Jewish but especially Christian charges, he flaunts his knowledge of Hebrew, quoting and translating the Old Testament (in Arabic script).<sup>14</sup> Meanwhile, Brockelmann cites *al-Ghurbah al-fākhīrah raddan 'alā al-millat al-kāfirah* (possibly the same work) as "the greatest apologetic achievement in Islam".<sup>15</sup> Both *al-'Iqd al-manẓūm fī al-khuṣūṣ wa al-'umūm* and *al-Istighnā' fī al-istithnā'* show al-Qarāfi to have been an able lexicographer and grammarian. In addition to these propaedeutic religious sciences, however, his *al-Furūq* reveals that he was also versed in mathematics and even had a working knowledge of the rudiments of magic. In *al-Dhakhīrah* (his opus on Mālikī *fiqh*), he speaks of using algebra to compute the shares of inheritance.<sup>16</sup> And his *al-Istibṣār fīmā tudrikuhu al-abṣār* is an attempt to explain some of the mysteries of ophthalmology and astronomy (in response, incidentally, to some questions put to the Ayyūbid sultan, al-Malik al-Kāmil, by the ruler of Sicily, Frederick II).<sup>17</sup> But it was ultimately al-Qarāfi's acumen as a legal theoretician (*uṣūlī*) and his uncommon ability to construct and manipulate legal precepts and propositions (*qawā'id/sg. qā'idah*) that earned him lasting acclaim. Al-Ṣafadī identifies him thus as "one of the Mālikī Imāms in the area of legal theory (*uṣūl al-fiqh*)."<sup>18</sup> Other sources contain, meanwhile, numerous citations of scholars, Mālikī and non-Mālikī alike, who travelled to Egypt from Syria and North Africa to study *uṣūl al-fiqh* with him.<sup>19</sup> His writings would even induce

b. Shukr (d. 680/1281). At *Husn al-muḥāḍarah*, 1:316, however, al-Suyūṭī apparently copies Ibn Farḥūn's mistake and mentions a Taqī al-Dīn b. Shukr. Meanwhile, al-Maqrīzī mentions a Shams al-Dīn b. Shukr, who was the Mālikī chief justice in 677/1279. *Khiṭaṭ*, 2:374.

<sup>14</sup> *al-Ajwibat al-fākhīrah 'an al-as'ilat al-fājīrah*, ed. Bakr Zakī 'Awad (Cairo: Maktabat Wahbah, 1407/1987), 226 (where he quotes Genesis 49:10), 239 (where he quotes Deuteronomy 31:9), and passim. I am thankful to Professor Benjamim Hary of Emory University for his kind assistance in converting al-Qarāfi's Arabic rendering of these verses into Hebrew and then locating them in the Hebrew Bible. According to Professor Hary, there are a few minor typographical errors in al-Qarāfi's Arabic rendering. These may be attributable, however, to the editor of the text rather than to al-Qarāfi himself.

<sup>15</sup> *GAL*, SI, 665.

<sup>16</sup> (Cairo: Maṭba'at Kulliyat al-Shari'ah, 1381/1961) 1:37. The College of Shari'ah at al-Azhar university had planned to edit and publish the entire six volumes of *al-Dhakhīrah*. To date, however, only volume one has appeared.

<sup>17</sup> (Arabic Mss. no. 19 (*falsafah*), Dār al-Kutub al-Miṣriyah). I wish to express my thanks to Dr. Muhammad Fadel for his kind assistance in procuring a copy of this manuscript.

<sup>18</sup> *al-Wāfi*, 6:233.

<sup>19</sup> See, e.g., Abū al-Falāh 'Abd al-Ḥayy b. al-'Imād, *Shadharāt al-dhahab fī akhbār man dhahab*, 8 vols. (Beirut: Dār al-Āfaq al-Jadidah, no date), 6:87; Taqī al-Dīn al-Maqrīzī,

the 10th/16th century al-Suyūṭī to place him on his list of *mujtahid muṭlaqs*.<sup>20</sup> For reasons alluded to in the introduction and further explored in chapter three, al-Qarāfī himself would probably not have made much of this claim; he certainly does not make it for himself. This is not to deny, however, that, assuming that the biographical dictionaries of Ibn Farḥūn and al-Timbuktī suffer no serious omissions, he was probably the greatest Mālikī legal theoretician in all of 7th/13th century Egypt, his only competition in this regard being the Kurdish repatriot from Damascus, Jamāl al-Dīn Ibn al-Ḥājjib (d. 646/1248).<sup>21</sup>

Given this level of fame and achievement, one is struck by the paucity of citations on al-Qarāfī in the standard chronicles and biographical dictionaries. Even authors who are aware of his activities fail to pay him individual notice. In *Shadharāt al-dhahab*, for example, Ibn al-ʿImād (d. 1089/1679), cites both the fact that al-Qarāfī engaged in a disputation with a Shāfiʿī judge, a certain Wajih al-Dīn ʿAbd al-Wahhāb b. al-Ḥasan,<sup>22</sup> and that another Ḥanbalī scholar travelled to Egypt to study legal theory with him.<sup>23</sup> Yet, nowhere in this work does he devote a biographical notice to al-Qarāfī specifically, neither under 684/1285, nor 682/1283. This lack of recognition is repeated in al-Dhahabī's (d. 748/1347) massive *Siyar al-aʿlām al-nubalāʾ*<sup>24</sup> and *al-Bidāyah wa al-nihāyah* of his fellow Syrian, Ibn Kathīr (d. 774/1343).<sup>25</sup> In a similar fashion, contemporary and later Egyptian historian-biographers, including Ibn ʿAbd al-Zāhir (620/1223–692/1292), Shāfiʿ b. ʿAlī (649/1252–730/1330), al-Maqrīzī (d. 845/1441), al-ʿAynī (d. 855/1451), Ibn Iyās (d. 930/1524) and Ibn Taghribirdī (d. 874/1470) also fail to pay al-Qarāfī notice. The only works in

*Kitāb al-Muqaffā al-Kabīr*, 8 vols. ed. Muḥammad al-Yaʿlāwī (Beirut: Dār al-Gharb al-Islāmī:1411/1991), 1:608, 3:763, 5:571–72 and passim.

<sup>20</sup> *Husn al-muḥādarah*, 1:316ff.

<sup>21</sup> Ibn Farḥūn's list of commentaries on Ibn al-Ḥājjib's *fiqh* work suggests that he was the 7th/13th century's uncontested master in Mālikī *fiqh*, being followed, perhaps, by Jamāl al-Dīn Ibn Shās (d. 616/1219), author of *al-Jawāhir al-thamīnah fi madhhab ʿālim al-madīnah. al-Dibāj*, 189–91. Ḥājjī Khalīfah, meanwhile, gives an extraordinarily long list of commentaries and abridgments on Ibn al-Ḥājjib's *Muntahā al-wuṣūl* [sic] on *uṣūl al-fiqh* and dialectic. See *Kashf al-zunūn ʿan asāmi al-kutub wa al-funūn*, 2 vols. (Istanbul: Maṭbaʿat al-Maʿārif, 1360–62/1941–43), 2:1853–57.

<sup>22</sup> *Shadharāt*, 5:396.

<sup>23</sup> *Ibid.*, 6:87.

<sup>24</sup> Shams al-Dīn Muḥammad ibn Aḥmad b. ʿUthmān al-Dhahabī, *Siyar al-aʿlām al-nubalāʾ*, 35 vols. (Beirut: Muʿassasat al-Risālah, 1409/1988).

<sup>25</sup> *al-Bidāyah wa al-nihāyah*, 14 vols. (Beirut: Maktabat al-Maʿārif, 1405/1984).

which I was able to locate individual notices on him are al-Suyūṭī's *Husn al-muḥādarah*,<sup>26</sup> al-Ṣafadī's *al-Wāfi bi al-wafāyāt*<sup>27</sup> and *al-Dibāj al-mudhahhab* of Ibn Farḥūn,<sup>28</sup> the latter, which treats Mālikīs exclusively, containing the fullest citation.

Al-Qarāfī's exclusion from so many historical and biographical sources need not cast any doubts on his significance as a thinker. Medieval Muslim historians routinely copied the works of their predecessors, at times uncritically and with little regard for extraneous information that may have come to them otherwise. Where an earlier author missed an entry, his omission could be repeated for several generations over. That Ibn al-ʿImād, for example, clearly knew of al-Qarāfī is an obvious reflection of this phenomenon in *Shadharāt al-dhahab*. Al-Maqrīzī too, in *al-Muqaffā al-kabīr*, fails to give an individual notice on al-Qarāfī, despite his citing several other scholars who studied *uṣūl al-fiqh* with him.<sup>29</sup> Al-Dhahabī (a frequent source for Ibn al-ʿImād) and Ibn Kathīr are also suspected of having known of al-Qarāfī, since their esteemed teacher, Ibn Taymīyah, is known to have fusiladed some of the latter's less stringent views on the legal status of hashish.<sup>30</sup> At any rate, such lack of recognition by medieval Arabic sources, though providing little grounds for downplaying al-Qarāfī's importance as a jurist, should go a long way perhaps in vindicating his perduring anonymity in Western scholarship.

## II. Teachers

The paucity of biographical information on al-Qarāfī obscures his educational background. Al-Ṣafadī and al-Suyūṭī name no teachers; Ibn Farḥūn names only four, two of these Shāfiʿīs, one a Ḥanbalī and only one a Mālikī. Al-Qarāfī himself adds to this list by intimating a cherished relationship with the celebrated Ibn al-Ḥājjib.<sup>31</sup> This, however, was almost certainly short-lived and probably of limited

<sup>26</sup> 1:316.

<sup>27</sup> *al-Wāfi*, 6:233–34.

<sup>28</sup> *al-Dibāj*, 62–67.

<sup>29</sup> See Taqī al-Dīn al-Maqrīzī, *al-Muqaffā al-Kabīr*, 1:608, 3:763, 5:571–72 and passim.

<sup>30</sup> Rosenthal, *The Herb*, 181–85, esp. 183 (Arabic text of al-Zarkashī's *Zahr al-ʿArīsh*, beginning of p. 175).

<sup>31</sup> See *al-Furūq*, 1:64.

consequences: al-Qarāfi was only thirteen when Ibn al-Hājib came to Egypt in 639/1241 and twenty when the latter died some seven years later in Alexandria, where he reportedly spent the last few years of his life. And though Ibn al-Hājib wrote an important work on *uṣūl al-fiqh* and dialectic, *Nihāyat al-wuṣūl wa al-amal ilā 'ilmayy al-uṣūl wa al-jadal*, this work does not figure at all in al-Qarāfi's writings on the subject.<sup>32</sup> In fact, I have come across very few actual citations of Ibn al-Hājib in any of al-Qarāfi's works.<sup>33</sup> Meanwhile, his opus on Mālikī *fiqh*, *al-Dhakhīrah*, suggests a much larger debt to other unnamed Mālikī teachers. The absence of Ḥanafī teachers from his *vitae* is both interesting and probably accurate. The high proportion of Shāfi'is, meanwhile, as shall be seen in chapter two, only underscores their dominance in Cairo, both politically and intellectually.<sup>34</sup>

Al-Qarāfi's Ḥanbalī teacher was Shams al-Dīn Abū Bakr Muḥammad b. Ibrāhīm b. 'Abd al-Wāhid b. 'Alī b. Surūr (d. 676/1277), a jurisconsult and hadith expert originally from Jerusalem. He came to Egypt sometime after 640/1242 after studying in Baghdād. In Egypt he became the first Ḥanbalī *qāḍī al-quḍāt* under Baybars in 663/1265 and had also been the first professor of Ḥanbalī law at the famous Ṣālihiyah *madrasah*.<sup>35</sup> He was later coerced, however, (or duped) into placing certain misappropriated funds into his care, as a result of which he was removed from office and spent a couple of years in prison.<sup>36</sup> Al-Qarāfi's debt to him was most probably in the area of hadith. Sh. 'Abd al-Fattāh Abū Ghuddah, editor of the 1967 edition of the *Tamyiz*, gives the opinion that this was the area in which al-Qarāfi was surprisingly weak.<sup>37</sup> However, the editors of *al-Dhakhīrah* point out

<sup>32</sup> Interestingly, a *mukhtaṣar* of Ibn al-Hājib's work became the subject of a number of commentaries by Shi'ite authors and even became a standard text among Shi'ite law students. See D. Stewart, "Twelver Shi'ite Jurisprudence and Its Struggle with Sunni Consensus," (Ph.D. diss., The University of Pennsylvania, 1991), 189-92.

<sup>33</sup> There is an interesting comment in al-Timbuktī's *Nayl al-ibtihāj*, 50, 73, in which al-Shāṭibi and al-Qabāb indict Ibn al-Hājib, along with Ibn Bashīr and Ibn Shās, for having "corrupted *fiqh*." Al-Timbuktī is not quite able to say exactly what this means, but he surmises that the reference is to their having taken over principles from non-Mālikī scholars, e.g., al-Ghazālī, and then extrapolating from these views that violated the Mālikī *madhhab*. See *ibid*, 73.

<sup>34</sup> On Shāfi'i dominance and the relationship among the schools of law in Cairo, see below, 53-56.

<sup>35</sup> See below, 40-41.

<sup>36</sup> *Kitāb al-dhayl 'alā ṭabaqāt al-ḥanābilah*, 2 vols. (Beirut: Dār al-Ma'ārif, n.d.), 2:294-95.

<sup>37</sup> *Tamyiz*, 13.

that al-Qarāfi simply relied on and related the meanings as opposed to the verbatim expressions of hadith, a practice, according to them, common among jurisconsults.<sup>38</sup>

Al-Qarāfi's Mālikī professor was Sharaf al-Dīn Muḥammad b. 'Umrān b. Mūsā, better known as al-Sharīf al-Karakī (d. 688 or 9/1290 or 91). Little is known of al-Karakī's activities overall. He came to Egypt from North Africa after learning Mālikī *fiqh* in Fez. As a Mālikī, he was possibly al-Qarāfi's professor proper, i.e., his professor of law.<sup>39</sup> Ibn Farḥūn reports that the latter *worked* under al-Karakī (*ishtaghala 'alayh*),<sup>40</sup> which suggests that it was possibly al-Karakī who granted al-Qarāfi his license to teach and issue formal legal opinions (*al-ijāzah li al-tadrīs wa al-iftā'*).<sup>41</sup> Al-Karakī himself is said to have studied with the redoubtable Shāfi'i jurist, 'Izz al-Dīn b. 'Abd al-Salām, and to have mastered both the Mālikī and Shāfi'i systems of law.<sup>42</sup>

Shams al-Dīn al-Khusrushāhī (d. 652/1254) was an accomplished Shāfi'i legal theoretician and rationalist theologian (*mutakallim*). He studied with the famed Fakhr al-Dīn al-Rāzī (d. 606/1209) and was apparently deeply influenced by the latter.<sup>43</sup> It was presumably through al-Khusrushāhī that al-Rāzī came to exert such an unexpected but apparently powerful influence on al-Qarāfi. The latter wrote commentaries on a number of al-Rāzī's works, including his *al-Arba'in fī uṣūl al-dīn*, on rationalist theology, and his voluminous *al-Maḥṣūl* on *uṣūl al-fiqh*, of which al-Qarāfi's *Tanqīh al-fuṣūl* is an abridgment and his *Sharḥ tanqīh al-fuṣūl* a commentary on the latter. "Commentaries," it is true, were often the means taken by less known scholars to identify themselves with superstars in order to entice people into reading their works, even, or perhaps especially, when their ideas differed from those of the original author. In al-Qarāfi's case, however, it is clear that he had a genuine admiration for al-Rāzī. In fact, he repeatedly refers to the latter as "al-Imām," so much so that he has to alert his reader on occasion that he is using this title to refer to Mālik! This

<sup>38</sup> 1:12.

<sup>39</sup> "Pour l'étudiant de la *madrasah*, il pouvait avoir, au cours de ses études, plusieurs professeurs de plusieurs *madhhabs* (hanafite, malikite, etc.) mais son appartenance à l'un de ces *madhhabs* était déterminée par celle de son professeur de droit (*fiqh*)." See G. Makdisi, "La Corporation," 196.

<sup>40</sup> *al-Dibāj*, 332. On *ishtighāl*, see Makdisi, *Rise*, 206-10.

<sup>41</sup> On this instrument see Makdisi, *Rise*, 148-52.

<sup>42</sup> *al-Dibāj*, 332.

<sup>43</sup> Ibn Taghribirdī, *al-Nujūm*, 7:32.



attachment to al-Rāzī may appear at first blush a tad anomalous. But this may be a result of our failure to appreciate the significance of al-Rāzī in later, i.e., post 7th/13th century, *uṣūl al-fiqh* overall. From the commentary by al-Isnawī (d. 772/1370), for example, on al-Bayḍāwī's (d. 685/1286) widely read *Minhāj al-wuṣūl ilā 'ilm al-uṣūl* we learn that al-Rāzī was viewed as something of a master synthesizer who had successfully digested and integrated all that had preceded him.<sup>44</sup> This, when added to his own contributions, conferred upon his work a sort of state-of-the-art status. One notices that Ḥajjī Khalīfah cites no less than fifteen commentaries, *ta'liqahs* and abridgments on al-Rāzī's *al-Maḥṣūl* (or derivatives thereof),<sup>45</sup> as compared to a mere four on al-Ghazālī's *al-Mustasfā*,<sup>46</sup> none on al-Juwaynī's *al-Burhān*,<sup>47</sup> and none on al-Baṣrī's *al-Mu'tamad*.<sup>48</sup> Meanwhile, works by such authors as al-Qarāfī and the Ḥanbalite, Muḥyī al-Dīn al-Ṭūfī (d. 710/1310) testify to al-Rāzī's cross-over appeal. Indeed, one senses that it was 7th/13th and 8th/14th century preoccupation with al-Rāzī that so drastically reduced the impact of the great Sayf al-Dīn al-Āmidī (d. 631/1233), though the latter would exert an undeniable, albeit indirect, influence via Ibn al-Ḥājj's *Muntahā al-ṣūl*, said to be an abridgment of al-Āmidī's *al-Iḥkām*.<sup>49</sup> In sum, all of this suggests that rather than view later *uṣūl al-fiqh* in light of the writings of such early masters as al-Ghazālī (d. 505/1111), al-Juwaynī (d. 478/1085) or al-Baṣrī (d. 436/1044), a more profitable approach might begin by looking to the contributions of al-Rāzī and his commentators.

It is necessary, however, to make a couple of points regarding the relationship between al-Rāzī and al-Qarāfī. First, al-Qarāfī was appa-

<sup>44</sup> Jamāl al-Dīn al-Isnawī, *Nihāyat al-ṣūl fī sharḥ minhāj al-wuṣūl ilā 'ilm al-uṣūl*, 3 vols. (Beirut: Dār al-Kutub al-'Ilmiyah, 1403/1983), 1:4 (on the margin of Ibn Amīr al-Ḥajj's *al-Taqrīr wa al-taḥbīr*).

<sup>45</sup> *Kashf al-zunūn*, 2:1615–16.

<sup>46</sup> *Ibid.*, 2:1673.

<sup>47</sup> *Ibid.*, 1:242.

<sup>48</sup> *Ibid.*, 2:1732.

<sup>49</sup> Cf., B. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City, University of Utah Press, 1992), 22. Mention has been made of the large number of commentaries on Ibn al-Ḥājj. Ḥajjī Khalīfah states that the latter's *Muntahā al-ṣūl* was a *mukhtaṣar* of al-Āmidī's *al-Iḥkām*. He cites, however, no direct commentaries on al-Āmidī's work (*Kashf*, 1:17). I would submit that the main attraction to Ibn al-Ḥājj resided not so much in the content as the brevity of his work, which rendered it a text that could be easily taught and digested. The same might be said of al-Bayḍāwī's *Minhāj*. Meanwhile, speaking of al-Āmidī, al-Qarāfī's frequently cited teacher, al-'Izz b. 'Abd al-Salām, is said to have studied *uṣūl al-fiqh* under him. See Ibn al-'Imnād, *Shadharāt*, 5:301.

rently interested only in al-Rāzī's writings on theology and legal theory proper, i.e., proper disciplines in which he considered the latter an authority. Encyclopedic works on the order of *Jāmi' al-'ulūm* or even *al-Tafsīr al-kabīr* (*Mafātīh al-ghayb*) were of no apparent use to him. In *Jāmi' al-'ulūm*, for example, al-Rāzī's main objective was allegedly "to preserve the conception of the Imām as the ideal ruler".<sup>50</sup> This, as I have tried to show elsewhere, was an ideal quite removed from al-Qarāfī's thinking.<sup>51</sup> Second, despite his genuine admiration for al-Rāzī, al-Qarāfī was not in the habit of slavishly following the master. His writings show that he often differed, at times strongly, with al-Rāzī, and that he continued to ponder and rethink issues on which he had taken the latter to task.<sup>52</sup> This manner of sustained discourse with the venerated master would undoubtedly sharpen al-Qarāfī's appreciation for intellectual neatness and precision. One finds thus in his relationship with al-Rāzī a significant contribution to his tendency toward logical punctiliousness and critical over dogmatic theory and analysis.

By far, however, al-Qarāfī's most important teacher was the redoubtable Shāfi'i jurist, 'Abd al-'Azīz b. 'Abd al-Salām ibn Abū al-Qāsim b. al-Ḥasan b. al-Muhadhdhab, better known as al-'Izz ibn 'Abd al-Salām. Even before he came to Cairo from Damascus in 639/1241, Ibn 'Abd al-Salām's reputation had become the stuff of legend. In Damascus, as sermon-giver (*khaṭīb*) of Umayyad mosque, he openly defied what he considered to be unsanctioned customs followed by the other sermon-givers: he refused to wear black, refused to say his sermons in rhymed prose (*saj'*) and refused to praise the princes. In fact, when al-Ṣāliḥ Ismā'il made his capitulatory concessions to the Crusaders during his struggle with al-Ṣāliḥ Ayyūb,<sup>53</sup> Ibn 'Abd al-Salām deleted his mention from the *khuṭbah* and condemned him publicly from the pulpit! Ismā'il had him jailed, but later released him, after which time he migrated to Egypt.<sup>54</sup>

<sup>50</sup> A.K.S. Lambton, *State and Government*, 132.

<sup>51</sup> "From Prophetic Actions to Constitutional Theory."

<sup>52</sup> See, e.g., his correction of al-Rāzī and an earlier opinion of his own at *Sharḥ*, 262: "... and for this reason I added the additional stipulations that you see here. ... And this was a mistake on my part. ... A full explication of this issue is included in the chapter dealing with the basis of legal rulings (*mā yatawaqqafu 'alayhi 'l-ḥukm*), which you should now consult, because what I mentioned there is actually the correct definition. As for what I and the Imām (al-Rāzī) stated originally, it is incorrect".

<sup>53</sup> A summary of the history of Egypt (and, to some extent, Syria) in this period is provided in chapter two below, 33–52.

<sup>54</sup> Ibn Ḥajar al-'Asqalānī, *Raf'*, 2: 351; *Shadharāt*, 5:301–02.

Upon his arrival in Cairo, he was welcomed by al-Ṣāliḥ Ayyūb, who appointed him chief justice of Fustat and the southern quarter of Cairo (*al-wajh al-qibli*).<sup>55</sup> But even in the face of this hospitality, Ibn 'Abd al-Salām remained the enemy of compromise. When he received word about a certain house of ill repute that had been allowed to operate unmolested by the authorities, he marched up to the citadel and gave the Sultan a royal reprimand. When the Sultan explained that he was not responsible for the situation and that he had inherited it from his father's reign, Ibn 'Abd al-Salām reportedly asked him if he would be content with being among those condemned in the Qur'an who say, "We found our fathers following a way, [and we are following their example]".<sup>56</sup> Later, when al-Zāhir Baybars became Sultan, Ibn 'Abd al-Salām reportedly refused to swear allegiance until he had seen satisfactory proof that Baybars had passed through the necessary steps to becoming a freed slave.<sup>57</sup> In fact, Ibn Iyās cites an incredible report to the effect that Ibn 'Abd al-Salām once insisted on selling the *mamlūks* in a public auction, arguing that their status as slaves disqualified them from holding public office!<sup>58</sup>

Ibn 'Abd al-Salām's legendary exploits eventually earned him the nickname, "*sulṭān al-'ulamā'*".<sup>59</sup> His activities suggest that this title was well deserved and that he was *the* legitimizing authority among the *fuqahā'* of Cairo. In fact, his many crucial roles and his being referred to as *shaykh al-islām* give the vague impression that in the same way that each *madhhab* was headed by a headmaster or *ra'īs*, the legal community as a whole may have been informally headed by a *shaykh al-islām* whose function it was to defend their interests and mediate between the populace and the central power. Thus, when Sayf al-Dīn Quṭuz wanted to levy additional taxes in preparation to meet the Mongols, he felt it necessary to seek Ibn 'Abd al-Salām's approval, despite the fact that the latter was at the time retired from public office and serving in no official capacity.<sup>60</sup> When Baybars decided to reorganize the judiciary in 660/1262, he delayed the initial

<sup>55</sup> See Ibn Hajar al-ʿAsqalānī, *ibid.*, 2:351.

<sup>56</sup> *Ibid.*, 2:352. The Qur'ānic reference is 43:22–23.

<sup>57</sup> Nielsen, "Sultan al-Zāhir Baybars," p. 172.

<sup>58</sup> *Badā'ī'*, 1:274. See also, al-Suyūṭī, *Husn al-muḥāḍarah*, 2:162–63 for a fuller version.

<sup>59</sup> *Raf'*, 2:350. This title was reportedly given him by Ibn Daqiq al-ʿId. See Ibn al-ʿImād, *Shadharāt*, 5:302.

<sup>60</sup> See, e.g., *Sulūk*, 1:416–17. Interestingly, the chief justice at the time was the wily Badr al-Dīn al-Sinjārī, who was also summoned to the citadel for this meeting but upon whose approval alone Quṭuz was apparently unwilling to rely.

stages (which broke the Shāfi'ī monopoly) until the month of Dhū al-Ḥijjah, i.e., six months after Ibn 'Abd al-Salām's death.<sup>61</sup> When Ibn 'Abd al-Salām finally died, Baybars is reported to have breathed a sigh of relief, saying, "Now my reign is secure; for were this *shaykh* to incite the people against me, my kingdom would be snatched away."<sup>62</sup> Meanwhile, within the legal community, or at least among the Shāfi'īs, Ibn 'Abd al-Salām's standing is succinctly summarized in a statement attributed to Zakī al-Dīn al-Mundhirī (581/1185–656/1258), the Shāfi'ī jurist, hadith expert and author of the still ubiquitous *Kitāb al-targhib wa al-tarhib*: "We used to give legal opinions before *shaykh* 'Izz al-Dīn arrived; now that he is among us, we no longer do so."<sup>63</sup>

A number of sources report that Ibn 'Abd al-Salām ultimately reached the rank of *ijtihād*, transcending the Shāfi'ī *madhhab* altogether and issuing legal opinions according to his own lights.<sup>64</sup> This attitude is clearly reflected in his writings, where in response to the question of the qualifications required of one who issues *fatwās* he insists that the latter be "a *mujtahid* in the principles of the law (*uṣūl al-sharī'ah*)".<sup>65</sup> This translated into a certain vigilance and even intolerance on his part towards what he deemed to be "weak and poorly substantiated" views espoused by the other schools.<sup>66</sup> Indeed, he was openly critical of the Mālikī tendency to go beyond the four corners of scripture on the basis of *maṣlahah* and related principles.<sup>67</sup> And he was equally hostile towards concessions made on the basis of the purportedly "corporate" status of the *madhhabs*.<sup>68</sup> Instead, al-'Izz insisted that only those views shown to comport *best* with scripture deserved recognition; and the mere fact that a view was endorsed by the Mālikī or

<sup>61</sup> See *Sulūk*, 1:472, where it is reported that the appointment of the four deputy judges (*nuwwāb*) took place in Dhū al-Qa'dah of 660, *pace* J.H. Escovitz, who puts it at 661. See J.H. Escovitz, "The Establishment of the Four Chief Judgeships in the Mamluke Empire," *Journal of the American Oriental Society*, 102 no. 3 (1982): 529.

<sup>62</sup> *Shadharāt*, 5:302. See also Tāj al-Dīn al-Subkī, *Tahaqāt al-shāfi'iyah*, 6 vols. (Cairo: Husayniyah Press, 1324/1906), 5:84.

<sup>63</sup> *Badā'ī'*, 1:317. On al-Mundhirī, see *Shadharāt*, 5:277–78.

<sup>64</sup> *Shadharāt*, 5:301; *Raf'*, 2:351; *Husn al-muḥāḍarah*, 1:314.

<sup>65</sup> *Fatāwā sulṭān al-'ulamā' al-'izz ibn 'abd al-salām*, ed. Muṣṭafā 'Ashiq (Cairo: Maktabat al-Qur'ān, n.d.), 127.

<sup>66</sup> See, for example, his views at *Ibid.*, 106.

<sup>67</sup> See, his *Qawā'id al-aḥkām fi maṣāliḥ al-anām*, 2 vols. ed. Ṭahā 'Abd al-Ra'ūf Sa'd (Cairo: Dār al-Jil, 1400/1980), 2:158. See also below, 63.

<sup>68</sup> See, e.g., *Fatāwā*, 106. For a discussion on the corporate status of the schools of law, see below, 103–12.

any other *madhhab* was of no probative value at all. This manner of reckoning was passed on to his favored protégé, the pertinacious Tāj al-Dīn b. bint al-A‘azz, who served as Shāfi‘ī chief justice under Baybars before (and after) the latter’s reorganization of the judiciary. It was primarily against the exclusivist policies of Ibn bint al-A‘azz as head of the judiciary that al-Qarāfi would ultimately direct his *Tamyīz*.<sup>69</sup>

Al-Qarāfi’s relationship with Ibn ‘Abd al-Salām was thus doubled-edged. On the one hand, he had great admiration for the *shaykh*, as he would later state in his *al-Furūq*:

No one have I seen throw question[s] into relief as did *shaykh* ‘Izz al-Dīn b. ‘Abd al-Salām, may God shew him mercy and sanctify his soul. Indeed, he had a striking ability to resolve difficult questions, both textual and theoretical, in many areas of the Law. And he would be blessed with insights totally unknown to others, may God shew him an abundance of mercy.<sup>70</sup>

At the same time, Ibn ‘Abd al-Salām represented precisely that tendency, so dreaded by al-Qarāfi, to ignore the considerable subjective element in his own thinking while condemning its presence in the views of others, a habit, given the political preeminence of Shāfi‘ism in Cairo,<sup>71</sup> that would inevitably result in the substitution of might for right. Indeed, despite Ibn ‘Abd al-Salām’s noble intentions and his belief that he was exalting scripture as the final arbiter, in reality it was and could only be the individual *mujtahid*’s interpretation that would be imposed on the community. And here, as a Mālikī, al-Qarāfi was painfully aware that it was not the interpretation of any *mujtahid* that mattered; it was, alas, the interpretation of the putative *mujtahid* in power!

I shall return to the issues of *ijtihād* versus *taqlīd* and the corporate status of the *madhhabs* in chapter three below. For now it is enough to note that al-Qarāfi apparently viewed these issues in the more general context of the relationship between knowledge and politics, i.e., the problem of how power influences the community’s understanding of what is ‘known’ and what is accepted, therefore, as right and proper

<sup>69</sup> Ibn bint al-A‘azz is said to have become chief justice at the specific behest of Ibn ‘Abd al-Salām. See Ibn al-‘Imād, *Shadharāt*, 5:319; Jackson, “The Primacy of Domestic Politics: Ibn Bint al-A‘azz and the Establishment of the Four Chief Judgeships in Mamlūk Egypt,” *JAOS* vol. 115 no. 1 (1995): 60.

<sup>70</sup> *al-Furūq*, 2:157.

conduct. This is a rather common phenomenon that results from the tendency of A’s possession of power to habituate B to seeing his interests in conforming with A’s point of view. Over time the original impetus behind this action is blurred or forgotten and B comes to see himself as acting not in accordance with A’s view but with his own interest or with the way things simply ought to be.<sup>72</sup> At this juncture, the incumbency of A’s view makes it difficult to subject it to critique or criticism; for it is no longer looked upon as just another in a series of equally eligible alternatives. This obtains despite the fact that A’s position never really proved itself in the arena of open debate. It is rather power and incumbency that, in the final analysis, determines and sustains the status quo.

At any rate, al-Qarāfi’s perspective on the problem of the relationship between knowledge and power was significantly affected by his experience and relationship with Ibn ‘Abd al-Salām. The latter is by far the most oft-cited of any contemporary scholar in all of his works. And while a comparison of their writings reveals al-Qarāfi to have been the deeper, more careful thinker,<sup>73</sup> Ibn ‘Abd al-Salām more than made up for this by the sheer force of his personality and the magnitude of his reputation. It is perhaps no accident that in the “pure-law doctrine” ultimately developed by al-Qarāfi there lies an effective mechanism for reducing the impact of personality and other non-legal sources of authority on the ability of scholars to pass off their personal views and predilections as bonafide law.<sup>74</sup>

### III. Teaching and Other Preoccupations

The paucity of biographical information on al-Qarāfi also obscures his teaching career. I have come across references to only three teaching posts which he was to have held: the Mālikī chair at the Ṭaybarsīyah college; a teaching position in Mālikī law at the Cairo Friday-mosque (*jāmi‘ miṣr*); and the Mālikī chair at the Ṣālihiyah super-college. Given his overall reputation and the obvious concern for students portrayed in his works, one would think that al-Qarāfi had a much more active

<sup>72</sup> On this understanding of the confluence between power and authority, see the discussion by T. Ball, “New Faces of Power,” *Rethinking Power*, ed. T.E. Wartenberg (New York: State University of New York Press, 1992), 18–19.

<sup>73</sup> Compare, e.g., al-Qarāfi’s *al-Furūq* with Ibn ‘Abd al-Salām’s *Qawā‘id al-aḥkām*, both on legal precepts and propositions.

teaching career than this. Unfortunately, we are simply poorly served by the sources in this regard.

The Ṭaybarsiyah college was founded in 677/1279 by the Mamlūk amīr 'Alā' al-Dīn Ṭaybars al-Wazīrī with an endowment for thirty students, fifteen Shāfi'ī and fifteen Mālikī. According to Ibn Duqmāq, al-Qarāfi was the first to occupy the Mālikī professorship there.<sup>75</sup> Al-Ṣafadī reports that he also taught at the Cairo Friday-mosque, but he does not indicate whether this was a formally endowed post or simply a *ḥalqah*.<sup>76</sup> I have come across no additional information on the activities of this mosque in either al-Maqrizī or Ibn Duqmāq. At any rate, al-Qarāfi's most important post was his professorship at the famous Ṣālihiyah super-college. This *madrasah*, which had a chair for each of the four Sunni schools of law, constituted a sort of round table and testing ground where each school would strive to make its best showing. In this capacity, early Mamlūk rulers came to acknowledge it as the most important repository of religious knowledge: al-Mu'izz Aybak established his *mazālim* court there;<sup>77</sup> and when Baybars installed the four chief judges in 663/1265, they all came from the Ṣālihiyah. Al-Ṣafadī indicates that al-Qarāfi assumed his tenure at the Ṣālihiyah sometime around 669/1270, following the death of his predecessor, Sharaf al-Dīn al-Subkī.<sup>78</sup> It was presumably in this capacity that he came into leadership of the Mālikī school, which may have included both Old and Fātimid Cairo, as the Ṣālihiyah was located in the latter, while al-Qarāfi himself hailed from the former.

Despite his reputation as a jurist and his concern for the political ramifications of the law, one is struck by the fact that al-Qarāfi never served as judge, not even a deputy (*nā'ib*). This is particularly interesting, given that the Ṣālihiyah *madrasah* served as a pool from which judges and chief justices were routinely recruited. Sharaf al-Dīn al-Subkī, the first Mālikī chief justice appointed by Baybars, came

<sup>75</sup> Ibn Duqmāq, *Kitāb al-intiṣār li wāsiyat 'aqd al-amṣār*, 2 vols. (Beirut: al-Maktab al-Tijārī li al-Ṭibā'ah wa al-Tawzī'; n.d.), 1:97. Al-Maqrizī cites the Ṭaybarsiyah as a Shāfi'ī college and does not indicate that it housed a chair for Mālikī law, nor that al-Qarāfi taught there. *Khiṭaṭ*, 2:383. Ibn Duqmāq, on the other hand, indicates that the Mālikī-Shāfi'ī Ṭaybarsiyah evolved out of an earlier college, which may have been the Shāfi'ī college identified by al-Maqrizī. It is also possible that 'Alā' al-Dīn Ṭaybars established more than one Ṭaybarsiyah.

<sup>76</sup> *al-Wāfi*, 6:233.

<sup>77</sup> al-Maqrizī, *Khiṭaṭ*, 2:374.

<sup>78</sup> *al-Wāfi*, 6:233. On Sharaf al-Dīn al-Subkī, see Ibn Kathīr, *al-Bidāyah*, 13:260. Al-Suyūṭī reports, however, that al-Subkī died in 667. *Husn al-Muḥāḍarah*, 2:188.

from the Ṣālihiyah; and as al-Subkī's successor, it would seem that al-Qarāfi would have been next in line for such a post. But this was not to be, and one can think of only two possible explanations. First, his preoccupation with teaching and disputation left him little time for other activities, he, like other scholars, fearing that involvement with administrative matters would take him away from research and the latest developments in legal science. The case of the Shāfi'ī chief justice, Ibn bint al-A'azz, may have provided sufficient admonition. It was said of the latter that were it not for his activities as judge he would have surpassed the leading Shāfi'ī of the day, al-'Izz b. 'Abd al-Salām. Second, it may be that al-Qarāfi simply lacked the political acumen and aggressiveness necessary to landing a judgeship. Ibn Farḥūn notes that he was fond of reciting the words of the poet, Ḥāfi al-Ra's:

I chided the world for giving preference to the ignorant  
and passing over those of knowledge  
She replied: I beg your pardon;  
but the ignorant are my children,  
the virtuous are the children of my co-wife.<sup>79</sup>

#### IV. Relevant Works

There is disagreement over the precise number of works al-Qarāfi authored. The editor of *Tamyīz*, Sh. 'Abd al-Fattāḥ Abū Ghuddah, cites twenty-four titles and intimates that his list is incomplete.<sup>80</sup> Brockelmann, meanwhile, cites only eleven.<sup>81</sup> At any rate, there are three works, all of which appear on the lists of both Abū Ghuddah and Brockelmann, that are of primary importance for the present study. These are *Kitāb al-iḥkām fī tamyīz al-fatāwā 'an al-aḥkām wa taṣarruḥāt al-qāḍī wa al-imām*; *al-Furūq*; and *Sharḥ tanqīḥ al-fuṣūl*.

In the present context, al-Qarāfi's seminal work is his *Tamyīz*. It is here that he raises and attempts to address such critical issues as the difference between the legal opinion (*fatwā*), the legal ruling (*ḥukm*), and the discretionary action (*taṣarruf*); the corporate status of the *madhhabs*; the definition and limits of law; and the distinction between

<sup>79</sup> *al-Dibāj*, 68. This may also be a reference to the waning position of Mālikism.

<sup>80</sup> *Tamyīz*, 16.

<sup>81</sup> *GAL*, SI, 665-66.

legal, non-legal and para-legal, on the basis of which it can be determined which judicial or caliphal pronouncements are binding and which are not. In the prolegomena to this work, he introduces the impending discussion as follows:

To proceed: There has run over the course of time between myself and some of the notables discussions concerning the matter of the difference between the *fatwā*, in the face of which the *fatwā* of a dissenter remains valid and standing, and the *ḥukm*, which may not be violated by a dissenter, and the discretionary actions of judges (*taṣarrufāt al-ḥukkām*) and those of the holders of (formal) authority (*taṣarrufāt al-a'immaḥ*). And there is disagreement regarding the establishment of the appearance of the crescent marking the beginning of Ramaḍān on the basis of a single testimony: Does this render the fast obligatory upon one who holds that establishing the appearance of the crescent requires the testimony of two witnesses? And there is disagreement over whether a judge's act of selling an orphan's property constitutes a binding ruling (*ḥukm*) affirming the validity of the sale which may then not be challenged. Or if [a judge] affirms the probity of a certain witness, is it then permissible for some other judge to reverse this (action); or does this constitute a binding ruling (*ḥukm*) which may not be overturned? And similar questions.<sup>82</sup>

Al-Qarāfi completed *Tamyiz* apparently sometime just prior to the year 660/1262, on the eve of the reestablishment of the 'Abbāsid caliphate and at the height of the Ibn bint al-A'azz controversy involving exclusivism in the judiciary.<sup>83</sup> Unfortunately, the *Tamyiz* itself carries no date of authorship, and the only key to the present suggestion is a citation in the text of a view apparently belonging al-'Izz b. 'Abd al-Salām, following the mention of which the panegyric formula, "May God shew him mercy" is conspicuously missing.<sup>84</sup> The view in question reappears later in al-Qarāfi's *al-Furūq*, but this time it is cited in the past tense and followed by the panegyric, *rahimuhu 'llāh*.<sup>85</sup> This suggests that the formula was omitted from the *Tamyiz* because at the time of its composition Ibn 'Abd al-Salām, who died in 660/1262, was still alive. While such evidence is far from conclusive, for the moment this is probably as close as we will be able

<sup>82</sup> *Tamyiz*, 18.

<sup>83</sup> See below, 64–67, 145–47.

<sup>84</sup> *Tamyiz*, 228.

<sup>85</sup> *al-Furūq*, 2:100.

to come to an exact date of composition. We may, nevertheless, take some comfort in knowing that *Tamyiz* was definitely written before 677/1279, as it is mentioned in *Sharḥ tanqīḥ al-fuṣūl*, which was completed in Sha'bān/December of that year.<sup>86</sup> On this information, it is almost certain that *Tamyiz* was written during the reign of Baybars I. This, again, is corroborated by its relevance to a number of contemporary events.

There are two printed editions of the *Tamyiz*. The first was produced on the basis of a single poorly preserved manuscript from the Egyptian National library and published in 1938 by Maḥmūd 'Arnūs.<sup>87</sup> This edition is replete with errors and is at times as confusing as it is misleading. 'Arnūs, himself a *sharī'ah* court judge and a scholar of some repute, was aware that in relying on this single manuscript he might produce an imperfect edition. Nevertheless, he felt that the work was so important and such a brilliant testimony to al-Qarāfi's acumen as a legal thinker that readers were likely to benefit from it despite the inevitable inaccuracies his edition contained.

The next edition of the *Tamyiz* was edited by Sh. 'Abd al-Fattāḥ Abū Ghuddah and appeared in 1967. This is a fine edition, annotated and accompanied by some helpful footnotes. It was produced on the basis of four manuscripts: (1) Mss. from the personal library of Sh. 'Ārif Hikmat at Medina (no. 3, *fatāwā*); (2) Mss. from the Aḥmadiyah library at Aleppo (no. 306, amid a collection of books on hadith), copied in 738/1338 by 'Abd al-Raḥmān b. 'Abbās b. 'Abd al-Raḥmān; (3) Mss. from the Azhar collection (no. 1766 *fiqh mālikī*), copied in 1005/1596 by Muḥammad b. Muḥammad b. 'Abd al-Bāqī al-Khālidi al-Mālikī; (4) Mss. from the Egyptian National library (no. 1850 *fiqh mālikī*, specific no. 21, general no. 1850), copied in 1173/1759 by an unknown copiest.<sup>88</sup>

There is fifth manuscript of the *Tamyiz* held at Princeton university (no. 826, Yahuda collection, shelf no. 488). This is apparently not identical to any of those relied upon by Abū Ghuddah, as it differs in places where he says all his sources agree. These differences are, however, mostly minor and with a few exceptions do not significantly affect one's reading of the text.

<sup>86</sup> *Sharḥ*, 460.

<sup>87</sup> (Cairo: Anwār Press, 1357/1938).

<sup>88</sup> See the preface to the Abū Ghuddah edition, (Aleppo; Maktabat al-Maṭbū'āt al-Islāmiyah, 1387/1967).

Mention has already been made of al-Qarāfi's work on legal theory (*uṣūl al-fiqh*), *Sharḥ tanqīh al-fuṣūl*. Though it is probably his most important work on legal theory, at least in the sense that it represents his final conclusions on the subject, this work should not be confused with another commentary on al-Rāzi's *al-Maḥṣūl*, *Nafā'is al-uṣūl fī 'ilm al-uṣūl* (reportedly over eighteen hundred folios in manuscript), both of which al-Qarāfi refers to simply as "*sharḥ al-maḥṣūl*".<sup>89</sup> The printed edition of *Sharḥ tanqīh al-fuṣūl* indicates that it was completed in Sha'bān/December of 677/1279.

*Al-Furūq* is a four-volume work on legal precepts and propositions (*qawā'id*). This work, perhaps more than anything else al-Qarāfi wrote, reflects the state to which Muslim legal science had evolved up to his time. It vividly reflects the post-formative phenomenon of what I refer to in chapter three as "legal scaffolding," essentially a form of neo-*ijtihād* practiced under the régime of *taqlīd*. This work (also less popularly known as *Anwār al-burūq fī anwā' al-furūq*) is apparently one of al-Qarāfi's later contributions. There is no mention of it in either *Sharḥ tanqīh al-fuṣūl* or *Tamyīz*. It is cited, however, in another work of his, *al-'Iqd al-manẓūm fī al-khuṣūṣ wa al-'umūm*, which was composed after 677/1279, the death-date of the Ḥanafī chief justice, Ṣadr al-Dīn Sulaymān, who is cited, with the panegyric, "*rahimahu 'llāh*," in the text.<sup>90</sup>

*Al-Furūq* is, to my knowledge, the only work by al-Qarāfi on which there is a printed commentary available, *Adrār al-shurūq 'alā anwā' al-furūq* by Abū al-Qāsim Qāsim b. 'Abd Allāh b. Muḥammad b. Muḥammad al-Anṣārī, better known as Ibn al-Shāṭṭ (643–723/1245–1323). There is also a supercommentary, *Tahdhīb al-furūq wa al-qawā'id al-sanīyah fī al-asrār al-fiqhiyah* by a modern *faqīh*, Muḥammad 'Alī b. Ḥusayn al-Mālikī al-Makkī (d. 1376/1948).<sup>91</sup> Based on the sections I consulted, neither of these works appear to offer much insight into al-Qarāfi's thought as a whole. In fact, it seems at times that Ibn al-Shāṭṭ's zeal to upstage al-Qarāfi results in his misunderstanding the latter.<sup>92</sup> Meanwhile, Muḥammad 'Alī b. Ḥusayn is per-

<sup>89</sup> I have been unable to obtain a copy of *Nafā'is*. It is described by Shaykh Ṭāhā Jābir al-'Alwānī in his edition of al-Rāzi's *al-Maḥṣūl*. I understand that it is presently being edited in Saudi Arabia by 'Iyād al-Sulamī and is scheduled to appear soon.

<sup>90</sup> *al-'Iqd*, 86 recto. Ṣadr al-Dīn Sulaymān is cited at *ibid.*, 135 recto.

<sup>91</sup> Both these works appear on the margin of al-Qarāfi's *al-Furūq*. For a biographical notice on Ibn al-Shāṭṭ, see Ibn Farḥūn, *al-Dibāj*, 225–26. On Muḥammad 'Alī b. Ḥusayn, see al-Ziriklī, *al-A'lām*, 6:305–06.

<sup>92</sup> See, e.g., his comments at *al-Furūq*, 4:48ff.; 2:103ff.

haps too far removed from al-Qarāfi's historical context to appreciate some of the subtleties and broader implications behind his thought.

Finally, mention must be made of al-Qarāfi's six-volume opus on Mālikī law, *al-Dhakhīrah*.<sup>93</sup> Though touted as one of the best works on Mālikī *fiqh*, this work is of little relevance to the present study. To begin with, it is an early work, written before the *Tamyīz*. Al-Qarāfi cites it by name in *al-Umnīyah fī idrāk al-nīyah*,<sup>94</sup> and *al-Umnīyah* is cited in *Tamyīz*. As an early work, it appears to reflect certain ideas that were swallowed whole by a young al-Qarāfi whose primary aim was to establish his familiarity with the authoritative sources of *madhhab*-law. By the time he came to write his *Tamyīz*, he appears to have outgrown some of these ideas and attitudes, including those connected with the issues of power and obedience to the ruler.

#### V. Sufism

In reading al-Qarāfi's works, one notices what appears to be a conspicuous lack of interest on his part in Sufism, despite what his works reveal to have been a deep religiosity and despite the presence of such notable contemporary Mālikī ṣūfīs as Ibn 'Aṭā' Allāh (d. 709/1309), Abū al-'Abbās al-Mursī (d. 686/1287), and Abū al-Ḥasan al-Shādhilī (d. 656/1258). Even his mentor, al-'Izz Ibn 'Abd al-Salām, is said to have attended ṣūfī *samā'* sessions and is even reported to have danced (i.e., the ṣūfī dance).<sup>95</sup> One wonders, on these facts, if, in addition to his preoccupation with legal matters, Sufism simply went against al-Qarāfi's intellectual grain.

#### VI. Theology

Egypt in the 7th/13th century was dominated by the Ash'arite school of theology. Ḥanbalism, the perennial home of Traditionalism, had never been a force in the Nile valley. One would be hard pressed, in fact, to name a single Egyptian Traditionalist of note throughout

<sup>93</sup> Arabic Mss. no. 35 (*fiqh mālikī*) Dār al-Kutub al-Miṣriyah. I have procured volumes one, two, three, four and six, volume five being unavailable.

<sup>94</sup> (Beirut: Dār al-Kutub al-'Ilmiyah, 1404/1984).

<sup>95</sup> Ibn al-'Imād, *Shadharāt*, 5:302.

this period.<sup>96</sup> It comes as no surprise, then, that al-Qarāfi, like most of his compatriots, was an Ash'arite. Even his legal writings are full of indications to this effect. In his *Sharḥ tanqīḥ al-fuṣūl*, for example, he denies the possibility of speech inhering in the divine essence.<sup>97</sup> Thus he states in *Tamyīz* that the expressions of the Qur'ān are "merely indications of God's ruling, not the ruling itself" (*innamā hiya adilatuhu lā huwa*),<sup>98</sup> implying that God's expressions are created, while only the meanings He imparts are uncreated. This was of course the Ash'arite alternative to the Mu'tazilite doctrine of the createdness of the Qur'ān, a compromise that had been rejected by Traditionalism. To this effect, the redoubtable Ibn Taymiyah would insist that it was not permissible to say that the Qur'ān is a report about God's metacognition (*hikāyah 'an kalām allāh*); rather, the Qur'ān is the actual speech of God which He Himself actually uttered.<sup>99</sup> Other evidence of al-Qarāfi's Ash'arism comes from his *al-Furūq*, where the eponymous al-Ash'arī is respectfully referred to as "*shaykh al-mutakallimīn*".<sup>100</sup> There he also states that notions such as God's corporeality (*jismīyah*), His occupying places (*makān*) and His being located in a specific direction (*jihah*) were all doctrines of the "*hashwīyah*," a pejorative term used typically by Rationalists against Traditionalists, especially Hanbalites.<sup>101</sup> In their effort to safeguard God's transcendence, the Ash'arites had always condemned such doctrines as anthropomorphic. Al-Qarāfi too clearly endorses this proscription when he states that the position of the people of Truth (*ahl al-ḥaqq*) is that such attributes (i.e., *jihah*, etc.) may not be applied to God.<sup>102</sup>

At the same time, al-Qarāfi may be described as a moderate Ash'arite, there being in Egypt no Traditionalist threat to spawn the type of fanaticism seen later, e.g., in Tāj al-Dīn al-Subkī (d. 771/1369) in Damascus. Not only does he steer clear of al-Subkī's claim that all

<sup>96</sup> See, for example, G. Leiser, "Hanbalism in Egypt before the Mamlūks," *Studia Islamica* 54 (1981):155-81.

<sup>97</sup> *Sharḥ*, 279-80.

<sup>98</sup> *Tamyīz*, 44.

<sup>99</sup> Taqī al-Dīn Ibn Taymiyah, *Majmū' al-rasā'il al-kubrā*, 2 vols., (Cairo: Muḥammad 'Alī Ṣubayḥ, n.d.) 1:419.

<sup>100</sup> *al-Furūq*, 3:224.

<sup>101</sup> See, for example, Ibn Rushd, *al-Kaṣḥf 'an manāḥij al-adillah fi 'aqā'id ahl al-millah* (Cairo: Maḥmūd 'Alī Ṣubayḥ, 1353/1935), p. 42: "As for that party referred to as *hashwīyah*, they believe that the way to knowledge of God's existence is revelation (*sam'*), not reason (*'aql*); that is to say that the faith (*īmān*) which He has imposed as a duty upon mankind may be attained (merely) through receipt of reports from the Prophet (*ṣāhib al-shar'*)." <sup>102</sup> *al-Furūq*, 4:128. 4:113-14.

Mālikīs were Ash'arites,<sup>103</sup> he appears unperturbed by the presence of known Traditionalists within Mālikī ranks. In *al-Dhakhīrah*, for example, he pays careful and conspicuous homage to such great Mālikī Traditionalists as Ibn 'Abd al-Barr, Ibn Abī Zayd and Abū Bakr b. al-'Arabī.<sup>104</sup> Similarly, he shows himself to be extremely tolerant and conscientious in his judgments of non-Ash'arites even outside the Mālikī school. While condemning, for example, certain doctrines of the *hashwīyah* as anthropomorphic, he insists all the same that such views do not constitute unbelief and that those who profess them are not to be branded unbelievers.<sup>105</sup>

#### A. *al-Qarāfi and Ash'arism*

Having established al-Qarāfi's Ash'arism, a word must be said about the broader implications of Ash'arite theology for legal and political thinking in medieval Islam. To begin with, it would be erroneous to see al-Qarāfi as one in a series of Ash'arite thinkers who operated within the confines of what H.A.R. Gibb referred to as the "Asharite theory" of the caliphate. According to Gibb, this theory was initially dedicated to the historical continuity of this hallowed institution.<sup>106</sup> But, beginning with al-Māwardī (d. 450/1057), Ash'arite attempts to reconcile theory with historical fact proves too arduous, as a result of which they end up divorcing the Imamate from the *sharī'ah* altogether, in effect negating, according to Gibb, the rule of law, a process that reaches its epitome in the writings of the Shāfi'ī chief *qāḍī* of Cairo, Badr al-Dīn b. Jamā'ah (d. 733/1333), who acknowledges forceful usurpation as a legitimate basis for rule.<sup>107</sup> This essentially realist concession would not be conceded overnight, however. Between al-Māwardī and Ibn Jamā'ah Ash'arite thinkers would mount a frantic search for alternatives to the classical theory which, despite a beleaguering reality, might safeguard the supremacy of the *sharī'ah* and reinforce the authority of the caliph as its upholder.<sup>108</sup> The attempt

<sup>103</sup> See Tāj al-Dīn al-Subkī, *Mu'īd al-ni'am wa mubīd al-niqam*, (Beirut: Mu'assasat al-Kutub al-Thaqāfiyah, 1407/1986), 62: "God has kept pure the Mālikīs; never has there been a Mālikī who was not an Ash'arite".

<sup>104</sup> *al-Dhakhīrah*, Arabic Mss. no. 35 (*fiqh Mālikī*) Dār al-Kutub al-Miṣriyah.

<sup>105</sup> *al-Furūq*, 4:128. See also his lengthy discussion at *ibid*, 4:114-37, where he distinguishes between indiscretions that constitute unbelief and those that do not.

<sup>106</sup> H.A.R. Gibb, *Sunni Theory of the Caliphate*, 142, 143.

<sup>107</sup> See, e.g., E.I.J. Rosenthal, *Political Thought in Medieval Islam*, 43-51.

<sup>108</sup> Gibb, *Sunni Theory*, 143.

was of course a dismal failure with the result that the caliph came to be viewed less and less as the true upholder of the religious law. As al-Qarāfi died less than two generations before Ibn Jamā'ah, one might be tempted to see in his ideas on law and the caliphate another link in this failed attempt. But as I have tried to show elsewhere, al-Qarāfi was neither in the business of reaffirming the authority of the caliphate<sup>109</sup> nor, in my estimation, a participant in this evolutionary, now neo-Ash'arite chain. In fact, I am inclined toward the suggestion of D.P. Little to the effect that there never was any specifically Ash'arite tradition on the caliphate.<sup>110</sup> As such, whatever ideas al-Qarāfi expressed on the subject are better understood in light of the political realities of Egypt in general and early Mamlūk Egypt specifically. For example, his doctrine to the effect that individuals are *sui juris* has the effect of safeguarding the sanctity of the religious law *without* a caliph.<sup>111</sup> But rather than see this as the result of a natural (or unnatural) progression in Ash'arite theory, this would be better understood in light of the fact that no Sunni caliph had held more than titular authority in Egypt for almost half a millennium and al-Qarāfi himself lived through a three-year period (656–659/1258–1261) during which there was no caliph.

I shall have more to say about the political context of early 7th/13th century Egypt in chapter two below. In the meantime, there is a much more serious issue to be confronted, namely, the impact of Ash'arism per se on legal and political thinking in medieval Islam, particularly in light of the view of some scholars that Ash'arism promoted a certain scriptural determinism that restricted the role of reason to analogical and deductive permutations of scripture. This is important to the discussion of the rule of law inasmuch as it informs what may be understood by the idea of law itself, and, hence, what it was that al-Qarāfi was trying to defend. If, as a matter of fact, Ash'arism can be understood to have contributed to the hegemonic propensity of the religious law by insisting that the only sound judgments are those that are rooted in scripture, then, al-Qarāfi, as an Ash'arite, might be expected to look askance upon the use of reason

<sup>109</sup> See, Jackson, "From Prophetic Actions to Constitutional Theory," 85–86.

<sup>110</sup> Little points to the fact, for example, that al-Māwardī's Ḥanbalite contemporary, Abū Ya'lā (d. 458/1064) held some of the very same ideas found in his Ash'arite counterparts. See "A New Look at al-Aḥkām al-Sultāniyya," *The Muslim World* vol. 64 no. 1 (1974):15.

<sup>111</sup> On *sui juris*, see below, 217–24.

as a competing alternative and a threat to the primacy of scripture. In point of fact, however, this is not at all what one finds to be the problem for al-Qarāfi. Rather, the problem for him is his recognition that all legal interpretations recline upon some use of human reasoning, and, as such, they all contain an inextricable subjective element. Where, therefore, the collective efforts of the community's attempt to understand scripture resulted in disagreement, it would be disingenuous for one party to claim objective truth while condemning the view of its counterparts as wrong, at least in any objectively knowable sense.<sup>112</sup> As such, the only fair and honest alternative would be to acknowledge, within certain limits, the existence of multiple legal truths for the Here and Now, leaving the issue of their proximity to actual truth to God and the Hereafter. Barring this, in the absence of voluntary concessions made in the arena of open exchange, the triumph of any interpretation over another could only recline on qualities and mechanisms external to the competing views themselves, namely, differential endowments of power.

This particular perspective on the role and nature of human reasoning is part of the Ash'arite legacy that emerged from their confrontation with Mu'tazilism and their ultimate rejection of the latter's objectivism. While it is true that the locution by means of which they express their objections to Mu'tazilism often give the impression that they were scriptural determinists, this, I contend, is only an illusion. Closer examination of Ash'arite psychology reveals that it was not at all reason that they rejected but only the role and nature of reason as understood by the Mu'tazilites.

#### B. *Ash'arite Psychology: Reason and the Law*<sup>113</sup>

It is as the counter-thesis to the Mu'tazilite doctrine affirming reason's ability to comprehend good and evil that Ash'arism is said to have held that "reason is essentially irrelevant to the substance, determination, and obligatory character of moral principles".<sup>114</sup> Such an

<sup>112</sup> See, e.g., below, 57–68.

<sup>113</sup> I use "psychology" here in the broad sense intended by R. Unger in his classic work, *Knowledge and Politics*, (New York: The Free Press, 1975), 29. It includes ethical questions (i.e., why individuals act as they do and what they believe they ought to do) and a theory of knowledge (i.e., what individuals believe they can know and how this affects their understanding of what they ought to do). It does not include or imply any empirical or scientific study of what determines human behavior.



understanding imputes not only a certain fideism and intellectual timidity to Ash'arism, it lends a certain force to the attribution of political passivity on the part of the 'ulamā'.<sup>115</sup> For if reason is superfluous in determining the propriety of acts, even the most tenuous relationship between a ruler's policies and scripture would be sufficient to place them beyond reproach. For, in the absence of reason, there can be no other grounds on which to question or oppose such policies. Yet, this is precisely the type of thinking that al-Qarāfī set out to overturn, which raises, on the one hand, the question of the extent to which he was committed to Ash'arism as a whole, or, on the other hand, whether Ash'arite psychology per se has been properly understood.

In discussing the strictures imposed by the classical tradition on modern Muslim reformers, M. Kerr summarized the impact of Ash'arism in the following terms:

The Mu'tazilites emphasized God's omniscience and justice; the Ash'arites emphasized His omnipotence and absolute will. The Mu'tazilites conceived of the universe as a rationally integrated system governed by laws of cause and effect, which God had created and set in motion once and for all. The Ash'arites, refusing to accept any implied limit on the will or power of God, denied the existence of any inherent order of any kind in the universe by which it might be characterized as natural or rational. . . . Likewise, as theistic subjectivists combating the objectivism of the Mu'tazilites and the philosophers, they held that good and evil have no intrinsic quality of their own but are simply products of the divine will conveyed in Revelation and systematically elaborated in the Shari'a. Accordingly, there is really nothing for men to learn in the moral sphere except the revealed obligations, which have no foundation in a natural order in the world, nor in a natural order in the human personality, nor in a rational order of justice. Right and duty are conceivable only in terms of God's command, and perceptible only within a submissive spirit.<sup>116</sup>

"Theistic subjectivism" was a term Kerr apparently borrowed from G. Hourani, for whom "subjectivism" described the belief that the

<sup>114</sup> Kerr, *Islamic Reform*, 60.

<sup>115</sup> The Ash'arites were understood to constitute the overwhelming majority of the 'ulamā'. But Traditionalists too were understood to be scriptural determinists when it came to making judgments about proper conduct and actions. See, e.g., G. Hourani, "Juwayni's Criticisms of Mu'tazilite Ethics," *Reason and Tradition in Islamic Ethics* (Cambridge: Cambridge University Press, 1985), 125.

<sup>116</sup> *Islamic Reform*, 59.

value of an act was determined not by any quality intrinsic to the act itself (which was what Mu'tazilite objectivism affirmed) but "solely by the opinions or emotional attitudes of some judge or observer".<sup>117</sup> The Ash'arites, according to Hourani, were *theistic* subjectivists in that they held that right action was simply what God had deemed so via His commands. On matters where God's commands were not explicit or failed to address a situation directly, the only valid course of deliberation remained that of analogical extrapolation, or *qiyās*. In other words, right action could only be known and could always be known by revelation or legitimate extensions thereof.

Behind this scriptural determinism lay yet another assumption that both underscored it and held it in place. This was the notion that the pursuit of personal or group interest lay beyond the scope of a Muslim's legitimate concerns. A Muslim's *raison d'être*, according to this view, was to seek and promote the "Islamic life".<sup>118</sup> In so doing, "[d]eliberation, whether to arrive at rules of action or individual decisions . . . proceed[ed] . . . not from constructions of human wisdom or philosophy but from the revealed law."<sup>119</sup>

These views of Kerr and Hourani are exceptional only in the degree of clarity and straightforwardness with which they are stated. At bottom, they constitute, *mutatis mutandis*, a staple ingredient of many if not most interpretations of medieval Islam. This includes the view that the demise of Mu'tazilism and the rise of Ash'arism marked a decisive defeat for the forces of reason, which not only prompted a radically more conservative approach to law and jurisprudence but summarily proscribed the contemplation of all interests beyond those defined by scripture. To my mind, however, such an understanding of the nature and role of Ash'arism not only overstates the Ash'arite position but also forces upon medieval Islam a psychology of Stoicism,<sup>120</sup> in the context of which *duty* is understood to be the only justification for

<sup>117</sup> See G. Hourani, "Two Theories of Value in Medieval Islam," *The Muslim World*, 50 (1960): 270.

<sup>118</sup> Hourani, "Two Theories," 273; Coulson, "The State and the Individual," 49-60. The neologism, "Islamic," is quite problematic and tends more often to distort more than it explains or clarifies. See my comments below, 140-41.

<sup>119</sup> Hourani, "Ghazālī on the Ethics of Action," *Reason and Tradition in Islamic Ethics*, (Cambridge: Cambridge University Press, 1985), 165.

<sup>120</sup> Stoics affirm that the highest Good is the performance of duty for duty's sake, taking pleasure in any other concern being a form of vice. Their counterparts, the Epicureans, hold that happiness is the highest Good, vice being itself the result of unhappiness.

action, to the exclusion of individual or group interest, or, if you will, the pursuit of happiness.<sup>121</sup>

While it is true that Ash'arism emphasized God's omnipotence, such an emphasis did not amount to a categorical denial of the probative value of reason. What the Ash'arites denied Mu'tazilism was essentially the same notion modern liberal philosophers (e.g., Hobbes, Locke, J.S. Mill) denied their classical and medieval ancestors, namely, what R. Unger refers to as the "doctrine of intelligible essences," i.e., what Kerr and Hourani had called Mu'tazilite objectivism.<sup>122</sup> In the theologically charged context that defined the early debates, it is true that the Ash'arite position amounted to the belief that God was all-powerful and had the complete and absolute ability to dispose of the affairs of the universe as He pleased. On such an understanding, reason could be characterized as ultimately superfluous, in that it could not be expected to find any absolute order or consistency in a universe that was subject to God's unrestricted power. When it came, however, to legal discussions, e.g., of the legal ruling (*hukm*), the focus of the discussion shifted to epistemological considerations with a palpably different thrust, namely, whether God could be held to the dictates of human reason such that what the latter deemed good God was obligated to reward and what it deemed evil He had to punish. Here the Ash'arites insisted not that reason could play no role in making moral or ethical judgments; they merely denied that it could play the role attributed to it by Mu'tazilism. Whereas Mu'tazilism asserted that reason could apprehend value as an objective reality, the Ash'arites insisted that reason could operate only in the interest of values already present. As such, the good and evil qualities claimed by Mu'tazilism to inhere in actions themselves were in reality no more than human predilections projected onto the world. Moreover, Ash'arism argued, the very nature of human reason was such that it could never get behind the values in whose interest it operated. Reason, in other words, could operate only as a tool of the self. To borrow the observation of Hobbes:

<sup>121</sup> Cf., Coulson, "The State and the Individual," 50: "The stress, therefore, throughout the entire *Shari'a*, lies upon the duty of the individual to act in accordance with the divine injunctions. . . ."

<sup>122</sup> *Knowledge and Politics*, 31ff. "According to such a view, a stone is different from a plant because it has a quality of stoneness, if you like, which we can grasp immediately." *Ibid.*, 31. Hourani, meanwhile, had defined objectivism as "any theory which affirms that value has a real existence in particular things or acts, regardless of the wishes or opinions of any judge or observer as such". "Two Theories of Value," 269.

Thoughts are to the Desires, as Scouts and Spies, to range abroad, and find the way to the things desired. . . . The mind is moved by desire, the active element of the self.<sup>123</sup>

This is precisely what al-Ghazali (d. 505/1111), for example, criticized the Mu'tazilites for failing to understand:

You have erred in stating that reason (*'aql*) is a motivator (*da'in*); nay, reason is only a guide (*hadin*), while impulses and motives (*al-bawā'ith wa al-dawā'ir*) issue from the self (*al-nafs*), based on the information provided by reason.<sup>124</sup>

In a similar fashion, al-Qarafi would point out that what the Mu'tazilites insisted was a priori (*daruri*) knowledge, e.g., of the good and evil qualities of truth and lying, was actually a function not of the mind but of the appetitive self (*at-tab'*). For, "good" and "evil" are essentially value judgments. As such, they reflect nothing about what the mind discovers but only what the self finds attractive or repulsive (*ma yulā'imu 't-tab'*).<sup>125</sup>

In effect, the Ash'arites charged the Mu'tazilites with engaging in a rather thinly veiled form of eudaimonism, as a result of which their doctrine actually fell short of the standards of true rationalism. Such a verdict may appear at first blush a tad ironic, given the tendency to view the Mu'tazilites as arch-rationalists and the Ash'arites as middle-roads. But it was, after all, the Ash'arite al-Ghazali, to take just one example, who insisted in his arguments against the Mu'tazilites that true moral judgments were ahistorical and attainable only to those who transcended the predilections of self and society:

Take the statement, "Justice is good, lying evil," and present it before the court of primordial reason (*al-'aql al-awwal al-fitri*), which affords a priori knowledge. Then imagine that you have not lived with anyone nor mingled in the midst of any religious community. And imagine that you have not been ingratiated with any tradition, that you have not been refined by any upbringing nor primed with the teachings of any teacher or guide. Then see if you are able to doubt the truth of such a statement. You will find that you are able to do so and that doubt comes readily. And the only reason that you find difficulty conducting this test is that the state in which you exist contradicts these instructions. . . . But if you

<sup>123</sup> Cited in Unger, *Knowledge and Politics*, 37-38.

<sup>124</sup> *al-Mustasfa*, 1:61.

<sup>125</sup> *Sharh*, 88 (last two lines). See also al-Razi, *al-Mahsul*, 1; 1:136, for a similar argument.

are earnest, you will be able to achieve such doubt. On the other hand, if you try bringing yourself to doubt that two is greater than one, you will never be able to do so. . . . As for such things as lying being evil, neither supposititious perception (*fiṭrat al-wahm*) nor reason (*fiṭrat al-aql*) dictates any of this. Such judgments are based purely on what an individual has become habituated to based on customs, moral teachings and upbringing.<sup>126</sup>

It was in this context that the Ash'arites insisted that God could not be held to the dictates of human reason. As for the doctrine that what God decrees is good and what He forbids evil, this was attributable to the fact that His commands and prohibitions were the basis of reward and punishment in the Hereafter, and human beings, as even the Mu'tazilites would admit, incline naturally towards procuring pleasure and avoiding pain. It is true, as Kerr and Hourani suggest, that the earlier Ash'arites (e.g., al-Ghazālī, al-Juwaynī) show appreciable reticence in admitting the practical good or utility of God's commands for the Here and Now. But this is perhaps best explained as having been a consequence of their proximity to a still influential Mu'tazilism which might have turned such a capitulation into an admission that it was the good of the command that obligated God to command it. Later Ash'arite thinkers, particularly outside Baghdād, are much more explicit in admitting the practical utility of God's commands along with reason's ability to apprehend this.<sup>127</sup> In his *Qawā'id al-aḥkām fī maṣāliḥ al-anām*, for example, al-Qarāfī's Ash'arite teacher, 'Izz al-Dīn b. 'Abd al-Salām, states openly, his Shāfi'ism notwithstanding:<sup>128</sup>

Whoever wants to know what is appropriate, what is an interest, what is a liability and what is preponderate in all of this and what is not, let him present the matter before the court of reason, assuming that the religious law is silent. Then let him base his legal conclusions on this (*yabnī 'alayhi al-aḥkām*). He will find that there is almost not a single ruling in the religious law that goes against his conclusions, except what

<sup>126</sup> *al-Mustasfā*, 1:49. See also al-Rāzī, *al-Maḥṣūl*, 1:1:36. Cf., however, the Mu'tazilite, 'Abd al-Jabbār (*al-Mughnī*, 6:19), who states that knowledge of the evil of lying and injustice (*ẓulm*) is *a priori* and to deny this is to deny *a priori* knowledge altogether.

<sup>127</sup> Professor G. Makdisi has pointed out that a number of ideas of apparent Mu'tazilite origin continued to influence Muslim legal thinking well into the high middle ages. See "The Juridical Theology of Shāfi'i: Origins and Significance of *Uṣūl al-Fiqh*," *Studia Islamica* 59 (1984): 16ff.

<sup>128</sup> On the intrinsic legal positivism of Shāfi'ism, see below, 57–60.

God has imposed as a duty upon His servants without informing them of the attending interest or liability. And in this way you can know good deeds from evil ones, even if God the exalted is not obligated to secure for human beings the advantages of good, as He is not obligated to divert from them the detriments of evil.<sup>129</sup>

In sum, it would appear to be an exaggeration to say that the Ash'arites held that the revealed obligations were not grounded in any rational order of justice or utility and that reason was wholly superfluous in judging the propriety of acts. In effect, Ash'arism denied only reason's ability to *determine* the propriety of action. It did not deny its otherwise probative value nor its ability to apprehend or *discover* the propriety of action, albeit on the basis of values already present, values that may be based on scripture or not.

But even if the Ash'arites attributed practical utility to God's commands and even if they then affirmed reason's ability to apprehend this, their rejection of what they deemed to be Mu'tazilite eudaimonism would still seem to force them to the Stoic conclusions of Kerr and Hourani. For on such a rejection they would have to concede that the source of a command's authority was not its utility (conceived in human terms) but its provenance. As such, right action would still be conceived strictly in terms of God's command. Here, however, one might observe that the Ash'arites rejected only the Mu'tazilite tendency to attribute religious authority to judgments that were genetically not the offspring of scripture;<sup>130</sup> they did not deny the substantive value such judgments might be said to have on other grounds. Al-Qarāfī, for example, gives a clear statement to this effect in his *Sharḥ tanqīḥ al-fuṣūl*, where, as mentioned earlier, he argues that what the Mu'tazilites deem "good" and "evil" is actually what the appetitive self (*at-tab'*) finds attractive or repulsive. Such judgments he accepts, however, as being both rational (*'aqlī*) and as constituting a form of knowledge. In other words, though reason cannot apprehend *objective*

<sup>129</sup> 1:10. On Ibn 'Abd al-Salām's Ash'arism, see his *Fatāwā sulṭān al-'ulamā' al-'izz b. 'abd al-salām*, ed. Muṣṭafā 'Ashiq (Cairo: Maktabat al-Qur'ān, n.d.) 103–04, in response to a question concerning the Traditionalist doctrine of God's being mounted on the Throne.

<sup>130</sup> This point is very subtly brought in al-Ghazālī's *al-Mustasfā*, 1:63–64. In *al-Mu'tamad*, 2: 315–22, the Mu'tazilite Abū Ḥusayn al-Baṣrī had indicated that in the absence of scripture all things believed to be of some benefit were licit (*mubāḥ*). Al-Ghazālī, meanwhile, insists that "licit" is a legal category which can only be established by scripture. Thus he asserts that these things are not "licit" but carry no legal status at all! Later jurisprudence appears to have abandoned this subtlety, the original point, however, having already been made.

good and evil, it can 'know', *independent of revelation*, that saving a drowning man is "good" and falsely accusing an innocent person is "evil". This remains so even if it cannot be said, *pace* the Mu'tazilites, that God must reward or punish such acts.<sup>131</sup> The upshot of this is that one does not have to await instruction from scripture to 'know' the propriety of engaging in such actions. Nor would scripture's failure to address them amount to their being in any way proscribed. Nor need one assume that within the realm of what scripture does not address there are religious impediments to contemplating or pursuing personal interest. It is perhaps worth mentioning in this regard that the fourth and final source (*aṣl*) in al-Ghazālī's legal theory was not *qiyās* but what he referred to as '*aql*', by which he meant *istiṣhāb* or *barā'ah aṣliyah*, i.e., the idea that what revelation does not condemn or impose as a duty has no legal status at all and incurs neither reward nor punishment.<sup>132</sup> This principle, which according to al-Qarāfī the Mu'tazilites rejected,<sup>133</sup> implies that there are limits to the scope of the law outside of which something other than revelation, i.e., personal interest, preference or perceived necessity, may legitimately determine the propriety of action. Al-Qarāfī would add that even within the scope of the law the propriety of a particular act for a particular individual may often require extra-scriptural contemplation. For example, the fact that it is licit for a man to marry a woman neither ensures the success of such a union nor relieves the couple of having to weigh the issue rationally.<sup>134</sup> And here, speaking of weighing issues rationally, one might reiterate that the Ash'arites did not, *pace* Kerr, "den[y] the existence of any inherent order of any kind in the universe by which it might be characterized as natural or rational". They denied, rather, only an *absolute* order, inasmuch as this would impose limits on God's power. They fully acknowledged, on the other hand, a probable order on the basis of which rational judgments and predictions could be made. It was in fact this probable or preponderant order that rendered probability (*ẓann*) probative in law.<sup>135</sup> To this effect al-Qarāfī's Ash'arite teacher, Ibn 'Abd al-Salām, would insist emphatically:

<sup>131</sup> See his discussion at *Sharḥ*, 88–89.

<sup>132</sup> *al-Mustasfā*, 1:55; 1:80–90, esp. 90.

<sup>133</sup> Al-Baṣrī's *al-Mu'tamad* (note 130, above), contradicts this, suggesting, perhaps, controversy on this point within Mu'tazilite ranks.

<sup>134</sup> *Sharḥ*, 291.

<sup>135</sup> Thinkers such as al-Ghazālī (*al-Mustasfā*, 1:370 and passim) emphatically insisted

In procuring most of the interests and avoiding most of the liabilities of This World and the Next one must rely on probability (*mā yazharu fī 'z-zunūn*). . . . Indeed, [even] those who work for the sake of the Hereafter have no certainty of a successful conclusion; they simply proceed on the basis of what they hope to be most probable, fearing all the while that their works might not be accepted. . . . Likewise do the people of all professions (*ahl al-dunyā*). . . . It is thus not permissible to forfeit interests that are normally procured through certain channels based on some fear of an exceptional failure or because one's calculations are not known to be error-proof.<sup>136</sup>

In sum, Ash'arite psychology was not Stoic. The rational pursuit of unproscribed profane interests was recognized as neither evil, nor flippant nor irreligious but, rather, natural and, *ceteris paribus*, perfectly innocent. This legitimized of course the pursuit of not all interests but of those that could be pursued in proper proportion to duty, the parameters of which were set by the religious law. As such, in pursuing such interests as safeguarding the authority and autonomy of the *madhhab*, or setting limits to the legitimate use of power, or establishing a measure of autonomy for the individual, al-Qarāfī was not in anomalous violation of Ash'arite theory. Nor was his Ash'arism an impediment to a rational critique and analysis of the legal and political order.

But, the Ash'arite rejection of Mu'tazilite objectivism did underscore the need, already present from at least the latter part of the 2nd/8th century, for a legal *cum* political theory capable of accommodating multiple, equally authoritative legal truths. For, paradoxically, their rejection of objectivism would obviate not only the fact that all interpretations contained a subjective element but also that the authority of an interpretation could not, therefore, inhere in the interpretation itself, since no interpretation could claim to be objectively true, at least not in any way that its truth could be objectively known and verified. Consensus (*ijmā'*), it is true, at least prior to the settling down

that what we can *know* with certainty (*yaqīn*) is separate from what we must often base our *actions* upon, i.e., probability (*ẓann*). While on the one hand the admission of *ẓann* introduces the danger of placing a certain dissonance between conviction and action, on the other hand it provides some protection against dogmatic ideology that confuses moral or religious obligation with objective fact.

<sup>136</sup> *Qawā'id al-aḥkām*, 1:4. Gibb has also pointed out that the denial of all order in the universe would undermine religion by undermining prophethood, since the most salient proof of prophethood was the so-called *kharq al-'ādah*, interruption of the natural order. See "The Islamic Background of Ibn Khaldūn's Political Theory," *Studies*, 172.

of the *madhhabs*, would provide the solution in a number of cases. But even here—not to mention the situation after the settling down of the *madhhabs*—where the community's collective effort ended in disagreement the problem would remain. It was perhaps early attempts to confront this issue that produced such doctrines as "*kullu mujtahid muṣīb*," by which was meant that every earnest exercise of independent interpretation resulted in an authoritative, acceptable conclusion, a view vigorously defended by such Ash'arites as al-Ghazālī.<sup>137</sup> Even Ash'arites who rejected this doctrine, e.g., Fakhr al-Dīn al-Rāzī and, later, al-Qarāfī, would insist that a jurist who reached and followed a 'wrong' conclusion incurred no sin, the idea being that in the absence of consensus there was no way of identifying a univocally 'correct' view.<sup>138</sup> But it was one thing to say that a Mālikī and a Shāfi'ī could each act in accordance with their respective conclusions, assuming that the two agreed to go their separate ways. *Interaction*, meanwhile, would remain a problem,<sup>139</sup> particularly where one jurist acted in behalf of government, the other as a private citizen. The early doctrine of *kullu mujtahid muṣīb*, meanwhile, like its antithesis, fell short of resolving this problem, as it also failed to acknowledge any power differential between adherents of conflicting views. Yet, this was precisely the situation confronting al-Qarāfī, the Mālikī, in Shāfi'ī-dominated Ayyūbid-Mamlūk Egypt. Indeed, the power differential between the Mālikī and Shāfi'ī schools contributed significantly to his constitutional thinking overall. This becomes more comprehensible in the light of Egypt's history and internal development in the first half of the 7th/13th century. It is to a summary of that history that I shall now turn.

<sup>137</sup> *Al-Mustasfā*, 2:363–72.

<sup>138</sup> al-Rāzī, *al-Maḥṣūl*, 2; 3:51; al-Qarāfī, *Sharḥ*, 439, 440.

<sup>139</sup> A striking demonstration of this is seen in al-Ghazālī's discussion of whether it is permissible for a Ḥanafī to pray behind a Shāfi'ī and vice-versa. Surprisingly, al-Ghazālī's response is in the negative! See below, 178–80.

## CHAPTER TWO

### THE EGYPTIAN CONTEXT

No sultan ever mounted the throne in Egypt as a follower of any *madhhab* other than that of al-Shāfi'ī but that he was quickly ousted or killed. . . . And this is one of the secrets behind the legacy of Imām al-Shāfi'ī, the patron of Egypt!

—Abū Shāmah

#### I. General Overview

With the likely exception of a pilgrimage or two to the holy cities of Mecca and Medina, al-Qarāfī apparently spent his entire life in Egypt.<sup>1</sup> This coincided with the period during which Cairo emerged as the new political and intellectual center of the Muslim world. One of the effects of this rise to prominence would be to endow Egyptian 'ulamā' with a heightened sense of empowerment, since it rendered reasonable the assumption that their actions, more than any outside forces beyond their sphere of influence, could have a direct and significant impact on their and others' political reality. Indeed, by the time al-Qarāfī reached his early thirties, the dominant factor affecting political life in Egypt and greater Syria had become the conflicts and hegemonies among the various groups and individuals *within* Cairo. A prominent example of this can be seen in the establishment of the four chief judgeships under al-Zāhir Baybars in 663/1265. Essentially the result of a local conflict between the Shāfi'ī chief justice and the remaining schools of law, this system was subsequently grafted onto Damascus, despite the opposition of the Mālikī and Ḥanbalī appointees there and the fact that none of the schools of law in Damascus are known to have sought this change.<sup>2</sup>

At the same time, al-Qarāfī lived during an incredibly unpredictable and cataclysmic era. He was an eye-witness to the endemic fratricide

<sup>1</sup> His relationship with one of his teachers, Shams al-Dīn al-Khusrushāhī (see above, 7) raises some question about this, as the latter is not known to have lived in Egypt.

<sup>2</sup> See Jackson, "Primacy", 52–65.

and ultimate disintegration of the Ayyūbid dynasty followed by the even more violent and precarious rise of the *bahrī* Mamlūks. He lived as well through several confrontations with the Crusaders. And he saw Egypt face the imminent possibility of becoming a Mongol colony. These events, to be sure, would produce shifts and interregna all bearing the potential for disaster, while, at the same time, holding out the vague promise of an improved *status quo*, as successive victors hastened to establish their legitimacy on the ruins of each *ancien régime*. But each episode would also intensify the central power's feeling that it was necessary to keep a firm grip on things in the nascent capital, which would in turn attenuate its tolerance towards any perceived challenges to its authority. For a thinker with constitutional fancies, the advantages of living in Cairo during this period were tempered indeed with a number of real and conspicuous liabilities.

Al-Qarāfi reached the height of his intellectual production during the reign of al-Zāhir Baybars. His constitutional ruminations reflect, however, not simply the realities of the reign of Baybars but of the running history of Egypt in the first half of the 7th/13th century. In particular, al-Qarāfi's thought is informed by the waning position of Mālikism, the rise of Shāfi'i exclusivism within the judiciary, the coming of Ḥanafism from the East and uncertainty about the impending policies of Baybars and the newly installed 'Abbāsīd caliph, following the destruction of Baghdād by the Mongols. All of this was seen in the overall context of the political violence and arbitrariness that had characterized Cairene life since the death of al-Malik al-Kāmil, during whose reign al-Qarāfi himself was born. The rise of Baybars, meanwhile, turns out to constitute a welcome if unexpected window of opportunity, indeed a period, one senses, of palpable albeit cautioned optimism. It seems that Baybars' ambition to move beyond the chaos, stigma and uncertainty of his and Egypt's past prompted him to embark on a campaign to transform his image from that of a *mamlūk* mercenary into that of a champion of benevolent Islamic rule. This was the context in which al-Qarāfi developed the main features of his constitutional theory. Baybars, meanwhile, was himself a product of Egypt in the first half of the 7th/13th century. His rise, his early policies and the realities they produced are best understood in that light.

## II. *Ayyūbids and Mamlūks; Chaos and Innovation: The Cycle of Cairo's Precarious Rise*

Al-Qarāfi's relatively short life of fifty-eight years (626/1228–684/1285) straddled the reigns of five Ayyūbid and seven Mamlūk regimes, including at least four *coups* and as many assassinations, yielding an average tenure of about 4.8 years per reign. The two long reigns of al-Malik al-Šāliḥ Najm al-Dīn Ayyūb and al-Zāhir Baybars (ten and seventeen years, respectively) represent the most important both in terms of internal institution-building (political and educational) and the rise in Cairo's stature internationally. The decade between these two reigns was one of great chaos and political innovation. And it is this period that sees al-Qarāfi through his early twenties into his early thirties and intellectual maturity. There would seem to be little doubt about its impact on him as a thinker, especially when one considers his preoccupation with issues of power and the limits of government. The following are the Ayyūbid and Mamlūk regimes through which he lived:

### *Ayyūbids*

al-Kāmil (regency: 615/1218–635/1237)  
 al-'Ādil II (regency: 635/1237–637/1240)  
 al-Šāliḥ Ayyūb (regency: 637/1240–647/1249)  
 al-Mu'azzam Tūrān Shāh (regency: 648/1249) (approx. 71 days)  
 Shajarat al-Durr (regency: 648/1249) (approx. 80 days)<sup>3</sup>

### *Mamlūks*

al-Mu'izz Aybak (regency: 648/1249–655/1257)  
 al-Manšūr Nūr al-Dīn 'Alī (regency: 655/1257–657/1258)  
 al-Muẓaffar Sayf al-Dīn Qutuz (regency: 657/1259–658/1260)  
 al-Zāhir Baybars (regency: 658/1260–676/1277)  
 al-Sa'id Barakah Khān (regency: 676/1277–678/1279)  
 al-'Ādil Sayf al-Dīn Salāmish (regency: 678/1279)  
 al-Manšūr Qalāwūn al-Alfi (regency: 678/1279–689/1290)

From the days of the Ayyūbids' founding father, Šalāḥ al-Dīn (Saladin) (regency: 568/1173–589/1193), up to the reign of al-'Ādil I (regency:

<sup>3</sup> Shajarat al-Durr (also called Shajar al-Durr) was actually not an Ayyūbid of the line of Šalāḥ al-Dīn. Similarly, though she was a "*mamlūk*" in that she was the concubine (later wife) of al-Malik al-Šāliḥ, she was not a member of the trained military regiment known as the Mamlūks. I have listed her with the Ayyūbids because she derived her legitimacy primarily from her relationship with al-Malik al-Šāliḥ, as his wife and the mother of his son, Khalil, rather than from her status as a former slave.

596–615/1200–1218) the seat of Ayyūbid government had been Damascus. Damascus provided an important strategic advantage in the perduring wars against the Crusaders, while at the same time enabling the Sultan to keep an eye on ambitious vassals in Syria and Mesopotamia. Cairo, meanwhile, while too remote to serve as a base of operation, had always been the economic foundation of Ayyūbid power.<sup>4</sup> Indeed, Egypt's revenues could support an army thrice the size of that of Syria.<sup>5</sup> This rendered her a critical constituent in the repertoire of Ayyūbid possessions. But, throughout most of the first half of the 7th/13th century, it was Baghdād, the seat of the 'Abbāsīd Caliph, that exercised cultural and political hegemony over most of the central lands. In fact, according to a report by al-Suyūṭī, the *qādi* of Damascus was still being appointed by the Caliph in Baghdād as late as 635/1237.<sup>6</sup> Thus, by establishing their capital at Damascus the Ayyūbids were equiposed between the cultural and political authority of Baghdād and the economic *cum* strategic importance of Egypt.

Ṣalāḥ al-Dīn had structured his Kurdish empire around the concept of collective sovereignty, i.e., a confederation of autonomous principalities held together by the idea of family rule.<sup>7</sup> Under this arrangement, though there existed numerous 'petty-sultans', one family member (viz., Ṣalāḥ al-Dīn) reigned supreme and was acknowledged as *al-sultān al-mu'azzam*.<sup>8</sup> The death of Ṣalāḥ al-Dīn, however, threw this coveted position open to whomever was powerful enough to seize it. Subsequent rivalry within the Ayyūbid house reached the point that princes in Egypt and Syria colluded (with some regularity) with the Crusaders against each other. This appeal to arms further accentuated the strategic and economic importance of Egypt, now even more openly acknowledged as the *sine qua non* of any successful bid for the sultanate.<sup>9</sup> In 596/1200, barely seven years after Ṣalāḥ al-Dīn's death,

<sup>4</sup> R.S. Humphreys, *From Saladin to the Mongols*, (Albany: State University of New York Press, 1977), 47.

<sup>5</sup> Humphreys, *Saladin*, 80.

<sup>6</sup> Jalāl al-Dīn 'Abd al-Raḥmān al-Suyūṭī, *Tārīkh al-khulafā'*, ed. Muḥammad Abū al-Faḍl Ibrāhīm (Cairo: Dār Nahḍat Miṣr li al-Ṭab' wa al-Naṣhr, 1395/1975), 734.

<sup>7</sup> Humphreys, *Saladin*, 67–75; see also *ibid.*, appendix A, 365–69, "The Ayyūbid concept of the sultanate".

<sup>8</sup> Humphreys, *Saladin*, 70.

<sup>9</sup> In fact, according to al-Maqrīzī, the great danger of the Frankish assault on Damietta during the Fifth Crusade was that if they conquered Egypt there would be nothing to stop them from overrunning the rest of the Ayyūbid empire. See *Sulūk*, 1:195.

his brother, al-'Ādil I, seized the throne in Cairo and with it the sultanate of the Ayyūbid oligarchy. It was at this point that Cairo began her rivalry with Damascus to become the capital of the Ayyūbid empire.

Under al-'Ādil I and his son, al-Kāmil, Damascus continued as an autonomous province whose ruler reserved the right to designate his own heir. But under al-Kāmil's son, al-Ṣāliḥ Ayyūb (regency: 637–647/1240–1249), Damascus was reduced to a vassal of the Egyptian capital.<sup>10</sup> Meanwhile, by 617/1220 the Mongols had already overrun the 'Abbāsīd caliphate northeast of Baghdād, including Transoxiana, Bukhārā, Samarqand, Khurāsān, Qazwīn, Tabrīz, and Khawārzim.<sup>11</sup> As the Caliph in Baghdād became more ensconced in the problems of the eastern caliphate, little more than perfunctory attention could go to Egypt and the Fertile Crescent. Thus, for example, when the Ayyūbids made their desperate appeal to al-Nāṣir li Dīn Allāh (regency: 575–622/1179–1225) following the Frankish assault on Damietta at the beginning of the Fifth Crusade (615–618/1218–1221) the Caliph initially failed to respond.<sup>12</sup> By the time al-Ṣāliḥ Ayyūb began his bid for power, there remained thus little confidence in the benefits to be gained from a close relationship with the Caliph. In fact, alienated from his family and unfavored by the Caliph (al-Mustanṣir: regency: 623–640/1226–1242), this Ayyūbid prince would be forced to establish a base of power that was independent of both. With Cairo as his capital, Egypt too would ultimately be fashioned in the image of this energetic and ambitious sultan.

#### A. al-Ṣāliḥ Ayyūb: A Sower of Seeds

The reign of al-Ṣāliḥ Ayyūb marks a critical juncture in the history of Egypt in the 7th/13th century. Already, while governor in Mesopotamia under his father, he had begun the unprecedented practice of purchasing large numbers of Turkish slaves, *mamlūks*, to man his army. When al-Kāmil received word of this and of al-Ṣāliḥ's reportedly tyrannical style of government, he deposed his son as heir apparent to the throne in Egypt and named al-Ṣāliḥ's younger brother,

<sup>10</sup> Humphreys, *Saladin*, 283.

<sup>11</sup> Shams al-Dīn al-Dhahabī, *Duwal al-islam*, 2 vols., ed. Fahīm Muḥammad Shaltūt and Muḥammad Muṣṭafā Ibrāhīm (Cairo: al-Hay'ah al-Miṣriyah al-'Āmmah li al-Kitāb, 1974), 2:120.

<sup>12</sup> Humphreys, *Saladin*, 178. Al-Maqrīzī reports that the Caliph did issue a decree in 616/1219 ordering that troops be dispatched to assist al-Kāmil. *Sulūk*, 1:204.

al-ʿĀdil II, in his place. When al-ʿĀdil II became Sultan, a cousin, al-Jawwād Yūnus, who had recently become governor of Damascus against al-ʿĀdil's wishes, invited al-Ṣāliḥ to come and take Damascus in exchange for some eastern provinces. This was of course little more than an attempt by al-Jawwād to insulate himself by placing al-Ṣāliḥ's ambition and quest for vengeance between him and al-ʿĀdil. Al-Ṣāliḥ, meanwhile, seeing this as an important first step towards the ultimate aim of extracting his brother from Cairo, jumped at the invitation.

Once in Damascus al-Ṣāliḥ set out against Egypt, only to be met at Nablus (just north of Jerusalem, west of the Jordan river) by the Caliph al-Mustanṣir's envoy, Muḥyi al-Dīn b. al-Jawzī (son of the famed Ḥanbalī scholar), who proposed that al-ʿĀdil be recognized in Egypt while al-Ṣāliḥ kept Damascus. Al-Mustanṣir, it seems, thought the younger al-ʿĀdil to be more manageable and thus more suitable to the Caliph's needs. As fate would have it, however, al-Ṣāliḥ would soon be smitten by the news that instead of joining him at Nablus his uncle, al-Ṣāliḥ Ismāʿīl of Baʿalbek, had double-crossed him and seized Damascus in his absence, proclaiming his allegiance to al-ʿĀdil II in Egypt. On this news, al-Ṣāliḥ soon found himself deserted by all but a tiny entourage and about eighty of his *mamlūks*. He ended up imprisoned by another cousin, al-Nāṣir Dāʿūd, who deposited the now kingdomless prince at the fortress of Karak.<sup>13</sup>

At the time, al-Nāṣir Dāʿūd bore no particular malice against al-Ṣāliḥ personally. In fact, his real gripe was with al-ʿĀdil, whom he blamed for having deprived him of Damascus, which he so deeply coveted. His plan was thus to use al-Ṣāliḥ as a bargaining chip with al-ʿĀdil (who offered him 400,000 dinars and Damascus in exchange for his royal hostage<sup>14</sup>) or as an ally against the latter in the event that negotiations failed. But al-Nāṣir would be ultimately frustrated by al-ʿĀdil's high-handed maneuvers, as a result of which he ended up a few months later freeing al-Ṣāliḥ and entering into an agreement with him according to which the latter would take Egypt and he Damascus, plus 200,000 dirhams.<sup>15</sup> In the spring of 637/1240 the two rallied their forces and set out to confront al-ʿĀdil. But the mere sight of the latter's superior Egyptian army joined by his Syrian allies was

<sup>13</sup> Humphreys, *Saladin*, 246–60; *Sulūk*, 1:288.

<sup>14</sup> *Sulūk*, 1:290. Al-Nāṣir's response to this offer was that when al-ʿĀdil himself gained possession of Damascus and surrendered it to him, he would turn over al-Ṣāliḥ.

<sup>15</sup> *Sulūk*, 1:294.

enough to force al-Ṣāliḥ and al-Nāṣir Dāʿūd to retreat to Nablus. It was at this time that al-Ṣāliḥ would receive the most shocking albeit welcome news of his career. The senior *amīrs* in Cairo had grown weary of the youthful al-ʿĀdil's hedonism, his extravagant expenditures<sup>16</sup> and his favoritism towards his junior *amīrs* and hand-picked courtiers. Their dissatisfaction culminated in the arrest of the young Sultan followed by an invitation to al-Ṣāliḥ to come to Egypt and assume the sultanate. In Dhū al-Qaʿdah (June) of 637/1240, al-Ṣāliḥ entered Cairo to become the fifth of the Ayyūbid sultans.<sup>17</sup>

Once in Cairo, al-Ṣāliḥ knew that he would have to contend with his shrewd and ambitious uncle, al-Ṣāliḥ Ismāʿīl. Indeed, so great was Ismāʿīl's contempt for his nephew that rather than recognize him as Sultan he had the *khutbah* in Damascus read in the name of the Seljuq ruler in Anatolia.<sup>18</sup> He went on to enlist the support of the Crusaders, offering them as *quid pro quo* a number of coastal possessions and the citadels at Ṣafad and Shaqīf.<sup>19</sup> He was later joined in this effort by al-Nāṣir Dāʿūd, who was now smarting over al-Ṣāliḥ's betrayal of promises made during their agreement at Nablus. Now al-Ṣāliḥ Ismāʿīl, al-Nāṣir Dāʿūd and the Crusaders, to whom al-Nāṣir had recently ceded Jerusalem, jointly prepared to launch an all out offensive against the new Sultan in Cairo.

To be sure, al-Ṣāliḥ recognized the seriousness of the threat posed by his uncle and cousin. His experience, however, had left him none too trusting of the network of alliances available within the Ayyūbid house. In order to meet this challenge, he decided, therefore, to venture outside the royal family. As quickly as possible, he fashioned an army composed of Central Asian Khawārmīs, whom he summoned from the East where he had spent time as governor, along with his own *mamlūks*, whom he was now using to purge the Kurdish soldiery in Cairo.<sup>20</sup> In the fall of 642/1244, his Egyptian-Khawārmīan forces met the Syrian-Frankish army near Gaza on the Levantine coast, roundly defeating the latter in a humiliating rout. Now, recognizing the Khawārmīs' questionable loyalty, al-Ṣāliḥ moved to neutralize them by denying them a base of operation. At once, he forbade them from entering Cairo and dispatched one of his generals to lead them on

<sup>16</sup> According to al-Maqrīzī, 6,000,020 dirhams. *Ibid.*

<sup>17</sup> Humphreys, *Saladin*, 260–64.

<sup>18</sup> *Sulūk*, 1:299.

<sup>19</sup> *Sulūk*, 1:303–04.

<sup>20</sup> Ibn Iyās, *Badāʿiʿ*, 1:269; Ibn Taghribirdī *al-Nujūm*, 6:331.



a campaign to retake Damascus.<sup>21</sup> But even before the dust could settle on the soldiers in the field, the Caliph, now al-Mustaʿsim (regency: 640–656/1242–1258), would have his envoy appear in Egypt with a formal investiture and the title *al-sultān* to be presented to al-Šāliḥ Ayyūb.<sup>22</sup> By this act, al-Šāliḥ became the first and only Ayyūbid ruler—including the great Šalāḥ al-Dīn himself—to receive the formal title “*al-sultān*” from a caliph.<sup>23</sup>

In the meantime, al-Šāliḥ had already begun the process of expanding his base of popular support in Cairo. This was for him a necessary task that could not be put off for long. For he was himself something of an estranged repatriate in Egypt, and the continually increasing numbers of Turkish *mamlūks* not only threatened the Kurdish soldiery but perturbed the local population as well.<sup>24</sup> In response to this situation, al-Šāliḥ decided to separate his troupes from the local population by housing them in special barracks on the Nile island of *al-Rawdah*, whence their name “*al-baḥrīyah*”.<sup>25</sup> Then, in 639/1241, in an apparent effort to ingratiate himself with the ‘*ulamāʾ*’, he broke ground for his famous Šāliḥīyah super-college. This *madrasah* was the first of its kind ever in Egypt, holding as it did a chair for each of the four Sunni schools of law. It was apparently modelled on the Caliph al-Mustansir’s Mustansirīyah in Baghdād, though it is difficult to tell whether al-Šāliḥ’s action implied flattery or defiance. At any rate, from the time the Šāliḥīyah began operating in 641/1243, it exercised a profound and permanent effect on the political situation in Cairo. For, in an unprecedented fashion this *madrasah* brought all the Sunni schools together in an open competition wherein each could argue the superiority of its position regardless of its political standing at large. The result was a certain equalizing effect, or at the very least, a heightened expectation of equal treatment, which ultimately set the stage for such

<sup>21</sup> *Sulūk*, 1:318–19. A few months into this siege, it was agreed that al-Šāliḥ Ismāʿīl would surrender Damascus in exchange for a safe return to Baʿalbek.

<sup>22</sup> *Sulūk*, 1:319.

<sup>23</sup> According to Humphreys (*Saladin*, 328), Šalāḥ al-Dīn did not formally receive the title “sultan” from a Caliph. While he struck coins bearing the epithet *sultān al-islām wa al-muslimīn* and was followed in this by several of his successors, this was “not a title granted by the caliph, but a self-bestowed honorific used for propaganda purposes: to vaunt Saladin’s claims vis-à-vis the rival Zangids or the status of the sultan as against his fellow princes of the blood.” *Ibid.*, 471–72 (nt. 1).

<sup>24</sup> Ibn Iyās reports that the Mamlūks so harassed the local population that the Egyptians called down the wrath of God upon al-Šāliḥ for bringing them there. *Badāʾiʾ*, 1:269.

<sup>25</sup> See Ibn Iyās, *Badāʾiʾ*, 1:269–70; Ibn Taghribirdī, *al-Nujūm*, 6:331.

major events as the establishment of the four chief judgeships under Baybars in 663/1265. While in the short run, al-Šāliḥ’s innovation served the immediate goal of broadening his base of support, in the long run, it provided the Mālikīs, Ḥanafīs and even the Ḥanbalīs the opportunity to compete with preeminent Shāfiʿism on a more equal footing.<sup>26</sup>

Meanwhile, al-Šāliḥ’s work beyond the Cairene homefront remained incomplete. There remained the nagging threat of the Khawārmīs, whom, following the victory over the Syrian-Frankish coalition, he forbade to enter Damascus, even after they had ejected al-Šāliḥ Ismāʿīl and forced him to return to Baʿalbek. In protest, they set out for the Levantine coast, pillaging the area and preparing a turn-around attack against Damascus, picking up a half-hearted ally in al-Šāliḥ Ismāʿīl along the way. Ironically, however, it was now the Syrian princes of Homs and Aleppo who had the most to fear from a Khawārmīan victory. For with Egypt securely in the hands of al-Šāliḥ Ayyūb, it was their territories that would be overrun if the Khawārmīs ever got a foothold in Syria.<sup>27</sup> It was thus a Homs-Aleppan alliance that was most responsible for beating back the Khawārmīs in 644/1246, decapitating their leader and scattering them to the four winds.

It was thus not until 644/1246 that al-Šāliḥ was firmly and securely mounted on the throne in Egypt. But by the time he had subdued his adversaries, all of the alternate centers of power outside of Cairo had been virtually eliminated. In effect, his triumph signalled the end of the era of Ayyūbid collective sovereignty. The Ayyūbid oligarchy had been effectively transformed from a collection of autonomous principalities into a more centralized autocracy.<sup>28</sup> Equally important, however, al-Šāliḥ now stood at the center of a power structure that was totally independent of the Ayyūbid house and totally beholden to him. Having marginalized the main units of Kurdish soldiers who had served his father and his brother, the mainstay of his power was now his own Turkish *mamlūks*. Ironically, however, it would be in the very sources of al-Šāliḥ’s strength and independence that lay the seeds of the Ayyūbids’ ultimate demise.

<sup>26</sup> On the Šāliḥīyah *madrasah*, see al-Maqrīzī, see *Khiṭaṭ*, 2:374–75. On its impact on the political equation of Cairo, see Jackson, “Primacy,” 55–56. On Shāfiʿi preeminence, see below, 53–55.

<sup>27</sup> Humphreys, *Saladin*, 286.

<sup>28</sup> Humphreys, *Saladin*, 300.

B. *Interregnum: Tūrān Shāh; Not Careful Enough*

Al-Ṣāliḥ died on the battlefield against Louis IX (Ninth Crusade) in Sha'bān (November) of 647/1249. He is said to have made a deathbed bequeathal of the sultanate to his second eldest son, al-Mu'azzam Tūrān Shāh, who was at the time governor in the Mesopotamian district of Ḥisn Kayfā.<sup>29</sup> Arrangements to have Tūrān Shāh installed were undertaken by al-Ṣāliḥ's widow and former concubine, the legendary Shajarat al-Durr, who concealed the Sultan's death and continued to run the affairs of state on her own, in cooperation with a few close generals. Tūrān Shāh arrived in Damascus in Ramaḍān (December) of 647/1249 and was crowned Sultan. From there he set out for Egypt, where, upon his arrival at the battlesight at al-Manṣūrah, he moved promptly to displace his father's *mamlūks* (who felt no loyalty whatever towards him) and install his own entourage whom he had brought from the East. For Tūrān Shāh, purging the *mamlūks* was as much a matter of necessity as it was of time, a fact he would openly proclaim during his nocturnal drinking sessions. Sword in hand, he would chop the tips off a row of lighted candles and bellow, "This is how I am going to cut down the *bahriyah*!"<sup>30</sup> Unfortunately for him, the *bahriyah* soon got word of his designs and decided on a preemptive strike of their own. Barely two months into his reign they surprised him while seated at a banquet and with their swords struck him to death.<sup>31</sup> His assassination brought to an end the era of Ayyūbid rule in Egypt.

C. *Interregnum: Shajarat al-Durr; Too Careful?*

What followed was an anomaly unprecedented and unmatched in the annals of Muslim history. At the time they assassinated Tūrān Shāh, the only authority the *mamlūks* enjoyed derived from their association with al-Ṣāliḥ Ayyūb.<sup>32</sup> They had not yet acquired the notion that they had a right to rule independently. The idea, thus, of setting up one of their own remained simply out of the question. Equally unacceptable, however, would be a candidate whose power base was independent of them and whose legitimacy was broad and deep enough to

<sup>29</sup> *Sulūk*, 1:339. See, however, *ibid.*, 1:342, where al-Maqrizī cites the allegation of some that al-Ṣāliḥ chose the Caliph al-Musta'ṣim to appoint his successor.

<sup>30</sup> *Sulūk*, 1:359.

<sup>31</sup> *Sulūk*, 1:359–60; *Saladin*, 302–03.

<sup>32</sup> See above, xxiv, where I distinguish authority from power.

oppose let alone supercede them. Their choice fell thus upon the widow of al-Ṣāliḥ, Shajarat al-Durr. Coins were struck bearing her epithet, the *khutbah* was read in her name, and in Safar (May) 648/1250 she was crowned "*malikat al-muslimīn*," the first—and last—woman in Muslim history to become a bona fide '*sultānah*'.<sup>33</sup> Al-Qarāfi was at the time a young man of about twenty-two. How he and his fellow graduate students must have marvelled in disbelief.

At any rate, Shajarat al-Durr understood that she, like her *mamlūk* supporters, had no real legitimacy of her own. Her only hope, therefore, was to try to identify herself as an extension of the Ayyūbid house and then as a faithful servant of the Caliph al-Musta'ṣim in Baghdād. The inscription on her seal thus read, "the mother of Khalil (the deceased son of al-Ṣāliḥ Ayyūb)"; and her coinage bore the title, "*al-must'āṣimīyah* [after the caliph al-Musta'ṣim] *al-ṣāliḥīyah malikat al-muslimīn wālidat al-malik al-manṣūr khalil amir al-mu'minīn*."<sup>34</sup> In the end, however, all of this would come to naught. It was ironically, the Caliph al-Musta'ṣim himself who upon hearing that she had been placed on the throne sent a biting message to the new junta in Cairo: "If there remain no men among you, let us know, and we will send you one!"<sup>35</sup> At the same time, the Kurdish amīrs in Damascus refused to pledge allegiance to the *grande dame*. They even called in the Ayyūbid prince al-Nāṣir Yūsuf from Aleppo and surrendered the city to him, an act that restored Damascus to its former status as an independent principality. But the proud and calculating Shajarat al-Durr would not be so easily denied. Recognizing the role of gender in this crisis, she decided to marry her military commandant, the *mamlūk* general, 'Izz al-Dīn Aybak, who in her stead would assume the title of Sultan with the unspoken expectation that she would remain the center of power. In Rabī' II (July), 648/1250 she formally abdicated. 'Izz al-Dīn Aybak, who now took the name al-Malik al-Mu'izz, became, for all intents and purposes, the first *mamlūk* sultan. Little did Shajarat al-Durr know it at the time, but she had effectively maneuvered herself out of a political career.

<sup>33</sup> See, e.g., *Sulūk*, 1:361–62. One may assume that such references as Ibn Baṭṭūṭah's to certain women of the Maldives as "*sultānah*" implied a strictly honorary title.

<sup>34</sup> *Sulūk*, 1:362.

<sup>35</sup> *Sulūk*, 1:368.

D. *Interregnum: al-Mu'izz Aybak; The Nemesis of Legitimacy*

Al-Mu'izz Aybak would initially fare no better than had Shajarat al-Durr. No sooner had the new arrangement been announced than al-Nāṣir Yūsuf set out from Damascus to return Egypt to its rightful masters, the Ayyūbids. Almost immediately, a slew of Ayyūbid princes in Syria and Mesopotamia were persuaded to recognize him and were confirmed, *seriatum*, as his vassals. This sudden re-orientation towards Damascus implied a patent contempt for the audacious ex-slave who was now claiming the right to the sultanate. But faced with these serious challenges, the best al-Mu'izz could muster was a pathetic and desperate attempt to align himself with the Caliph in Baghdād. "Egypt," he proclaimed throughout the capital, "and all the lands [formerly under Ayyūbid control] belong to the Caliph al-Musta'ṣim billāh, and al-Malik al-Mu'izz 'Izz al-Dīn Aybak is his representative!"<sup>36</sup> Meanwhile, the *mamlūk* junta in Cairo had a different view of things. To their eyes, only a descendent of Ṣalāḥ al-Dīn would be able to cap the centrifugal force now building in Cairo and insulate the capital from further outside Ayyūbid challenges. They decided thus to set up the six year old Ayyūbid prince al-Malik al-Ashraf Mūsā as a "co-sultan" alongside al-Mu'izz Aybak. Royal correspondence and the new currency now appeared bearing the names of the two Sultans. And both of them had their names read in the Friday *khutbah*.<sup>37</sup> Life must have appeared to the young al-Qarāfī even more strange and precarious than he could have ever previously imagined.

But despite all of this effort to the contrary, the nemesis of legitimacy would continue to taunt al-Mu'izz. Not only was he surrounded by an endless line of Ayyūbid detractors, an important segment of Turkish *mamlūks* remained unprepared to accept his authority. Their sentiment was (later) captured in an exchange between them and the Seljuq ruler of Anatolia:

- What is the matter between you and your leader (*ustādhukum*)?
- And who, your highness, is our leader?
- al-Malik al-Mu'izz, the ruler of Egypt.
- May God preserve you, your highness. If al-Mu'izz has claimed this in his correspondence to you, he is mistaken. He was simply one of our comrades (*khushdāsh*) whom we appointed over us, while there

<sup>36</sup> *Sulūk*, 1:370.

<sup>37</sup> *Sulūk*, 1:369-70; *Nujūm*, 6:374.

were among us some who were older, more qualified, more skilled and more deserving to be Sultan. . . .<sup>38</sup>

This segment of the *bahriyah* had only supported al-Mu'izz initially for the same reason they had set up Shajarat al-Durr: they believed that he would be able to exercise minimal control over them. During the early years of his reign they wreaked havoc on the Cairene population, robbing citizens in the streets, burning and pillaging the city, extorting money and accosting womenfolk at public bathhouses.<sup>39</sup> Meanwhile, realizing that his political future depended on the speed with which he would be able to establish an independent power-base, al-Mu'izz turned his attention to financial matters, unleashing on the local business community his ruthless *wazīr*, Sharaf al-Dīn Hibat Allāh b. Ṣā'id al-Fā'izī. A Coptic convert to Islam, al-Fā'izī's heavy taxation and illegal confiscations would win him a place of splendid infamy in the annals of Egyptian history: truculent, punned scorn heaped lavishly on his head in celebration of his death.

God damn Ṣā'id!  
his parents and all his ancestry  
his children and all his progeny  
one after the other.<sup>40</sup>

It was not long before al-Mu'izz felt strong enough to confront the fractious group of *bahriyah*, at the head of which stood Fāris al-Dīn Aqtay, Sayf al-Dīn Balabān al-Rashīdī and Rukn al-Dīn Baybars al-Bunduqdārī.<sup>41</sup> In Sha'bān (September) of 652/1254 he summoned their spokesman, Fāris al-Dīn Aqtay, to the citadel, ostensibly for the purpose of discussing some important matters of state. When the unsuspecting general arrived, Sayf al-Dīn Quṭuz and a group of *mamlūks* loyal to al-Mu'izz drew their swords and assassinated him.<sup>42</sup> The rest of the group took flight, some fleeing to al-Nāṣir Yūsuf in Damascus, others

<sup>38</sup> *Sulūk*, 1:393.

<sup>39</sup> *Ibid.*, 1:380; 1:384; 1:390. See also D. Ayalon, "Le régiment bahriya dans l'armée mamelouke," *Studies on the Mamlūks of Egypt (1250-1517)*, (London: Variorum Reprints, 1977), III: 135-38, esp. 135: Ils faisaient ce que bon leur semblait dans les rues du Caire, assassinant, incendiant, se livrant au pillage et au viol sans aucun frein "de sorte que si les Francs mêmes avaient occupé le pays, ils n'auraient pas fait ce que ceux-la faisaient".

<sup>40</sup> Jalāl al-Dīn al-Suyūṭī, *Husn al-muḥādarah*, 2:216-17: *la'ana 'llāhu ṣā'idan; wa abāhu fa ṣā'idan; wa banīhi fa nāzilan; wāḥidan thumma wāḥidan.*

<sup>41</sup> *Sulūk*, 1:380

<sup>42</sup> *Sulūk*, 1:390. Humphreys, *Saladin*, 326, gives Dhū al-Qa'dah (January) 651/1254 as the date of Aqtay's assassination.

seeking asylum with the Seljuq ruler of Anatolia. In order to prevent them from re-entering Cairo, al-Mu'izz spent the next few years camped outside the city with his army at a place called al-'Abbāsah (northeast of Cairo on the road to Damascus). By the time he was able to return, however, a number of amirs in Cairo had grown apprehensive about his impending policies, and his relationship with Shajarat al-Durr had badly deteriorated. This situation reached a head in Rabī' I (April) of 655/1257, when Shajarat al-Durr dispatched a group of henchmen to intercept him at the royal bathhouse, where they strangled (and according to some, stabbed)<sup>43</sup> the Sultan to death.<sup>44</sup> A few days later, the thinly clad body of Shajarat al-Durr herself was found sprawled beneath the citadel.<sup>45</sup>

#### E. *Interregnum: Sayf al-Dīn Quṭuz; A Tragic Hero*

Within days of al-Mu'izz's death, the *mamlūk* amirs set up his son, al-Malik al-Manṣūr Nūr al-Dīn 'Alī, a boy barely fifteen years of age and still preoccupied with the frivolities of youth. Real power devolved upon the *mamlūk* general, Sayf al-Dīn Quṭuz, who had served as vice gerent (*nā'ib al-salṭanah*) under al-Mu'izz. By this time, however, Egypt—indeed most of the Muslim world—was on the precipice of the most horrifying crucible in its history: the Mongol invasions. In Ṣafār (February), 656/1258 the Mongols, under Hülagü, sacked Baghdād, killing the 'Abbāsīd Caliph al-Musta'ṣim and bringing to an end Baghdād's era of cultural and political supremacy.<sup>46</sup> By 657/1259, they had crossed the Euphrates and were threatening the major centers in northern Syria. When news of this reached Egypt, Sayf al-Dīn Quṭuz decided to depose al-Manṣūr Nūr al-Dīn and proclaim himself Sultan, arguing that the situation called for more experienced leadership. Meanwhile, in Rabī' I (February) 658/1260 the Mongols, continuing their westward drive, took Aleppo; Homs and Hama followed in rapid succession. Damascus, now defense-

<sup>43</sup> Humphreys, *Saladin*, 329–30.

<sup>44</sup> *Sulūk*, 1:403. The assertion that Shajarat al-Durr was motivated by jealousy over al-Mu'izz's planned marriage to the ruler of Mosul's daughter is hardly credible (See, e.g., *Shadharāt*, 5:267). Al-Maqrīzī reports that she had in fact written to al-Nāṣir Yūsuf in Damascus, offering to marry him in order to aid him in seizing the throne in Egypt. *Sulūk*, 1:403.

<sup>45</sup> *Sulūk*, 1:404.

<sup>46</sup> *Sulūk*, 1:409.

less following the evacuation by the horror stricken Ayyūbid prince, al-Nāṣir Yūsuf, capitulated shortly thereafter and was placed under the Mongol general Kitbugha. By late summer of 658/1260, the Mongols had gained control of all of Muslim southern Syria with the exception of Jabal al-Duruz and Transjordan, the latter having preserved itself by sending its surrender to Kitbugha upon his entry into Damascus.<sup>47</sup> There was now nothing standing between Egypt and the Mongols save time itself.

News of the Mongol advance brought Cairo to the brink of a nervous breakdown. Meanwhile, in order to finance the impending war effort, Quṭuz levied monstrous excise, property and poll taxes, and even confiscated a third of all inherited estates.<sup>48</sup> To be sure, these were trying times for the local population in Egypt. And with all the lands to the east cut off by the Mongols, the traditional option of relocating to a more hospital domicile was drastically reduced. This may explain in part why al-Qarāfī's constitutionalism appears as such a radical departure from anything found in previous discussions, e.g., those of al-Māwardī (d. 450/1057) or Abū Ya'lā (d. 458/1064). It seems that the latter wrote against a background of a "politics of exit," according to which dissidents enjoyed the permanent option of voting with their feet. This is why neither of their *al-Aḥkām al-sulṭānīyahs* give instruction on the legal means of voicing dissent: the assumption was that dissidents simply moved.<sup>49</sup> Al-Qarāfī, meanwhile, because of the boundary restrictions imposed by the Mongol invasions, was denied the luxury of thinking in terms of a politics of exit. Instead, he would have to formulate his concerns in terms of a "politics of voice" whereby, as geographical prisoners, citizens, as it were, of a

<sup>47</sup> Humphreys, *Saladin*, 355.

<sup>48</sup> *Sulūk*, 1:405.

<sup>49</sup> Some evidence supporting this thesis may be taken from the diary of the Ḥanbalite, Ibn al-Bannā' (d. 471/1071), a Baghdadian contemporary of both al-Māwardī (d. 450/1057) and Abū Ya'lā (458/1064). Ibn al-Bannā' relates that once the Caliph ordered a certain Ibn Sukkarah arrested for charging into a someone's home and destroying the latter's musical instruments. Later, when the Caliph learned that other prominent jurists had issued *fatwās* supporting Ibn Sukkarah's action, he granted the latter clemency and permission to return to his home. To this, however, Ibn Sukkarah replied: "I will not (return)! Nor will I remain in this town. Rather, my companions and I will move to the town of Baṣrah." Recognizing the seriousness of this threat, the notables went to Ibn Sukkarah and exclaimed in a frenzy: "Will you risk plunging this town and its people into civil strife and ruining the Sultan's reputation? See G. Makdisi, "Autograph Diary of an Eleventh-Century Historian of Baghdad," *Bulletin of the School of Oriental and African Studies* XIX (1957), 282–83.

territorial state, dissidents had to work to secure the right to speak out against policies with which they disagreed.<sup>50</sup>

At any rate, by this time the Mongol threat had forced a rapprochement between Qutuz and the *bahriyah*, who now returned to Egypt to join the Muslim forces. Shortly thereafter, Hülagü's emissaries arrived with threats of destruction and terms for a surrender. But a now defiant Qutuz decided to feign a show of strength, summarily executing his Mongol guests and displaying their heads at the city gate of *bāb zuwaylah*. From there he went on to rally a terror-ridden Egyptian army to go out and fight. In Ramaḍān (September) of 658/1260, he and his army (including some Syrian Ayyūbid regiments) met Kitbugha's forces at a place called 'Ayn Jālūt (southeast of Nazareth, west of the Jordan river) where the Mamlūks defeated the Mongols and achieved the single most important victory of their military career.<sup>51</sup> From 'Ayn Jālūt, Qutuz would march into Damascus and return the grand old city to Muslim rule. For the next two hundred and fifty years, Damascus would remain a Mamlūk province with Cairo as the uncontested capital of the central Islamic lands.

When news of the Mamlūk victory reached Cairo, the city bedecked itself in preparation to receive its hero, al-Malik al-Muzaffar Sayf al-Dīn Qutuz. Their euphoria would soon be broken, however, by the news that the Sultan had been assassinated and the sultanate passed on to the *bahri* amir, Rukn al-Dīn Baybars al-Bunduqdārī. Waves of terror reverberated throughout the capital, as the Egyptians recoiled in horror at the thought of the *bahriyah* coming to power.<sup>52</sup> Baybars, it will be recalled, had been one of the leaders of that fractious group of freebooting *mamlūks* who had terrorized the capital during the early years of al-Mu'izz Aybak. This, coupled with the violent means by which he had now seized the sultanate, only heightened local fears that Egypt was about to enter upon another bleak and protracted reign of terror.

<sup>50</sup> I am indebted to Professor Ellis Goldberg of the University of Washington, Seattle for his suggestions concerning the possible significance of voice versus exit politics in medieval Islam. For examples of al-Qarāfi's attempts to secure the right to express opposition, see below, 215–17; see also, S.A. Jackson "From Prophetic Actions to Constitutional Theory".

<sup>51</sup> *Sulūk*, 1:427–31.

<sup>52</sup> See, e.g., Abū Bakr b. 'Abd Allāh b. Aybak al-Dawādārī, *Kanz al-durar wa jāmi' al-ghurar*, ed. U. Harmann (Cairo: 'Isā al-Bābī al-Ḥalabī, 1391/1971), 8:62–63.

#### F. *al-Zāhir Baybars: The True Heir to al-Ṣāliḥ Ayyūb?*

Contrary to what had been expected, the reign of al-Zāhir Baybars turns out to mark the *terminus ad quem* of the great chaos and confusion that had been unleashed by the death of al-Ṣāliḥ Ayyūb. Under Baybars, things begin to settle down, and the foundations for what later become known as distinctly Mamlūk institutions are laid. This came about, however, only with great effort and equally great expenditures on the part of this great sultan. Indeed, the situation facing Baybars upon his ascension to power was unenviable, to say the least. As R.S. Humphreys points out:

When Baybars seized the throne in 1260, he confronted a world in chaos. The Mongol invasions had destroyed all the independent centers of power in Syria. The Egyptian state had been saved by 'Ayn Jalut, of course, but it was a state with no sense of legitimacy or political continuity, since three of its last four Sultans had ascended the throne by assassination.<sup>53</sup>

To be sure, victory over the Mongols would go a long way in securing a measure of legitimacy for the Mamlūks; it was, after all, they who had insured that Egypt would continue as a Muslim entity. Important, however, though this may have been, it would not be enough to render the local population any more secure in their persons and property. Baybars, after all, had been a leader of that group of *mamlūks* who only a few years earlier had committed atrocities "the likes of which even the Franks would not have committed had they occupied the country."<sup>54</sup> Neither victory over the Mongols nor the type of formal legitimacy obtainable through investiture from a caliph would be enough to overcome this stigma.<sup>55</sup> If Baybars, now a decade older and beyond the rashness of youth, was to repair the destruction of the last ten years and lay the foundations for stable and effective government, he would have to overcome this image-problem by ingratiating himself more directly with his Egyptian constituency.

That Baybars understood this as well as the fact that formal

<sup>53</sup> "The Emergence of the Mamluk Army (Conclusion), *Studia Islamica* 46 (1977): 153–54.

<sup>54</sup> See above, note 39.

<sup>55</sup> Cf., however, P. Thorau: "Mit der Bestätigung durch den Kalifen . . . [e]iner eventuellen Kritik am Sultan als unrechtmäßigem Machthaber wurde damit auch in dem Augen der Frommen die Grundlage entzogen". *Sultan Baibars I. von Ägypten* (Weisbaden, 1987), 135–36.

legitimacy was not the answer to his dilemma is clearly reflected in his relationship with the two 'Abbāsīd Caliphs, al-Mustansir (regency: 659/1261) and al-Hākim (regency: 661–701/1262–1302). In Rajab (June) of 659/1261, just ten months after 'Ayn Jālūt and following more than a three-year vacancy of the caliphate, a black man appeared in Cairo claiming to be a member of the 'Abbāsīd house.<sup>56</sup> Amid great fanfare, his genealogy was confirmed and, taking the name "al-Mustansir", this descendent of the Prophet's family was inaugurated Caliph. Baybars was immediately confirmed as Sultan and the affairs of state were turned over to him. But rather than retain the Caliph in Cairo as a symbol of legitimacy, Baybars sent him back to Baghdād less than three months after his inauguration (Shawwāl/September).<sup>57</sup> To no one's surprise, al-Mustansir was killed en route by the Mongols,<sup>58</sup> and, following his death, the caliphate remained vacant for another year and a half, until Muḥarram (November) of 661/1262 when al-Hākim was confirmed.<sup>59</sup> Al-Hākim, it is true, remained in Cairo for the remainder of Baybars' reign; but under humiliating restrictions imposed by the Sultan, he remained Caliph only in name.<sup>60</sup> In fact, there is evidence suggesting that he too became Caliph entirely by accident. He had met up with al-Mustansir on his way back to Baghdād and only narrowly escaped the Mongol attack in which the latter was killed.<sup>61</sup> What all of this suggests is that far from actively pursuing the reestablishment of the 'Abbāsīd caliphate at Cairo, Baybars—his position as Sultan and ostensible defender of the caliphate notwithstanding—was perfectly willing to see it to die a quiet and uneventful death. Indeed, so little was his regard for the benefits to be derived from this institution that despite the fact that he himself had seven daughters<sup>62</sup> he made no attempt to establish family ties with the

<sup>56</sup> See Shāfi' b. 'Alī, *Husn al-manāqib al-sirriyah al-muntaza'ah min al-sirah al-zāhiriyyah*, 2nd ed. 'Abd al-'Azīz al-Khowaytar (Riyad: 1410/1989), 79; al-Dhahabī, *Duwal al-Islām*, 2:165.

<sup>57</sup> Shāfi' b. 'Alī, *Husn al-manāqib*, 94–95.

<sup>58</sup> *Husn al-manāqib*, 93–96.

<sup>59</sup> *Husn al-manāqib*, 107–08. According to al-Suyūṭī (*Husn al-muḥāḍarah*, 2:59), al-Hākim returned to Cairo in Rabi' II of 660, but his inauguration was delayed until the following year. D. Ayalon, meanwhile, has refuted the suggestion that Baybars recognized the Ḥafsid Caliph of Tunis. See "Studies on the Transfer of the 'Abbāsīd Caliphate From Bagdād to Cairo," *Studies on the Mamlūks*, IX (pp. 41–59).

<sup>60</sup> He was quarantined by Baybars in 663/1265 (*Sulūk*, 1:540; *Husn al-manāqib*, 114), and his name was subsequently removed from gold and silver coinage (*Husn al-muḥāḍarah*, 2:61).

<sup>61</sup> al-Dhahabī, *Duwal al-Islām*, 2:165–66.

'Abbāsīds, which would have enabled him to produce an offspring capable of assuming the caliphate!<sup>63</sup>

Rather than invest his time and energies in the pursuit of formal authority, Baybars would seek to overcome the stigma of his past by way of a public relations campaign aimed at transforming his image from that of a *mamlūk* mercenary into that of a champion of benevolent Islamic rule. The first few years of his reign thus witnessed a massive "Islamization" program: He nullified non-Sharī'ah taxes,<sup>64</sup> renovated the Prophet's mosque in Medina (for which there was a grand procession in Cairo),<sup>65</sup> renovated the Dome of the Rock in Jerusalem, restored the charitable trusts of Khalil (Hebron) (grave site of the prophet Abraham),<sup>66</sup> reinstated defunct laws of Sharī'ah, including a renewal of the ban on alcohol.<sup>67</sup> He even instituted a policy to ensure that instead of being devoured by army officers, the estates of fallen soldiers would be passed on to their non-*mamlūk* heirs (*awlād nās*).<sup>68</sup> Underscoring all of this was the appointment of the pertinacious Tāj al-Dīn Ibn bint al-A'azz as head of the judiciary, a move unquestionably designed to restore confidence in the justice system.<sup>69</sup> Meanwhile, Baybars would go on to build his famous *Zāhiriyyah madrasah*.<sup>70</sup> And he would later erect a large congregational mosque (*jāmi'*) (in another part of the city) in which Friday prayers were held.<sup>71</sup> He even made a point of visiting *ṣūfī shaykhs* during his legendary inspection tours to Alexandria.<sup>72</sup> In sum, Baybars was quite serious about broadening his base of support and winning the confidence of his Egyptian constituency. It is perhaps a testimony to his success that, as the royal biographer, Muḥyī al-Dīn b. 'Abd al-Zāhir reports,

<sup>63</sup> Compare this with the tireless efforts of the Seljuq sultan, Tughril Beg, to establish family ties with the 'Abbāsīd caliph in Baghdād. See G. Makdisi, "The Marriage of Tughril Beg," *IJMES*, I (1970): 259–75. It might be suggested that the early Mamlūks had no concept of hereditary rule and, as such, the idea of a "mamlūk caliphate" would have never occurred to them. However, the reigns of Baybars' two sons, Barakah Khān and Sayf al-Dīn Salāmish, would seem to refute this notion and suggest that the Mamlūks did embrace the principle of hereditary rule. So would the reigns of the Qalāwūnids.

<sup>64</sup> *Rawḍ*, 77.

<sup>65</sup> *Husn*, 2:95; *Rawḍ*, 89.

<sup>66</sup> *Sulūk*, 1:445.

<sup>67</sup> Ibn Taghribirdī reports that the equivalent of one thousand dinars worth of wine per day was destroyed following Baybars' announcement. *Nujūm*, 7:154.

<sup>68</sup> *Sulūk*, 1:512.

<sup>69</sup> See below, 64–68.

<sup>70</sup> *Rawḍ*, 89–90.

<sup>71</sup> *Sulūk*, 1:588.

news of his policies encouraged a group of businessmen to return to Cairo from Yemen to which they had earlier fled.<sup>73</sup>

In all of this, however, Baybars was much more the pragmatist than a revolutionary. His interest rested primarily in exploiting, not changing, the political equation of Cairo. This meant acknowledging—and in so doing confirming—the preeminence of the powerful Shāfiʿī school of law. To be sure, there was nothing new in this alliance between Shāfiʿism and power in 7th/13th century Egypt. But a new element would appear in the exclusivist policies of the newly appointed chief justice, Tāj al-Dīn b. bint al-Aʿazz, who refused to enforce rulings of deputy judges whenever these went against his Shāfiʿī view. This policy would eventually raise the ire of the remaining schools of law, even as the recent demographic and institutional changes had brought them to question the validity of Shāfiʿī privilege overall.<sup>74</sup> Meanwhile, in his very pertinacity Ibn bint al-Aʿazz only fortified his reputation for being totally uncorruptible, which rendered it virtually impossible under the circumstances for Baybars to remove him from office. In the end, the need to placate the competing interests in this conflict culminated in Baybars' decision to quadruple the number of chief judges, one for each of the four schools of law.<sup>75</sup> It was apparently during this conflict, incidentally, that al-Qarāfi wrote his *Tamyīz*, as a scholarly protest against exclusivism within the judiciary and as a legal argument affirming the inviolable status of all the Sunni *madhhabs*. The establishment of the four chief judgeships, meanwhile, while ostensibly solving the problem of Ibn bint al-Aʿazz and raising the stature of the Mālikī, Ḥanafī and especially the traditionally weak Ḥanbalī schools, did not spell the end of Shāfiʿī dominance in Egypt. Shāfiʿism would remain preeminent throughout the 7th/13th century. Al-Qarāfi's writings, as a Mālikī, must be read in this light.

<sup>73</sup> *Rawḍ*, 132.

<sup>74</sup> An example of the changing political equation of Cairo can be seen in an event reported in the year 662/1264, when the Ḥanbalī professor at the Ṣālihiyah, Ibn Abī Surūr, was brought up on charges of circulating seditious propaganda. Ibn Abī Surūr's disgruntlement is said to have resulted from Baybars' failure to appoint a full Ḥanbalī deputy judge (*nāʾib*) in 660/1262 joined by his failure to provide a Ḥanbalī chair at his newly established Zāhiriyyah *madrasah*. In earlier times, for a Ḥanbalī in Egypt to expect such consideration would have been unthinkable. The fact that these charges were now even credible reflect the changing face of Cairene politics. See Jackson, "Primacy," 56.

<sup>75</sup> For a full presentation of this thesis, see Jackson, "Primacy," 52–65.

### III. *The Schools of Law in Egypt*

At the time Baybars came to power, Shāfiʿī dominance in Egypt was still less than a century old. Not until the reign of Ṣalāḥ al-Dīn, first as *wazīr* to the last Fātimid Caliph, al-ʿAḍid, then as Sultan, did Shāfiʿism become preeminent. Prior to that, Mālikism seems to have had the upper hand. When the Fātimids moved their capital to Cairo in 363/973 the *qādī* of Egypt was a Mālikī, Abū al-Ṭāhir al-Dhuhli (d. 367/978), who had been installed by the black Ikhshidid, Kāfūr, and remained in this position for sixteen years.<sup>76</sup> The Fātimid Caliph, al-Muʿizz li Dīn Allāh, confirmed al-Dhuhli in this position, but later removed him in 366/976 when al-Dhuhli's health failed him. The office then passed to the Ismāʿīlī propagandist, ʿAlī b. Nuʿmān, and then to his son, al-Ḥusayn, who became the first to hold the formal title of *qādī al-quḍāt*.<sup>77</sup> From here the chief judgeship apparently remained in Ismāʿīlī hands until 525/1140, when the Imāmī *wazīr*, Ibn al-Afdal, seized de facto rule and instituted a system of multiple chief judgeships, appointing four independent justices from four different schools: an Ismāʿīlī, an Imāmī, a Mālikī and a Shāfiʿī.<sup>78</sup> The exclusion of the Ḥanafīs may reflect here an aspect of the still intense Fātimid-ʿAbbāsīd rivalry, Ḥanafism being the school favored by the latter. Ḥanbalism, meanwhile, had, again, never been a force in Egypt. At any rate, both the Mālikī and Shāfiʿī posts would be subsequently lost to Shīʿites. But in 566/1170 the Shīʿites would themselves be ousted, as Ṣalāḥ al-Dīn began his Sunni *reconquista*.<sup>79</sup>

It was at this point that Shāfiʿism was propelled to the forefront. Upon taking over from the Fātimids, Ṣalāḥ al-Dīn established a number of Sunni law colleges in Cairo: the Nāṣiriyyah (named after the founder, al-Nāṣir Ṣalāḥ al-Dīn) for the teaching of Shāfiʿī law; the Qumḥiyah for Mālikī law; and a third institution, the Suyūfiyyah, dedicated to Ḥanafism, according to al-Maqrīzī, the first Ḥanafī institution in Egypt.<sup>80</sup> This was all part of an effort to fortify Sunnism and preempt the

<sup>76</sup> *Husn al-muḥāḍarah*, 2:148.

<sup>77</sup> See A. Allouche, "The Establishment of Four Chief Judgeships in Fatimid Egypt," *Journal of the American Oriental Society*, vol. 105 no. 2 (1985): 317.

<sup>78</sup> *Ibid.*, 317–20, esp. 318, note 11, where it is pointed out that the fourth appointment was not a Ḥanafī, pace S.M. Stern, but a Mālikī.

<sup>79</sup> Ibn Iyās reports that when Ṣalāḥ al-Dīn removed the incumbents he did so "because they were all Shīʿites". *Badāʾiʿ*, 1:233.

<sup>80</sup> *Khīṭaṭ*, 2:365–66. Ibn Iyās reports that Ṣalāḥ al-Dīn also built a school for the Ḥanbalīs in the area around the local mint. *Badāʾiʿ*, 1:243.

possibility of a Shi'ite riposte, a mission requiring the broadest possible base of Sunni support. At the same time, however, Ṣalāḥ al-Dīn was himself a Shāfi'i, and he would eventually evince a strong favoritism toward the Shāfi'i school. When he ousted the Shi'ite judges in 566/1170, he consolidated their offices into one and replaced them with a single chief justice, a Shāfi'i, Ṣadr al-Dīn b. Darbās.<sup>81</sup> From that time on, up until Baybars' reforms, which began in 660/1262, the Shāfi'is would enjoy an absolute, uncontested monopoly over the chief judgeship in Cairo.<sup>82</sup> This had of course a significant impact on the political situation; for under this arrangement, Shāfi'ism became not only the main conduit for the legitimate use of power, the Shāfi'is would also sit in judgment over the remaining schools of law, basking in the privilege of second-guessing rulings handed down by the latter's judges.<sup>83</sup> Moreover, the Shāfi'i chief justice would exercise this right with full impunity, since the remaining schools would not have the opportunity to second-guess Shāfi'i rulings.<sup>84</sup>

Shāfi'i dominance in the period after Ṣalāḥ al-Dīn can also be seen in the patterns of *madrasah* endowments. Of the twenty-seven colleges listed by al-Maqrīzī and Ibn Duqmāq whose school affiliations I have been able to determine and whose dates of foundation appear to fall between 568/1172 and 663/1265, fifteen were exclusively Shāfi'i institutions, four exclusively Mālikī, four exclusively Ḥanafī, and none exclusively Ḥanbalī;<sup>85</sup> two were Shāfi'i-Mālikī, two Shāfi'i-Ḥanafī, none Shāfi'i-Ḥanbalī, and one, the Ṣāliḥiyah, had a chair for each of the four schools. There were no combinations (e.g., Ḥanafī-Mālikī) that excluded the Shāfi'is.<sup>86</sup>

Not only did Ayyūbid rulers of this period support the Shāfi'is with positions of prestige and power, Mamlūk rulers would go so far as to convert to Shāfi'ism upon their ascension to power. Ibn Iyās reports

<sup>81</sup> *Badā'i'*, 1:233.

<sup>82</sup> *al-Nujūm*, 7:134; *Badā'i'*, 1:233.

<sup>83</sup> See Jackson, "Primacy," 61–63, where it is explained that under the Ayyūbids and early Mamlūks the chief justice could review and overturn the rulings of his deputy appointees.

<sup>84</sup> This appears to be a departure from the situation in Baghdād, where the chief judgeship apparently rotated among the various schools. See the list of judges by L. Massignon, "Cadis Et Naqibs Baghdadiens," *Opera Minora*, 3 vols. (Beirut: Dār al-Ma'āref, 1963), 1:259–62.

<sup>85</sup> Ibn Iyās reports, however, that Ṣalāḥ al-Dīn established a college for the Ḥanbalis in the area around the royal mint. *Badā'i'*, 1:243.

<sup>86</sup> Ibn Duqmāq, *Kitāb al-intiṣār*, 1:92–99; al-Maqrīzī, *Kitāb al-mawā'iz wa al-ittibār bi dhikr al-khiṭaṭ wa al-āthār*, 2 vols. (Cairo: Maktabat al-Thaqāfah al-Dīniyah, 1987),

on the authority of Abū Shāmah (d. 665/1267): "No Sultan ever sat on the throne of Egypt as a follower of any *madhhab* except that of al-Shāfi'i but that he was quickly ousted or killed."<sup>87</sup> As an admonishment to posterity, he holds up the example of Sayf al-Dīn Quṭuz. When Quṭuz became Sultan, he remained a Ḥanafī; he was killed, however, only months into his reign. Baybars, on the other hand, became a Shāfi'i<sup>88</sup> and reigned for an unprecedented seventeen years. When the Caliph al-Ḥākim settled in Cairo he too took up the study of Shāfi'i law.<sup>89</sup>

Mālikism, meanwhile, from around the time of al-'Ādil II, appears to have fallen upon difficult days. Whereas Shāfi'is are found in prestigious ministerial and ambassadorial positions, no Mālikī appears to have occupied an important government post since the days of the tempestuous Ṣafī al-Dīn b. Shukr (d. 622/1225) and his stepfather, al-A'azz Fakhr al-Dīn b. Shukr, both of whom served as *wazīr* (the latter also a judge) under al-'Ādil I and al-Kāmil.<sup>90</sup> But perhaps the career of al-A'azz Fakhr al-Dīn's grandson, Tāj al-Dīn b. bint al-A'azz, sums up the subsequent history of Mālikism in Cairo as a whole, at least up to the time of the powerful and energetic Mālikī chief justice, Ibn Makhlūf, renowned for his role in prosecuting the case against Ibn Taymiyah. Though orphaned as a child and raised by his Mālikī grandfather,<sup>91</sup> Ibn bint al-A'azz (lit., "the son of the daughter of al-A'azz", i.e., Fakhr al-Dīn) later became a Shāfi'i. From there he went on to become not only *wazīr* and *qāḍī al-quḍāt* but the occupant of more positions than anyone else in his day. Indeed, from his Mālikī roots, he ended up producing a long line of prominent Shāfi'i judges.<sup>92</sup>

Mālikism was also affected by the westward migration from Syria and points east following the Mongol invasions. Whereas both Damascus and Baghdād had been important centers of Shāfi'ism and Ḥanafism, "Baghdād had no known Mālikī *madrasahs* . . . [and] Damascus produced only four over a period of centuries."<sup>93</sup> In fact,

<sup>87</sup> *Badā'i'*, 1:308.

<sup>88</sup> *Husn al-muḥādarah*, 2:166.

<sup>89</sup> Ibn Kathīr, *Ṭabaqāt al-shāfi'iyyah*, Arabic Mss. no. 4993, Yahuda collection, Princeton University library, Princeton, N.J., fol. 277 recto.

<sup>90</sup> See *Khiṭaṭ*, 2:371–73.

<sup>91</sup> See Ibn Ḥajar al-'Asqalānī, *Raf' al-iṣr 'an quḍāt miṣr*, 2 vols. ed. Aḥmad Muḥammad Shākir (Cairo: Maktabat al-Khanjī, 1403/1983), 2:385, 386.

<sup>92</sup> See, e.g., the list of Mamlūk judges by K.S. Salib, "Listes chronologiques des grands cadis de l'égypte sous les mamelouks," *Revue des études islamiques*, XXV (1957): 82ff.

<sup>93</sup> See G. Makdisi, *The Rise of Colleges*, 229.



when the Caliph al-Mustansir founded his famous Mustansiriyyah super-college in Baghdād, its first professor of Mālikī law had to be imported from Egypt.<sup>94</sup> Ḥanafism, meanwhile, though apparently not a force in Egypt since before Fātimid times, was now making the greatest strides there. Of all the appointees to chief judgeships under Baybars in 663/1265, it was the Ḥanafī alone who felt strong enough to challenge (unsuccessfully) the Shāfi'ī monopoly over religious endowments (*awqāf/sg.waqf*) and the trusteeship of orphans.<sup>95</sup> The same year saw the appointment of a Ḥanafī to the important post of Friday sermon giver (*khatīb*).<sup>96</sup> And when Baybars founded his Zāhiriyyah college in 662/1263, he endowed it not only with a chair in Shāfi'ī law but with one in Ḥanafī law as well.<sup>97</sup> A Ḥanafī would also be appointed Friday sermon-giver at his congregational al-Zāhiri mosque.<sup>98</sup> In fact, following the death of the Shāfi'ī chief justice Ibn bint al-A'azz in 665/1267, one gets the impression that the Ḥanafī chief justice, Ṣadr al-Dīn Sulaymān, came into a special relationship with Baybars, accompanying the Sultan on his first pilgrimage and teaching him the rituals of the *hajj*.<sup>99</sup> These gains would come of course at the expense of Mālikism, Ḥanbalism, never having been a contender in Egypt, and Shāfi'ism remaining too firmly entrenched. One notices, particularly in his earlier writings, that al-Qarāfi habitually ignores the Ḥanbalis, while on those extremely rare occasions where he lapses into intolerance, Ḥanafism is his target.<sup>100</sup> Meanwhile, his tactical maneuver of lining up with the Shāfi'īs (to demonstrate the virtues of critical over dogmatic advocacy, an example he hoped his non-Mālikī counterparts would follow) is executed with enough force and frequency to convince the great Ottoman bibliographer, Ḥājji Khalifah, that al-Qarāfi was himself a Shāfi'ī!<sup>101</sup>

<sup>94</sup> This was 'Abd Allāh b. 'Abd al-Rahmān b. 'Umar al-Ma'arri, who was recruited from Cairo in 633/1235. See Ibn Farḥūn, *al-Dibāj*, 142.

<sup>95</sup> *Badā'i*, 1:322.

<sup>96</sup> See Jorgen S. Nielsen, "Sultan al-Zahir Baybars and the Appointment of Four Chief Qadis, 663/1265," *Studia Islamica* 60 (1984): 174.

<sup>97</sup> *Khiṭat*, 2:378–9. Interestingly, the first Ḥanafī professor at this college was the son of a Mamlūk amir, Majd al-Dīn 'Abd al-Rahmān b. Kamāl al-Dīn 'Umar b. al-'Adīm. *Ibid.*, 2:379. Ibn Iyās reports that the Zāhiriyyah was located next to the Ṣālihiyyah and that it was begun in 659/1261. *Badā'i*, 1:312.

<sup>98</sup> Nielsen, *Sultan al-Zāhir*, 174.

<sup>99</sup> *Sulūk*, 1:580–81. According to J.S. Nielsen, Ṣadr al-Dīn Sulaymān also used to accompany Baybars on his military expeditions. See *Sultan al-Zāhir*, 175.

<sup>100</sup> See, e.g., *Sharḥ*, 363; *Tamyiz*, 131–32.

<sup>101</sup> See Ḥājji Khalifah, *Kashf al-zunūn*, 2:135.

### A. Mālikī versus Shāfi'ī Law and Jurisprudence

Underscoring the significance and impact of Shāfi'ī preeminence in Cairo were the standing differences separating Mālikī from Shāfi'ī law and jurisprudence. At bottom, these differences resulted from the asymmetrical development of these two schools following the 2nd/8th century revolution spearheaded by al-Shāfi'ī.<sup>102</sup> Al-Shāfi'ī (d. 204/820) had introduced an essentially new, positivist jurisprudence that stood in opposition to what Professor Joseph Schacht has referred to as the "ancient schools of law" of which Mālik (d. 179/795) had been a leading advocate.<sup>103</sup> The mainstay of al-Shāfi'ī's approach was, according to Schacht, his adoption of the thesis of the Traditionists, who equated the sunnah of the Prophet with the contents of formal hadiths traceable back to the Prophet via an unbroken chain of transmitters (*isnād*). Mālik, meanwhile, had not only taken the normative practice of Medina to be the embodiment of the Prophet's teachings, he also attempted to establish the probative value of individual Prophetic reports by comparing them with Medinese practice, the precedents of the Righteous Caliphs or the views of other prominent Companions. Mālik also relied on "personal judgment," or *ray'*, on the basis of which he would at times restrict the application of Prophetic reports or even set them aside. According to Umar F. 'Abd Allāh, whose *Mālik's Concept of 'Amal* is perhaps the best—certainly the most comprehensive—study on Mālik to date, this particular aspect of Mālik's methodology was based neither on a hostile nor even a lukewarm attitude towards Prophetic sunnah or hadith. Rather, his attempt was to remove the textual ambiguities from Prophetic reports by using Medinese practice as the semantic backdrop against which to determine their intended scope and application.<sup>104</sup> Such justifications, plausible though they might have been, would not be enough to stave off the attacks of al-Shāfi'ī, who insisted, first of all, that Prophetic reports were authoritative *in themselves* and in need of no further

<sup>102</sup> The most authoritative work on al-Shāfi'ī's revolution is of course J. Schacht's *Origins of Muhammadan Jurisprudence*.

<sup>103</sup> By positivism I refer here to the legal philosophy affirming that law is simply the command of a sovereign and that there are no higher standards such as justice or morality that determine a rule's authority. Some of the leading Legal Positivists in our time include H.L.A. Hart, Hans Kelsen, and John Austin. See, e.g., A. Watson, *The Nature of Law* (Edinburgh: Edinburgh University Press, 1977), 3.

<sup>104</sup> U.F. 'Abd Allāh, *Mālik's Concept of 'Amal in Light of Mālikī Legal Theory* (Ph.D. diss., The University of Chicago, 1978), 135ff.

confirmation by Medinese or any other practice. Similarly, once a report on the authority of the Prophet had been established as reliable, there could be no justification for 'tampering' with its meaning, let alone setting it aside.<sup>105</sup> Indeed, al-Shāfi'ī's approach was summed up in a famous dictum attributed to him: "Whenever a hadith proves sound, it is my *madhhab*".<sup>106</sup>

Schacht, whose *Origins of Muhammadan Jurisprudence* remains a benchmark in the study of Islamic law in the formative period, made the important point that al-Shāfi'ī's effort to supersede the ancient schools met with only limited success. Whereas in theory the old Kufan (later Ḥanafī) and Medinese (later Mālikī) schools subsequently adopted a jurisprudence of obvious traditionalist inspiration, in practice their positive doctrines did not change from what they had been prior to al-Shāfi'ī.<sup>107</sup> Thus, one witnesses the continuation of sustained differences in *furū'* side by side with the tendency, under the hegemonic influence of al-Shāfi'ī, to trace these doctrines with more and more frequency back to specific hadith, as opposed to other sources such as Kufan consensus or Medinese practice. A good example of this can be seen in *Bidāyat al-mujtahid* of the 6th/12th century Spanish Mālikī jurist, Ibn Rushd (Averroes). But Schacht also makes the point that Ḥanafī and Mālikī principles of legal reasoning such as *istihsān* and *maṣlahah*, both of which al-Shāfi'ī had vehemently rejected, also survived into the post-formative period.<sup>108</sup> In other words, the controversies sparked by al-Shāfi'ī in the 2nd–3rd/8th–9th century were not settled by his brilliant polemics, e.g., in *Ikhtilāf mālik wa al-shāfi'ī*. Rather, the debate between Mālikīs and Shāfi'īs, both in the area of positive law and legal methodology, would continue unabated well into the high middle ages.<sup>109</sup>

<sup>105</sup> This is not at all to suggest that al-Shāfi'ī was a strict literalist. Indeed, he accepted such moderating principles as *takhṣiṣ al-āmm* (specifying statements of general signification) and even admitted the principle that statements appearing to be of general application might actually carry only specific signification. All of this of course modified the apparent scope of legal injunctions.

<sup>106</sup> *Sharḥ*, 450.

<sup>107</sup> "The Schools of Law and Later Developments of Jurisprudence," *Law in the Middle East*, ed. M. Khadduri and H. Liebesny (Washington: The Middle East Institute, 1955), 64.

<sup>108</sup> *The Schools of Law*, 65. It is interesting that some of these non-Shāfi'ī principles, especially *maṣlahah*, also appear to have enjoyed hegemonic force in later centuries, even to the point of influencing Shāfi'ī jurists! A good example of this is perhaps al-'Izz b. 'Abd al-Salām's *Qawā'id al-aḥkām fī maṣāliḥ al-anām*.

<sup>109</sup> One is reminded in this context of the suggestion of Professor R. Brunschvig: "Si l'on se délivrait de l'emprise d'al-Sāfi, dont la synthèse géniale a faussé pour longtemps

This difference in approach to law and jurisprudence is in clear evidence in al-Qarāfi's writings. The main point of contention between him and his Shāfi'ī compatriots centers around the issue of what he refers to as "countervailing considerations" (*mu'āridāt/sg. mu'ārid*), on the basis of which explicit scriptural injunctions might be qualified or set aside. To be sure, all the schools recognized that the Qur'ān and hadith contained material of appreciable complexity, including various levels of meaning, apparent contradictions and verses and reports that supplemented, qualified or even abrogated others. As such, the principal that the apparent meaning of an *āyah* might be modified or superseded by another verse or hadith was not the exclusive preserve of any one school. But the bulk of al-Qarāfi's countervailing considerations appear to be based on seemingly extra-scriptural Mālikī principles such as *maṣlahah* (vaguely articulated broader interests), *maṣlahah mursalah* (unarticulated broader interests)<sup>110</sup> and *sadd al-dharā'i'* (cutting off the means).<sup>111</sup> These principles had been rejected by al-Shāfi'ī (who, incidentally, died in Egypt reportedly at the hands of a frustrated Mālikī disputant) and were an affront to the strong legal positivism that he brought to the legal tradition and raised to the level of a canon. To the Shāfi'īs, "broader interests," "legitimate interests," "harm," etc., were mere weasel words, malleable, self-serving

bien des perspectives... l'on verrait peut-être les commencements du *fiqh* avec des yeux neufs." "Polémiques médiévales autour du rite de Mālik," *Andalus* 15 (1950): 413. One notices also that Ibn Farḥūn cites several refutations of al-Shāfi'ī written by Mālikī jurists.

<sup>110</sup> Al-Qarāfi divides "broader interests" (*maṣāliḥ/s. maṣlahah*) into three categories: (1) those whose consideration has been acknowledged in the body of the law (*mā shahada 'sh-shar'u bi'tibārih*); (2) those whose non-consideration has been acknowledged in the body of the law (*mā shahada 'sh-shar'u bi 'adami'tibārih*); and (3) interests neither the consideration or non-consideration of which have been acknowledged by the law (*mā lam yashhadī 'sh-shar'u bi'tibārih wa lā bi ilghā'ih*) (*Sharḥ*, 446). The first type al-Qarāfi identifies with analogy (*qiyās*), his argument being that locating the ratio essendi ('illah) is actually an exercise in locating appropriate interests, which he defines as "that which entails the procurement of some good or the avoidance of some harm" (*Sharḥ*, 391). As an example of the second type he adduces the allowance of growing grapes, noting that the fear that people may use them to make wine is a non-consideration acknowledged by the law. This, however, like the method of adducing the ratio, relies on suggestive clues contained in the sources, whence my "vaguely articulated broader interests". The third type of *maṣlahah* is identified as *maṣlahah mursalah*, which I render "unarticulated broader interests," since no direct textual basis at all can be found for them.

<sup>111</sup> *Sadd al-dharā'i'* is the principle that denies one the right to use legal means to reach illegal ends. See *Sharḥ*, 448ff. An example of the application of *sadd al-dharā'i'* would be Malik's disallowance of *bay' al-ājāl*, which may be summarized as follows: A sells B a commodity (usually of negligible value) for a needed sum of \$100.00 payable on the spot. B then sells this commodity back to A for \$115.00 payable in a month. The net effect is that B receives \$100.00 in exchange for \$115.00. Mālik forbade such transactions

concepts that could mean ultimately whatever one wanted them to. To them, there could be no amorphous concepts, such as justice or morality, hovering above the law as a higher standard to which one could appeal in the face of explicit scriptural injunctions. Nay, justice and morality were simply what God had commanded. The only test for a rule's validity was its pedigree, not its content nor the effects of its application. This was the essence of such famous Shāfi'i dictums as, "Whenever a hadith proves sound it is my *madhhab*," and "Whoever resorts to equity (*istihsān*) violates God's rightful monopoly as Law-giver (*mani 'stahsana fa qad shara'a*).<sup>112</sup> At bottom, strict Shāfi'i doctrine amounted to a ruthless deductive syllogism: All validly established scriptural sources are binding; X is a validly established scriptural source; the contents of X are thus binding.

Meanwhile, the basic notion underlying the Mālikī position was that an overarching aim of the law was to promote the legitimate interests of the community and to protect it from harm and undue hardship. Where the community was found in need of provisions not explicitly stated in the law, or where the strict application of a rule stood to undermine its overall intent, cause undue hardship or obliterate a legitimate interest, the principal of *maṣlahah* could be resorted to for a remedy.<sup>113</sup> The rule in question could be set aside or the needed provisions applied as bonafide law. The key to identifying legitimate or compelling interests was what al-Qarāfi referred to as an "inductive reading of scripture" (*istiqrā'*), via which process, for example, the so-called five compelling interests (*al-ḍarūrāt al-khamṣ*) were established. These included life, religion, progeny, sanity and property (and some included honor (*'ird*)). Since, the argument ran, in no revealed religion has God ever sanctioned murder, unbelief, adultery, drunkenness, theft or robbery, these five interests had to be deemed compelling interests which the law must serve and never obliterate.<sup>114</sup> The following examples demonstrate how this principle was applied in actual practice.

as an illegal means to taking interest on loans. Al-Shāfi'i, meanwhile, allowed them, on the view that they constituted two independent contracts of sale, the intention behind which could not be second-guessed. See Aḥmad b. Muḥammad al-Ṣāwī (Mālikī), *Bulghat al-sālik li aqrab al-masālik ilā madhhab al-imām mālik*, 2 vols. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1372/1952), 2:40ff.

<sup>112</sup> Cited in Aḥmad b. 'Alī b. Burhān al-Baghdādī (Shāfi'i), *al-Wuṣūl ilā al-uṣūl*, 2 vols., ed. 'Abd al-Ḥamīd 'Alī Abū Zayd (Riyad: Maktabat al-Ma'ārif, 1403/1983), 2:320.

<sup>113</sup> See, for example, *Sharḥ*, 446.

<sup>114</sup> See, for example, *Sharḥ*, 391-92.

It is reported that Mālik granted the authorities the option of flogging intentional murderers a hundred lashes and jailing them for a year, even after the victim's family had issued a pardon under the rules of *qisās*, and despite the fact that the rules governing intentional homicide provided no additional sanctions. According to a strict reading of scripture, the family of a victim of an intentional act of homicide had only three options: execution of the murderer; blood money; or clemency. Because of this, al-Shāfi'i (along with Aḥmad b. Ḥanbal) rejected Mālik's position, insisting that the Sultan could impose no additional sanctions in the face of the family's pardon. Mālik, meanwhile, apparently felt that allowing murderers to go scott free (where a family pardoned) would expose the community to the threat of recidivism. Thus he supported the additional, non-prescribed sanctions of flogging and jailing for a year.<sup>115</sup>

Another example, this one of setting scriptural injunctions aside: It is reported that during the battle of Ḥunayn the Prophet announced, "Whoever slays an enemy may despoil him". Five of the 'canonical collections,' including the two *ṣaḥīḥs* of Muslim and al-Bukhārī, cite this hadith, and Mālik also related it in his *al-Muwatta'*. Now, al-Shāfi'i accepted this hadith at face value and argued that any time a Muslim soldier killed an enemy he could despoil the latter on the field of battle. Mālik, meanwhile, set this hadith aside and held that such was not an automatic right but could be exercised only after obtaining explicit permission from the Imām. In *Tamyīz*, al-Qarāfi defends the position of Mālik on the following grounds.

Allowing such (automatic despoiling) leads to the corruption of intentions and induces a man to gamble with his life against his non-Muslim enemy, owing to what he sees of the latter's possessions. And it might happen that the infidel ends up killing him, while his intention in fighting was not pure to begin with. Thus he ends up entering the Hellfire, and life and religion are lost. This is a grave pitfall (the avoidance of which) justifies setting this hadith aside.<sup>116</sup>

Again, al-Qarāfi defends the basic thrust of Mālikī jurisprudence on the grounds that an inductive reading (*istiqrā'*) of scripture will inevitably yield broader interests beyond the letter of the law. Some of these may be vaguely or indirectly articulated in the body of the

<sup>115</sup> See Ibn Rushd, *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*, 2 vols. (Beirut: Dār al-Fikr, n.d.), 2:303.

<sup>116</sup> *Tamyīz*, 107.

law; others may require greater investment in the law's spirit. At any rate, it is this inductive reading or *istiqrā'* that provides the key. Even where scripture provides no direct leads at all but there is a pressing need felt for a provision, inductive inference may provide a remedy. For, according to al-Qarāfi,

God has sent messengers—upon them be peace—simply for the purpose of promoting the welfare of His servants. This is according to what we are able to infer from the law by way of induction (*'amalan bi 'l-istiqrā'*). Thus, whenever we find a thing to be beneficial, we assume it to be a benefit which the law seeks to promote.<sup>117</sup>

In a sense, this inductive reading of scripture constituted for al-Qarāfi a first principle of jurisprudence. It was via this process that one established the objectives (*maqāsid*) of the law and from here the identity of those interests the preservation of which constituted countervailing considerations (*mu'āridāt*), in the face of which scriptural injunctions could be qualified or set aside.<sup>118</sup> It was only after a jurist had ascertained the absence of countervailing considerations that he was justified in insisting on the strict application of any scriptural injunction. Indeed, according to al-Qarāfi, the famous dictum, "Whenever a hadith proves sound, it is my *madhhab*," was not intended, even by al-Shāfi'i, to be taken literally but only assuming the absence of valid countervailing considerations. He would go on to indicate that many Shāfi'is in his time had wrongly construed this dictum, as a result of which they would often claim, "Such and such is the *madhhab* of al-Shāfi'i because there is a sound hadith reflecting this doctrine". This, al-Qarāfi insists, is wrong, unless it has been first established that there are no countervailing considerations facing this hadith. But, alas, these Shāfi'is, according to him, were handicapped by their inability to extrapolate universal principles from specific rules and to rely on inductive inferences instead of strict deductive syllogisms.<sup>119</sup>

<sup>117</sup> *Sharh*, 446.

<sup>118</sup> Al-Qarāfi distinguishes in this context between objectives (*maqāsid*) and means (*wasā'il*), indicating that some scriptural injunctions constitute the former, some the latter. This is an important, for example, when weighing apparently conflicting injunctions, since goals, according to al-Qarāfi, take precedence over means. Moreover, al-Qarāfi argues, just as it is necessary to "cut off the means" to unlawful ends (based on the principle, *sadd al-dharā'i'*) it is also necessary to "open up the means" to lawful ones. See *Sharh*, 449. This brand of reasoning is most often associated with the name of the great Spanish jurist, al-Shāfi'i. However, al-Qarāfi's writings suggest that al-Shāfi'i's true contribution may lie in a clearer and more organized articulation of an already existing Mālikī tradition.

<sup>119</sup> *Sharh*, 450.

To be sure, the Shāfi'is were not to be swayed by this brand of reasoning. In his *Qawā'id al-aḥkām*, al-Qarāfi's redoubtable Shāfi'i contemporary, al-'Izz b. 'Abd al-Salām, not only rejected it but branded it a poor excuse for abandoning scripture in favor of the subjective judgments of the *mujtahid*-Imāms.

... there are no rules except His (God's) rules. And His rules are derived from the Qur'ān, the sunnah, consensus, valid analogies, and (other) valid forms of deduction (*istidlālāt mu'tabarāh*). And it is not the right of anyone to resort to equity (*laysa li aḥadin an yastahsin*) nor to rely upon (what they deem to be) unarticulated broader interests (*maṣlahah mursalah*).<sup>120</sup>

It is indeed an amazing thing that among the *muqallid-fuqahā'* is one who comes upon some would-be evidence relied upon by his Imām that is so weak that he cannot find a defense for it. Yet, despite this, he follows it anyway, abandoning the Qur'ān, the sunnah and valid analogies in favor of the view of his Imām—out of sheer tenaciousness to following his Imām. . . . We have seen these people at (disputation) sessions; and when there is cited some controversy to which one of them believes himself to be a party, he is utterly amazed at his counterpart's settling for the clear evidence. . . .<sup>121</sup>

Al-Qarāfi's response to this was that the Shāfi'is were not altogether consistent in their condemnation of subjective judgments. For they accepted, for example, *qiyās*, despite the fact that scripture often provided no clues to the ratio essendi (*'illah*),<sup>122</sup> and as such, positing the ratio was necessarily a subjective enterprise.<sup>123</sup> At the same time, al-Qarāfi argued, *maṣlahah* and setting scriptural injunctions aside were not exclusively Mālikī idiosyncracies. On the contrary, close examination of their doctrines revealed that all of the schools engaged in this. All of them allowed, for example, commercial transactions such as *bay' al-salam*, *qirād* and *musāqāh*, simply because there was a pressing need for them, despite the fact that they all entail an unlawful element of possible deception (*gharar*) and uncertainty (*jahālah*).<sup>124</sup>

<sup>120</sup> *Fatāwā*, 2:158.

<sup>121</sup> *Fatāwā*, 2:159.

<sup>122</sup> Al-Qarāfi probably has in mind such specimens as determining the ratio behind the ban on trading foodstuffs with an increase in one of the counter-exchanges, i.e., weight, quantity, being stored, etc. See, e.g., N. Sālih, *Unlawful Gain and Legitimate Profit in Islamic Law* (Cambridge: Cambridge University Press, 1980), 15–18.

<sup>123</sup> *Sharh*, 394, 446, 448.

<sup>124</sup> *Sharh*, 392–93. *Bay' al-salam* is where a person forwards money to a farmer to assist

The issue, then, was not as simple as condemning all subjective judgments as inadmissible. The issue was rather one of determining which were admissible and which were not. The tendency, however, in making such a determination across school boundaries would tend inevitably towards a double standard. And given the power differential between Shāfi'is and Mālikis in Egypt, this would not bode well for the latter.

### B. Shāfi'i Exclusivism in the Judiciary: A Closer Look

It is in the context of this Shāfi'i-Mālikī tension coupled with the waning position of the latter that one comes to appreciate the full implications of the exclusivist policies of the pertinacious Shāfi'i chief justice, Tāj al-Dīn Ibn bint al-A'azz ('Abd al-Wahhāb b. Abū Qāsim Khalaf b. Abū al-Thana Maḥmūd b. Badr al-'Alāmi) (604–665/1207–1267), who refused to enforce judicial rulings that went against his Shāfi'i view. That the Mālikis should be particularly affected by such a policy would seem almost inevitable on demographic grounds alone. Mālikism was at least the second largest school in Cairo and, as such, the judges with whose rulings Ibn bint al-A'azz disagreed would in a good number of cases hail from the Mālikī school. Indeed, some confirmation of this liability may be inferred from a report by Ibn Hajar al-'Asqalāni, who has the Shāfi'i chief justice on record as having once stated:

Never have I seen a thing so strange as that Mālikī judge. Whenever he is presented with a (difficult) case he comes to me and says, "Such and such has occurred, and the ruling in my *madhhab* is so and so." I remain silent, not uttering a word. Then he goes and adjudicates the case. And when he is reprimanded (for having given this ruling) he exclaims, "I issued this ruling only after having reviewed it with judge Tāj al-Dīn (Ibn bint al-A'azz)!"<sup>125</sup>

the latter in planting his crops in exchange for an agreed upon portion of the harvest. See al-Ṣāwī, *Bulghat al-sālik*, 2:93. *Qirāḍ* is basically profit-sharing (*ibid.*, 2:245). *Musāqāh* is where a person agrees to water the crops of another in exchange for an agreed upon portion of the produce (*ibid.*, 2:256). The risk and uncertainty in these transactions lie in the possibility of the crops not making, or the goods not being sold, or that the goods are not sold for a fair return. Al-Qarāfi notes that, despite their severe criticism of *maṣlahah mursalah*, the two Shāfi'is, Imām al-Ḥaramayn al-Juwaynī and al-Ghazālī, openly endorsed certain rulings deduced on the basis of *maṣlahah* that even the Mālikis would not support. *Sharh*, 446–47.

<sup>125</sup> *Raf'*, 2:382. Al-Qarāfi's response, which shall be treated further in chapter five, was

Ibn bint al-A'azz's exclusivism as head of the judiciary is described as having resided in his "stopping short" or what the sources refer to as *tawaqquf*. Though somewhat obscure on the surface, the ramifications of this policy become clear in the context of the overall structure of the Ayyūbid-Mamlūk judicial system. According to that system, there were two categories of judges: principals and deputies. The authority of deputies was not original but derived from that of their principals. Principals could in turn reserve to themselves the right to review all rulings handed down by their deputy appointees. And whenever a principal stipulated his wish to do so, the rulings of a deputy remained unenforceable until they had been reviewed and confirmed by the authorizing principal. This was done via a process known as *tasjil*, or registration, which consisted of (1) entering the ruling into the official registry, and (2) issuing notarized copies of the confirmed ruling to the winning litigant. As the Sultan's direct representative, the chief justice was the principal of all other judges on the circuit. By refusing, therefore, to register rulings, he could block the enforcement of any 'lower court' decision with which he disagreed. This was the essence of the "stopping short" (*tawaqquf*) mechanism resorted to by Ibn bint al-A'azz.<sup>126</sup>

It should be noted, however, that Ibn bint al-A'azz's exclusivist policy was not the result of an attempt on his part to bend the law—for political or other reasons.<sup>127</sup> In fact, he was known not only to be incorruptible but pertinacious almost to the point of eccentricity. The royal biographer, Shāfi'i b. 'Alī (649–730/1252–1330), reports, for example, that once a well-meaning confirmed notary ('*adl*) waved a fan in order to relieve the chief justice of the intense heat. The latter turned away preemptively and snarled, "This is bribery!"<sup>128</sup> This stern disposition is confirmed by Ibn Hajar al-'Asqalāni, who relates a rumor to the effect that Ibn bint al-A'azz never had a childhood. When other students would complete their studies and take time out for fun and games, young Tāj al-Dīn would never join them. And, "whenever they saw him coming they would abruptly end their playing, in awe of him".<sup>129</sup>

that as long as the Mālikī judge's ruling was valid according to the Mālikī school there was no justification for reprimanding him.

<sup>126</sup> See "Primacy," 61–64.

<sup>127</sup> See below, 145–46 for al-Qarāfi's perception of the real reasons behind the chief justice's trespasses.

<sup>128</sup> *Husn al-manāqib*, 210–11.

<sup>129</sup> *Raf'*, 2:376.

Ibn bint al-A'azz was also known for his close association with al-'Izz b. 'Abd al-Salām, mention of whose vigilance and stern disposition has already been made. When the latter retired from public life and was consulted about having his sons succeed him, his response was, "None of them are suited for these posts; but Tāj al-Dīn b. bint al-A'azz would suit them well".<sup>130</sup> Ibn al-'Imād reports that the latter became chief justice at the specific behest of Ibn 'Abd al-Salām.<sup>131</sup> But there was apparently more to this association than the coming together of kindred spirits. Ibn 'Abd al-Salām is known to have endorsed a view, upheld exclusively in the Shāfi'i *madhhab*, according to which judges could refuse to enforce rulings handed down by previous or deputy judges.

According to Ḥanafī, Mālikī and Ḥanbalī sources, it was illegal for a principal or subsequent judge to refuse to implement decisions already handed down.<sup>132</sup> According to the Shāfi'i, Ibn Abī al-Dam (d. 642/1244), himself a chief justice in Aleppo, there were two positions in the Shāfi'i school. The first was identical to that upheld by the other schools. According to the second, however, if a Shāfi'i judge found that a Ḥanafī deputy or predecessor (according to whom wine is a valuable commodity permitted to *dhimmi*s) had jailed someone in lieu of payment for destroying a *dhimmi*'s wine, the Shāfi'i judge might seek to effect a compromise (*ṣulḥ*) or some similar solution. But under no circumstances would he be bound to uphold this Ḥanafī ruling.<sup>133</sup>

In Ibn 'Abd al-Salām's collection of *fatwās*, one reads the following:

Question: Is it permissible for a Shāfi'i to approve a ruling which he does not believe to be permissible (*hal yajūzu li 'sh-shāfi'i 'l-madhhabī tajwīzu qaḍiyatin lā ya'taqidu ḥillahā*)? For example [if he is presented with] a Ḥanafī's marriage of a girl who has no father or grandfather [i.e., no *walī*], or testimony to the effect that the marriage was contracted on the basis of the girl's consent.

Response: If he follows the dissenter (*in qallada 'l-mukhālifa*) in the latter's endorsement of this position, he may (enforce it); if not, he may not.<sup>134</sup>

<sup>130</sup> Ibn Ḥajar, *Raf'*, 2:253.

<sup>131</sup> *Shadharāt*, 5:319. Ibn Kathīr reports that it was Baybars himself who consulted al-'Izz about this appointment. See *Ṭabaqāt*, fol. 259 verso.

<sup>132</sup> See "Primacy, 62-63".

<sup>133</sup> Shihāb al-Dīn Ibrāhīm b. 'Abd Allāh, better known as Ibn Abī al-Dam, *Kitāb adab al-qaḍā'*, ed. Muḥammad 'Abd al-Qādir Aḥmad 'Atā (Beirut: Dār al-Kutub al-'Ilmiyah, 1407/1987), 74.

Ibn bint al-A'azz became chief justice for the first time in 654/1256 under al-Mu'izz Aybak. This lasted less than a year, and almost five years passed before he was reinstated under Baybars in Jumādā I (February) 659/1261, apparently as a part of the latter's Islamization program. It seems that he wasted little time implementing his exclusivist policies. The initial stages of Baybars' reforms, which were an apparent attempt to control the damage caused by the chief judge's policies, began in 660/1262. Al-Qarāfi's *Tamyīz* appears sometime slightly before. In his introduction he clearly echoes the growing concern about *madhhab* disparity and the judiciary.

To proceed: Indeed, there has run over the course of time between myself and some of the notables discussions concerning the difference between the *fatwā*, in the face of which the *fatwā* of a dissenter remains valid and standing, and the *ḥukm*, which may not be violated by a dissenter. . . .<sup>135</sup>

Clearly, the problem of Ibn bint al-A'azz was a major concern for al-Qarāfi. In a sense, it constitutes the triggering device that set off his thinking about constitutional issues overall.<sup>136</sup> This is not to say that this was the only issue with which al-Qarāfi was concerned; nor was it, thematically speaking, the most important, once the process of theorizing got under way. But Ibn bint al-A'azz obviated the emptiness of any concept of mutual recognition where there existed a power differential among the schools of law. For, even if a view was recognized as being doctrinally acceptable, this would prove little consolation in the face of its being practically overridden. Moreover, Ibn bint al-A'azz was not the author of the exclusivist policy he endorsed; this was a view upheld in the Shāfi'i school at large. Hence, while there is no evidence that any of his Shāfi'i predecessors pursued exclusivist policies, al-Qarāfi probably discerned that this was an eventuality simply waiting to happen. Meanwhile, the reforms of Baybars, it is true, broke the Shāfi'i monopoly, established a semblance of equality among the *madhhabs* and ostensibly solved the problem of exclusivism in the judiciary. But given the chaos and arbitrariness of the first half of the 7th/13th century, few at the time could have had much confidence in the permanence of such changes.

<sup>135</sup> *Tamyīz*, 18.

<sup>136</sup> In fact, he later states that his *Tamyīz* was aimed primarily at the illegal practice of overturning rulings that were valid according to the school of the issuing judge. See *al-Furūq*, 2:106. This problem and al-Qarāfi's proposed solution will be discussed in

Meanwhile, law and the *madhhabs* had historically proved much more permanent than the programs or policies of any particular state or government. It was thus to the *madhhab*—both in the sense of law and in the sense of a corporate entity—that al-Qarāfi would ultimately turn. In short, it is the *madhhab* that comes to function as the constitutional unit in his nomocratic scheme.

## CHAPTER THREE

THE *MADHHAB*: AL-QARĀFĪ'S CONSTITUTIONAL UNIT

He fashions from the shroud of history  
a new bed in which he is reborn

—Adonis ('Alī Aḥmad Sa'īd)

I. *General Introductory*

The problem of Shāfi'ī exclusivism in the judiciary represented only one aspect of the much broader issue of the relationship between government and the community at large. By government, however, one should understand not simply the 'state' or central power; legitimate government consisted of both the men of power *and* those who legitimated its use. This symbiosis resulted naturally from the fact that, as S.D. Goitein observes, "with the exception of some local statutes, promulgated and abrogated from time to time, the [medieval Muslim] state as such did not possess any law. . . ." <sup>1</sup> This would apply all the more in the case of the Mamlūks, since they, as a central power, consisted literally of nothing more than an army. The need, as such, to enlist the services of those who could legitimate their rule would be as obvious as it was pressing. Those who defined the legitimate use of power were of course the explicators of the *sharī'ah*, the so-called '*ulamā*'. But the '*ulamā*' were themselves a diverse and multifarious group, espousing conflicting opinions and belonging to various schools of law. Where the state chose, as it did in 7th/13th century Egypt, to erect its government on the doctrines and personnel of a particular school, the question of the relationship between the remaining schools and government would inevitably rise to the surface. What, if any, principles would define this relationship? What degree of authority would the remaining schools retain? And how relevant would their doctrines and professional activities (e.g., teaching and issuing *fatwās*) remain in the face of policies and a legal order

<sup>1</sup> *A Mediterranean Society*, 4 vols. (Berkeley: University of California Press, 1967–83), 1:66.

sponsored by a government dominated by another school? These were the types of questions that occupied al-Qarāfi. And it is these questions that his constitutional theories seek primarily to resolve.

That al-Qarāfi should concern himself with matters of government might appear at first blush to contradict the widely touted notion that medieval jurists were generally passive in their attitude towards power and the activities of the state.<sup>2</sup> It is important, however, in attempting to assess al-Qarāfi in this regard, to understand the precise nature of the political passivity in question. It has already been noted that no less a figure than the redoubtable Ibn Taymiyah could, on the one hand, argue fervently in favor of the rule of law while, at the same time, showing virtually no concern whatever for such issues as whether the Imām came to power by legal or illegal means.<sup>3</sup> This was based on the fact that, as E.I.J. Rosenthal has observed, Ibn Taymiyah's center of attention was not the caliphate or power at the top, but rather the larger community and its relationship to the sacred law.<sup>4</sup> As such, the *khilāfah* or *imāmah* as the battleground between *imām* and *amīr* or sultan remained largely outside the purview of his concern.<sup>5</sup> In other words, promoting the rule of law was in his view not at all contingent upon legitimate rule but rather on how successfully the 'ulamā' could be brought into an effective role in government (used here in the broader sense). This is strikingly similar to what one finds in al-Qarāfi, who, as noted earlier, shared with Ibn Taymiyah the fact that he belonged to a politically disadvantaged school and was not part of the establishment. This shared vantage-point contributed significantly, one suspects, to the common features found in their legal-political thought. Indeed, their common tendency to deemphasize power at the top in favor of a greater emphasis on law and the community at large is perhaps not coincidental but reflective of a much more widespread attitude, the attitude, as it were, of certain non-establishment 'ulamā'. This attitude, if we may safely speak of such, is distinct from that of such establishment writers as Ibn Jamā'ah, al-Māwardī or Abū Ya'lā, all of whom served in government and were faced as such with the question of the state's legitimacy vis-à-vis other contenders. Non-establishment 'ulamā', on the other hand, would tend to

<sup>2</sup> See, e.g., Lambton, *State and Government*, 313 and passim; H. Enayat, *Modern Islamic Political Thought*, 12, 16 and passim.

<sup>3</sup> See above, xxii-xxiii.

<sup>4</sup> *Political Thought*, 52.

<sup>5</sup> Rosenthal, *Political Thought*, 59.

recognize more readily that formal legitimacy was itself a blunt instrument that would inevitably aid the state in its periodic attempts to blur the distinction between might and right. As such, they would incline away from the question of formal legitimacy toward that of function, i.e., what the state is supposed to do. Their attitude finds ample expression in the words of another North African Berber, this one a Christian, St. Augustine of Hippo (d. 430 C.E).

As far as I can see, the distinction between victors and vanquished has not the slightest importance for security, for moral standards, or even for human dignity. . . . As far as this mortal life is concerned . . . what does it matter under whose rule a man lives, . . . provided that the rulers do not force him to impious and wicked acts?<sup>6</sup>

In short, politics at the top was not al-Qarāfi's focal point. He appears in fact little concerned with the issue of formal legitimacy and *who* ruled or what his qualifications were. Nor was he concerned with establishing mechanisms for ensuring smooth and orderly transfers of power from one régime to the next. In this his attitude might be described as conspicuously passive. The issue, however, of *how* a ruler ruled was a different question. For, this had implications that reached deeper down into society affecting more directly that class to which al-Qarāfi belonged. Thus, we find in him a much more spirited attitude on the question of the state's modality of rule. Here the issue becomes, again, defining the relationship between government and the community at large, or more specifically, developing mechanisms to prevent the former from exercising a monopoly over law, or legal authority, such that it could legitimately impose policies that, though perhaps legal from the perspective of some, represented 'impious and wicked acts' in the eyes of others.

This manner of framing al-Qarāfi's agenda might appear at first glance to be something of an exercise in stuffing straw-men. For, it is generally recognized that the 'ulamā' (which would include the *madhhab* in power) sanctioned an order of mutual recognition, what Ignaz Goldziher once referred to as "legitimate particularity" (*berechtigtiger Eigentümlichkeiten*), which included the idea that though a view might be particular to a specific group or individual it could still be considered 'orthodox' and followed with impunity.<sup>7</sup> Yet, for all its

<sup>6</sup> From *City of God*, cited in C. Lasch, *The True and Only Heaven*, 49.

<sup>7</sup> I. Goldziher, "Catholic Tendencies in Islam," translated from "Katholische Tendenz



usefulness, legitimate particularity amounted essentially to little more than an agreement to disagree agreeably. Its success was measured largely in terms of a Shāfi'i's willingness, for example, to acknowledge a Ḥanafī view, such as the permissibility of consuming non-intoxicating quantities of *nabīdh*-wine,<sup>8</sup> even though he himself disagreed with this. The introduction of power into the equation, however, would ultimately challenge both the meaning and the value of this recognition. For a power differential among the schools meant that one would be able to *apply* its interpretation of the *sharī'ah* even against those who disagreed with it. This raised a number of very practical questions, such as whether a Ḥanafī living under a Shāfi'i-dominated government would actually be allowed to consume *nabīdh*-wine in public, or whether a Ḥanafī judge's ruling indemnifying a *dhimmi*'s wine would actually be upheld and implemented at court. With the exception of such rules as that upholding judicial decisions regardless of *madhhab* disparity between judge and *litigant*, there appears to be little discussion on the problem of power and *madhhab* disparity in medieval Islam. It was precisely this issue, however, that preoccupied al-Qarāfi and informed his constitutionalism, indeed his legal thought overall, in some rather conspicuous ways.

The key to al-Qarāfi's solution to the problem of power and *madhhab* disparity lies in his attribution of what I have referred to as "corporate status" to the *madhhabs*. In this capacity, each school acquires the ability to confer a measure of protection upon its members by virtue of their membership in that particular group. As such, a Mālikī living under a Shāfi'i-dominated government would enjoy exemptions from certain 'public policies' by virtue of his being a follower of Mālik. Similarly, any ruling handed down by a Mālikī judge would be protected, as long as it reflected a view upheld in the Mālikī school. In this capacity the *madhhab* becomes in effect al-Qarāfi's constitutional unit that both defines and mediates the relationship between government and the community at large.

In this capacity, however, the *madhhab* itself emerges as the product of a significant degree of evolution. Whereas in earlier times it had assumed the form of a loose association held together by an undefined commitment to fairly broad principles of legal interpreta-

und Partikularismus im Islam," by M. Swartz, *Studies in Islam* (New York: Oxford University Press, 1981), 123.

<sup>8</sup> *Nabīdh*-wine is apparently any wine made from other than grapes, the latter being technically referred to as *khamr*. See Ibn Rushd, *Bidāyat al-mujtahid*, 1:345.

tion (including the hierarchal ranking of the sources of law), with al-Qarāfi it comes to constitute a tightly-knit structure held together by mutual subscription to a strict body of legal rules. The means by which the *madhhab* is held together is the institution of *taqlīd*, which in the highly technical sense defined by al-Qarāfi might be likened to *stare decisis*. Bound to the views of his school, a jurist's declarations now acquired authority because he spoke in the name of a recognized *madhhab*. And, as long as a view maintained the endorsement of a recognized school, it remained, willy-nilly, orthodox. In effect, this change from a régime of *ijtihād* to a régime of *taqlīd* reappropriated the authority of the individual jurist to the association of jurisconsults as a whole; the old doctrine of *kullu mujtahid muṣīb* yielded in effect to a new dictum: "*kullu madhhab muṣīb*". "*Madhhab*," however, at least as defined by al-Qarāfi, was now exclusive of the methods and principles (*uṣūl*) relied upon in legal interpretation and included only concrete conclusions on questions of positive law (*furū'*). It was thus by virtue of his adherence to the *positive rules* of his *madhhab* that a Mālikī could claim exemption from Shāfi'i-based policies. Rules, in other words, not principles, defined both the *madhhab* and the scope of its corporate protection.<sup>9</sup>

The corporate status of the *madhhabs* must be understood, then, in the overall context of what has been referred to as the régime of *taqlīd*. Such a contention renders me party, of course, to the standing controversy over the question of *ijtihād* versus *taqlīd* in medieval Islam. In the following pages I shall present what I believe to be a more nuanced understanding of this issue, based primarily on my reading of al-Qarāfi. This will include a look at a number of developments in law and legal science that appear to reflect the changed constitution of the *madhhab*, as well as the activities of the individual jurist under the régime of *taqlīd*. Following this I will return to a more precise description of the corporate status of the *madhhabs* as conceived by al-Qarāfi.

## II. Ijtihād versus Taqlīd

The terms, "régime of *ijtihād*," "régime of *taqlīd*" are not new. They were first employed by J. Schacht in his 1964 publication, *An*

<sup>9</sup> See chapter four below for a more detailed definition of *madhhab*.

*Introduction to Islamic Law*. According to Schacht, beginning in the 4th/10th century, a consensus gradually established itself to the effect that "no one might be deemed qualified to exercise independent judgment and that future activity would be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all."<sup>10</sup> This "closing of the door of *ijtihād*," as Schacht called it, amounted to the obligation to perform *taqlīd*, which he defined as "the unquestioning acceptance of the doctrines of the established schools and authorities."<sup>11</sup> From that time on the law would have to be accepted as taught by one of the recognized schools. To be sure, Schacht was not the first to affirm this so-called "closing of the door of *ijtihād*." But he was at the time the leading authority on Islamic law, about whom G.E. von Grunbaum would later insist, "Muslim law[']s . . . origin and structure no longer can be seen except through his eyes."<sup>12</sup> His endorsement thus conferred upon this view an added authenticity that rendered it the going opinion in the field at large.

In 1981 this near-consensus was broken when Professor G. Makdisi raised what was perhaps the first major voice of dissent.<sup>13</sup> But it was with Wael B. Hallaq's 1984 article, "Was the Gate of Ijtihad Closed?"<sup>14</sup> that the most serious doubts were cast upon Schacht's conclusions, and a growing contingent, particularly of younger scholars, came to insist more emphatically that *ijtihād* never ceased in medieval Islam. Hallaq argued that throughout the medieval period the qualifications required to reach the rank of *mujtahid* remained relatively easy to meet.<sup>15</sup> He produced, in fact, the names of several jurists who openly contradicted the conclusions of their respective Imāms, a fact that testified to their independent and direct interpretation of scripture.<sup>16</sup> He also cited a number of jurists who upheld the doctrine obligating all jurisconsults to perform *ijtihād*.<sup>17</sup> In fact, the very existence,

<sup>10</sup> *Intro*, 71.

<sup>11</sup> *Intro*, 71.

<sup>12</sup> "Presentation of Award to Second Recipient, Joseph Schacht," *Theology and Law in Islam* (Wiesbaden: Otto Harrassowitz, 1971), 1. This was part of a speech delivered at the second Giorgio Levi Della Vida Conference in Los Angeles in 1969, at which Schacht received the prestigious Levi Della Vida prize.

<sup>13</sup> See, e.g., *Rise*, 199.

<sup>14</sup> *IJMES*, 16 (1984): 3-41.

<sup>15</sup> *Gate*, 4.

<sup>16</sup> *Gate*, 15 and passim.

<sup>17</sup> *Gate*, 27.

according to Hallaq, of the medieval controversy over *ijtihād* was proof that no consensus had ever been reached on a closing of its gate. As such, independent interpretation had to have continued throughout the medieval era.<sup>18</sup>

Professor Hallaq presents an eloquent and well-documented argument. In my view, however, it is questionable whether he is successful in dislodging the view first established by Schacht and subsequently enshrined as the going opinion in the field. Having said this much, it must be added to Professor Hallaq's credit that he more than any other scholar in modern times has forced open the door to new possibilities and insights by necessitating, virtually single-handedly, a critical reexamination of this very important issue. As such, though my conclusions will be seen to be at variance with his, I readily acknowledge my debt, albeit indirect, to his seminal and groundbreaking contributions.

Generally speaking, the reaction to Schacht has tended to ignore the fact that the latter saw the régime of *taqlīd* as a porous edifice. This is almost certainly the result, however, of a certain equivocation on the part of Schacht himself. In his *Introduction*, for example, he states that *taqlīd* did not impose itself without opposition and that there were always scholars who held that *mujtahids* could and did exist.<sup>19</sup> Elsewhere he adds, "Whatever the theory might say on *ijtihād* and *taqlīd*, the activity of the later jurists, after the 'closing of the door of independent reasoning,' was no less creative, within the limits set to it by the nature of the shari'a, than that of their predecessors."<sup>20</sup> "Mais," Schacht maintains in another essay,

il est significatif que cette pensée originale devait se réfugier et ne pouvait s'exprimer que dans des constructions systématiques abstraites qui n'ont eu aucune influence ni sur les solutions acquises de droit positif ni sur la théorie classique des fondements du droit. Cette ankylose donc, ou peu s'en faut, est, selon moi, le résultat inévitable d'une tournure décisive que nous pouvons et devons considérer comme naturelle dans les conditions historiques où elle a pris place, et aussi longtemps de ce qu'est le « droit », rien n'y est changé ni ne peut y être changé.<sup>21</sup>

<sup>18</sup> *Gate*, 4.

<sup>19</sup> E.g., *Intro*, 71-72.

<sup>20</sup> "The Schools of Law and Later Developments," 75.

<sup>21</sup> "Classicisme, traditionalisme et ankylose dans la loi religieuse de l'Islam," *Classicisme et déclin culturel dans l'histoire de l'Islam*, ed. R. Brunschvig and G.E. Von Grunbaum, new edition, (Paris: G.P. Maisonneuve et Larose, 1977), 11. The essays in this collection

What is ceded, in other words, in the way of creative activity is revoked, or so it seems, in the name of *ankylose* and the immutable nature of Islamic law.<sup>22</sup> This seemingly unavoidable conclusion informs as much as it prompts the reaction against Schacht. This certainly seems to be the case with Professor Hallaq, who points out precisely that what little change and creativity Schacht was willing to acknowledge was of "such marginal import that it disappear[ed] into oblivion when compared to what [wa]s seen as the massive stagnation and ankylose."<sup>23</sup>

Yet, the question remains whether the reaction against Schacht has not gone too far. Indeed, in its present form the view of the learned Professor Hallaq would appear to amount to a zero-sum proposition. His denial of the closing of the gate of *ijtihād* would seem to imply a similar denial of the emergence of a régime of *taqlīd*. But how tenable is such an assertion in the face of the historical record? What is to be made, for example, of the vivid accounts of men who were condemned or severely reprimanded for going against the views of their respective schools?<sup>24</sup> And why after a certain point do the jurists continue, without exception, to associate themselves with one of the four recognized *madhhabs*? How justified are we in ignoring the claims of later scholars such as Fakhr al-Dīn al-Rāzī (d. 606/1209) to the effect that consensus had confirmed the extinction of *mujtahids*?<sup>25</sup> And how are we to explain the emergence of the tendency to identify views as the position of a *madhhab*, as opposed to that of individual jurists?<sup>26</sup> What is to be made of the clearly discernable changes in the meanings and usages of key technical terms such as *ijtihād* or *tarjih*?<sup>27</sup>

were first published in 1957, following a colloquium held in France in June of 1956.

<sup>22</sup> Again, despite his apparent recognition of continued creativity, Schacht would go on to profess what appear to be some rather extreme conclusions, such as his statement to the effect that even "the mechanical method of reasoning by analogy . . . was put out of the reach of later generations by the doctrine of the 'closing of the gate of independent reasoning (*ijthād*)'". *Intro*, 211.

<sup>23</sup> W.B. Hallaq, "Uṣūl al-Fiqh: Beyond Tradition," *Journal of Islamic Studies* 3:2 (1992): 176.

<sup>24</sup> In the year 704/1304, for example, a group of Shāfi'is in Damascus sought to have a fellow jurist, 'Alā' al-Dīn b. al-'Aṭṭār (a foster brother of the famed historian and hadith expert, Shams al-Dīn al-Dhahabī), arraigned for issuing *fatwās* "that went against the *madhhab* of al-Shāfi'i". See Ibn Kathīr, *Bidāyah*, 14:35. Another, better known example would be that of Ibn Taymiyah, who was prosecuted and eventually imprisoned for his allegedly unauthorized views on divorce.

<sup>25</sup> *al-Maḥṣūl*, 2:3:98.

<sup>26</sup> See below, 82–83.

<sup>27</sup> E.g., see below, 96, 161–62 on the change in meaning and usage of the term *ijtihād*.

And if the value and existence of *ijtihād* continued unabated, why, in a nomocratic religion like Islam, is this so scantily reflected in the social status of the *fuqahā'*?<sup>28</sup> Why, finally, do not the number of *madhhabs* increase after a certain point in history?

Whatever answers one may offer to these questions, it seems clear that by the later middle ages the activities of the individual jurist came to be significantly circumscribed by his membership in a particular *madhhab*. The *madhhab*, moreover, clearly became the context within which all interpretive activity took place. Under such circumstances, even if it could be claimed, or proved, that the gate of *ijtihād* remained open, it would remain, in my judgment, counterproductive to continue to speak as if this had the same meaning in the 7th/13th century as it had in the 3rd/9th. Nor would there appear to be much advantage in denying the gradual but certain ascendancy of *taqlīd*.

To my mind, in qualified agreement with Schacht, *ijtihād* and *taqlīd* represent not mutually exclusive linear moments in Muslim history but rather competing hegemonies that stood (and continue to stand) in perpetual competition with each other. With the exception of the formative era of the first few generations or so, there was perhaps never a period that could be characterized exclusively as one of *ijtihād* or *taqlīd*. What seems to have obtained, rather, is the ascendancy or predominance of one of these two competing hegemonies over the other at different points in time. *Ijihād* dominated in the formative period, but *taqlīd* gains the upper hand from about the 6th/12th century on. Again, however, these were only dominant tendencies, which is why one encounters 2nd/8th and 3rd/9th century scholars such as Aḥmad b. Ḥanbal, Ishāq b. Rāhawayh, Ṣufyān al-Thawrī and al-Shaybānī, all of whom allowed even *mujtahids* to follow the views of greater scholars by way of *taqlīd*,<sup>29</sup> while Ibn 'Abd al-Salām, Ibn Taymiyah, al-Suyūṭī, al-Shawkānī and others could openly practice and advocate *ijtihād* well after the 6th/12th century. Both régimes, in other words, were porous configurations, neither of which fully preempted activity in the opposite direction. The main advantage of

Compare also the meaning of *tarjih* in, e.g., al-Ghazālī's *al-Mustasfā*, 2:392–407, where it refers strictly to the act of giving preponderance to one of a number of apparently conflicting Qur'anic verses or prophetic hadiths, with its meaning discussed below, namely, that of giving preponderance to one of a number of competing views within a *madhhab*.

<sup>28</sup> The impression that one gets, for example, is that Shi'ite '*ulamā'*' enjoy a higher standing among the laity precisely because Shi'ite doctrine insists on following not only *mujtahids* but living *mujtahids* at that. See C. Mallat, *Renewal*, 35ff.

<sup>29</sup> See, e.g., al-Ghazālī, *al-Mustasfā*, 2:384.

Schacht's thesis is that it describes, albeit in approximate and in some instances rather extreme terms, what ultimately came to be the *dominant* tendency by the later middle ages. If the tone of his thesis could be adjusted to reflect a less cavalier attitude, while the substance could be made to exclude the theory of depleted intellectual energies and to accommodate a more gradual ascendancy of *taqlid* (over several centuries), one would be more than justified in endorsing his view as the closest to the actual situation on the ground. For it seems undeniable that *taqlid* came to dominate at a certain point in Muslim history. And it is here that the accuracy and or significance of Professor Hallaq's thesis is most drastically reduced. For even if it is argued, or proved, that *ijtihād* continued throughout the middle ages, it cannot be claimed that *ijtihād* remained the dominant tendency in Islam. *Ijihād*, understood here not merely as the fresh, unfettered and direct interpretation of scripture but also as the clear and open advocacy of views as having resulted from such a process, ceased to dominate from around the 6th/12th century.

One of the clearest indications of the gradual ascendancy of *taqlid* emerges when one reviews descriptions of the judicial function before and after the 6th/12th century.<sup>30</sup> Judicature, it should be noted, is particularly instructive in this regard in that, despite the perduring controversy over whether muftis could base their responsa on *taqlid*, prior to the 6th/12th century there appears to be universal agreement that judges had to be *mujtahids*, capable of deducing law independently from scripture. By the 6th/12th century, however, this requirement appears to fade, and this development is reflected in subsequent manuals on judicature (the so-called *adab al-qāḍī* genre), whose intended design undergoes a fundamental change. For example, al-Māwardī's (Shāfi'i, d. 450/1058) *Adab al-qāḍī* is for all intents and purposes a work on *uṣūl al-fiqh*, including chapters on the Qur'ān, the Sunnah, consensus, analogy, linguistic conventions, and so forth. It is designed to teach judges how to interpret scripture, deduce rules, and apply them to cases. Beginning, however, with Ibn Abī al-Dam's (Shāfi'i, d. 642/1244) *Adab al-qāḍī*, and continuing through Ibn Salmūn al-Kinānī's (Mālikī, d. 767/1325) *al-'Iqd al-munazzam li al-hukkām*,<sup>31</sup> Ibn Farḥūn's (Mālikī, d. 799/1396) *Tabṣirat al-hukkām*, al-

<sup>30</sup> See also my diachronic synopsis below, 147–70.

<sup>31</sup> Ibn Salmūn al-Kinānī, *Kitāb al-'iqd al-munazzam li al-hukkām fimā yajri bayna aydihim min al-'uqūd wa al-ahkām*, 2 vols. (Beirut: Dār al-Kutub al-'Ilmiyah, n.d.). On the margin of an edition of Ibn Farḥūn's *Tabṣirat*.

Ṭarābulusī's (Hanafi, d. 844/1440) *Mu'in al-hukkām*, and Ibn Shihnah's (Hanafi, d. 882/1477) *Lisān al-hukkām fī ma'rifat al-ahkām*,<sup>32</sup> works on judicature assume the form of statute manuals designed to provide judges with the rules already deduced on the basis of one of the recognized schools. In the case of controversial questions, some of these manuals even instruct judges on how to identify and extract the view most widely subscribed to within a given school. Meanwhile, the appearance, between the 6th/12th and 7th/13th century, of works on legal precepts or so-called *qawā'id* mark the beginning of an era during which, in treating unprecedented cases, judges and jurists retain access to the sources of law only through the lenses of their *mujtahid-Imāms* and other recognized ancient authorities.<sup>33</sup> All of this stood as a confirmation of a new order, according to which not only was the judicial function restricted to choosing rules already deduced, but legal opinions themselves came ultimately to be judged not on the basis of their intrinsic quality but by whether or not they carried the endorsement of the *madhhab* as a whole.

#### A. Taqlid: A Quest for Authority

The term "*taqlid*" is the verbal noun of the transitive verb, "*qallada*," meaning literally, "to place something around another's neck."<sup>34</sup> The Prophet is reported to have used the verb in this sense, saying, "Do not place cords around their [i.e., horses] necks (*lā tuqallidūhā 'l-awtār*)."<sup>35</sup> According to Ibn Badrān, one explanation of this command was that the Arabs used to believe that such tying cords around the necks of horses protected them from ill affliction. The Prophet thus forbade the practice in order to disabuse them of this false belief.<sup>36</sup> As a technical term, *taqlid* is said to have the basic meaning of "accepting the view of another without [scriptural] proof of its correctness."<sup>37</sup> It has been suggested that this derives from the pre-

<sup>32</sup> Abū al-Walid Ibrāhīm b. Abī al-Yaman Muḥammad ibn Abī al-Faḍl, better known as Ibn al-Shihnah, *Lisān al-hukkām fī ma'rifat al-ahkām* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī and sons, 1393/1973), appended to al-Ṭarābulusī's *Mu'in*, beginning on p. 216.

<sup>33</sup> On *qawā'id*, or legal precepts, see below.

<sup>34</sup> 'Abd al-Qādir b. Badrān, *Nuzhat al-khaṭṭār al-'aṭṭār*, 2 vols. (Cairo: Dār al-Fikr al-'Arabī, n.d.) 2:449. The *Nuzhat* is a commentary on the Hanbalite Ibn Qudāmah's (d. 620/1223) work on *uṣūl al-fiqh*, *Rawḍat al-nāẓir wa junnat al-munāẓir*.

<sup>35</sup> *Nuzhat*, 2:449.

<sup>36</sup> *Nuzhat*, 2:449.

<sup>37</sup> *Nuzhat*, 2:450.

Islamic practice of tying cords around animals' necks, implying that performing *taqlid* of another serves as a means of protecting oneself from divine reprobrium. This would confirm the oft-cited dictum to the effect that one who performs *taqlid* of another renders the latter one's defense (*hujjah*) before God.

As a technical term, "*taqlid*" is commonly translated as "blind following," "imitation,"<sup>38</sup> "servile imitation,"<sup>39</sup> "unquestioning acceptance,"<sup>40</sup> "unreasoning acceptance".<sup>41</sup> Such appellations tend not only to cast *taqlid* in a wholly negative light but also to obscure the basic logic underlying the institution itself. For such translations assume the *content* of what is borrowed to be the most important element in the process, imputing, meanwhile, a certain timidity and anti-intellectualism to the very act of looking back. This, I think, reflects what is perhaps an understandable bias, given the place of philosophy in the history of Western civilization, where authority plays a marginal if any role, and innovation is lauded as a virtue.<sup>42</sup> Law, on the other hand, to borrow the observation of Thomas Hobbes, is not philosophy. Its dictates cannot remain forever open to dispute and reconsideration; nor can it accommodate, let alone promote, change and innovation to a degree that would threaten its essential function, namely, the preservation of order. Nor, in the final analysis, can content or even reasonableness be said to provide the binding force behind a law. Rather, "It is not Wisdom but Authority that makes a law."<sup>43</sup> And, "When an issue arises, whether in theory or in practice . . . lawyers habitually seek [not philosophical or even social norms but rather] authority."<sup>44</sup> It is essentially the search for stable and uncontested sources of *authority*, not substance, that underlies the medieval institution of *taqlid*. It is not as Schacht and others seem to think, that medieval Muslims deemed themselves incapable of independent in-

<sup>38</sup> Coulson, *History*, 80.

<sup>39</sup> Makdisi, *Rise*, 199.

<sup>40</sup> Schacht, *Intro*, 71.

<sup>41</sup> Lambton, *State and Government*, 12.

<sup>42</sup> One is reminded here of August Comte's "cerebral hygiene," which described his decision not to read the ancient philosophers so as not to be polluted by their ideas. One is also inclined to suspect that science too, as the other major forward-looking enterprise that has informed the modern mind, not to mention the modern academe, has contributed to this bias against backward-looking traditions.

<sup>43</sup> The quote is actually from Hobbes, cited in G.J. Postema, "Some Roots of Our Notion of Precedent," *Precedent in Law*, ed. L. Goldstein (Oxford: Clarendon Press, 1987), 11.

<sup>44</sup> See A. Watson, *The Evolution of Law* (Baltimore: Johns Hopkins University Press, 1985), 117.

terpretation. In fact, as shall be seen below, al-Qarāfi is explicit in declaring that *muqallids* and *mujtahids* are absolutely equal in their required mastery of the interpretive sciences.<sup>45</sup> But Muslim jurists, particularly in the post-formative period, seem to become increasingly aware that by the time any new interpretation had outstripped its present or pre-existent rivals and gained enough authority to be accepted and applied as law, the circumstances to which one had hoped to apply this interpretation are likely to have passed. Thus, a better means of ensuring that such interpretations could be applied to present circumstances would be to attach them to authorities already established in the past. That such a logic was at work has already been discerned by Professor Bernard Weiss, who perceptively points out in one of his studies on the post-formative jurist, Sayf al-Dīn al-Āmidī (d. 631/1233): "*Taqlid* entails a choice, not of rules from a range of variant rules, but of an authority (i.e., a *mujtahid*) among a number of equally acceptable authorities."<sup>46</sup> Shi'ism, meanwhile, appears to be even more emphatic in highlighting this reality. The Shi'ite *mujtahid* is referred to as a *marja'*, which, for all intents and purposes, translates precisely into "final authority".<sup>47</sup>

It should be noted, however, that by authority I have in mind the notion as it was commonly understood, according to Hannah Arendt, in the medieval world (by which she meant of course the medieval West). Dominated as it was by the Roman understanding of the term, the medieval world knew authority only as that right that grew out of an act of foundation. It was the founder of the nation or group, and then those who could prove the closest and truest relationship to him, who gained authority in the sense of the right to be obeyed and honored in the hearts and minds of men. This, according to Arendt, all changed with Machiavelli, whose focus on revolution sought both to exploit and overthrow the habit of placing value in the act of foundation. In Machiavelli, foundation is replaced with power; and from his time down to the present the idea of authority has remained largely dependent upon and identified with power.<sup>48</sup> Without wishing

<sup>45</sup> *al-Furūq*, 2:109.

<sup>46</sup> "The Primacy of Revelation in Classical Islamic Legal Theory as Expounded by Sayf al-Dīn al-Āmidī," *Studia Islamica* 59 (1984): 97.

<sup>47</sup> In fact, *marja'* or *marja'iyah* is probably the closest we can come to an Arabic equivalent for authority in the non-political sense. The other possibilities, namely, *sultāh* or *sultān* are too heavily laden with connotations of power and force.

<sup>48</sup> See H. Arendt, "What Was Authority?" in *Authority*, ed. C.J. Friedrich (Cambridge, Mass.: Harvard University Press, 1958), 98-110.

to overindulge Arendt's views on the actual history of the idea of authority, I wish to stress that my use of the term has nothing to do with power or the ability to force compliance but relates exclusively to the attempt to validate one's views by associating them with the name of some 'founding' figure and his closest and truest associates.

The quest for authority to back and validate legal interpretations is reflected in a number of phenomena found in later jurisprudence. In addition to the obvious practice of referring back to the interpretations of previous *mujtahids*, jurists often disguise their own interpretations as having originated with earlier authorities. A clear example of this retrojection can be seen in al-Qarāfi's attribution to Mālik and al-Shāfi'i of the view that the majority of the Prophet's statements constituted *fatwās*, on the basis of which he argues that the majority of caliphal declarations are not binding but may be taken as *obiter dicta*.<sup>49</sup> No explicit statements are presented on the authority of Mālik or al-Shāfi'i to prove that either actually held such a view. Rather, al-Qarāfi relies on his own interpretation of Mālik's and al-Shāfi'i's opinions as a justification for claiming literally that "Mālik said (*qāla mālik*)," and "al-Shāfi'i said (*qāla al-shāfi'i*)" that the majority of the Prophet's statements were made in his capacity as mufti.<sup>50</sup> This was clearly a novel interpretation authority for which was being sought in earlier times. The practice, however, of retrojection seems to have become standard to the point that al-Qarāfi could proclaim openly that whenever a jurist finds a reason plausible enough to explain an Imām's position, he is justified in attributing that reason to the Imām, even in the absence of explicit indications on the latter's part.<sup>51</sup>

Another practice reflective of the search for authority is that of casting views not back to the past but to the center, as it were, of the *madhhab* in an attempt to identify one's view with that of the *madhhab* as a whole. This should be seen perhaps not so much as an attempt to plagiarize the *madhhab* but as an effort to come to terms with a new standard. As it became increasingly apparent that the view most likely to receive the widest application was that which could be shown to enjoy the widest endorsement within a school at large, jurists found themselves in need of ways to show that their conclu-

<sup>49</sup> See below, 213–17.

<sup>50</sup> See below, 215–16. See also S.A. Jackson, "From Prophetic Actions to Constitutional Theory," 83.

<sup>51</sup> *al-Furūq*, 1:48.

sions had not deviated from the position of the *madhhab*, or at least from what they could claim the position of the *madhhab* should be. This gave rise to a new and uneasy conflict between the individual jurist and the *madhhab* as a whole. For no longer was it the case that a view was rendered orthodox merely by the fact that it issued from an authorized jurist;<sup>52</sup> it was now the *madhhab* as a whole that conferred this status upon a view. Within a *madhhab* there could exist, of course, a multiplicity of views all of which might be considered acceptable or 'orthodox' from a doctrinal standpoint. But these, in the final analysis, would be overridden by the going opinion of the school, which would be enshrined, for all intents and purposes, as the view of orthopraxy. The object, therefore, for the individual jurist became to get his view accepted as the view of orthopraxy.

#### 1. *The Individual versus the Group: Rājih versus Mashhūr*

The cumulative stock of a school consists of: (1) views attributed to the eponym and early authorities and (2) views extrapolated or deduced on the basis of their *madhhab*. Because of disparity in narration (on the authority of early authorities) and differences in the ways in which subsequent scholars extrapolate from earlier views there is diversity within each of these general categories. Within this diversity, however, some opinions gain greater acceptance within a school than others. These preferred views come under two primary designations: *rājih* and *mashhūr*.<sup>53</sup>

Literally speaking, "*rājih*" means "preponderant," or "weightiest;" "*mashhūr*," on the other hand, means "famous" or "widely subscribed to". Between these two terms is a degree of overlap, and jurists often use them interchangeably, ostensibly on the assumption that the weightiest view is bound to receive the widest recognition. This assumption, however, is not necessarily true, and at bottom there

<sup>52</sup> According to Professor George Makdisi, all opinions that resulted from an individual jurist's *ijtihād* were orthodox and followable by the layman. See his "Scholasticism and Humanism in Classical Islam and the Christian West," *Journal of the American Oriental Society* 109.2 (1989): 177. This, I wish to argue, describes the situation only under the régime of *ijtihād*.

<sup>53</sup> There are other designations for these categories. The Hanbalite, al-Mardāwi indicates that another term for *mashhūr* was "*ẓāhir*". See *al-Inṣāf fī ma'rīfat al-rājih min al-khilāf 'alā madhhab al-imām al-mubajjal aḥmad b. ḥanbal*, 12 vols. ed., Muḥammad Ḥāmid al-Fiḍī (Cairo, 1374/1955), 1:7. Meanwhile, we learn from Ibn Farḥūn's *Kashf al-niqāb al-ḥājjib min muṣṭalaḥ ibn al-ḥājjib* (Beirut; Dār al-'Arab al-Islāmi, 1990) that other designations for these categories included *al-mu'tamad*, *al-ma'mul bihi*, *al-ṣāḥih*, *al-madhhab*.

remains an important, albeit subtle, distinction between the *rājih* and the *mashhūr*.

Generally speaking, for a jurist to conclude that a view is *rājih* is for him to make a subjective judgment founded on his individual scrutiny. Al-Qarāfi underscores the subjective character of the *rājih* when he points out that what may be *rājih* to one jurist may not be so to another.<sup>54</sup> *Mashhūr*, on the other hand, implies not so much the subjective judgment of an individual but a group acceptance, with far less attention paid to the reasons for such. Whereas *tarjih*, the act of adjudging a view to be *rājih*, is the preserve of only the most qualified jurists, identifying the *mashhūr* becomes the duty of jurists on the intermediate level and below, those who have not yet reached the point where they are deemed competent to assess the merit of a view. This is clearly reflected in the position cited by Ibn Farḥūn, who, in response to the claim that *muqallid*-judges may rule according to their *ijtihād* states:

This was intended for the *muqallid* who is perspicacious and able to identify the most preponderant (*al-rājih*) of the views of the followers of his school, capable of determining which of these are in accord with the method (*uṣūl*) of his Imām and which are not. As for the *muqallid* who is not of this calibre, he must follow the view most widely subscribed to (*al-mashhūr*) (in his school).<sup>55</sup>

Again, this underscores the fact that while the *rājih* is based on individual scrutiny, the *mashhūr* is more bound to tradition and numbers. The *mashhūr* is the view of the majority, willy-nilly; the *rājih*, in contradistinction, is the view of the individual and may exist for him even alongside the *mashhūr*. Similarly, if a proponent of a *rājih* view is able to convert enough jurists to his way of thinking, his view may acquire *mashhūr* status and displace the incumbent view.

#### a. Criteria: Rājih

According to Ibn Farḥūn, assessing the merit or pedigree of a legal opinion is the preserve of qualified master-jurisconsults only, "those knowledgable of the sources relied upon by the eponyms, well versed in legal methodology, knowledgable of which views are anterior and which posterior."<sup>56</sup>

<sup>54</sup> *Sharḥ*, 331.

<sup>55</sup> *Tabṣirat*, 1:66. Note here the subtle change in the meaning of "*ijtihād*. For more on this point, see below, 162.

<sup>56</sup> *Uṣūl*, 1:69.

Such qualified jurists employ, however, a variety of criteria, apparently with varying degrees of consistency, in determining which of the views related on the authority of an Imām is *rājih*. There appears to be general agreement that whenever a view is known to have been the Imām's final word, it is the *rājih*.<sup>57</sup> This suggests that "*rājih*," when applied to questions already treated, refers to the view most favored by the Imām, not his followers. If it is not possible to determine which view was the final word, a number of other factors may be taken into consideration. Some jurists select the view that accords best with the Imām's method (*uṣūl*).<sup>58</sup> Others might compare it with scripture. Apparently, some jurists understood the existence of numerous conflicting narrations to reflect a certain diffidence on the part of the Imām or the fact that deliberation over the question had not run its full course. They would therefore consider the matter unresolved and resort to *takhrīj* (extrapolation),<sup>59</sup> coming up with solutions of their own.

Some scholars rely on precedent to assist them in identifying the most preponderant view. For example, where the cumulative manuals and court records indicated that a view had been generally accepted and applied, this added probative weight to it.<sup>60</sup> In commenting on this practice, Ibn Farḥūn carefully stipulates that the practice (*amal*) of the various centers may be relied upon only if differences in time and place did not amount to differences in custom. For example, if the practice at Cordova had been to assume certain household items to be the property of the wife, the view that divorced women are awarded these items would not be *rājih* in places where these things customarily belonged to husbands.<sup>61</sup> Ibn Farḥūn adds that many Shāfi'is were also mindful of this observandum.<sup>62</sup>

Where the question is one of deciding which of the views extrapolated as solutions to unprecedented questions is *rājih*, Ibn Farḥūn cites three distinct criteria: (1) congruence with the sources of law, e.g., the Qur'ān, the Sunnah, etc.; (2) congruence with the method of the Imām; (3) precedence, i.e., the accepted practice of the various centers. It is conceivable that these criteria are at times observed in combination. Thus, a view supported both by precedence and congruence

<sup>57</sup> *Ibid.*, 1:67.

<sup>58</sup> *Ibid.*, 1:66, 71.

<sup>59</sup> On *takhrīj*, see below, 94-96.

<sup>60</sup> *Ibid.*, 1:66-67.

<sup>61</sup> *Ibid.*, 1:69.

<sup>62</sup> *Ibid.*, 1:69-70.

with the method of an Imām might be preferred over a view that is congruent with his method but unsupported by practice.

b. *Criteria: Mashhūr*

There are several criteria observed in determining which of the views narrated on the authority of an Imām is *mashhūr*. This diversity of approach bespeaks the sometimes unwieldy confusion between the *mashhūr* and the *rājih*, as these terms are employed by various scholars.

According to Ibn Farḥūn, whenever there was conflict among the views of Mālik, the *mashhūr* was the view related by Ibn al-Qāsim.<sup>63</sup> His reasoning was that Ibn al-Qāsim had spent more than twenty years as Mālik's student and was therefore in the best position to know which of Mālik's views were earlier, which later, which had been retracted, and which had been his final say.<sup>64</sup>

Ibn Farḥūn cites other scholars, however, who disagreed with this approach. Some held that in the face of variant narrations the *mashhūr* was the view that accorded best with Mālik's method, or that which resembled a known view of Mālik on a similar question.<sup>65</sup> Still others identified the *mashhūr* with that which had been traditionally accepted at the various centers and applied in the courts. They held phrases found in the cumulative manuals and court records, such as, "That which has been traditionally applied" (*alladhī jarā bihi 'l-ʿamal*), "That which had been traditionally applied in the courts" (*alladhī jarā bihi 'l-qadā*), and "That which has been given traditionally as the view (of the *madhhab*)" (*alladhī jarā bihi 'l-futyā*), to indicate that these views were *mashhūr*.<sup>66</sup> For some, these phrases indicated not that a view was *mashhūr* but that it was *rājih*, and the question arose whether judges could abandon *mashhūr* views in favor of views supported by this type of precedent.<sup>67</sup>

Some jurists objected to giving any probative weight at all to statements such as, "That which has been traditionally applied". For, these statements, they protested, indicated only that a view had been accepted and applied, without indicating who had accepted them or who had applied them.<sup>68</sup>

<sup>63</sup> *Tabṣirat*, 1:71.

<sup>64</sup> *Ibid.*, 1:68.

<sup>65</sup> *Ibid.*, 1:66.

<sup>66</sup> *Ibid.*, 1:67.

<sup>67</sup> *Ibid.*, 1:66.

<sup>68</sup> *Ibid.*, 1:67.

Sometimes the *mashhūr* differed according to region. The 'Irāqīs, for example, frequently differed with the North Africans. The general practice of the moderns, reports Ibn Farḥūn, was to accept what the Egyptians and the North Africans identified as the *mashhūr*.<sup>69</sup>

Regarding views on unprecedented questions extrapolated on the basis of the *madhhabs* of the Imāms, there is disagreement as to what exactly the term "*mashhūr*" means. Some jurists held that it was "that for which there is the strongest evidence" (*mā qawiya dalīluh*); others insisted that it was "that for which there is the greatest number of proponents" (*mā kathura qā'iluh*).<sup>70</sup> Historically speaking, the latter is almost certainly the original and correct definition, as the dependence of the *mashhūr* on numbers seems inescapable: a thing cannot become famous by appealing to an individual; fame requires recognition by a multiplicity. Similarly, it seems certain that at its origins the *mashhūr* was far less dependent upon the ability of individuals to assess its congruence with scripture. This is brought out clearly in the views of Ibn Farḥūn and Ibn al-Ḥājjib to the effect that the *mashhūr* is resorted to by default, i.e., when one is not capable of assessing the merit of the multiple alternatives.<sup>71</sup> Clearly, on such a rule the *mashhūr* could not be "that for which there is the strongest evidence." In his voluminous compendium of Ḥanbalī controversies, *al-Inṣāf fī masā'il al-khilāf*, the 9th/15th century al-Mardāwī is more explicit in tying the *mashhūr* to numbers.<sup>72</sup>

Some jurists, for example the Mālikī, Ibn Rāshid (d. circa., 731/1330),<sup>73</sup> objected to the use of the term "*mashhūr*" altogether. His argument was that, "A thing may gain wide acceptance, while in reality it has no basis."<sup>74</sup> The proper thing to do was thus to accept the view best substantiated by scripture, no matter what. He also insisted that both of the prevailing definitions of "*mashhūr*" were defective. On the one hand, he pointed out, the leading scholars often cite a view as *mashhūr* and then point to another view as "the correct view". This proved, according to Ibn Rāshid, that the *mashhūr* was not identical with the view best supported by the evidence. On the other hand, he

<sup>69</sup> *Ibid.*, 1:71.

<sup>70</sup> *Ibid.*

<sup>71</sup> See above, p. 168.

<sup>72</sup> *al-Inṣāf*, 1:16–17 and passim.

<sup>73</sup> Ibn Rāshid was actually a student of al-Qarāfi. See *al-Dibāj*, 334–36; al-Timbukti, *Nayl al-ibtihāj*, 235.

<sup>74</sup> *Tabṣirat*, 1:71.



pointed out that while the well-known position on a thing may be that it is forbidden, the majority is often found allowing it. This proves that the *mashhūr* is not that for which there is the greatest number of proponents.<sup>75</sup>

The insistence of those jurists who argue that the *mashhūr* is the view best substantiated by scripture reflects, in my view, the uneasy conflict between the individual and the group. The "view of the *madhhab*," i.e., *al-mashhūr*, being the view to which all members would have to pay respect, whenever a jurist's hunches or independent research led him to a different conclusion he would have to find some way either to circumvent the incumbent view or to dislodge it. However, displacing an incumbent view would take time, and even if done successfully would only affect things in the future. Thus, one witnesses such phenomena as scholars attempting to substitute their preference for the view of the school by claiming that their view represents not the *mashhūr* but "*al-madhhab*".<sup>76</sup> Or a jurist might resort to the stratagem of manipulating the order in which he cites a view. Ordinarily, the *mashhūr* is the first view cited, weaker views being listed subsequently, typically via the passive phrase, "and it is said (*wa qila*)". Ibn Farhūn notes, however, that Ibn al-Ḥājjib would often "omit the *mashhūr* from the first position and substitute another view in its place," giving of course the impression that the latter was the *mashhūr*.<sup>77</sup> On other occasions a jurist might simply try to outwit the majority by going one better than it. Thus, for example, alongside the *mashhūr* Ibn al-Ḥājjib would often cite another view and simply dub the latter "*al-ashhar*," i.e., "the more famous!"<sup>78</sup> Tāj al-Dīn al-Subkī appears to follow a similar approach, when, after comparing his view with previous opinions, he refers to his as "*al-aẓhar*," i.e., "the more apparent!"<sup>79</sup>

These practices are all actually exercises in *tarjih* (identifying the *rājih*). Yet jurists engage in this only surreptitiously, wishing not to make obvious the distinction between the view of the school at large and their own preferred opinions. This shows, again, that they recognized that the view most likely to receive the widest acceptance

<sup>75</sup> *Ibid.*

<sup>76</sup> al-Mardāwī, *al-Inṣāf*, 1:7–9.

<sup>77</sup> Ibn Farhūn, *Kashf al-niqāb al-hājjib*, 77–78.

<sup>78</sup> *Tabṣirat*, 1:72; *Kashf al-niqāb*, 75.

<sup>79</sup> *Mu'īd al-ni'am*, 52. "*Al-zāhir*" was an alternative designation for *mashhūr*. See above, n. 53.

and application was not that of the individual jurist, its potential qualitative superiority notwithstanding, but that of the group. One sees, thus, in this phenomenon perhaps one of the clearest examples of how, under the régime of *taqlid*, the activities of the individual *faqih* were circumscribed by the authority of the *madhhab*.

## 2. Levels of Taqlid

According to al-Qarāfī's *al-Furūq*, there appear to be two types of *taqlid*: (1) verbatim transmission (*naql*) and (2) extrapolation (*takh-rīj*). There are essentially two levels of verbatim transmission, *naql* and *naql al-mashhūr*. This brings the total number of levels of *taqlid* to three.<sup>80</sup>

The type of *taqlid* practiced will depend on the level of training of the practitioner, as well as the nature of the question posed. Novices practice verbatim transmission in response to basic questions which have been exhaustively treated in the standard manuals of the school. Those on the intermediate level practice selective verbatim transmission (*naql al-mashhūr*) in response to questions of a more complex nature, e.g., questions that have been previously treated but on which a standing diversity of opinion has been handed down. Those who have mastered the method of the *mujtahid*-Imām extrapolate on the basis of the latter's *madhhab* and treat unprecedented questions never before addressed.

### a. Verbatim Transmission: Naql

Verbatim transmission is the response when the question asked is perfectly symmetrical with its corresponding entry in the standard manuals and abridgments of the *madhhab*. The respondent transmits, verbatim, the content of the abridgment, and this is sufficient to subsume the question in all of its aspects. The qualifications of a jurisconsult operating on this level is that he have memorized some abridgment of the school containing general, cut-and-dried, unqualified statements of law. These statements are often further elaborated, however, e.g., made specific (*mukhaṣṣaṣ*) or qualified (*muqayyad*), in larger commentaries or monographs devoted to specific topics. Al-Qarāfī stipulates thus that a student who has mastered such an abridgment must be certain that the question to which he is responding is exactly as that covered in the abridgment, "not similar to it, and not analogous to

<sup>80</sup> *al-Furūq*, 2:107–10.

it; nay, it exactly."<sup>81</sup> If it is believed that there may be differences between the question asked and that covered in the abridgment, or that the information in the abridgment has been elaborated on in some other place, this student may not relate to his petitioner the content of this abridgment. Rather, the question must be handed on to a practitioner more versed in the law. The following example will demonstrate this point.

In the single volume abridgment, *Uṣūl al-futyā fī al-fiqh 'alā madhhab al-imām mālik*, of Muḥammad b. al-Ḥārith al-Kushanī (d. 361/971), it is stated,

If the husband and wife differ on whether the wife received her dowry, they are both to give sworn oaths and the marriage is to be annulled, if it has not yet been consummated. If the marriage has been consummated, then the burden of proof falls upon the wife (*al-qawlu qawlu 'z-zawj*).<sup>82</sup>

Now, a novice who has mastered this abridgment could respond to a question involving disagreement over dowry where the marriage had not been consummated. But where the marriage had been consummated, it would be improper for him to assert that the burden of proof fell upon the wife. For this question has been elaborated elsewhere by the masters of the school, and it has been concluded that the above ruling applies only where it is the custom of a people that the wife always receives her dowry before consummation, as was the case in Medinah during the time of Mālik. Where it is found that this is not customary practice, the burden of proof is placed on the husband, since in the absence of indications to the contrary, it must be assumed that the dowry has not been paid.<sup>83</sup>

b. *Selective Verbatim Transmission*: Naql al-Mashhūr

The second level of *taqlīd*, selective verbatim transmission, is practiced by the jurisconsult who is more advanced in his study than the novice, and qualified, therefore, to respond to questions of a more complex nature. This jurisconsult goes beyond the abridgments of the *madhhab* and acquires more elaborate knowledge, such as the manner

<sup>81</sup> *Ibid.*, 2:107.

<sup>82</sup> Muḥammad b. al-Ḥārith al-Kushanī, *Uṣūl al-futyā fī al-fiqh 'alā madhhab al-imām mālik*, ed. Muḥammad al-Majdūb (Dār al-'Arabīyah li al-Kitāb, 1985), 286.

<sup>83</sup> *Tamyiz*, 233–34.

in which general or unqualified statements are specified or qualified, from monographs, private sessions or detailed commentaries. Still, he has not completely mastered the method of his Imām. He does not know, for example, the exact sources and principles relied upon in every case, nor the consistency with which his Imām relied on these, nor the rank accorded each source or principle, particularly where many of these may bear relevance to a single question; nor is he certain of the circumstances under which a source or principle may be set aside. Rather, he is only vaguely familiar with these issues, having picked up scant information in passing from fellows and teachers at various sessions of *fiqh*. He is thus not qualified to extrapolate from treated questions solutions to untreated ones. Rather, he simply surveys the various views upheld in the *madhhab* and transmits, verbatim, to his petitioner the view most widely subscribed to (*al-mashhūr*) in his school.<sup>84</sup>

The difference between the novice and the intermediate jurisconsult is that the novice treats basic questions on which there is little if any disagreement and which involve few if any variables; e.g., "Does vomiting break one's fast," "Is it permissible to sell things forbidden by the religious law, e.g., pork?" The intermediate jurisconsult, on the other hand, may go beyond these rudimentary questions to more complicated ones that evolve out of the helter skelter of everyday life. However, he himself does not actually resolve these questions. They are resolved by the master-jurisconsults on the third and highest level of *taqlīd*, by way of analogy and the application of the methods of *uṣūl al-fiqh*, along with the relevant legal precepts (*qawā'id*). The intermediate jurisconsult merely surveys these views and transmits the one most widely subscribed to in the *madhhab*.

c. *Extrapolation*: Takhrīj

The third and highest level of *taqlīd* is *takhrīj*, extrapolation. The basic idea behind *takhrīj* is that the method of an Imām is extractable from the aggregate of his opinions on individual questions. An example of such extraction can be seen in the *Muqaddimah fī uṣūl al-fiqh* of the 4th/10th century Mālikī jurist, Ibn al-Qaṣṣār al-Baghdādī (d. 397/1004), who systematically deduces "Mālik's *madhhab*," (i.e., his method) on the basis of the latter's conclusions on individual questions. For example, the fact that Mālik's position on preemption

<sup>84</sup> *al-Furūq*, 2:107.

of partners (*shuf'at al-sharik*) was based on *mursal* hadiths indicated that he accepted such hadith as a probative source of law.<sup>85</sup> Once the method of an Imām has been mastered, a jurist can predict what his position on unprecedented questions would be and then indicate this on his behalf.

According to al-Qarāfi, however, in extrapolating from the *madhhab* of an Imām a jurist also had to be certain not to violate any legal precepts, or so-called *qawā'id*. Legal precepts are essentially broad-based rules or tests deduced from the aggregate of opinions of the early Imāms. Their basic function was to enable a jurist to screen unprecedented questions without having to memorize scores of individual rules and without having to refer back to scripture for specific proof-texts for each individual case.<sup>86</sup> Where a question could be subsumed under an existing precept, there remained neither cause nor justification to investigate it any further. At the same time, where the need did arise to consult scripture on an unprecedented matter, legal precepts ensured that the resulting interpretations did not violate the *madhhab* of the respective Imām. Thus, according to al-Qarāfi,

It is not permissible for a jurisconsult to extrapolate a ruling for an unprecedented question unless he is thoroughly capable of recalling the legal precepts (*qawā'id*) of his *madhhab* along with the rules of consensus. And to the extent that he is deficient in this ability, it is prohibited for him to perform *takhrij*. Nay, under such circumstances he should respond only to questions already treated. . . .<sup>87</sup>

Elsewhere, al-Qarāfi insists more emphatically that it is not enough, in order to qualify to perform *takhrij*, for a jurist to have mastered the discipline of *uṣūl al-fiqh*. This is because, according to him, *uṣūl al-fiqh* does not encompass legal precepts (*qawā'id*). "On the contrary," he insists, "there are many precepts of the *shari'ah* relied upon by the Imāms and the ancient masters that are nowhere to be found in the books of *uṣūl al-fiqh*."<sup>88</sup> In the final analysis, what this stipulation comes down to is the *prima facie* counterintuitive conclusion

<sup>85</sup> See, Abū al-Ḥasan 'Alī b. 'Umar, better known as Ibn al-Qaṣṣār, *Muqaddimah fi uṣūl al-fiqh*, Arabic Mss. (170) 5786 (catalogue no. 2), al-Azhar collection, Cairo, fol. 10 verso. *Mursal* hadiths are those where a Successor or Companion does not indicate who stood between him and the Prophet.

<sup>86</sup> *al-Furūq*, 1:2-3.

<sup>87</sup> *Tamyiz*, 260.

<sup>88</sup> *al-Furūq*, 1:110. Al-Qarāfi adds that it was for this reason that he decided to compose his *al-Furūq*.

that, whereas mastery of *uṣūl al-fiqh* had been enough to qualify a jurist to practice *ijtihād* in the early period, now it would not be enough to qualify him to engage successfully in *taqlid*! *Taqlid*, in other words (as I shall argue further below) represents a more rather than less advanced stage of legal development.

Legal precepts operate much the same way as what are often referred to as "tests" in American Constitutional law. For example, the First Amendment of the U.S. Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." When a case is brought before a court, however, there is no return to these words to determine their meaning anew. Instead a three-part "test" is applied: First, the law affecting religion must have a secular purpose; second, it must have a primarily secular effect; and third, it must not involve the government in an excessive entanglement with religion. "Excessive entanglement," is further determined on the basis of a three-part sub-test which looks at: (1) the character and purpose of the religious institution to be benefitted; (2) the nature of the aid involved; and (3) the resulting relationship between the government and the religious officials. The application of these tests is not unanalogous to the activity of *muqallid* jurists performing *takhrij* under the régime of *taqlid*. In effect, the legal community seeks to interpret not the meaning of the Constitution but the implications of these tests, which are themselves not the result of congressional legislation but of the interpretive activity of the Supreme Court. Essentially, by imposing these tests on the legal community one is assured that the conclusions reached on cases not directly heard by the Supreme Court do not violate the meaning of the Constitution, as determined by the highest legal authority in the land.<sup>89</sup>

An example of a legal precept in Islamic law would be the rule in the Mālikī school prohibiting all transactions where money paid is liable to oscillate between payment and loan (*al-taraddud bayna al-thamanīyah wa al-salafiyah*). Basically, this rule comes down to the stipulation that in any transaction where a buyer has a warranty option (*khiyār*), a vendor may not stipulate payment before he has delivered the product. Thus, if a seller describes to a buyer a certain crop and the buyer agrees to purchase it, the contract will remain valid only as long as the seller does not stipulate payment before delivery.

<sup>89</sup> On "tests" in American Constitutional law, see J.E. Novack et al., *Handbook on Constitutional Law* (St. Paul, Minn.: West Publishing Co., 1978), 851.

The reason for this is that the crop may not make or the buyer may later decide against buying, in which case the money in the vendor's hand will oscillate between being payment for the crop (*thaman*) and a loan to the seller (*salaf*).<sup>90</sup> On this precept, any transaction that threatens to lead to oscillation between payment and loan would be deemed illegal, automatically, regardless of particulars, and even if scripture and the *madhhab* were both devoid of specific rules to cover individual cases.

The ban on violating legal precepts appears to crystalize sometime during the 7th/13th century. Hājji Khalifah reports that the first work on *qawā'id* was written by one Mu'īn al-Dīn Abū Hāmid Muḥammad b. Ibrāhīm al-Jājirmī (Shāfi'ī), who died in 613/1216. Al-Jājirmī was followed by Khalil b. Kaykaldī al-'Alā'ī and then al-Qarāfi, whose *al-Furūq* includes five hundred forty-eight precepts.<sup>91</sup> The development and imposition of legal precepts clearly emerge as another manifestation of the régime of *taqlid*. For, again, their observance is ultimately designed to ensure a genetic relationship between novel interpretations and the views of the *mujtahid*-Imāms and ancient authorities.

#### 1. *Takhrīj: The Ijtihād of the Muqallid-Jurisconsult*

According to al-Qarāfi, complete mastery of *uṣūl al-fiqh* is an absolute necessity for anyone aspiring to perform *takhrīj*.<sup>92</sup> In this there is no difference between the *mujtahid* and his *muqallid*-follower.

This is an area in which the *mujtahids* and the *muqallids* are equal, inasmuch as neither may perform *takhrīj* (unless he has mastered this discipline). Nay, any *muqallid* who has only reached the level where he is able to temper the universal statements of his Imām and the (cumulative stock of opinions in the) *madhhab* may only issue opinions that embody narrations handed down in the *madhhab*, without venturing beyond this into *takhrīj*, since he lacks the necessary qualifications to perform *takhrīj*. This applies equally to his Imām: If he is deficient in the area of *uṣūl al-fiqh*, even if he has memorized and understood the sources of the Law, he becomes thereby a *muḥaddith*, a transmitter, not

<sup>90</sup> See *Bulghat*, 2:14 ff. Among the difficulties raised by such an occurrence would be the question of repayment of the money, and whether the seller was liable. If the money paid is payment for the crop, is not the seller's willful payment an indication that he was satisfied with the product? If, on the other hand, the seller is held liable and the money is understood to have been a loan, what is its maturity date?

<sup>91</sup> Hājji Khalifah, *Kashf*, 2:135.

<sup>92</sup> *Tamyiz*, 261; *al-Furūq*, 2:109.

a *mujtahid*-Imām. The same goes for the *muqallid* [i.e., he may not extrapolate unless he has mastered *uṣūl al-fiqh*].<sup>93</sup>

To this should be added of course mastery of legal precepts. In fact, it seems that al-Qarāfi's use of "*uṣūl al-fiqh*" is in certain contexts inclusive of *qawā'id*. In effect, in performing *takhrīj* the *muqallid* engages in his own form of *ijtihād*; he exerts the same intellectual effort and employs, *mutatis mutandis*, the same methodology as does his *mujtahid*-Imām. The basic difference, however, is that while the object of the *mujtahid*'s *ijtihād* is scripture, the object of the *muqallid*'s *ijtihād* is the *madhhab* of his Imām. Whereas the *mujtahid* in al-Qarāfi's words is the "translator-interpreter for God,"<sup>94</sup> the *muqallid* is "the tongue of his Imām, and the interpreter of that which [wa]s in the latter's mind."<sup>95</sup> "He is the representative of his Imām on behalf of whose conclusions he communicates to those seeking legal counsel."<sup>96</sup> Summed up in the words of al-Qarāfi,

One who looks into the *madhhab* of his Imām (*an-nāziru fī madhhabi imāmih*) and seeks to extrapolate on the basis of the latter's method (*uṣūl*) stands in relation to his Imām as his Imām stands in relation to the Lawgiver, in following His explicit statements and extrapolating on the basis of (his understanding) of His intended purposes (*maqāsidih*).<sup>97</sup>

Thus, he tempers his (Imām's) general statements with specific ones and his generic statements with qualifying ones; and he gives precedence to his abrogating statements over his abrogated ones and his explicit statements over his ambiguous ones, just as is done in the case of scripture.<sup>98</sup>

The fact that *muqallid* jurists engage in a type of *ijtihād* further complicates a problem encountered, perhaps, in studying most legal cultures, namely, the tendency to disguise rather than acknowledge, let alone explain, change and evolution. This in turn begets a certain sloppiness (or perhaps intentional obfuscation) in the use of technical terminology. The word *ijtihād*, for example, is often used as a sort of catch-all for any diligent effort exerted in discovering the law, even when this amounts to no more than simple exercises of *tarjih* or *takhrīj*,

<sup>93</sup> *Ibid.*, 2:109.

<sup>94</sup> *Tamyiz*, 29. See also below, 160.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *al-Furūq*, 2:107.

<sup>98</sup> *Sharḥ*, 419.

both of which are actually exercises in *taqlid*. Al-Qarāfi himself engages in this practice on occasion.<sup>99</sup> A much more blatant example, however, would be that of the 9th/15th century Ḥanafī jurist, ‘Alā’ al-Dīn al-Ṭarābulisī, who at one point states that *ijtihād* is a requirement for all judges but then cites the view of the 5th/11th century al-Sarakhsī to explain this: “Whoever memorizes *al-Mabsūt* becomes thereby a *mujtahid*!”<sup>100</sup> *Al-Mabsūt* is of course a work on *fiqh*, not *uṣūl*. As such, its memorization could in no way afford mastery of the interpretive skills necessary to the exercise of true *ijtihād*. Later on, al-Ṭarābulisī uses “*ijtihād*” to describe the practice of sifting through and choosing the most probative of the views of Abū Ḥanīfa, Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī.<sup>101</sup> This was obviously a departure from its meaning in the early period, where it referred to the exertion of effort to understand the meaning of scripture directly. A similar problem of ambiguity can be seen in Ibn Badrān’s commentary on Ibn Qudāmah’s *Rawḍat al-nāzir* on *uṣūl al-fiqh*. At one point, for example, in explaining the phrase, “*fihā naṣṣ* (there is an explicit text covering this question)” he insists that the “text” in question is a text of the Lawgiver (i.e., a Qur’ānic verse or a hadith), not, as he complains some jurists have been given to understand, an explicit statement handed down on the authority of one of the *mujtahid*-Imāms or ancient authorities.<sup>102</sup> What all of this suggests is that in interpreting the legal literature of the post-formative period, particularly in pursuit of information on *ijtihād* and *taqlid*, additional care must be taken to pin down the precise meanings of technical terms. In particular, the continued use of the term “*ijtihād*” should not be immediately taken as proof of the existence, let alone widespread practice, of the type of direct and unfettered scriptural interpretation that characterized the formative period of Islamic law.

### III. Legal Change, Rank and Legal Scaffolding

The process of legal change under the régime of *taqlid* is connected with the ability of individual jurists to displace the incumbent view

<sup>99</sup> See, e.g., *Sharḥ*, 441; *al-Furūq*, 2:100; *Tamyīz*, 79, 220.

<sup>100</sup> *Mu’in al-hukkām fīmā yataraddadu bayna al-khaṣmayn min al-aḥkām* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1393/1973), 26.

<sup>101</sup> *Mu’in al-hukkām*, 27.

<sup>102</sup> *Nuzhat*, 2:415.

of their *madhhab* and replace it with a new one. Their ability to do this is generally a function of (1) their rank and reputation within their respective *madhhab*, and (2) their acumen in what the legal historian Alan Watson refers to as “legal scaffolding,” according to which, rather than abandon existing rules in favor of new interpretations from the sources, needed adjustments are sought through new divisions, classifications, distinctions, exceptions and expanding or restricting the scope of existing rules.<sup>103</sup> To be sure, only ranking jurists acquired enough authority over time to be able to challenge an incumbent view or introduce a new one; and it was only they who possessed enough skill to engage successfully in legal scaffolding. As such, only ranking jurists normally spoke out on major or unprecedented issues, while junior scholars remained silent in deference to the masters.<sup>104</sup>

That the *madhhabs* had a hierarchal internal structure has already been established by Professor George Makdisi. According to Professor Makdisi, each school was divided into three ranks: (1) beginner (*mutafaqqih*); (2) graduate student (*ṣāhib*); and (3) master/teacher (*muftī/mudarris*).<sup>105</sup> Each *madhhab*, moreover, was led by a headmaster or *ra’īs*.<sup>106</sup> It was the *ra’īs* who represented the *madhhab* on difficult and extremely controversial issues. It was also the view of the *ra’īs*, along with that of his closest competitors within a school, that stood the greatest chance of becoming the view of the *madhhab*.

In his *Tamyīz*, al-Qarāfi provides additional insight into the relationships of informal authority among *madhhab* members and the manner by which this affects their activities overall. This appears in his advice to fellow muftis on how to avoid colliding with their colleagues and counterparts in the field. According to this advice, if a petitioner brings his question to a mufti after having already received a response from another one, it would behoove the second mufti to observe proper protocol: If he agrees with the first response, he should write, “Like this is my response (*ka dhālika jawābī*)”. Less

<sup>103</sup> See *Nature of Law*, 95.

<sup>104</sup> See the explicit statement to the effect by the Ḥanafī, Ibn al-Humām (d. 861/1456) in Ibn Amīr al-Ḥajj, *al-Taqrīr wa al-tahbīr*, 3 vols. (Beirut: Dār al-Kutub al-‘Ilmiyah, 1403/1983), 3:102.

<sup>105</sup> “La Corporation à l’époque classique de l’Islam,” *The Islamic World, From Classical to Modern Times: Essays in Honor of Bernard Lewis*, ed. E. Bosworth et al. (Princeton: The Darwin Press, 1989), 204–06.

<sup>106</sup> See G. Makdisi, “The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court,” *Zeitschrift für Geschichte der Arabisch-Islamischen Wissenschaften*, Band I (1984): 239–40.

deferential, however, would be, "My response is like this (*jawābī ka dhālika*)".<sup>107</sup> Still less deferential and tending towards haughtiness would be for the second mufti to write, "The response is correct (*al-jawābu ṣawāb*)," or "The response is sound (*al-jawāb ṣaḥīh*)". These latter expressions should be used, "only where it is proper for the second mufti to authorize the first to give *fatwās* (*yujīzuh*) or to act as overseer of the latter's work, the relationship between them being as that between teacher and student".<sup>108</sup> If the second mufti wishes to defer to the first, he should write beneath the response of the latter. If his aim is to assert his superiority, he should write parallel to it. Even here, however, he may want to make a show of modesty by writing his response to the left. If, on the other hand, his wish is not to show such modesty, he should write to the right.<sup>109</sup>

Such advice clearly confirms the existence of informal lines of authority among *madhhab* members, which renders it all the more likely that at any given time only a minority, i.e., the masters, were in a position to effect legal change. Even here, however, given the need to maintain genetic links with the views of the Imāms and ancient authorities, there would be little incentive *in the area of positive law* (*furū'*) to make open claims of originality. For even where the rules on the books appear to have lost a measure of suitability, they remained important repositories of authority. *Ijtihād*, for its part, might confer the advantage of showing the way to more suitable and pragmatic interpretations. But it alone would not be enough to overturn the authority of previously established views. It is here that the process referred to as legal scaffolding assumes a central role.

As interpreters, the *fuqahā'* had no power to abolish existing law. On occasion a particularly talented jurist might succeed in displacing a previously established view. But more often than not, the attempt would be simply to mitigate some of the more stultifying effects of existing doctrine by finding new exceptions or inventing new principles via which needed or desired modifications could be brought about. This would apply all the more in the case of post-formative jurists operating under a régime of *taqlīd*, since they would be straddled with the additional necessity of maintaining a discernably genetic relationship between their conclusions and those of the *mujtahid*-Imāms.

<sup>107</sup> *Tamyīz*, 264.

<sup>108</sup> *Ibid.*, 265.

<sup>109</sup> *Ibid.*

For these jurists, the process of inventing new divisions, exceptions and classifications, as well as manipulating the scope of legal injunctions, etc., would become a virtual necessity. Speaking in this context, it is perhaps no accident that al-Qarāfi, for example, composed a monograph on "exceptions" (*al-Istighnā' fī al-istithnā'*), another one on scope (*al-Iqd al-manzūm fī al-khuṣūṣ wa al-'umūm*) and a four-volume work on legal precepts or principles (*al-Furūq*) in which the main objective was to point out and clarify subtle distinctions (lit., *furūq/s. farq*) between apparently similar rules and principles. Legal scaffolding, in other words, becomes virtually unavoidable under a régime of *taqlīd*. In fact, it is perhaps the surest manifestation of the latter's dominance and institutionalization. Yet, contrary to the common assumption that *taqlīd* constitutes a decline to a more primitive stage of development, it is in this very process of legal scaffolding that a legal tradition reaches the height of innovative acumen. Indeed, to the extent that it can be said that it is authority that makes law, there is a sense in which not *taqlīd* but *ijtihād* might be considered the more primitive stage, in that it is during this phase that a tradition strives to determine who and what the sources of authority are (speaking here of the force that validates legal interpretations, not the law per se). This should not be obscured by the fact that the *terminus ad quem* of *taqlīd* and legal scaffolding is often increased rigidity and farther removal from the practical needs of society. For, in a majority of cases this will have little to do with any lack of creative energies on the part of the interpreters. On the contrary, the very nature of legal scaffolding is more often than not

... of horrendous complexity, which can be understood only by the specialist lawyer. Law becomes remote from the understanding of the people most affected. More than that, because of its haphazard growth the scaffolding can scarcely ever cope with all the tasks it should, and in its turn it becomes rigid and in need of reform. But the very existence of the scaffolding makes a general reform more difficult, since an overall view of the law and the problems is obscured for lawyer and layman alike.<sup>110</sup>

Anyone familiar with the opaqueness and often cryptic locution of later legal literature will recognize the descriptive force and validity of these words. At the same time, however, such an observation about the nature of law and legal traditions in general suggest that in studying

<sup>110</sup> *Ibid.*

*taqlid* and the history of Islamic law, greater caution should be exercised in applying the logic of *post hoc ergo propter hoc*, which often leads to exaggerated and imprecise conclusions about the role and nature of *taqlid*. Given the intricate and highly complex nature of legal scaffolding, the edifice constructed under its aegis is bound to grow more and more fragile with each succeeding generation of *muqallid* interpreters, no matter how creative the activity of the jurists remains. At the same time, even when the *fuqahā'* are at the height of their interpretive energies, there remains any number of non-legal factors that could negatively affect the system. For example, an economic shift or setback that affects educational institutions' ability to accommodate the need for additional years of training or the legal profession's ability to attract the better minds could virtually arrest the process of legal scaffolding or lead to the collapse of the edifice. When this happens, the system is doomed to grow out of touch with the demands of society at a rate proportionate to the number of lost or missing tiers, since, once the scaffolding collapses, it becomes extremely difficult if at all possible to resume the process from the level of the remaining tiers. For, any number of pieces and joints will remain missing, and subtle differences in the spirit or perspective separating one generation from the next will make it difficult to get all the colors to match. It is perhaps as a response to this type of situation that one is to understand statements found in later literature that are essentially expressive of a level of despair and disillusionment, e.g., "The people must accept everything the *mujtahid*-Imāms pronounce and follow them in everything they say, including legal rulings, exegesis, Prophetic hadith . . .".<sup>111</sup> Such declarations reflect the fact that an edifice that used to consist of dozens of tiers has now been reduced to three or four levels which are now taken to constitute the entire system. At the same time, adherence to this now truncated ruin becomes an exaggerated imperative in order to compensate for or disguise the loss. Another response might be to campaign for a return to *ijtihad*, which amounts essentially to a call to lay the foundations for a new edifice. But even this *ijtihad*, if successful, will inevitably lead to a re-institutionalization of *taqlid*. This is because, especially in a religion like Islam, which

<sup>111</sup> Ibn Ḥusayn, *Tahdhīb al-furūq*, 2:122. See also, however, *ibid.*, 2:116ff. for an interesting and insightful discussion on the extinction of *mujtahids*. See also below, 123–27, on the fact that even under a régime of *taqlid* not everything the *mujtahids* espouse is probative.

is, on the one hand, nomocratic, but, on the other hand, has no church, synod, or central authority to determine its orthodoxy, one of the main objectives of the *mujtahid* to begin with has to be to establish himself as an authority. For only in this way can he justify the acceptance or imposition of his views. The relationship, then, between *ijtihad* and *taqlid* might be seen as part and parcel of the nature of law in general and the various cycles of stasis and renewal through which legal traditions characteristically pass. It is in my view a mistake to shoulder *taqlid* (speaking here of the institution in its restricted, technical sense)<sup>112</sup> with the primary responsibility for the substantive decline and stagnation of Islamic law. For legal systems constitute only a part of the civilizations to which they belong and, as such, are affected by any number of non-legal advantages or disadvantages conferred by the carrier civilization. This is certainly the secret behind the spread of Roman law (in the form of Civil law) throughout the world long after the interpretive efforts of the Roman jurists had ceased. It may also explain why modern Islamic law has had such a negligible impact on neighboring communities who possess far less developed legal systems and inferior legal thought.

At any rate, legal change and innovation both remain realities even under a régime of *taqlid*. A few examples will demonstrate this fact.

In his *Mu'īd al-ni'am*, Tāj al-Dīn al-Subkī relates a controversy over the practice of well-to-do suitors who would have their dowry commitments written out on silk sheets. The use of silk being forbidden to men, the question came up as to whether this practice was permissible. Al-Subkī notes that the issue had been debated previously in the Shāfi'ī school, the headmaster, al-Nawawī (d. 676/1277), deeming the practice forbidden. Later, however, al-Subkī reports that he saw his father, chief justice Taqī al-Dīn, write out such contracts on silk sheets, though he had originally refrained from doing so (suggesting that al-Nawawī's view had been originally accepted as the *mashhūr*). Tāj al-Dīn, however, after reexamining the issue, comes out against the view of al-Nawawī and concludes that the "more apparent view" (*al-aẓhar*) is that the practice is permissible, since women are the beneficiaries thereof and not men.<sup>113</sup>

In the *Tamyīz* al-Qarāfi asserts that the Mālikī position is that if a woman is knowledgeable of her husband's indigence at the time of

<sup>112</sup> See below, 123–33, on proper versus improper *taqlid*.

<sup>113</sup> *Mu'īd al-ni'am*, 52.

marriage, she may not later petition for an annulment on grounds of non-support.<sup>114</sup> This is confirmed in Ibn Qudāmah's *al-Mughnī*, which catalogues what is apparently the going opinion of all four schools.<sup>115</sup> Throughout *al-Mudawwanah*, however, Mālik maintains that, rich or poor at the time of marriage, if a man is unable to support his wife, she has a right to annulment.<sup>116</sup> In *Bidāyat al-mujtahid*, Ibn Rushd (d. 595/1198) confirms this and gives as the Mālikī position the view cited in *al-Mudawwanah*. Then, in a much later work, *Bulghat al-sālik*, a standard Mālikī manual cataloguing views from several centuries back, the view cited by al-Qarāfi and Ibn Qudāmah turns up missing once again.<sup>117</sup>

A final example from the Ḥanafī school. According to *al-Ikhtiyār li ta'līl al-mukhtār* of 'Abd Allāh b. Maḥmūd b. Mawḍūd al-Mawṣalī (d. 683/1284), if a woman claims that a man is her husband, it is legal for the man to offer her a monetary sum in exchange for her abandoning this claim.<sup>118</sup> In the *al-Lubāb fī sharḥ al-kitāb* of 'Abd al-Ghanī al-Ghunaymī (13th/19th century), this same arrangement is condemned as illegal.<sup>119</sup> These two works, like the majority of those cited above, are works on "*madhhab-fiqh*," i.e., they represent the views not of the individual authors but the going opinion of each respective *madhhab* as a whole. This is explicitly confirmed in al-Mawṣalī's *al-Ikhtiyār*, where in his introduction he states:

To proceed: I have been beseeched, by one whose request cannot be refused, to compose an abridgment in law according to the *madhhab* of the great Imām, Abū Ḥanīfa al-Nu'mān, may God be pleased with him and grant him pleasure, in which I restrict myself to his *madhhab* and rely on his opinions. So I composed for him this abridgment, as requested. And I entitled it "*al-Mukhtār li al-fatwā*," because it contains the opinion that has been chosen and given assent to by most of the *fukahā*." <sup>120</sup>

<sup>114</sup> *Tamyiz*, 147.

<sup>115</sup> *al-Mughnī*, 7:577.

<sup>116</sup> See Suḥnūn (Ibn Sa'd al-Tanūkhī), *al-Mudawwanah al-kubrā*, 4 vols. (Beirut: Dār al-Fikr, 1407/1986), 2:192-4.

<sup>117</sup> *Bulghat*, 1:521ff. esp. 1:524: "in uthbita 'usruhu tuluwwima lahu 'ala 'l-mu'tamadi thuma tullīqa 'alayh."

<sup>118</sup> See 'Abd Allāh b. Maḥmūd b. Mawḍūd al-Mawṣalī, *al-Ikhtiyār li ta'līl al-mukhtār*, 5 vols. ed. Maḥmūd Abū Daqīqah (Cairo: Dār al-Fikr al-Arabī, no date), 3:7.

<sup>119</sup> 'Abd al-Ghanī al-Ghunaymī, *al-Lubāb fī sharḥ al-kitāb*, 4 vols. ed. Muḥammad Amin al-Nawawī (Beirut: Dār al-Ḥadīth, no date), 2:165.

<sup>120</sup> Al-Mawṣalī, *ibid*, 1:6. Emphasis mine.

#### IV. The Madhhab: al-Qarāfi's Corporate Constitutional Unit

Having examined some of the most important aspects of the relationship between Islamic law, the juriconsult and the *madhhab* under the régime of *taqlīd*, we may now return to the subject of the school of law as a corporate unit in al-Qarāfi's constitutional scheme. The question of the existence of corporate entities in Islam dates back to 1920 and the controversy over the presence of guilds, which was sparked by the appearance of Louis Massignon's "Les Corps des métiers et la cité islamique".<sup>121</sup> According to Massignon, guilds ("corporation" in French) existed in classical Islam (i.e., from the 3rd/9th century) and influenced or perhaps inspired those of the medieval Christian West. The view of Massignon's opponents was essentially that, whereas Muslim guilds became admittedly commonplace by the late middle ages, there was "no definite information about the existence of guilds, let alone their structure or function, before the fifteenth century".<sup>122</sup>

The guild-debate reached its high point during the 1970's, during which time the evidence appeared to be heavily in favor of Massignon's opponents.<sup>123</sup> Then, in a series of essays beginning in 1984, Professor George Makdisi introduced a thesis that not only added a new dimension to the guild controversy but offered another perspective on the history of Islamic law and its most permanent institution, the *madhhab*. Defining a guild as "une association de personnes professionnelles, groupées dans le but de régler leur profession et de défendre leurs intérêts,"<sup>124</sup> Professor Makdisi asserted that the *madhhabs* were nothing less than guilds. He went on to respond to the criteria of G. Baer, who, though an opponent of Massignon, provided the fullest definition of what a guild was. According to Baer, in order for an organization to be considered a guild it had to (1) be professional;

<sup>121</sup> *Revue internationale de sociologie* (September, 1920): 473-89. Massignon's thesis reappeared in his 1935 entry in the *Encyclopaedia of Islam*, "Ṣinf": "The grouping of workers into corporations in Muslim cities dates from the ninth century of our era and is closely connected with a movement half religious and half social in origin, that of the Karmatians." This view was later repeated by Bernard Lewis in his "The Islamic Guilds," *Economic History Review* 8-9 (Nov-May 1937-39): 20-37.

<sup>122</sup> G. Baer, *Guilds in Middle Eastern History*, 27.

<sup>123</sup> See, for example, S.M. Stern's "The Constitution of the Islamic City," *The Islamic City*, ed. A. Hourani and S.M. Stern (Oxford: Bruno Cassirer Publishers Ltd., 1970); G. Baer, "Guilds in Middle Eastern History," *Studies in the Economic History of the Middle East*, ed. M.A. Cook (London: Oxford University Press, 1970); C. Cahen, "Y-a-t-il des corporations professionnelles dans le monde musulman classique?" *The Islamic City*.

<sup>124</sup> *La Corporation*, 194.



(2) occupy a specific segment of the economy; (3) fulfill some specific purpose (restrictive practices, etc.); (4) be autonomous; (5) enjoy or seek to establish some sort of monopoly; and (6) have a framework of officers, headed by a headmaster who performed some specific function (e.g., collect taxes). According to Professor Makdisi, the *madhhabs* satisfied this criterion. They were (1) professional (they sought to preserve a standard of performance); (2) they occupied a specific segment of the 'economy' (law); (3) they engaged in restrictive practices and sought to establish a monopoly (through strict regulation of the licence to teach and give legal opinions); (4) they were autonomous (government neither brought them into existence nor terminated them); (5) they had a framework of 'officers' (professors, deputy-professors, repetitors, etc.); and (6) they were headed by a headman, i.e., the *ra'īs*.<sup>125</sup> As such, according to Professor Makdisi, there remained no justification for not considering the *madhhabs* to be guilds.

Professor Makdisi's thesis is valuable in that it forces a more serious consideration of the nature and structure of the *madhhab* as a more formally constituted and integral Muslim institution. This is important inasmuch as the nature of any activity, legal interpretation or other, is fundamentally affected by the organizational structure within which it takes place. As such, future progress in the study of Islamic law is bound to include more detailed studies on the nature and operation of the *madhhab*. Regarding, however, the question of the corporate status of the *madhhab*, Professor Makdisi evinced a perspective the main thrust of which differs from my own. For him, corporate status hinged on the existence of juristic persons, which, he rightfully observes, Islamic law did not recognize. As such, he remained unwilling to cede corporate status to the *madhhabs*. There is, however, another perspective from which this question might be addressed, namely, to look at precisely what corporate status confers upon the members of the group in possession of it, regardless of what the legal basis of that status may be. In his *Corporations: A Study of the Origin and Development of Great Business Combinations and Their Relation to the Authority of the State*, J.P. Davis describes corporate status in the following terms.

To be sure, all social activity, whether of individuals or groups, is limited and conditioned by the system of law under which it is exercised . . .

<sup>125</sup> *The Guilds of Law*, 239-40.

but the corporate form brings to the members of the group in possession of it internal and external relations different from the usual and regular social relations imposed on individuals by the existing system of law and artificial and exceptional compared with them.<sup>126</sup>

This particular understanding of corporate status had been alluded to by S.M. Stern in his critique of Massignon's thesis. Stern had made the point that none of the organizations in classical Islam, including the *madhhabs*, appear to have possessed that propensity, which he refers to as "corporate," to protect the interests of its members through formally recognized persons and statuses. Citing the view of D. Santillana, he writes: "Muslim jurists do not know—and it is easy to understand if we think of the political and social differences between the Islamic state and those of the Roman type—neither the juridical personality of municipalities, nor that of collectives of persons such as guilds."<sup>127</sup> In *La Corporation*, Professor Makdisi responded to this objection, pointing out that while it is true that Islam, unlike the Christian West, did not recognize juristic persons, this did not prove the non-existence of guilds, since at their origins neither were the European guilds based on juristic persons.<sup>128</sup>

My understanding of Stern's objection is, however, somewhat different. To my mind he seems to be referring not merely to the absence of juristic persons but more particularly to the absence of any protected status that the *madhhab* or any other organization confers upon its members by virtue of their membership in a particular group. While all sorts of what he describes as corporate institutions are said to have proliferated in Europe, these, he maintains, were entirely absent in Islam.<sup>129</sup> The key to what Professor Stern means by "corporate" appears on the first page of his essay, which, again, was entitled, "The Constitution of the Islamic City". There he states that the Islamic city did not have a constitution, not in the sense of structure or character, but *in the narrower sense of the term*: "[O]ne of the main points which I wish to make is that the Islamic city has no constitution in this

<sup>126</sup> J.P. Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and Their Relation to the Authority of the State*, 2 vols. (New York: Knickerbocker Press, 1905), 1:16.

<sup>127</sup> *Constitution*, 49. The quote is from Santillana's *Instituzioni di diritto musulmana malichita*.

<sup>128</sup> *La Corporation*, 96: "... les corporations au debut de leur existence en Europe n'étaient pas douées de personnalité morale." See also *ibid.*, 207, where he explains that occidental guilds were based on juristic persons, "pas à l'origine, mais au treizième siècle".

<sup>129</sup> *Constitution*, 47.

[narrower] sense."<sup>130</sup> In other words, according to Professor Stern, there were no groups or individuals in the medieval Islamic city who enjoyed privileges or exemptions from state authority by virtue of their membership in any particular group or association.

It is at this juncture that I would like to consider a particular aspect of the *madhhab* as construed by al-Qarāfi. In his *al-Furūq*, for example, he makes the following statement:

If a lone witness cites the crescent marking the beginning of Ramaḍān and a Shāfi'i judge announces throughout the city that the month of obligatory fasting has begun, such an announcement would not make it obligatory upon a member of the Mālikī *madhhab* to fast. . . .<sup>131</sup>

According to the going opinion of the Mālikī school, two witnesses are required to establish the appearance of a new crescent. This contrasts the view of the Shāfi'is, who accept the testimony of a lone witness. Now, al-Qarāfi's point is that, although in making this announcement the Shāfi'i judge may be acting as representative of the government, any individual's membership in the Mālikī school renders him exempt from sanctions that may be applied to others who eat following the official announcement. This, for all intents and purposes, is corporate status. Individuals enjoy this exemption not as individuals but due to their membership in the Mālikī school. Moreover, whenever this status is violated, it is not the individual but the Mālikī school as a whole that will rise in defense.

Underlying this corporate status is the notion that, as constituents of the disputed (*mukhtalaf fih*) tier of orthodox law, the views of all the schools are protected, since they are all, *ceteris paribus*, correct. This al-Qarāfi supports on the basis of a consensus in which he also seems to find support for the institution of *taqlid*.

Every legal ruling is certain (*ma'lūm*), because every legal ruling is supported by consensus. And that which is supported by consensus is certain. Thus, every legal ruling is certain. And we say that every legal ruling is supported by consensus because there are two categories of rulings: (1) universally agreed upon (*mujma' alayh*)—and these are obviously supported by consensus; and (2) those concerning which there is disagreement (*mukhtalaf fih*). But here there is consensus to the effect that whenever (the propriety of) a ruling reigns predominate in a *mujtahid's*

<sup>130</sup> *Ibid.*, 25.

<sup>131</sup> *al-Furūq*, 4:48. See also *Tamyiz*, 180 for a similar statement.

mind, that ruling is the ruling of God both for that *mujtahid* and whoever follows him via *taqlid*. . . .<sup>132</sup>

To illustrate his point, al-Qarāfi aduces a syllogism in which the middle term is Mālik's position on the necessity of rubbing (*tadlik*) when performing ablution.

The necessity of rubbing the members during ritual washing appeared, without doubt, we must assume, to be the correct view to Mālik. Everything that appeared to be correct to Mālik is, without doubt, God's ruling, according to consensus. Thus, the necessity of rubbing is, without doubt, God's ruling.<sup>133</sup>

As mentioned earlier, al-Qarāfi was not an advocate of the doctrine, "*kullu mujtahid muṣīb*."<sup>134</sup> He parted with the doctrine, however, only in that he did not consider every conclusion to be objectively correct in the sense that each competing *mujtahid* struck an ontological bull's eye somewhere 'out there'. He insisted all the same, however, that while a single question might elicit multiple and even contradictory responses, each response was authoritative for the respective *mujtahid* who endorsed it, as well as his followers. This applied as long as this response did not violate, according to al-Qarāfi, a four-part criterion, which included (1) univocal verses of scripture (*naṣṣ*); (2) consensus; (3) a fortiori analogy (*qiyās jalī*); and (4) established legal precepts (*qawā'id*)—all in the absence of some countervailing consideration (*mu'ārid*).<sup>135</sup> As long a view did not violate this four-part criterion, it had to be accepted as a constituent of the disputed (*mukhtalaf fih*) tier of orthodox law and acknowledged as such by the entire Community. The Community had thus to acknowledge, for example, that marrying a woman who is not represented by a male agent (*walī*) might be licit to one group of Muslims though illicit to another, "just as God made carion (*maytah*) permissible to one compelled by necessity but forbidden to one who finds an alternative."<sup>136</sup> Indeed, despite their many differences, all of the schools are recognized by al-Qarāfi as "a way to God."<sup>137</sup>

<sup>132</sup> *Sharḥ*, 18. See also *Tamyiz*, 219 for a similar statement.

<sup>133</sup> *Ibid.*, 19.

<sup>134</sup> See above, 32.

<sup>135</sup> *Tamyiz*, 128–29; *al-Furūq* 2:109. On countervailing considerations, see above, 59–64.

<sup>136</sup> *Tamyiz*, 221.

<sup>137</sup> *Ibid.*, 142.

Now, the *mujtahids* of whom al-Qarāfi speaks here are none other than the eponyms and ancient authorities of the four orthodox schools. It is important to understand this in order to understand that for him a view acquired orthodox status not because it issued from a putative contemporary *mujtahid* but because its advocate represented one of the orthodox *madhhabs*, i.e., as a *follower* of one of the *mujtahids* par excellence. To establish this, al-Qarāfi appropriates another ancient consensus, which, in effect, proscribes all views outside those of the four recognized schools following the so-called settling down of the *madhhabs*. In his *al-Mu'tamad*, Abū Ḥusayn al-Baṣrī (d. 426/1044) had stipulated that

... if the scholars of one generation are divided on a question into two distinct and contradictory views, this implies their agreement to the effect that all other views are invalid.<sup>138</sup>

On the basis of this consensus, al-Qarāfi maintains that

... if [a judge] rules that an entire estate is to go to a brother of the deceased, excluding the grandfather, the Community has agreed that there are two acceptable views: (1) that the grandfather receives the entire estate; and (2) that he shares it with the brother. As for denying the grandfather altogether, no one has ever held such a view. Thus, whenever he (a judge) hands down such a ruling based on the assumption [e.g.,] that the brother is related by sonship while the grandfather is related by paternity, and sonship takes precedence over paternity, we overturn his ruling. And if he is a mufti we do not follow him.<sup>139</sup>

According to al-Qarāfi, even if one claiming to be a *mujtahid* advocated awarding the entire estate to a brother, such an opinion "would be in violation of consensus; for this third opinion contradicts the validity of that upon which the Community has agreed. It is thus itself invalid, because it is impossible for the truth to have escaped them."<sup>140</sup>

In sum, all validly deduced views endorsed by one of the four Sunni schools on a disputed question of law fall into the protected category of the disputed (*mukhtalaf fiḥ*) tier of orthodox law. The orthodox status of these views is confirmed by consensus, which renders their *recognition* binding on the entire Community. Moreover, this orthodox status not only authorizes the members of each *madhhab* to act

<sup>138</sup> *al-Mu'tamad*, 2:505.

<sup>139</sup> *Tamyīz*, 130.

<sup>140</sup> *Sharḥ*, 326.

in accordance with their respective doctrines, it also authorizes judges (and even other government officials) to impose these as binding decisions (*aḥkām/s. ḥukm*), at which time it becomes illegal for any other authority to challenge or violate them in any way.

It is clear that this doctrine of al-Qarāfi was not formulated in a vacuum but rather in response to the concrete circumstances of his time. This is the light, for example, in which his tacit endorsement of the régime of *taqlīd* should be understood. For, it certainly could not have escaped him that if jurists had mastered the discipline of *uṣūl al-fiqh* to the end of being able to extrapolate on the basis of the Imāms' *madhhabs*, they should also be able to apply these same interpretive methods to scripture directly. But al-Qarāfi seems to have discerned that where there existed a power differential between putative *mujtahids* (such as existed in 7th/13th century Egypt) such *ijtihād* would pose a clear and present liability. This is clear from his attitude towards the views of his Shāfi'i mentor, the redoubtable al-'Izz b. 'Abd al-Salām. For al-'Izz, all views were to be scrutinized on their merits, and individuals were to follow the view best substantiated by scripture, regardless of the dictates of their school.<sup>141</sup> A jurist's primary obligation was not to his *madhhab* but to God and the faithful communication of His will. The *madhhab* was for al-'Izz not a corporate entity that either protected its members or authorized them to act. The mere fact that a view had been endorsed by a recognized school rendered it neither correct, nor authoritative, nor protected, nor unassailable (e.g., when it appeared in the form of a judicial decision).

To al-Qarāfi's eyes the view of al-'Izz was fine as long as one was a Shāfi'i, given the political situation of the times. But it was no secret that the destiny of a view would be ultimately determined not on the basis of its intrinsic quality but by the judgments passed on it by those with official backing. Despite al-'Izz's noble intentions and his belief that he was exalting scripture as the final arbiter, in reality it was only the *mujtahid's* interpretation that determined the result. And here it was not merely the interpretation of any *mujtahid* that mattered; it was the interpretation of the *mujtahid* in power.

One example will serve to demonstrate this point. According to the *ijtihād* of Abū Ḥanīfa, it is not a prerequisite for a valid marriage that a woman be represented by a male agent (*walī*).<sup>142</sup> In al-'Izz's

<sup>141</sup> *Ibid.*, 106.

<sup>142</sup> The Ḥanafis base their view on the fact that the Qur'an attributes the act of marriage

collection of *fatwās*, however, he indicates that it is not permissible for a Shāfi'i judge to approve a marriage where the woman does not have such an agent.<sup>143</sup> In practical terms, al-'Izz's position comes down to the following: If a judge is a Ḥanafī (or follows Abū Ḥanīfa on this particular question) such a marriage would pass judicial muster. But if he is a Shāfi'i who does not recognize Abū Ḥanīfa's position, it would not. Clearly, however, the matter is not simply one of valid *ijtihād*. For Abū Ḥanīfa's *ijtihād* is obviously valid to him and the Ḥanafīs. The question, rather, is one of *whose ijtiḥād*. And the answer, again, can only be: the *ijtiḥād* of the *mujtahid* in power.

To be sure, al-Qarāfi admits that subjected to close scrutiny all of the schools will be found to contain erroneous views in which it is not permissible to follow the *mujtahid*-Imāms.<sup>144</sup> And whenever this proves to be the case, it becomes necessary to switch schools, either on the individual question or altogether.<sup>145</sup> It is indeed a testimony to his commitment to this principal that he openly contradicts, on several occasions, the view of Mālik and or "the Mālikīs".<sup>146</sup> But al-Qarāfi differs with al-'Izz in that he sees a fundamental difference between 'wrong' and 'weak'. 'Weak,' in his view, is a much more subjective judgment, which, depending on how far one wants to carry it, may be leveled against almost any opposing view. 'Wrong', on the other hand, applies only to those views that violate his four part criterion. As such, there may exist substantial disparity in the degree of strength and weakness among the views endorsed by the various schools, but as constituents of the disputed (*mukhtalaf fiḥ*) tier of orthodoxy, all of these are authoritative and protected as orthodox law.<sup>147</sup> Unless a view is proven *wrong*, i.e., unorthodox, it must simply be accepted as authoritative for all who subscribe to it, the question of relative strength or weakness being left to debate and voluntary reconsideration. Such reconsideration is, moreover, a completely

to women directly via the transitive verb *n-k-h*: "an tankiḥa zawjan ghayrah [2:230], and an yankiḥna azwājahunna [2:232]. They also adduce a hadith from the Prophet in which he says, "Matrons have more rights over themselves than do their guardians; virgins, meanwhile, should seek counsel, and their approval is their silence." See Ibn Rushd, *Bidayat al-mujtahid*, 2:7.

<sup>143</sup> See above, 66.

<sup>144</sup> *Tamyiz*, 129.

<sup>145</sup> *Ibid.*, 225.

<sup>146</sup> See, for example, *al-Furūq*, 2:36-37, 2:104, 2:181-82, 3:20, 3:85, 3:133, 3:214 and *passim*.

<sup>147</sup> For a more detailed description of orthodox law, see below, 122-23.

intramural process consummated in the final analysis by the masters of each respective *madhhab*. Though possibly influenced by views from without, it is ultimately they, to the exclusion of all outside authorities, who determine the going opinion of their school. Power, in other words, ceases to operate as an effective element in determining the validity of any interpretation.

It appears equally apparent that al-Qarāfi was responding to the contemporary situation when he sought to impute to the *madhhab* highly defined borders that restrict as well as protect the activities of its members. In *Tamyiz*, he complained bitterly about jurisconsults who would respond according their own views, "even if the petitioner said expressly, 'I am a Shāfi'i,' or 'I am a Mālikī'."<sup>148</sup> According to him, a member of the Mālikī school is not bound by what al-Shāfi'i says; nor vice versa. Nor may a Mālikī partake of a thing forbidden according to Mālik's *ijtiḥād*, even if it is permitted according to al-Shāfi'i or Abū Ḥanīfa. For it is, according to al-Qarāfi, the consensus (*ijmā'*) of the Community that "God's ruling for both the *mujtahid* and those who follow him is the ruling concluded by the respective *mujtahid*"<sup>149</sup>—not the conclusions of some other Imām.<sup>150</sup> And,

... there being consensus on this point, were we to give a petitioner a response that went against the conclusion (of his Imām), we would be in violation of consensus. Nay, this is a rule that is backed by consensus, and it is forbidden for anyone to violate it.<sup>151</sup>

The practice of picking and choosing among the views of more than one *madhhab* is known as *talfiq*, i.e., legal eclecticism. Al-Qarāfi intimates that a good number of Shāfi'is allowed this practice. He gives the Mālikī position, however, as being flatly against it.<sup>152</sup> This latter pronouncement was something of an exaggeration, as his recent predecessor, Ibn al-Hājib (d. 642/1244), openly allowed *talfiq*, which suggests that at the very least its status was disputed within the Mālikī school.<sup>153</sup> But al-Qarāfi's intention was apparently to protect individuals, such as himself, who belonged to politically weaker schools from

<sup>148</sup> *Tamyiz*, 247-48.

<sup>149</sup> *Ibid.*, 219.

<sup>150</sup> *Ibid.*, 248.

<sup>151</sup> *Ibid.*, 220.

<sup>152</sup> *Ibid.*, 274.

<sup>153</sup> *Muntahā al-ṣūl*, 221-22. See also, *ibid.*, 216, where judges are allowed to perform *talfiq* and rule according to a *madhhab* other than their own, *pace* al-Qarāfi, as discussed below, 160.

being coerced into following extraneous views. He appears, in other words, to have reasoned that if individuals are permitted to violate their own *madhhab*, there would be little to stop government from demanding the same. If, for example, a Mālikī could claim Shāfi'ī rights and exemptions, what would prevent the government from forcing him to accept the same, from forcing him, for example, to fast when the Shāfi'ī chief justice announces the beginning of Ramaḍān on the basis of a lone witness's testimony? At the same time, al-Qarāfi acknowledges the right of the Imām to choose from among the views of the various *madhhabs*, at least on certain questions.<sup>154</sup> Though this would appear at first blush to contradict his previously stated position, there is a sense in which acknowledging the Imām's right to impose views other than those of his own *madhhab* (or the *madhhab* in power) affords greater opportunity for politically weaker schools to have their views recognized and, where deemed appropriate, translated into binding law. This provision opens up, in other words, another avenue via which the remaining schools are able to compete with the incumbent *madhhab*, or at least avoid the inevitability of being held to the latter's views.<sup>155</sup> This was of course the main objective behind al-Qarāfi's constitutional campaign.

<sup>154</sup> See, e.g., *Tamyiz*, 188–89. The possibility must be admitted here that this reflects little more than al-Qarāfi's political realism.

<sup>155</sup> For an instance of Baybars choosing a Ḥanafī position over that of the Shāfi'īs, for example, see J. Sublet, "Le sequestre sur les jardins de la ghouta (Damas, 666/1267)," *Studia Islamica* 43 (1976): 84–85.

## CHAPTER FOUR

THE LIMITS OF LAW  
AGAINST THE TYRANNY OF THE *MADHHAB*

Je vous délivre d'une bête féroce, et vous me demandez par quoi je la remplace.

—Voltaire

I. *General Introductory*

As corporate entities, one would expect al-Qarāfi to impute to the *madhhabs* the broadest legal jurisdiction possible, the better to provide the broadest protection to its constituent members. Yet it appears that the perspicacious Mālikī constitutionalist would be unable to escape the realization that, as repositories of religious *cum* legal authority and conduits via which the state and government could legitimately exercise power, the *madhhabs* themselves stood in need of clearly defined jurisdictional limits. Otherwise, there would remain little defense against the tendency on the part of government or even individual jurists (i.e., in their *fatwās*) to force law and legal sanctions into areas where these were not intended to go or to claim religious authority for views that were actually not the genetic offspring of scripture. In the final analysis, the only way of avoiding such liabilities would be through a clear and precise definition of "law," such that the distinction between law and non-law could be easily recognized and the function of the *madhhab* limited to the validation of strictly legal views. Otherwise, to look to the school of law as the primary mechanism for limiting the effect and use of power, without seeking to impose limits on the very concept of law itself, would be to run the risk of exchanging one form of tyranny for another. For, again, assuming the corporate status of the *madhhabs*, in the absence of a clear distinction between law and non-law, virtually any view for which a government official or mufti could claim the backing of a recognized school on virtually any subject could acquire binding legal authority and, *ceteris paribus*, protection as bona fide, unassailable law.

It is in response to this filiation of facts that al-Qarāfi introduces what I refer to as his "pure-law" doctrine, on the basis of which he establishes the distinction between law and non-law. Law, according to this doctrine, is a restrictive construct inclusive of five things only: (1) legal rules (*aḥkām/s. ḥukm*); (2) legal causes (*asbāb/s. sabab*); (3) legal prerequisites (*shurūṭ/s. shart*); (4) legal impediments (*mawānī/s. mānī*); and (5) the various forms of admissible courtroom evidence (*ḥijāj/s. ḥujjah*). Statements or pronouncements pertaining to matters outside these perimeters are not statements of law; nor are statements pertaining to the factual *occurrence*, as opposed to the legal *status*, of any of these constituents of law. The upshot of this is that, within their respective jurisdictions, only that portion of a caliph's, judge's or mufti's statements that speak to strictly legal matters may be considered legally probative and capable of conferring legal rights or imposing legal obligations; all else is mere dictum. If one to whom such latter statements are issued accepts them, he may act accordingly; if not, he may simply ignore them, with full impunity. In this way, the utility of the corporate *madhhab* as a basis for 'legal tyranny' is significantly reduced.

## II. Madhhab: Pure Law

Al-Qarāfi's most definitive statement on law as a restricted construct appears in *Tamyīz* where he responds to a question petitioning a precise definition of "*madhhab*". By "*madhhab*," however, his imaginary interlocutor has in mind not any particular association of jurisconsults per se but the body of legal doctrines upon which this association is founded. The ultimate aim behind his question is ostensibly to define the area in which it is legitimate for a *muqallid* to perform *taqlīd* of a *mujtahid*-Imām. It is apparently clear in his mind that this area is of a fixed constitution and has defined limits. Thus, he identifies a number of doctrines in which he acknowledges that it is not proper to follow Mālik, not because the latter's views are substantively wrong but because they are not the proper object of *taqlīd*. These include, *inter alia*, views pertaining to questions on mathematics, geometry, *uṣūl al-fiqh* or *uṣūl al-dīn*. In other words, al-Qarāfi's interlocutor is aware that, properly speaking, *taqlīd* is restricted to questions of law. His problem, however, is that he is not quite able to arrive at an exact definition of law, which would enable him to clarify the distinction

between law and non-law. This in turn prompts his request for a precise definition of "*madhhab*," the understanding being that all that falls outside of this is non-*madhhab*, i.e., non-law, and hence neither probative nor subject to *taqlīd*. "*Madhhab*," in other words, is, strictly speaking, the equivalent of "pure law". As such, it is exclusive of all non-legal and para-legal elements. The question put to al-Qarāfi runs, thus, as follows:

What is the meaning of 'Mālik's *madhhab*' and the '*madhhab*' of other scholars [i.e., eponyms] in which it is permissible to follow them via *taqlīd*? If you say, 'That which they say which is true and correct,' such is made problematic by statements of theirs such as 'one and one is two,' and all other statements that relate to mathematics and other rational sciences. And if you say, 'That which they say which is true and correct concerning religious matters, including those things of which the Lawgiver has commanded that we acquire knowledge,' this statement would also be invalidated by the cases of *uṣūl al-dīn* and *uṣūl al-fiqh*. For while these include matters concerning which the Lawgiver has commanded that we acquire knowledge, it remains, nonetheless, impermissible to perform *taqlīd* of Mālik or anyone else regarding these things. If you say: 'Mālik's *madhhab*' and the '*madhhab*' of other scholars who are followed via *taqlīd* consists of the branches of positive law (*al-furū'*), I respond: If you mean all of the branches of positive law, your statement is invalidated by the case of those branches which are known, a priori, to be a part of the religion (*al-ma'lūmah min al-dīn bi al-darūrah*), such as [the obligation to perform] the five daily prayers, the fast of Ramaḍān, the prohibition on lying, fornication, stealing, and the like. For there is no place at all in these matters for *taqlīd*, because their status is already known by necessity. And it is impossible to have *taqlīd* in matters that are already known by necessity to be a part of the religion. For the learned and the laity are equal in their knowledge of these things. Yet, these things remain a part of the branches of positive law.

If, on the other hand, you mean only some of the branches of positive law, how, then, is this portion to be determined? Moreover, even if you clarify the manner by which this portion is determined, you will still not have realized your goal. For your definition will remain underinclusive in that it will not comprise the legal causes (*asbāb/s. sabab*), and prerequisites (*shurūṭ/s. shart*) in which you follow the scholars via *taqlīd*. Indeed, legal causes and legal prerequisites are not the same as legal rules (*aḥkām/s. ḥukm*). And for this reason, the scholars have said: 'Legal rules belong to that portion of God's address that is prescriptive (*khiṭāb taklīf*), while legal causes and prerequisites belong to that portion that is descriptive (*khiṭāb waḍ'*)'

And it is because of questions such as these that we find hardly any of the lesser jurists able to respond definitively when asked to define the *madhhab* of their Imām whom they follow via *taqlid*. This applies equally to the followers of all the *madhhabs*.<sup>1</sup>

In his response, al-Qarāfi confirms the suspicion of his interlocutor and goes on to give his definition of law proper, i.e., *madhhab*. According to him, the *madhhab* of an Imām is limited to those constituents mentioned above, namely: (1) the legal rules which make up the branches of positive law and which have been deduced on the basis of *ijtihād* (*al-ahkām al-sharʿīyah al-furūʿīyah al-ijtihādīyah*); (2) the legal causes (*asbāb/s. sabab*) which activate these rules; (3) the legal prerequisites (*shurūʿ/s. sharʿ*) to the application of these rules; (4) the legal impediments (*mawānīʿ/s. mānīʿ*) to the application of these rules; and (5) the various forms of courtroom evidence (*hijāj/s. hujjah*) by which the occurrence of these rules, causes, prerequisites, and impediments may be legally established.<sup>2</sup>

#### A. The Constituents of Pure Law: Definitions

The first four constituents of al-Qarāfi's "*madhhab*" are known in the parlance of *uṣūl al-fiqh* as *al-ahkām al-sharʿīyah/s. al-ḥukm al-sharʿī*, i.e., legal rulings or statuses. The *ḥukm sharʿī* is further divided into two categories: (1) prescriptive rulings (*al-ahkām al-taklīfīyah*) and (2) descriptive rulings (*al-ahkām al-waḍʿīyah*). The *ḥukm* identified by al-Qarāfi as the first constituent of *madhhab* is the *ḥukm taklīfī*. The remaining three are *ahkām waḍʿīyah*.

##### 1. Ḥukm Sharʿī

The *ḥukm sharʿī* establishes in religious terms the status of specific human actions relative to specific things. It speaks not to the essence of things in themselves but only to the propriety of specific human actions towards them.<sup>3</sup> For example, a *ḥukm sharʿī* would not state that pork is forbidden; it would state rather that *eating* pork is for-

<sup>1</sup> *Tamyiz*, 194-95.

<sup>2</sup> *Tamyiz*, 195.

<sup>3</sup> This point is made forcefully by al-Ghazālī in his *al-Mustasfā*, 2:377, where he states: "(Some) jurists have erred simply because they understood legal statuses (*ahkām*), such as permissible and forbidden, to be descriptions of the essence of things (*ʿayān*) in themselves, just as a group thought that good and evil (*al-ḥusn wa al-qubh*) described the actual essence of things."

bidden; looking at pork or smelling it would not be included in this prohibition. Similarly, a *ḥukm sharʿī* would obligate one to *pay* for the damages caused another's property. Merely apologizing or even fasting (e.g., to expiate for the sin) or offering some other charitable gesture would not in itself satisfy this rule. Each *ḥukm sharʿī* includes thus a specified action plus a particular status. It speaks to the legal implications of performing or abstaining from certain actions upon the occurrence or non-occurrence of certain events. In the *Sharḥ tanqīḥ al-fuṣūl*, al-Qarāfi defines the *ḥukm sharʿī* as

God's sempiternal speech addressed to persons of maturity and sound mind (*mukallaf*) in which He commands them to (perform some act) or grants them an option concerning the performance of some act.<sup>4</sup>

##### a. Ḥukm Taklīfī

The *ḥukm taklīfī* comprises those *ahkām sharʿīyah* that involve direct commands of the sort, "Do!" or "Do not do!," or options of the form, "You may do," or "You may choose not to do." It consists of five categories: (1) obligatory (*wājib*); (2) forbidden (*ḥarām*); (3) recommended (*mandūb*); (4) discouraged (*makrūh*); and (5) neutral (*mubāḥ*).<sup>5</sup> When failure to perform an act incurs punishment or censure from God, the act is said to be obligatory, and there is an obligation (*wujūb*) to perform it. An example of this would include the five daily prayers. When failure to eschew an act incurs punishment or censure, the act is recognized as forbidden (*ḥarām*). Adultery, for example, would fall into this category. When God, or by extension, His Prophet, issues a command, "Do!," but failure to comply does not incur punishment or censure, performance of this act is said to be recommended (*mandūb*). According to Mālik, forwarding a severance gift (*mutʿah*) to an erstwhile wife at the time of divorce is recommended; al-Shāfiʿī held that offering such gifts was obligatory (*wājib*). When there is a countermand whose non-abstention is not punished, performance of the act is said to be discouraged (*makrūh*). It is discouraged, for example, according to Mālik, for an agent to buy directly from a supplier in a profit-sharing arrangement (*muḍārabah*). Whenever neither the performance nor non-performance of an act incur punishment or censure, the act is recognized as being neutral (*mubāḥ*).<sup>6</sup> Mundane actions such

<sup>4</sup> *Sharḥ*, 67.

<sup>5</sup> *Sharḥ*, 68.

<sup>6</sup> *Sharḥ*, 67-71.

as standing up or riding one's horse might be included here. In sum, the performance of obligatory and recommended acts are rewarded by God, as is abstention from forbidden and discouraged acts. Neutral acts, meanwhile, incur no reward, just as they incur no punishment.

In modern times, it has become a common practice to speak of the rules of Islamic law in the binary terms of *halāl* (licit) and *harām* (illicit). This is something of an oversimplification in that it tends to conceal the gradations of propriety and impropriety represented in the recommended (*mandūb*) and discouraged (*makrūh*) categories. This has resulted in some cases (e.g., among certain so-called Fundamentalists) in the tendency to appropriate matters that are actually *makrūh* to the forbidden category, or to render acts that are actually *mandūb* obligatory. This latter tendency is further complicated by the fact that among the alternate terms for *mandūb* is "*sunnah*," which has actually come close to eclipsing (especially among the laity) the term "*mandūb*" altogether.<sup>7</sup> The inherent danger in this subtle substitution is that by abandoning an act or practice that is simply recommended, or performing one that is merely discouraged, one stands to be understood as having abandoned the "*sunnah* of the Prophet," a matter of no mean consequences. At the same time, however, the *halāl-harām* dichotomy cannot be deemed wrong. In fact, properly understood, it might even serve a positive function, by obviating the fact, albeit via disjunctive inference, that all actions that are not forbidden must be considered lawful. At any rate, these are all complications that have emerged in modern times. In al-Qarāfi's 7th/13th century Egypt, the distinction between the five legal categories remained not only clear but functional (as shall be seen in further detail in chapter six below).

In sum, the *ḥukm taklīfī* is religio-legal (*sharʿī*): it defines the status of actions in strictly religious terms, concerning itself only with how one who performs such acts is to be received by God in the Hereafter. It is 'positive' (*farʿī*) in that it is connected with concrete practical matters, as opposed to universal principles and theoretical postulates. It is derivative (*ijtihādīyah*) in that it is connected neither with universally agreed upon matters (*mujmaʿ ʿalayh*) nor those that are known, a priori, to be part of the religion.

<sup>7</sup> See, e.g., Muḥammad Abū Zahrah, *Uṣūl al-fiqh*, (Cairo: Dār al-Fikr al-ʿArabi, n.d.), 31. Another term for recommended acts is *mustahabb*.

#### b. *Hukm Wadʿī*

The *ḥukm wadʿī*, including the *sabab*, *sharṭ*, and *māniʿ*, entails not prescriptive commands of the type, "Do!" or "Do not do!" but rather directives of the type, "Whenever X occurs my ruling (*ḥukm taklīfī*) is Y"; or, "If A does not obtain, even if X does occur, my ruling is not Y"; or, "If B obtains, even if X obtains, my ruling is not Y". According to al-Qarāfi, the *ḥukm wadʿī* is referred to as *wadʿī* (i.e., positive), because, "it is something which God has simply posited in His law, in contradistinction to those things which He has commanded His servants to perform. . . ."<sup>8</sup> It is defined as

That which renders a legal ruling (*ḥukm taklīfī*) applicable or inapplicable. That which renders it applicable is the legal cause (*sabab*) [by its presence]; that which renders it inapplicable is the legal prerequisite (*sharṭ*)—by its absence—and the legal impediment (*māniʿ*)—by its presence.<sup>9</sup>

To illustrate: The legal ruling governing theft is that amputation of the hand is obligatory. However, the value of the stolen property must exceed a certain amount, known as the *niṣāb*. In addition, the property claimed stolen cannot have been left out in the open without safe-keeping measurements (*ḥirz*) having been taken, nor can it have been willfully delivered into the possession of the alleged thief.<sup>10</sup> Now, legally speaking, an act of theft constitutes a legal cause (*sabab*), activating the ruling, "amputation of the hand is obligatory." Exceeding the *niṣāb*, however, is a legal prerequisite (*sharṭ*) that must be fulfilled before this ruling can be applied. Similarly, if the property was left in the open or willfully delivered into the possession of another who subsequently absconded with it, the legal ruling, "amputation is obligatory" could not be applied. This is because taking safe-keeping measurements is a legal prerequisite (*sharṭ*) to applying the rule on theft, while willfully delivering property into the hands of another is a legal impediment (*māniʿ*) to the application of this rule. Clearly, of the three *aḥkām wadʿīyah*, the legal cause (*sabab*) is primary; the legal prerequisite (*sharṭ*) and legal impediment (*māniʿ*) come into play only after the initial occurrence of a legal cause is assumed.

It is important, however, not to confuse the legal cause or *sabab* with another important legal concept, namely, the *ʿillah*, or ratio essendi,

<sup>8</sup> *Sharḥ*, 79.

<sup>9</sup> *Ibid.*, 70.

<sup>10</sup> See Ibn Rushd, *Bidāyat*, 2:334.



which lies at the heart of the process of analogy or *qiyās*. Briefly stated, the *'illah* is the underlying reason for which a thing is believed to have been designated a legal cause. This is commonly conceived in terms of how such designation serves the interests of humanity, e.g., the preservation or promotion of life, religion, property, soundness of mind, or, according to some, honor. Where there is a clear connection between the underlying reason and some human interest, "appropriateness," or what the scholars refer to as "*munāsabah*" is said to exist. "Appropriateness," however, is not the *sine qua non* of an *'illah*, and the mere presence of a trait in enough cases that carry a certain ruling may also be sufficient to declare this trait an *'illah*. This is known in the parlance of the *uṣūlīs* as *tard* or *jarayān*.<sup>11</sup> Having said this much, it is important to note that whereas the *'illah*, no matter how it is determined, refers ultimately to the *reason* for which a thing has been designated a legal cause, the *sabab* is the actual thing or legal cause itself. To illustrate: Consumption of wine is said to be a legal cause obliging lashing as a punishment; the underlying reason for this is said to be wine's intoxicating quality. The actual consumption of wine is, thus, a *sabab*, while wine's intoxicating quality is said to be the *'illah* underlying this rule. To be sure, this distinction is somewhat blurred by the fact that, according to the principal of analogy (*qiyās*), lashing as a punishment would extend to any substance in which wine's intoxicating quality, as the efficient ratio, was known to inhere. This gives the impression that it is the quality of being an intoxicant not that of being wine that is the legal cause, since upon the consumption of any intoxicant, not necessarily wine, lashing would be rendered obligatory. This ambiguity notwithstanding, there are a number of other factors upon whose consideration the distinction between the the *'illah* and the *sabab* becomes much more substantive.

To begin with, not every legal cause or *sabab* can be assigned an *'illah*. The sun's passing its zenith, for example, or the appearance of the crescent marking the beginning of Ramaḍān are both legal causes obliging performance of the noon prayer and fasting, respectively. Yet, no plausible reason can be given for why these two occurrences should give rise to such obligations, nor does the lack of a plausible reason detract from the status of either as legal causes.

<sup>11</sup> al-Qarāfi, *Sharḥ*, 398; Ibn al-Qaṣṣār, *Muqadimmah*, 23 recto.

Similarly, there are instances wherein the mere occurrence of a trait identified as an underlying reason will not be sufficient to activate a legal ruling. For example, confusion of children's agnatic relationship is said to be the *'illah* underlying the ruling on adultery. But, as al-Qarāfi points out, were a man to cast away his children at an age when they were too young to know who their father was and they should grow up as a result thereof with no knowledge of their agnatic origins, this would not suffice as a legal cause necessitating the punishment for *zinā*.<sup>12</sup>

The process of identifying the ratio essendi is, properly speaking, a part of *uṣūl al-fiqh*, i.e., theoretical jurisprudence, not *fiqh*, or practical jurisprudence proper. It is, in many cases, necessarily a subjective process, inasmuch as scripture is often silent about the precise reasons underlying its injunctions. Al-Qarāfi, as indicated earlier, does not admit *taqlīd* on matters of *uṣūl al-fiqh*. This would seem to indicate, if I understand him correctly, that, while he admits analogy as a valid legal principal, he does not hold conclusions regarding the *reasons* underlying legal causes to be a part of *madhhab* or protected as such. In fact, this is probably the very meaning of the stipulation that there is no *taqlīd* in *uṣūl al-fiqh*.

## 2. Hijāj/s. Hujjah

The final constituent of al-Qarāfi's "*madhhab*" is the various forms of courtroom evidence (*hijāj/s. hujjah*) upon which judges must rely in order to establish the existence of a legal cause, prerequisite, or impediment. Such forms include, physical testimony or proof (*bayyinah*), sworn oaths (*yamīn*), confession (*iqrār*), and the like.<sup>13</sup> The type of evidence required in each case will depend on the matter under review. For example, in order to establish an act of adultery, four male eye-witnesses are required, or, according to some jurists, eight women. A marriage, on the other hand, may be proven via the testimony of two male witnesses, or one male and two females. A legal cause in cases involving money matters, according to Mālik, may be established on the basis of the testimony of a lone witness joined by the plaintiff's sworn oath.

<sup>12</sup> See, *Sharḥ*, 407.

<sup>13</sup> For a more detailed list of recognized forms of evidence, see below 163, note 64.

## B. "Madhhab Mālik" vs. "Madhhab al-Ummah"

Each constituent of al-Qarāfi's "madhhab" may be the object of consensus (*ijmā'*) or disagreement (*khilāf*). There is consensus, for example, that damaging another's property is a legal cause (*sabab*) obligating reimbursement;<sup>14</sup> but there is disagreement over the status of a single instance of suckling from the same wet-nurse as a legal cause rendering marriage between two people forbidden (on grounds that they are foster relatives); Mālik held that a single instance was a legal cause; al-Shāfi'i held that it was not.<sup>15</sup> Similarly, there is consensus that maintaining an amount of wealth in excess of the minimum quota (*niṣāb*) for one year (*ḥawl*) is a prerequisite (*shart*) to the obligation to pay obligatory alms (*zakāh*).<sup>16</sup> But there is disagreement over whether the presence of a male guardian (*walī*) to represent the bride is a prerequisite for a valid marriage. Abū Ḥanīfa, for example, held that it was not.<sup>17</sup>

Consensus on a constituent of "madhhab" confers upon it the status of the "madhhab of the ummah," or what is referred to as the *mujma' alayh*.<sup>18</sup> The *madhhab* of an eponym is simply his position on any constituent of "madhhab" that is not universally agreed upon, even if he is joined in this by one or more of the other *mujtahid*-Imāms. Thus, for example, the presence of a male guardian as a prerequisite (*shart*) to a valid marriage is the *madhhab* of Mālik, al-Shāfi'i and Aḥmad b. Ḥanbal. It is Abū Ḥanīfa's *madhhab* that the presence of a guardian is not required. It is the *madhhab* of Mālik, however, that the saliva of dogs is not ritually impure. The other three eponyms hold this substance to be *najis*. On this construction, the ultimate effect of attributing corporate status to the *madhhabs* can be clearly seen to be that of conferring a measure of protection upon minority views. This, again, appears to be the primary aim behind al-Qarāfi's advocacy of this view.

## C. "Orthodox Law"

One of the most important effects of al-Qarāfi's restrictive definition of "madhhab" is that it provides working definitions of both law,

<sup>14</sup> Tamyiz, 196.

<sup>15</sup> Tamyiz, 196-97.

<sup>16</sup> Tamyiz, 197.

<sup>17</sup> See Ibn Rushd, *Bidāyat*, 2:7.

properly speaking, and orthodoxy, legally speaking. Law, properly speaking, is limited to legal rules, causes, prerequisites, impediments, and courtroom evidence. Orthodoxy, legally speaking, consists of two tiers: *mujma' alayh* (universally agreed upon), and *mukhtalaf fih* (disputed). This manner of conceptualizing the law introduces two important negative categories, namely, "non-legal" and "illegal". Non-legal describes matters that fall outside the perimeters of "madhhab." Illegal applies to views that fall outside the two tiers of orthodoxy, *mujma' alayh* and *mukhtalaf fih*, even though they may pertain to questions of law properly speaking. This, and especially the issue of legal versus non-legal, has important implications for *taqlid* and, hence, for the scope of corporate protection conferred by the *madhhabs*. For, on this understanding, only that portion of the pronouncements of the eponyms and ancient authorities that is legal in the strict sense becomes the proper subject of *taqlid*, and only that portion of the pronouncements of judges, jurists and government officials that is both legal and orthodox, i.e., *mujma' alayh* or *mukhtalaf fih*, is capable of assuming the status of bona fide law. In other words, by imposing strictures on law as a construct and defining the proper scope and execution of *taqlid*, one is able to set limits to the scope of the *madhhab*'s corporate protection. For al-Qarāfi the idea is of course that by doing so one stands a greater chance of reducing the likelihood of the *madhhab* being taken, innocently or not, as a means to legal tyranny. This emerges perhaps most clearly during the course of his discussion of proper versus improper *taqlid*.

### III. The Limits of Corporate Protection: Proper versus Improper Taqlid

In the course of responding to his imaginary interlocutor's petition for a precise definition of "madhhab," al-Qarāfi takes up the issue of proper versus improper *taqlid*. The problem here turns out to be not so much one of *muqallids* following their Imāms on questions that fall outside the perimeters of *madhhab*; the problem, rather, is that they often fail to distinguish between what is legal concerning a constituent of *madhhab* from what is factual. As a result, they often follow the eponyms on views that are actually matters of fact, which, according to al-Qarāfi, constitutes a violation of "proper *taqlid*". For, according to al-Qarāfi, jurisconsults *qua* jurisconsults are limited to

para-legal issues amounts to no more than dictum and should be treated as such. Statements on such matters should never be accorded the status of unassailable statements of law.

According to al-Qarāfi, the function of a *mujtahid* is analogous to that of a translator-interpreter who translates the meaning of his patron's speech to those who do not understand it. The patron served by the *mujtahid* is God. Those translated to are Muslims who do not understand certain aspects of God's speech. God's speech is of course His revelation.<sup>19</sup> As God's translator-interpreters, however, *mujtahids* enjoy only jurisdiction of law. This is because scripture itself addresses not questions of fact but only questions of law. This is brought out clearly in al-Qarāfi's *al-Furuq*, where he describes scriptural evidence as the sources for determining if a thing carries a particular ruling, or qualifies as a legal cause, prerequisite, impediment, or valid form of courtroom evidence (*adillat mashrū'iyat al-ahkām . . .*).<sup>20</sup> In this capacity, scripture is contrasted to the sources for determining the *occurrence* of these legal causes and the like. Al-Qarāfi refers to these latter as "*adillat wuqū' al-ahkām, ay, wuqū' asbābihā wa huṣūl shurūṭihā wa 'ntifā' mawāni'hā.*"<sup>21</sup> On this distinction, he draws the explicit conclusion that:

The jurisconsult does not give information about the *occurrence* of a legal cause which activates a legal rule; he gives information only on the *status* of a legal rule [including causes, prerequisites, etc.] as a legal rule.<sup>22</sup> (emphasis added)

To illustrate the difference between the sources of law and the sources of fact, al-Qarāfi cites the example of the sun's passing its zenith as a legal cause necessitating performance of the noon prayer. That the sun's passing its zenith is a legal cause is a legal question resolved on the basis of the verse, "And establish prayer at the sun's decline (from its meridian)." [Q.17:83] However, the sources by which one may determine the sun's actual passing its zenith are numerous. Al-Qarāfi cites some fourteen different ways, means, and instruments, including the use of an astrolabe, shade-measuring instruments, and the breath-rate of certain animals. Furthermore, he notes that while the sources of law are finite, numbering around twenty, the sources

<sup>19</sup> *Tamyiz*, 29.

<sup>20</sup> *al-Furuq*, 1:128.

<sup>21</sup> *al-Furuq*, 1:128.

<sup>22</sup> *al-Furuq*, 1:11.

of fact are infinite (*ghayru munḥaṣirah*) and may increase in number with man's increase in technological knowledge and acumen.<sup>23</sup> In other words, while God has stipulated the sources to be relied upon for the determination of every legal rule, He has not, according to al-Qarāfi, done so for the determination of every fact, even those that have legal implications, such as the sun's passing its zenith.<sup>24</sup>

This distinction between law and fact, or between the *status* of things and their actual *occurrence*, has important implications for *taqlid*. For, according to al-Qarāfi, not only are *muqallids* restricted, in following their Imāms, to the five constituents of "*madhhab*," they are also restricted to following the latter in what they say concerning the *status* of a thing as a constituent of *madhhab*, in contradistinction to what is said concerning the actual *occurrence* of this thing. This becomes extremely significant when one considers the fact that much of what is handed down on the authority of the Imāms and ancient authorities contains an admixture of scriptural interpretations and assessments of facts to which these interpretations were applied. This raises the danger on the part of *muqallids* of confusing law with fact and of accepting as authoritative everything that has been handed down. This practice of confusing law with fact is condemned by al-Qarāfi as constituting or leading to improper exercises of *taqlid*.

Know that when we follow the scholars [i.e., the eponyms] via *taqlid* concerning legal causes, we do so only as regards the status of these legal causes as legal causes—not as regards their actual occurrence. There is indeed a difference between Mālik's statement, "Engaging in homosexual relations necessitates stoning," and his statement, "So and so committed a homosexual act." We follow him by way of *taqlid* in this first statement, but not in the second. Rather, this second statement falls into the category of testimony (*shahādah*). If three other upright witnesses testify along with Mālik, the ruling is established; if not, it is not. And in this regard, the testimony of any other upright witness would be absolutely equal to that of Mālik. His status as a *mujtahid* is of absolutely no consequence in this regard. Nor is the status of any of the other *mujtahids*.<sup>25</sup>

<sup>23</sup> For an interesting thesis by a modern scholar based on this notion, see Aḥmad Muḥammad Shākir, *Awā'il al-shuhūr al-'arabīyah: hal yajūzu shar'an ithbātuhā bi al-hisāb al-falākī; baḥth jadīd ḥurr* (The Beginnings of the Arabic Months; Is it Permissible According to the Religious Law to Establish Them on the Basis of Astronomical Computation?: A New Independent Study) (Cairo: Dār al-Hidāyah, 1939).

<sup>24</sup> *al-Furuq*, 1:128.

<sup>25</sup> *Tamyiz*, 201.

Al-Qarāfi complains that there are a number of views that have been erroneously adopted by the followers of the Imāms owing to their failure to distinguish law from fact. He bids his reader to take careful notice of this problem; "for it is a pitfall into which many a jurisconsult has fallen."<sup>26</sup> As an example of such instances of improper *taqlid*, he cites a controversy surrounding the legal status of agricultural lands and public works left standing when Egypt was conquered by the Muslims.

According to Mālik, agricultural lands and public works of lands conquered by force (*anwatan*) are charitable trusts established for the benefit of the generality of Muslims. As such, no private property rights may be obtained over them, nor may they be sold, rented, or made the object of claims of preemption (*shuf'ah*).<sup>27</sup> It was also Mālik's view that Egypt had been conquered by force.<sup>28</sup> Now, based on these opinions, some Mālikī jurists and judges in al-Qarāfi's time ruled that it was forbidden to sell, rent, or claim preemption rights over the agricultural lands and public utilities in Egypt.<sup>29</sup> Al-Qarāfi took exception with this position and argued that it was inadmissible on the following grounds:

Their *taqlid* of him (Mālik) in that the ruling on selling, renting, and claiming rights of preemption over such lands is "forbidden" (*tahrīm*) is a proper *taqlid*; for such is a *taqlid* concerning a legal category (*hukm*).<sup>30</sup>

And their *taqlid* of him in that a territory which has been conquered by force receives this ruling is a proper *taqlid*; for such is a *taqlid* concerning a legal cause's status as a legal cause (*sababiyat sabab*).

But their *taqlid* of him in that forced despoilment and conquest actually occurred in Egypt, or Mecca for that matter, is an improper *taqlid*; for this is a *taqlid* concerning the occurrence of a legal cause. (As such), no rulings are to be based on this *taqlid*, neither in general nor with regard to any specific case.<sup>31</sup>

Mālik's statement, "Egypt was conquered by force," is not a statement of law. It is, rather, a 'para-legal' statement, dictum, as it were,

<sup>26</sup> *Tamyiz*, 206.

<sup>27</sup> *Tamyiz*, 207.

<sup>28</sup> *Tamyiz*, 207.

<sup>29</sup> *Tamyiz*, 211.

<sup>30</sup> In other words, assuming the fact of forced despoilment, selling, renting, and preemption receive the ruling "forbidden," as opposed, e.g., to "neutral," or "disapproved."

<sup>31</sup> *Tamyiz*, 208.

a learned opinion which is not legal in the strict sense even though it may have legal implications. As dictum, it is not a constituent of "*madhhab*" and not, therefore, probative nor protected as orthodox law. It is thus not permissible to follow Mālik by way of *taqlid* in this regard. And purportedly legal extrapolations made on the basis thereof are invalid as statements of law. It is interesting that in some of his writings the modern reformer, Muḥammad 'Abduh, is found condemning a practice that fits precisely al-Qarāfi's description of improper *taqlid*. At one point, for example, 'Abduh cites the lamentable case of a student who petitioned to be admitted to al-Azhar mosque-college as a beneficiary of a particular charitable trust. The question arose as to whether the student's home-country was included among those covered by the *waqf*. The Shaykh of the quarter (*riwāq*) in question was informed that according to the books of geography the student's country was covered. But to this the Shaykh replied, "I do not accept the contents of these books; nay, the only acceptable thing to me is the statement of a jurisconsult (among those who have died) to the effect that this country is included in this geographical designation and that the donor of this *waqf* designated the people of this area as its beneficiaries!"<sup>32</sup>

#### A. *Taqlid and Independent Reasoning*

Related to the problem of improper *taqlid* is the issue of the relationship between *taqlid* and the use of reason. In his discussion of *taqlid*, Professor Schacht had equated the institution with the complete absence of independent reasoning, describing it further as the "unquestioning acceptance of the *doctrines* of the established schools and authorities."<sup>33</sup> "Doctrine" was apparently Schacht's translation for *madhhab*. This rendering, however, at least on al-Qarāfi's scheme, would appear to be overinclusive. For, according to the latter, there are potentially many 'doctrines' espoused by the Imāms and ancient authorities that are not to be included as part of the latter's *madhhabs* and not, therefore, to be made the object of *taqlid*. Similarly, the views of the eponyms and ancient authorities are not, according to al-Qarāfi, to be followed uncritically, but, rather, great care is to be taken to exclude extra-legal "doctrines" from the sanctum of law.

<sup>32</sup> See *al-Islām dīn al-'ilm wa al-madanīyah* (Cairo: Sinā li al-Nashr, 1986), 145.

<sup>33</sup> *Intro*, 71. Emphasis mine.

Finally, since "*madhhab*" does not encompass para-legal matters of fact, independent reasoning, at least in the sense of personal or scientific observation, is not obliterated but assumes its proper place alongside *taqlid*, in many cases as a necessary part of the process.<sup>34</sup> A few examples in this regard will help demonstrate my point.

In *Bulghat al-salik*, a 12th/18th century Mālikī manual still used at al-Azhar mosque-college today, it is stated that the corpses of dead insects that do not have "flowing souls" (*nafsun jāriyah*), i.e., blood does not flow from them when they are crushed, are not ritually impure (*najis*), as dead animals (*maytah*). Among the list of insects given are fleas.<sup>35</sup> Now, on al-Qarāfi's doctrine, to accept that dead animals from which blood does not flow are ritually pure would be a proper exercise of *taqlid*. However, that fleas fall under this category would be determined by observation and or scientific inquiry, both of which a follower of Mālik may have greater knowledge than he. Thus, in determining the status of a substance into which has fallen a dead flea, a *muqallid* would rely both upon *taqlid* and independent observation. By way of *taqlid*, he would deem dead insects that do not have "running souls" ritually pure. By way of independent observation, however, he would determine whether or not fleas fit this description.

Also in *Bulghat al-salik*, under the provisions of *khiyār al-naqīṣah* (option in the event of product defect), the maximum warranty on real estate is given as thirty-six days.<sup>36</sup> If during this period the property shows a defect, the buyer has the right to revoke the sale. This thirty-six day allowance was apparently the result, however, of Mālik's deliberation over how long, in order to be fair to both buyer and seller, a buyer should be given to inspect a property. This is suggested by the fact that, according to the Mālikīs, in contradistinction to the Shāfi'is

<sup>34</sup> I should add here that, on my reading of him, al-Qarāfi also appears to provide a rejoinder to Professor Hallaq, who seemed to argue against the emergence of a régime of *taqlid*. First, in response to the claim that a number of later jurists openly contradicted the views of their eponyms, (*Gate*, 15) al-Qarāfi shows that a *muqallid* may differ with his Imām, e.g., on a view that is para-legal or non-legal, and still remain a *muqallid*. Second, in response to the claim that *qiyās* (which Hallaq sees as "the backbone of *ijtihād*") was practiced throughout the medieval period, al-Qarāfi shows that one may practice *qiyās*, e.g., on the basis of his Imām's *madhhab*—in which case it becomes *takhrīj*—and still remain a *muqallid*. My fundamental difference with Professor Hallaq is that while he appears to consider any use of the tools of *uṣūl al-fiqh* to be an exercise in *ijtihād*, I do not consider this *ijtihād* in the proper sense unless these tools are applied to scripture directly and the resulting conclusions are openly proclaimed as having resulted from such direct application.

<sup>35</sup> al-Ṣāwī, *Bulghat*, 1:17. For the list including fleas, see *ibid.*, 1:19.

<sup>36</sup> *Ibid.*, 2:47.

and Ḥanafis who grant only three days on all products, the warranty period differs depending on the nature of the product: ten days, for example, are allowed for slaves, five for clothing, and so on.<sup>37</sup> Now, that an act of sale grants a buyer a warranty option is a question of law, resolved on the basis of scripture. But that the warranty period should be five, ten, or thirty-six days is a para-legal question resolved more on the basis of individual discretion than anything else. In a sale of a modern office building, for example, where the structure is complex and the expenditures massive, *taqlid* would bind a *muqallid* to acknowledge a warranty period under the provisions of *khiyār al-naqīṣah*. The actual duration of this period, however, would be determined on the basis of his individual discretion, which would allow him to grant what he believed to be a fair and sufficient amount of time.

To be sure, this subtle distinction between law and para-law has significant and potentially far-reaching implications for *taqlid* and legal interpretation, at least in terms of determining how the rules on the books are actually applied. At the same time, however, the meaning and importance of the allowance of independent reasoning should not be stretched beyond its actual constitution. After all, it is, strictly speaking, limited to questions of fact. As such, it cannot be properly considered an exercise in *ijtihād*, or scriptural interpretation, since it is connected not with determining the meaning of scripture but with the assessment of the facts to which scriptural interpretations are to be applied. At the same time, however, by removing quasi- and para-legal issues from the sanctum of law, al-Qarāfi's theory does have the effect of freeing the doctrine of the *madhhab* from the space-time restrictions of past generations. As such, in terms of its impact on the actual shape of the law as it is transmitted and imposed on the community, the admission of independent reasoning, even in this limited capacity, has both real and potentially far-reaching effects. This point emerges perhaps most clearly in al-Qarāfi's discussion of the problem of custom and *taqlid*.

#### B. Custom

A major problem with *muqallids*' reliance upon independent reasoning revolves around those opinions handed down from the *mujtahid*-Imāms

<sup>37</sup> *Ibid.*, 2:50. See also *ibid.*, 2:47 for the position of the Shāfi'is and Ḥanafis.

in which the latter relied on custom. Custom, it seems, by its very nature, blurs the distinction between legal and para-legal and heightens the likelihood of falling into improper practices of *taqlid*. Here it should be noted, incidentally, that al-Qarāfi appears to be concerned not so much with the actions of judges and government officials but with the tendency on the part of muftis, including those of his own *madhhab*, to surrender legal authority to views that are actually not legal. This is brought out clearly in a lively exchange in Qu. no. 39 of *Tamyiz*, which opens with the following question.

What is the correct view concerning those rulings found in the *madhhab* of al-Shāfi'i, Mālik and the rest, which have been deduced on the basis of habits and customs prevailing at the time these scholars reached these conclusions? When these customs change and the practice comes to indicate the opposite of what it used to, are the *fatwās* recorded in the manuals of the jurists rendered thereby defunct, it becoming incumbent to issue *fatwās* based on the new custom? Or is it to be said, "We are *muqallids*. It is thus not our place to innovate new rulings, as we lack the qualifications to perform *ijtihād*. We issue, therefore, *fatwās* according to what we find in the books handed down on the authority of the *mujtahids*."?<sup>38</sup>

Al-Qarāfi's response is emphatic: A ruling remains valid only as long as the custom upon which it was based remains intact and retains the same implications it had at the time the ruling was originally reached.

Holding to rulings that have been deduced on the basis of custom, even after this custom has changed, is a violation of consensus and an open display of ignorance of the religion.<sup>39</sup>

Al-Qarāfi cites several areas of law in which this principle should be observed with particular care: sale, testate wills, oaths, profit sharing, presumption of innocence in civil disputes, divorce. He cites a number of instances where non-observance of this principle had led jurists to giving wrong and outdated *fatwās* which had lost their validity owing to changes in custom. Perhaps the most striking example of this appears on the question of divorce.

In the famous Mālikī opus, *al-Mudawwanah*, which was compiled in the 3rd/9th century, it is stated that if a man says to his wife, "You are forbidden to me" (*anti 'alayya ḥarām*), or "You are devoid (of

<sup>38</sup> *Tamyiz*, 231.

<sup>39</sup> *Tamyiz*, 231.

obligation)" (*anti khalīyah*), or "You are exempt" (*anti barīyah*), or "I have given you to your family" (*wahabtuki li ahliki*), he actioned a triple, irrevocable, divorce, which could not be reversed by any subsequent claim that the initiation of such a divorce was not the intention behind these words. On the basis of this entry, Mālikī jurists in al-Qarāfi's time held that whenever a man uttered such phrases, he set in motion the same legal effects. Al-Qarāfi protested that in 7th/13th century Egypt these statements no longer meant what they used to and that people now used them without the slightest wish or idea that they had any legal implications. It was thus wrong, according to al-Qarāfi, to impute legal force to these words. For, as he pointed out to his colleagues,

You know that you do not find anyone using these phrases today for this purpose. On the contrary, whole lifetimes pass and no one hears anyone say to his wife when he wants to divorce her, "*anti khalīyah*," or "*wahabtuki li ahliki*". No one hears anyone use these phrases today, neither to sever the marital bond, nor to designate the desired number of divorces.<sup>40</sup>

For al-Qarāfi, the distinction was, again, between legal and para-legal. That God has granted husbands the right to initiate divorce is a legal question. It is thus permissible to follow Mālik or any other eponym on this point. But God has not prescribed any particular formula for actioning this right; nor is the legal effect of the words used for this purpose intrinsic to them from the standpoint of language. This evolves, rather, out of the customary practice of the people, from pre-Islamic times down to the present. And this is clearly determined on the basis of independent observation. This is clearly spelled out by al-Qarāfi in *al-Furūq*:

A man's statement to his wife, "You are divorced," does not effect divorce, according to the original meaning of these words (*bi al-waḍ' al-awwal*). Rather, the original meaning of this expression is that he informed (*akhbara*) her that he had divorced her thrice. Ordinarily speaking, these words would not legally bind him in any way. On the contrary, the effect of such a statement would be similar to what occurs were she to ask him about her status after a divorce had occurred and he were to respond, "You are thrice divorced," informing her that divorce had taken place. This is the original effect of these words. And they

<sup>40</sup> *Tamyiz*, 238.

have only come to acquire the ability to bring divorce into actual existence by the fact that custom has converted them from a mere assertion (*khabar*) into an origination (*inshā'*) (*wa innamā šārat tufidu 'l-talāqa bi sababi 'n-naqli 'l-'urfīyī 'ani 'l-ikhbāri ilā 'l-inshā'*). This is how all such (legally binding) formulae work.<sup>41</sup>

The upshot of all of this is that in determining if a particular statement is a pronouncement of divorce, a *muqallid* must look not to the statements of the eponyms but to the contemporary practice of the people, to see which conventions have become predominant or customary among the latter as formulae for divorce. In making such a determination, however, a jurist must be careful not to confuse what is predominate in the minds of the *fuqahā'* with what is predominate among the common people. For a statement may acquire univocal meaning to the mind of a jurist for any number of reasons, including his exposure to legal literature and his specialized training and regular disputation in the law.<sup>42</sup> This however, according to al-Qarāfi, is neither a proper nor sufficient basis for such judgments.

It is not enough that a mufti believes that a particular expression has become customary; for his belief of what has become customary may stem from his training in the *madhhab* and his persistent study and disputation in the law. Rather, for an expression to become customary is for the common people of a particular locale to understand one thing only whenever they hear it, not from one of the *fuqahā'*, but from one of their own and according to *their* use of the expression for this particular purpose. It is this "becoming customary" (*al-ishtihār*) that is sufficient to transform the literal meaning of an expression into a legal meaning based on custom.<sup>43</sup>

Again, al-Qarāfi's discussion on custom is designed to highlight the distinction between law proper and para-law. This is for the purpose of preempting the habit of muftis, judges and government officials who claim, in the name of their respective *madhhabs*, legal authority for views that are genetically not the offspring of scripture. As custom is particularly relevant to issues that affect the everyday lives of commoners, one can only conclude that the threat of legal tyranny

<sup>41</sup> *al-Furūq*, 1:23.

<sup>42</sup> *Tamyiz*, 243.

<sup>43</sup> *Tamyiz*, 234. See also, S. Jackson, "The Second Education of the Mufti: Notes on Shihāb al-Dīn al-Qarāfi's Tips to the Jurisconsult," *Muslim World* vol. 82 no. 3-4 (Jul-Oct. 1992): 205-11.

is in al-Qarāfi's view not limited to the excesses of judges and government officials. Muftis too, including his fellow Mālikis, often commit this indiscretion when they attempt to 'legalize' their personal experiences, individual prejudices and unchallenged assumptions, or when they attempt to carry their legal authority into areas where it was not intended to go.

### C. *Supplementary Dicta*: *Taşarruf*; *Fatwā*

Having established the parallel operation of *taqlid* and independent reasoning, the question arises as to the status of the extra-legal or non-*madhhab* portion of views thus deduced. If, as it has been claimed, the duration of the warranty period in a sale involving *khiyār al-naqīshah*, for example, cannot be established on the basis of *taqlid* but only on the basis of independent reasoning, what can be the status of a jurist's conclusion so deduced? Can it, for example, not resting upon *madhhab* proper, claim the status of bona fide law? If not, what can be its ultimate value and function? It is here that al-Qarāfi's discussion of two forms of supplementary dicta, namely, the discretionary opinion or action (*taşarruf*) and obiter dictum (*fatwā*) comes to the fore. In short, a *taşarruf* or discretionary opinion (or action, if it issues from a judge or government official)<sup>44</sup> is binding, in the sense that it carries the capacity to confer legal rights or impose legal obligations. But it is not unassailable in that it is not protected and may be legally challenged or adjusted. The *fatwā*, meanwhile,—and this is a novel use of the term, to my knowledge unique to al-Qarāfi, which I shall discuss further in chapters five and six below—is, in and of itself, neither binding nor unassailable. At bottom, these two instruments appear to be quite similar, so much so that al-Qarāfi will occasionally identify a single view now as a *fatwā*, now as a *taşarruf*.<sup>45</sup> This occurs almost exclusively, however, in the context of discussing the extra-legal views of judges and government officials, as opposed to those of muftis. The overall aim in doing so appears to be to establish, on the one hand, the privilege of allowing certain non-legal (not to be confused with illegal) views to stand, in order to be able to resolve legal disputes, while reserving the right to dismiss, on the

<sup>44</sup> See chapter six, below, 194-95, for my vindication of "government official," and "government," as translations for *hukkām/s. ḥākim*.

<sup>45</sup> See, e.g., *Tamyiz*, 182.

other hand, other views—mainly but not exclusively those of judges and other government officials (including the Caliph)—as mere dicta. In this way, while recognizing the propriety of judicial and other forms of discretion as a necessary means to filling the inevitable gaps in the law, al-Qarāfi provides a fail-safe mechanism for checking this activity whenever its execution is deemed to be misguided or to have gone too far.

There is, according to al-Qarāfi, only one legal instrument in Islam that is both binding and unassailable: this is the *ḥukm*.<sup>46</sup> As a strictly legal instrument, this *ḥukm* must recline upon one of the two tiers of orthodox law, i.e., the *madhhab* of the Community (*mujma' alyah*) or the *madhhab* of one of the *mujtahid*-Imāms (*mukhtalaf fiḥ*).<sup>47</sup> As both these tiers are restricted, strictly speaking, to questions of law, not only non-legal but also para-legal questions remain essentially beyond their scope. As such, non- and para-legal questions cannot be resolved on the basis of *madhhab*, and conclusions reached in their regard cannot be accorded the status of a binding, unassailable *ḥukm*. Now, the term “non-legal” has already been explained above. By “para-legal” I refer here primarily to legally relevant questions of fact. This includes not simply questions concerning the *existence* of what I referred to earlier as legally relevant facts (e.g., was Egypt conquered by force?; what is a fair warranty period?) but also questions concerning the *extent* to which a legal fact, i.e., a legal cause (*sabab*) may be said to exist. As indicated earlier, the actual existence of legal causes is established by way of valid courtroom evidence (*ḥijāj/s. ḥujjah*). And since judges are credited with jurisdiction of fact, their rulings based on this evidence are rendered binding and unassailable.<sup>48</sup> But legal causes are often of an amorphous or desultory nature. As such, judges frequently confront the problem of having to establish not merely the existence of a legal cause but rather the *extent* to which it gives rise to its corresponding legal rule. Since, however, in addressing such issues judges (or government officials) cannot rely on *madhhab* nor courtroom evidence proper, al-Qarāfi wants to guard against the assumption that their conclusions on such matters constitute unassailable rulings. These constitute, according to him, only discretionary actions, which may be both legally challenged and overturned. By

<sup>46</sup> See below, 193–210 for a more detailed discussion of the *ḥukm*.

<sup>47</sup> This is discussed in further detail in chapter five below.

<sup>48</sup> See chapter five below.

clarifying this subtle but important distinction al-Qarāfi introduces yet another mechanism for checking the tendency—inevitably heightened by the attribution of corporate status to the *madhhabs*—on the part of judges, muftis and other government officials to pass off as bona fide, unassailable law views that are essentially non-legal.

This is the point behind a lengthy discussion in *Tamyiz*, which is precipitated by the following question:

The status of some of the discretionary actions (*taṣarrufāt/s. taṣarruf*) of government officials has become a point of confusion among many jurists: i.e., Do these actions constitute binding rulings (*aḥkām/s. ḥukm*) or not? What, indeed, are the discretionary actions, which do not constitute binding rulings and which it is legitimate for some other official to rescind, if he deems this proper, or (for any non-official) to oppose? For, a valid ruling (*ḥukm*) cannot be overturned, whereas anything that is not a valid ruling can be overturned or opposed. So, what is it that distinguishes the legal ruling (*ḥukm*) from non-rulings so that it can be known that an action or pronouncement is not a binding ruling and may be, as such, looked into (for possible rescension or modification)?<sup>49</sup>

Al-Qarāfi indicates that discretionary actions are of many types. He gives a list of some twenty actions and intimates that this list is not exhaustive. Space prevents of course a discussion of all of these. I shall attempt, however, an examination of enough of them to provide ample insight into the point that al-Qarāfi is trying to make.

In the very first example, al-Qarāfi lists, “contracts, such as buying and selling the property of orphaned girls, absentees and the mentally incapacitated, contracting marriages for those orphans who reach maturity or those women who lack legal competence (*maḥjūr 'alay-hinna*) or who do not have a male guardian to represent them. . . .”<sup>50</sup> None of these actions, al-Qarāfi notes, constitute unassailable rulings. Rather, any other (authorized) official may review them, and if he finds that the orphan’s property was sold for an unfair price, or that the woman was married to someone to whom she was not suited, he may overturn these actions and make the needed adjustments. Interestingly, however, even these latter would not constitute unassailable rulings; for they too could be subsequently challenged or overturned. At the same time, al-Qarāfi is careful to note that there is a sense

<sup>49</sup> *Tamyiz*, 177.

<sup>50</sup> *Tamyiz*, 177–78.



in which discretionary actions may have the effect of a binding ruling. For example, if a judge concludes that an orphan's property was sold for an unfair price and he decides to re-sell this property for a better price, this subsequent action would have the effect of overturning the first sale. It would operate, in other words, as a *hukm* declaring the original sale invalid.<sup>51</sup> But, again, this would not render the second sale itself unassailable, as it too could be subsequently challenged and adjusted.

In his second example, al-Qarāfi lists, "establishing the presence of certain attributes, e.g., establishing the probity or lack thereof (of a witness) before a judge, or (establishing a person's) qualifications to be a prayer-leader or to assume custody of a child or to make a will, etc."<sup>52</sup> None of these actions constitute unassailable rulings. Another judge may reject the testimony of a witness deemed worthy by a previous judge, as he may accept the testimony of a witness previously deemed corrupt. This applies as well to cases involving child-custody, the right to make a will, etc.

Under the third category, al-Qarāfi lists, "establishing grounds for legal entitlements (*asbāb al-muṭālabāt*), e.g., the value of destroyed property . . . or the amount of support payment due a spouse or family member. . . ." None of the conclusions of a judge or government official concerning such matters would constitute an unassailable ruling. Such actions, on the contrary, could be reviewed and, if deemed necessary, adjusted or overturned.<sup>53</sup>

In these examples, as in the majority that follow them, al-Qarāfi appears to be making the point that whether a person is upright or not, or qualified as a child-custodian or not, or whether a suitor is suited to a particular woman or not, or whether a piece of property is worth this amount or that are not, properly speaking, questions of law. They are, rather, para-legal questions, legally relevant, to be sure, in that their resolution is a *sine qua non* to resolving cases involving them. But they themselves are not, properly speaking, legal in the strict sense. As such, in addressing such questions, judges (and other officials) can recline neither upon scripture nor the views upheld in their respective *madhhabs*. They rely, rather, only upon their own discretion, personal observation or inductive inferences from known

<sup>51</sup> *Tamyiz*, 178.

<sup>52</sup> *Tamyiz*, 178.

<sup>53</sup> *Tamyiz*, 179.

or commonly accepted facts. In this capacity, not only are their conclusions subject to error, in the final analysis they can only be founded on a very broad construction of the authority vested in them as judges. I say very broad because judicial authority, as previously mentioned, is supposed to be limited to the establishment of strictly legal facts. On the other hand, the connection between the para-legal and legal aspects of legal disputes is often so inextricable that judges and other officials will end up presenting their conclusions on essentially non-legal questions as unassailable statements of law. This is precisely the liability that al-Qarāfi wants to avoid, as it effectively extends "*madhhab*" beyond its proper boundaries and confers upon judges, government officials and even muftis an authority that is not properly theirs. In effect, his doctrine amounts to an attempt to reduce the effectiveness of the corporate *madhhab* as an instrument of legal tyranny, by denying the possibility of placing its legal authority behind essentially non-legal views. Again, however, it should be noted that al-Qarāfi's strictures divest para-legal views not of *all* authority but simply of *final* authority. And here one should be careful not to force his thesis to logical conclusions he never contemplated. Logically speaking, one could argue that if the para-legal aspects of judicial rulings remain open to contestation, then this aspect of all legal disputes must remain so, thus emaciating the overall effectiveness of the legal process. But this is not at all what al-Qarāfi has in mind. In fact, as I have tried to emphasize, discretionary actions retain, according to him, a certain binding aspect sufficient to settle disputes. A man, for example, whom a judge sees fit to marry to an orphan girl could not be charged with fornication or denied inheritance rights. Even though this action would be based on the judge's para-legal assessment of the man's suitability as a spouse, this marriage would remain, *ceteris paribus*, a valid and binding marriage. What al-Qarāfi wants to avoid is the imputation of final authority to such actions, such that they become permanently unassailable and subject to absolutely no subsequent challenges. This marriage, for example, though legally valid, could still be challenged and, if deemed proper, legally overturned. Whether and when this happens will depend of course on any number of social and other factors operating in society at any given time. A community may settle upon and institutionalize certain para-legal solutions because they happen to suit certain psychological, economic or other needs and aspirations. What al-Qarāfi wants to ensure, however, is that when these psychological and other needs change, the community

will not be left laboring under discretionary measures as if they constituted immutable law. This is why—and this is the context in which one should understand why—discretionary actions are for him potentially ‘binding’ but not unassailable.

Further on in his discussion of discretionary actions al-Qarāfi takes up an interesting group of discretionary actions in which the underlying legal cause is not fixed but of a desultory or amorphous constitution, e.g., cases involving offenses for which there are non-prescribed or discretionary punishments, the so-called *ta'āzīr/s. ta'zīr*. The problem presented by these cases is that, whereas it is agreed that certain offenses constitute legal causes (*asbāb/s. sabab*) warranting non-prescribed punishments, there is often disagreement as to the magnitude of punishment warranted. This is based of course on disagreements over the extent or actual magnitude of the offense itself. The question, however, of the *extent* of a legal cause's existence is not, according to al-Qarāfi, a legal question; it is only disagreement over the *status* of an act as a legal cause that constitutes a *mukhtalaf fih*. Thus, he insists, when a judge sets a non-prescribed punishment, this constitutes not a legal ruling (*ḥukm*) but rather “an earnest attempt to determine the extent of a legal cause's existence (*ijtihād fi sabab*)”.<sup>54</sup> As such, his conclusions may be legally adjusted to fit the crime or even overturned altogether. In other words, al-Qarāfi wants to preempt the habit of mistaking all disputes among the *fuqahā'* as strictly *legal* disputes. This is what he means when he says, regarding certain disputed issues, “this is not a disputed (legal) question (*laysa mukhtalafan fih*)”.<sup>55</sup> In other words, because the views expressed by the *madhhabs* on disputed legal questions are protected as orthodox law, al-Qarāfi wants to prevent that status from being extended to disputed para-legal and non-legal views. Thus he points out that judicial pronouncements on para-legal questions constitute not binding decisions but only discretionary actions. This is different, he notes, from a caliph's decision, e.g., concerning the fate of prisoners of war, or a judge's decision concerning the fate of one who has abandoned prayer; for these are actually disputed questions of law, and the decision handed down in these cases represents the view of one of the *madhhabs*. As such, they are protected as orthodox law. As for matters such as setting discretionary punishments and determining if certain criminals should

<sup>54</sup> *Tamyiz*, 188.

<sup>55</sup> *Tamyiz*, 190.

be executed for certain offenses not directly addressed by scripture, these in no way constitute disputed questions of law. On the contrary, if, before the sentence has been carried out, another judge or official determines the punishment to have been improperly set, he may legally overturn this action and adjust the punishment to fit the crime.<sup>56</sup>

Again, al-Qarāfi's theory recognizes both the need for and the propriety of discretionary powers on the part of judges and other government officials. He entertains a certain anxiety, however, over the fact that such powers bear an obvious potential for being extended beyond their proper bounds. As such, it is necessary, in his view, to devise a means of preventing any unwanted confluence between discretionary and legal authority, such that the former is not passed off, intentionally or otherwise, as the latter. In this regard, al-Qarāfi would appear to constitute something of an exception the general pattern observed by Professor Majid Khadduri, according to whom the experience of medieval Islam demonstrates the fact that man in earlier societies was more habitually inclined to trust the judge than to trust the judicial system as a whole and that, by contrast, “man in the modern age seems to be more inclined to trust ‘government by law’ rather than ‘government by men’ on the grounds that the highly developed legal and judicial systems provide a more objective standard of justice than the quality of justness in the man (or men) who preside over its processes.”<sup>57</sup>

To summarize: Law, or *madhhab*, according to al-Qarāfi, consists of five components: legal categories (*aḥkām*), legal causes (*asbāb*) legal prerequisites (*shurūṭ*) legal impediments (*mawānī'*) and the various forms of courtroom evidence (*ḥijāj*). *Taqlīd*, the institution that holds the *madhhab* together, is valid only as regards a thing's *status* as a constituent of law; it is not permitted where the question is one concerning the *occurrence* of this thing. Between the rules on the books and the outside world in which these rules are applied lies a certain dissonance, which itself must be overcome in order to know if and to what extent a rule applies. Since, however, jurisconsults enjoy only jurisdiction of law, pronouncements by *mujtahids* on such para-legal questions are in and of themselves not authoritative; nor

<sup>56</sup> See *Tamyiz*, 188–91.

<sup>57</sup> M. Khadduri, *The Islamic Conception of Justice* (Baltimore and London: The Johns Hopkins University Press, 1984), 145, nt. 30 (emphasis added).

is it proper, therefore, for a *muqallid* to follow his Imām in this regard; nor is it proper for the laity to attribute legal authority to such views when issued by muftis. A layman may accept as law a jurist's statement, "Hardship is a valid excuse to break one's fast," or "Small amounts of ritually impure substance pollute entire bodies of water"; but he should not accept a jurist's statement, *qua* jurist, "You have a hardship," or "This body of water is impure." This is not to deny that both *mujtahids* and *muqallids* speak to para-legal issues in their attempt to determine if a rule applies. What is important, however, is that neither speaks in this regard *authoritatively*. Rather, where the dissonance between law and fact affects a matter of religious observance (*ibādāt*), its resolution is left to personal observation and individual conscience. Where the matter is one of a conflict of rights between individuals (*mu'āmalāt*), judges are called upon to determine the facts on the basis of valid courtroom evidence.<sup>58</sup> Even here, however, there are limits to the scope of judges' legal authority, and the discretionary powers upon which they must often rely are not a sufficient basis to confer the status of unassailable law upon the non- and para-legal conclusions they reach.

By imposing this very disciplined and narrow definition upon the *madhhab*, al-Qarāfi hopes to avoid the problem of the *madhhab*, as a corporate entity, being taken as an instrument of tyranny, whereby any and all pronouncements of muftis, judges and government officials made in the name of a *madhhab* are rendered, in essence, protected speech. The danger presented by the *madhhab* in this capacity is very similar to a problem brought about more recently by the hegemonic rise of the broad and imprecise neologism, "*islāmī*," and its English equivalent, "Islamic," both of which impute religious provenance and authority to ideas and institutions of little to no relationship to the sources of Islam. On the one hand, Western scholars often use "Islamic" in ways that set up false or misleading similarities and dichotomies between the activities of Muslims and other peoples.<sup>59</sup> "*Islāmī*," on the other hand, is often used by modern Muslims to the same end,

<sup>58</sup> See, overall, chapter six below.

<sup>59</sup> J.L. Abu-Lughod has discussed an aspect of this problem in her treatment of "the Islamic city". See her "The Islamic City—Historic Myth, Islamic Essence, and Contemporary Relevance," *International Journal of Middle East Studies* 19 (1987):155–76. Earlier, Marshall Hodgson had recognized aspects of this problem, noting that some of what had been referred to by scholars as "Islamic" had unquestionably violated the teachings of Islam. As a provisional solution, he offered the use of three distinct terms, "Islamic,"

with the additional function of serving as a powerful and virtually unassailable authenticator of the cultural and other predilections of various Muslim communities.<sup>60</sup> For his part, al-Qarāfi's writings reflect a clear concern over the problem of false and or over-legalization of temporal ideas, which, according to him, was the inevitable result of placing poorly defined constructs and categories at the disposal of the *fuqahā'*, which in turn promoted the habit of claiming legal authority for virtually every insight and predilection they came to possess.

In the final analysis, al-Qarāfi's efforts must be seen, again, as part of his very deep but carefully thought-out commitment to the rule of law. If the *madhhab*, however, was to be looked to as the protector and guarantor of the rule of law, it too would have to be reduced to strictly legal boundaries. This would prove especially critical in the context of a legal order that included a power differential among the competing schools of law. It was, after all, power and its dreaded confluence with authority that prompted al-Qarāfi's constitutional campaign to begin with. The next two chapters will address, thus, the two main repositories of power that concerned al-Qarāfi most: the judiciary and the executive.

"Islamdom" and "Islamicate". This troika was to distinguish between (1) the genetic products of scripture; (2) products of Muslim ingenuity; and (3) products, including hybrids, of the lands predominated by the Islamic religion. See his *Venture of Islam*, 3 vols. (Chicago and London: The University of Chicago Press, 1974), 1:56–60.

<sup>60</sup> For example, the Egyptian modernist, Fahmī Huwaydī, once recalled the remark of a fellow Egyptian supporter of the Iranian revolution to the effect that since the *mullahs* were taking over, everything would be Islamic, including the traffic! It is perhaps no accident, on the other hand, that medieval Muslim writers hardly ever used the word, "*islāmī*". The few examples of its use that I have come across were all in titles to books, apparently for the purpose of maintaining a rhyme or meter.

## CHAPTER FIVE

THE JUDICIARY AND CONFLICT OF LAWS:  
AGAINST THE TYRANNY OF IBN BINT AL-A'AZZ

[I]f independence means only that judges decide cases as they like without pressure from other officials, it is not obvious that an independent judiciary is in the public interest; the people may be exchanging one set of tyrants for another.

—Judge Richard A. Posner<sup>1</sup>

## I. General Introductory

Integral to the preservation of the rule of law is the efficient operation of a legal system's judiciary. In the case of classical Islam, however, it has been suggested, perhaps most affirmatively by the late Professor N.J. Coulson, that the realization of this goal was severely impeded by the judiciary's lack of independence and the sovereign power's ability to dismiss at will any appointment to judgeship and or limit the latter's competence.<sup>2</sup> This preoccupation with the issue of independence, while legitimate on its face, appears at times to peripheralize if not eclipse other considerations which, from the perspective of medieval Muslims, were perhaps equally if not more important. Al-Qarāfi, for example, who, like most medieval jurists, never served as a member of the judiciary, appears far less concerned about the latter's independence than he is about its ability to accommodate multiple and occasionally mutually exclusive interpretations of the law. For him, the very concept of "the rule of law" connotes the ability to countenance a plurality of equally authoritative legal interpretations. Otherwise, mere independence from state coercion could not be looked upon as an effective guarantor against tyranny. For even where the state gave free reign to the judiciary, this would do little to arrest the

tendency toward partisanship among the 'ulamā', which could only result in the displacement of some or another party's views. This perspective is easy to understand, given the power differential among the *madhhabs* in 7th/13th century Cairo along with the monopoly of the lone Shāfi'i chief justice prior to Baybars' reforms. While it might be hoped that legal diversity could be accommodated through certain voluntary acts of inter-*madhhab* tolerance offered on the tacit expectation of mutual reciprocation (e.g., the remaining schools' acquiescence in the face of such Shāfi'i privileges as monopoly over the supervision of religious endowments (*awqāf/s. waqf*) and the trusteeship of orphans), the very best such an arrangement would produce would be a conspicuously precarious *modus vivendi*. It could hardly prove satisfactory for the politically weaker schools, at least not on any permanent basis. Ultimately, the enterprise of managing legal diversity would require a solution that was at once legally probative and, at the same time, capable of confirming the propriety of mutual recognition in the eyes of the legal community as a whole.

It has been suggested that it was the exclusivist policies of the Shāfi'i chief justice, Ibn bint al-A'azz, that triggered al-Qarāfi's thinking on the problem of power and the rule of law to begin with.<sup>3</sup> In the present chapter, I shall limit my discussion primarily to al-Qarāfi's response to this particular problem, though the broader implications for the history of Islamic law will also be observed. In short, al-Qarāfi's solution resides in the argument that as long as the ruling of a Mālikī (or any other) judge is endorsed in the Mālikī (or other recognized) *madhhab*, there is no justification for attempting to second-guess let alone overturn it. For what the Mālikīs endorse within their school is, by consensus, orthodox. As such, to overturn a Mālikī judge's ruling would constitute a violation of consensus and orthodoxy. This is not to deny a Shāfi'i, or any other jurist, the right to criticize Mālikī views when they appear in the form of *fatwās*; for *fatwās* are by definition both non-binding and subject to challenge. But the basic constitution of a judicial ruling (*ḥukm*) is that it is both binding and *unassailable*. As such, to challenge a Mālikī view when it appears in the form of a judicial decision is to violate its basic constitution as a *ḥukm*.

My treatment of al-Qarāfi's response to Ibn bint al-A'azz and exclusivism in the judiciary will also include an analysis of his perception

<sup>1</sup> *The Problems of Jurisprudence* (Cambridge Mass.: Harvard University Press, 1990), 6.

<sup>2</sup> See, for example, *History*, 121–23; 132. For an alternative to the view on the sovereign's desire to limit the judicial competence, see below, 195–96.

<sup>3</sup> See above, 67.

of the genesis of this problem. This will provide additional insight into the broader context within which he formulated his thought. In particular, it will be seen how his analysis of and reaction to this problem reflects what appears to have been another major development in the Islamic legal tradition, namely, the separation of the jurisdictions of law and fact and their ultimate redistribution among judges and jurisconsults. This occurs seemingly as a further manifestation of the ultimate ascendancy of *taqlid*. In fact, it will be seen that both the content and the intended impact of al-Qarāfi's proposals could hardly have come into being, let alone found effective application, except under a régime of *taqlid*.

In his attempt to provide a solution to the problem of exclusivism in the judiciary, al-Qarāfi will also be forced to confront an additional liability engendered by his attribution of corporate status to the *madhhabs*. Simply stated, if the *madhhabs* in general are to be treated as corporate entities, this must extend as well to the *madhhab* in power. But if this is so, the actions of a Shāfi'i chief justice who refuses to implement rulings of other judges must also be protected, since in doing so he acts in accordance with a view upheld in the Shāfi'i school.<sup>4</sup> In an attempt to circumvent this filiation of facts, al-Qarāfi will be seen theorizing and 'scaffolding' in a fashion perhaps characteristic of post-formative jurisprudence as a whole. Specifically, he will recycle the juristic principle, "giving precedence to the specific over the general," (*taqdīm al-khāṣṣ 'alā al-'āmm*) along with the generally recognized distinction between the report (*khābar*) and the origination (*inshā'*). To this will be added the proposition that actions involving individuals who hold conflicting views be judged according to the perspective of the initiating party. This legitimizes a Shāfi'i's interacting with a Mālikī, even on issues concerning which he would not interact with a fellow Shāfi'i, because he acknowledges the permissibility of the act according to the *madhhab* of Mālik (i.e., as the *madhhab* of the initiating party). These issues will all be treated toward the latter part of this chapter. In the interim, I would like to return to al-Qarāfi's perception of the genesis of the problem of judicial exclusivism for the light it sheds on the internal development of the Islamic legal system and the manner by which this informed al-Qarāfi's approach overall.

<sup>4</sup> See above, 67.

## II. *The Fatwā versus the Ḥukm: "An Extremely Subtle Distinction"*

The exclusivism of chief justice Ibn bint al-A'azz is said to have resided in his refusal (*tawaqquf*) to implement rulings by deputy-judges (*nuwwāb/s. nā'ib*) whenever these failed to meet his approval.<sup>5</sup> In analyzing this problem, al-Qarāfi intimates what appears to have become a standard feature of the judicial process as a whole, namely, the effective division of competences between judges and jurisconsults, the former being restricted to questions of fact, the latter retaining jurisdiction of law. This meant that in terms of the legal (as opposed to the factual) content of their rulings, judges were bound to the views upheld in their respective schools. When a judge chose as his ruling a *fatwā* endorsed in his school, his act of choosing transformed this view from a *fatwā* into an unassailable *ḥukm*. It was, according to al-Qarāfi, failure to recognize the difference between this view's former status as a *fatwā* and its new status as a *ḥukm* that resulted in the illegal practice of challenging and possibly overturning valid rulings, these rulings being now treated as if they were still *fatwās*. The solution, then, from al-Qarāfi's perspective, lay in highlighting the fact that though in one manifestation *x* might constitute a *fatwā* and be treated as such, in another manifestation, i.e., as *X* (capital intended) it constituted a *ḥukm* whereupon it could not be treated as *x*, despite the fact that *x* and *X* were substantively identical.

The first insights into al-Qarāfi's perception of this problem begin upon the realization that the rulings that had been rejected by the chief justice were sound according to the school of the issuing judge; Ibn bint al-A'azz had simply refused to register (*yusajjil*) them because they contradicted his Shāfi'i view. This is unequivocally confirmed by the report of Ibn Kathīr, himself a Shāfi'i, who in citing the reforms of Baybars in 663/1265, writes the following:

In this year al-Zāhir (Baybars) appointed in Egypt judges from the remaining schools of law, all of whom were authorized to appoint judges in the various districts as the Shāfi'i judge had done. . . . This occurred on Monday 22 Dhū al-Hijjah at *dār al-'adl*. And the reason behind this action was the repeated instances of refusal (*kathrat al-tawaqquf*) on the part of chief justice Ibn bint al-A'azz to enforce rulings that went

<sup>5</sup> See above, 65.

against the view of the Shāfi'i school while agreeing with the view of one of the other schools.<sup>6</sup>

As might be expected, al-Qarāfi points out that the chief justice's action was thoroughly illegal. For according to consensus (*ijmā'*), substantively valid rulings in cases involving disputed (*mukhtalaf fih*) questions of law were incontrovertably immune to any and all challenges. According to al-Qarāfi,

It is the consensus of all the Imāms, without exception, that God's ruling in cases involving disputed questions of law is the ruling handed down by the presiding judge. . . . And it is incumbent upon the entire Community to submit to the ruling of this judge. And it is forbidden for anyone to overturn it.<sup>7</sup>

The real key, however, to understanding al-Qarāfi's perspective lies in the realization that he traces the chief justice's indiscretion not to a failure or unwillingness on his part to recognize this basic rule but rather to a failure to distinguish the legal opinion (*fatwā*) from the judicial decision (*ḥukm*). Whereas, al-Qarāfi argues, those who understand the difference between these two instruments know that judicial decisions terminate disputes both among the litigants and the *fuqahā'*,

because this distinction is extremely subtle, so subtle that I have found no one who is able to pinpoint and explicate it with precision, some have disagreed with the basic rule [against challenging decisions] and they have not required that the decisions of judges in cases involving disputed questions of law be enforced.<sup>8</sup>

Because of this misunderstanding, al-Qarāfi would go on to observe,

one (or some) of the Shāfi'is has taken up the view cited in one (or some) of their books on the authority of one (or some) of their partisans to the effect that when the ruling of a judge is brought before one who disagrees with it, the latter is neither to enforce it nor overturn it; he is simply to leave the matter as it is (*yatrūkuhu 'alā ḥālih*).<sup>9</sup>

<sup>6</sup> *al-Bidāyah wa al-nihāyah*, 13:245. It should be recalled that al-Qarāfi's *Tamyiz* was composed sometime around 660/1262, i.e., prior to these reforms by Baybars and, hence, in the midst of the problem of Ibn bint al-A'azz. For more on the Ibn bint al-A'azz affair, see S.A. Jackson, "Primacy," 52-65.

<sup>7</sup> *Tamyiz*, 28.

<sup>8</sup> *al-Furūq*, 2:106.

<sup>9</sup> *al-Furūq*, 2:104. See also above, 65-67.

This position, as indicated earlier, amounted to overturning the rulings in question, since it meant that they would not be registered. It is by exploring, however, the question of how and why the distinction between the *fatwā* and the *ḥukm* comes to be so imperceptible that one begins to appreciate al-Qarāfi's perception of the problem and its genesis. It is also here that one comes to appreciate the depth and subtlety of al-Qarāfi's analysis and response.

#### A. *The Judicial Function under the Régime of Taqlid*

I first entered my study of al-Qarāfi under the influence of a number of ideas gathered from primary and secondary sources on Islamic law. Chief among these was the notion that Islamic law constituted a system of "judge-made law," "Cadi-justice," as it had been called by some.<sup>10</sup> Emile Tyan, for example, in the most extensive work on judicature to date had written,

. . . l'inexistence d'un organe de legislation, devait avoir sa repercussion sur le statut juridique du kadi et contribuer dans une tres large mesure a faire de lui, non pas simplement un organe d'application de la loi, mais aussi un organe de creation du droit.<sup>11</sup>

C'est un principe qui a toujours ete proclame, dans l'Islam sunnite, qui la source premiere de toute loi se trouve dans le livre saint, le Coran, et dans la Sunna du Prophete et l'accord de la communaute (Ijmā'). Par consequent, on ne reconnaitre a personne, pas meme au calife, un pouvoir de legislation. Il devait resulter necessairement de la une extension exorbitante du pouvoir d'interpretation, surtout aux premiers siecles, camouflant un vaste et profond travail d'adaptation et creation, auquel les magistrats charges d'attributions judiciaires devaient participer dans une tres mesure.<sup>12</sup>

<sup>10</sup> "Cadi-justice" was a phrase popularized by the German sociologist, Max Weber, at whose hands it came to be used as a catch-all for systems where judges actually interpret the law, often abusively. See, for example, Edgar Bodenheimer, *Jurisprudence: the Philosophy of the Law* (Cambridge, Mass.: Harvard University Press, 1962), 116-20, where he discusses the diatribes of the Legal Realist, Jerome Frank, who described American law as a system of Cadi-justice in disguise. See also, John Makdisi, "Formal Rationality in Islamic Law and the Common Law," *Cleveland State Law Review*, vol. 34, no. 1 (1985-86): 97-112, esp. 105-6; Lawrence Rosen, *The Anthropology of Justice* (Cambridge: Cambridge University Press, 1989), 58ff., esp. 59, where Weber's *kadijustiz* is cited.

<sup>11</sup> Tyan, *Histoire*, 1:107.

<sup>12</sup> *Ibid.*, 1:12-13.

In addition to such analyses as these, there was the locus-classicus of modern scholarship asserting an endemic "separation between theory and practice". As one leading scholar put it,

Inherent . . . in Islamic law—to use the term in the sense of the laws which govern the lives of the Muslims—is a distinction between the ideal doctrine and the actual practice, between the Shari'ah law as expounded by the classical jurists and the positive law administered by the courts. . . .<sup>13</sup>

On these views, I proceeded on the assumption that Muslim judges interpreted scripture, deduced the rules therefrom, and applied these, thus deduced, to cases before them. Though perhaps guided by the interpretations upheld in the schools of law, the content of a judge's ruling was ultimately his own product and might differ substantially from the rules on the books, whence Professor Coulson's "distinction between the ideal doctrine and the actual practice". This notion of the judicial function was confirmed by what I found in medieval Muslim manuals on judicature from the period prior to al-Qarāfi. These manuals all stipulated that one had to be a *mujtahid*, i.e., qualified to interpret scripture directly, in order to serve as judge. To my mind, this meant that judges were charged with the task of interpreting scripture, unconstrained by the views upheld in the respective schools of law. The stipulation that they be *mujtahids* was designed, as I understood it, to ensure the quality and correctness of their interpretive results. Taken as a whole, all of this gave the impression that the *fatwā* and the *ḥukm* were two tenuously related entities operating in two tenuously related orbs.

On this understanding, however, I was not able to make sense of al-Qarāfi's characterization of the problem. For if both judges and muftis interpret the law, the distinction between a *fatwā* and a *ḥukm* must be essentially that the interpretation of the judge is binding while that of the mufti is not. On such an understanding, it would be conceivable for a problem to result from a failure to acknowledge the authority of certain judicial interpretations, but this would not at all explain al-Qarāfi's attribution of Ibn bint al-A'azz's exclusivism to a failure to distinguish the *fatwā* (the interpretation of the mufti) from

<sup>13</sup> Coulson, *History*, 3. This doctrine of the separation between theory and practice is cited also in Tyan, *Histoire*, 1:9, where he attributes it to Snouck Hurgronje (1857–1936). It can also be found in Schacht, *Intro.*, 2, and *passim*.

the *ḥukm* (the interpretation of the judge), particularly where Zayd is clearly distinguishable as judge and 'Amr as mufti. By analogy to the American system (where judges actually do interpret law), it would make sense to attribute such a problem to a failure on the part of some local authorities to recognize the authority of Supreme Court rulings; but this would not blur the distinction between such rulings and the legal opinions given by a lawyer or presented in a law journal; nor would it justify describing the difference between the judicial decision and the legal opinion as being "so subtle that I have found no one able to pinpoint and explicate it with precision."<sup>14</sup>

Meanwhile, further examination of works on judicature written closer to the period of al-Qarāfi and after appeared to indicate that a fundamental change had befallen the judicial function. The role of the judge had come to reside in the simple act of determining the *existence* of facts, which had been identified as legal causes, prerequisites and impediments and which activated or blocked the application of specified legal rules (*ahkām/s. ḥukm*). This was done on the basis of the judge's interpretation of the courtroom evidence (*ḥujjah*) presented in each individual case. The identity of these legal causes and rules, however, had been predetermined by the juriconsults of the *madhhabs*. In other words, on questions of law, judges did not interpret, they merely chose. At its origins, the interpretation chosen by the judge was of course a *fatwā*. It was in the failure, according to al-Qarāfi, to recognize the effect of the judge's act of choosing on this theretofore *fatwā* that led to the problem of challenging and overturning judicial rulings. In fact, he states explicitly at one point that he composed *Tamyiz* entirely for the purpose of clarifying the fact that a judge's act of choosing a particular disputed (*mukhtalaf fih*) view changes that view's status from assailable to unassailable:

This [the judge's act of choosing] constitutes the difference between the principle of controversial status (*khilāf*) before a judge's decision and the very same principle after a judge's decision. And whoever wishes to comprehend this difference should consult *Kitāb al-iḥkām fi al-farq bayna al-fatāwā wa al-aḥkām*. For that work is devoted entirely to a discussion of this difference alone. . . .<sup>15</sup>

<sup>14</sup> *al-Furūq*, 2:106.

<sup>15</sup> *Ibid.*

The following information is presented as a backdrop against which to interpret a hypothetical case I have constructed which I believe to illustrate the nature and mechanics of the problem.

According to the Mālikī school, a husband's insolvency and resulting inability to support his wife is grounds for the wife to obtain an annulment (*faskh*). The Mālikīs add, however, an impediment (*māni'*) to the wife's right to exercise this option: If at the time she agrees to marry she is aware that her husband is indigent and may not always be able to support her and she, despite this knowledge, agrees to marry him, she may not subsequently petition for an annulment on grounds of his inability to support her.<sup>16</sup>

According to the Shāfi'ī school, the wife of a man who is unable to support her enjoys an unconditional, straightforward right to annulment. This is unaffected by whether or not she had knowledge of his real or potential indigence at the time of marriage.

Even if she accepts his insolvency before or after their marriage, she retains the right to annul the marriage on grounds of insolvency, because the harmful effects of his inability to support her are of a recurrent nature. . . .<sup>17</sup>

According to the Ḥanafīs, a husband's insolvency in no way confers upon his wife the right to an annulment. Rather, the Ḥanafīs maintain, the wife may petition the court to make an assessment of how much support payment she is due and then permit her to make loans in this amount with the husband as the guarantor. In other words, repayment of any loans becomes a legal obligation upon the husband, not the wife.<sup>18</sup>

There is disagreement in the Ḥanbalī school. Ibn Qudāmah indicates that the narrations on the authority of Aḥmad b. Ḥanbal support the position of the Mālikīs. He himself, however, comes out in favor of the position of al-Shāfi'ī, endorsing the view that since the right

<sup>16</sup> See *Tamyiz*, 146–7; Ibn Qudāmah, *al-Mughni*, 7:577.

<sup>17</sup> See Shams al-Dīn Muḥammad ibn Aḥmad al-Sharbīnī (d. 977/1570), *al-Iqnā' fi ḥall al-fāz abī shujā'*, 2 vols. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1359/1940), 2:146–7. The *Iqnā'* is a commentary on the famous Shāfi'ī manual, *Ghāyat al-ikhtisār*, of Aḥmad b. al-Ḥusayn ibn Aḥmad al-Ḥafṣānī, better known as Abū Shujā' (533/1138–593/1197). See al-Ziriklī, *al-A'lām*, 1:116–7.

<sup>18</sup> See 'Abd al-Ghanī b. Ṭālib b. Ḥamādah b. Ibrāhīm al-Ghunaymī, *al-Lubāb fi sharḥ al-kitāb*, 4 vols. ed. Muḥammad Muḥyī al-Dīn 'Abd al-Ḥamīd (Beirut: Dār al-Ḥadīth, 1399/1979), 3:96. The *Lubāb* is a commentary on the famous Ḥanafī manual, *al-Kitāb*, of Abū al-Ḥusayn Aḥmad b. Muḥammad al-Qudūrī al-Baghdādī (362/973–428/1037). See al-Ziriklī, *al-A'lām*, 1:212.

to financial support recurs daily, it cannot—unlike dowry, which is a onetime right—be permanently forfeited.<sup>19</sup>

Now, two men, a husband and a father-in-law, both tattered and soiled, enter the Ṣāliḥiyah *madrasah* in pursuit of a *fatwā* concerning the case of the man's wife (the father-in-law's daughter), who is threatening to seek an annulment. Upon their entry they find two muftis seated, engaged in a discussion. They approach the two, the husband states his case, and they await a response. Before responding, the first mufti inquires about the man's financial state: "Pardon me for saying so, but you appear to be of that class of people whose periodic inability to support their spouses is known and perhaps expected. Have you of a sudden fallen upon bad times, or is this your normal and apparent state?" "I am a poor tiller of farmland," replies the man. "Whenever there is land to till, we work and earn our living; when there is not, God is our only provider." "And your wife knew of this at the time of your marriage, did she?" "Yes," replies the man, "as does everyone else." "Then go in peace, and do not worry," the mufti advises him. "For under such circumstances, your wife has no right to annulment on grounds of your temporary inability to support her."

The husband happily departs, at which time the father-in-law exclaims in a frenzy, "But we are migrating north, and this man cannot support my daughter! From where is she to survive?" "Exactly!" interrupts the second mufti. "And for this reason the Lawgiver has legislated the right to annulment under such circumstances, regardless of the husband's financial state at the time of marriage. Gather your witnesses and have your daughter present her case at court. For the law of God provides amply for such circumstances: This marriage is to be annulled."

The father-in-law departs. Upon his exit the Shāfi'ī and Mālikī muftis plunge into a heated debate over the case of the two men and the propriety of the *fatwās* they received. Finally, the Mālikī mufti exclaims, "I am aware of the Shāfi'ī position, as I am aware of the merits of the arguments adduced in support of their view. But I am the judge in this district, by appointment of the chief justice. And I subscribe to the Mālikī view on this question. If this woman brings her case before me and her husband provides ample proof of her knowledge of his indigence at the time they married, I shall flatly deny her petition and uphold their marital bond."

<sup>19</sup> *al-Mughni*, 7:577. Ibn Qudāmah's reasoning is an interesting display of *qiyās*.



Meanwhile, the wife's family has convinced her that her future and the future of her children is in jeopardy and that she must seek an annulment. She presents her case at court, and, as promised, the Mālikī judge denies her petition. Her father, now shocked and dismayed, frantically seeks out the Shāfi'ī mufti and informs him of what has happened. The latter is appalled at hearing this and immediately issues a *fatwā* in which he states that the wife has an absolute, undeniable right to annulment. He informs the man that the Mālikī judge's ruling is inadmissible and that he shall speak to the chief justice personally about having this ruling overturned.

Now, al-Qarāfi's point is that the action of the Shāfi'ī mufti at the Ṣālihiyah (before the case came to trial) was legitimate. For the first statement by the Mālikī mufti was a *fatwā*. As such, its status was not affected by the Shāfi'ī's espousal of his own view. But in the second instance, after the case had been tried, the Shāfi'ī mufti erred and in doing so violated consensus. For the second statement of the Mālikī, as a judge, was not a *fatwā* but a *ḥukm*. It was thus illegal for the Shāfi'ī to challenge this view in any way, as it would be illegal for the chief justice to overturn it subsequently. But the reason the Shāfi'ī committed this infraction—and this is the crux of the matter—is not that he does not recognize the consensus prohibiting the challenging and overturning of judicial rulings. The reason he commits this infraction is that the *content* of the Mālikī judge's *ḥukm* is the same as the *fatwā* of the Mālikī school. The Shāfi'ī mufti simply failed to recognize a difference in status between the two. In failing to recognize the effect of the judge's act of choosing on the theretofore *fatwā* of his school, he continued to treat this ruling as if it were still a *fatwā*.

### III. From Ijtihād to Taqlid

#### A. Ijtihād Required of all Judges

Again, al-Qarāfi's perception of the cause and genesis of the problem he describes assumes a fully operative régime of *taqlid*, wherein judges are bound to their respective *madhhabs* for the legal content of their rulings. While it is beyond the scope of this study to review all works on judicature written before and after the period of al-Qarāfi, there are a number of major works on the subject that should provide a

reasonably accurate sketch of the judicial function between the 5th/11th and 8th/14th centuries. I shall rely on these in tracing the evolution in the judicial function from the régime of *ijtihād* into the régime of *taqlid*. In short, I will show that the judicial function evolved from one in which judges enjoyed both jurisdictions of law and fact into one in which judges were restricted to interpreting facts, legal interpretation proper being left to the jurisconsults of the *madhhabs*.

According to the two *al-Aḥkām al-sultāniyah* works of the 5th/11th century Shāfi'ī, al-Māwardī (d. 450/1058), and the Ḥanbalī, Abū Ya'ālā (d. 458/1065), both of whom served as judges in Baghdād, a necessary qualification for a candidate for judgeship was that he be a *mujtahid*. This meant, according to al-Māwardī, that he be

... knowledgeable of the rules of the religious law. And his knowledge of these includes knowledge of their sources (*uṣūluḥā*) and training in the various branches of positive law. And the sources of the rules of the religious law are four: (1) knowledge of the Book of God, such that yields a correct understanding of the abrogating and abrogated, the univocal and allegorical, the universal and specific, and the summary and detailed verses it contains; (2) knowledge of the Sunnah of the Prophet—God's blessings and peace be upon him—including his statements and his actions, the manner in which these have been reported, i.e., via many incongruent channels (*tawātur*), or via small numbers of isolated reporters (*āḥād*), their status as sound or unsound, and whether or not they were connected with a particular event; (3) knowledge of the manner in which the Pious Ancestors understood the law, including both that upon which they agreed unanimously and that upon which they differed, so that he can follow them in their consensus, and exercise his personal judgment (*ijtihād*) in matters on which they differed; (4) knowledge of analogy (*qiyās*), which entails extrapolating from enunciated and agreed upon maxims rulings for specific cases not spoken to directly by the sources. This is in order that he be able to find his way to knowledge of the correct ruling for cases confronting him, and that he be able to distinguish truth from falsehood. If he obtains perfect mastery of these four sources, he becomes thereby a *mujtahid*. And it becomes then permissible for him to give legal opinions and to preside as judge, as it becomes permissible for one to petition him for a legal opinion or to serve as judge. But if he is deficient in any of these in any way, he is not to be considered a *mujtahid*, and it is neither permissible for him to give legal opinions nor to serve as judge.<sup>20</sup>

<sup>20</sup> al-Māwardī, *al-Aḥkām al-sultāniyah*, 63. For an earlier version of these qualifications,

In his version of *al-Ahkām al-sultānīyah*, Abū Ya'la cites the same qualifications and explains them in almost the exact same terms.<sup>21</sup> Elsewhere, in *Adab al-qādi*, a work devoted exclusively to judicature, al-Māwardī confirms these requirements more emphatically and devotes an entire section to the invalidation of *taqlid*: "*al-taqlid wa fasāduh*."<sup>22</sup>

Al-Māwardī insists that it is incumbent upon all judges to rule according to their own *ijtihād*, even if they are followers of a particular school, such as that of al-Shāfi'i or Abū Ḥanifa.<sup>23</sup> If a judge's interpretation leads him to a conclusion that contradicts that of his Imām, he is to discard the view of the latter and rule according to his own lights.<sup>24</sup> Al-Māwardī cites an objection by "some of the jurists," to which "some of our [Shāfi'i] partisans have given support," to the effect that the schools of law have settled down (*qad istaqarrati 'l-yawma madhāhibu 'l-fuqahā'*) and it is therefore not permissible for a judge to go against the view of his school.<sup>25</sup> He also cites a view attributed to Abū Ḥanifa, according to which judges have the choice of either ruling on the basis of their own scriptural interpretations, or according to the interpretation of one more versed in the law, either from among their contemporaries or bygone members of their school.<sup>26</sup>

Al-Māwardī rejects these views and insists that under no circumstances is it permissible for a judge to follow another scholar by way of *taqlid*, even if this other should be more knowledgeable than he.<sup>27</sup> If a judge does issue a ruling based on *taqlid*, this ruling, according to al-Māwardī, is to be rejected as null and void, even if it is substantively sound.<sup>28</sup> Among his proofs, he adduces a hadith of the Prophet in which the latter is reported to have sent the Companion, Mu'adh b. Jabal, to Yemen to serve as judge, asking him, "On the basis of what shall you rule?" "The Book of God," replied Mu'adh. "And if

see Abū Bakr Aḥmad b. 'Umar b. Māhir al-Shaybānī, better known as al-Khaṣṣāf, *Kitāb adab al-qādi*, ed. Farhat Ziadeh (Cairo: American University Press, 1978), 29.

<sup>21</sup> Muḥammad b. al-Ḥusayn b. Muḥammad b. Khalaf b. Aḥmad b. al-Farrā', better known as Abū Ya'la, *al-Ahkām al-sultānīyah*, ed. Muḥammad Ḥāmid al-Fiḳī (Beirut: Dār al-Kutub al-'Ilmiyah, 1404/1983), 62–63.

<sup>22</sup> al-Māwardī, *Adab*, 1:269–73.

<sup>23</sup> *Ibid.*, 1:644.

<sup>24</sup> *Ibid.*, 1:644–45.

<sup>25</sup> *Ibid.*, 1:645.

<sup>26</sup> *Ibid.*, 1:645–46.

<sup>27</sup> *Ibid.*, 1:647.

<sup>28</sup> *al-Ahkām*, 63.

you do not find an answer there?" "Then by the Sunnah of God's messenger." "And if you do not find an answer there?" "Then I perform *ijtihād*, and I spare nothing in the cause thereof." To this the Prophet is said to have responded, "Praise be to God, Who has guided the messenger of the messenger of God to that which pleases the messenger of God."<sup>29</sup>

This, argued al-Māwardī, was proof positive that a judge must exercise his own independent judgment, and that once he does so it is not permissible for him to follow anyone else.<sup>30</sup> Additional arguments adduced in support of this position include the following.

It is not permissible for anyone who is able to rule according to his own independent judgment to rule according to the *ijtihād* of another, by analogy to a situation wherein the judge himself is the most knowledgeable.<sup>31</sup>

And it is not permissible for those who share the ability to exercise independent judgment to follow each other by way of *taqlid*—even if one of them is more knowledgeable than the other—by analogy to the case of exercising independent judgment in order to find the direction of prayer.<sup>32</sup>

And because for any *mujtahid* for whom it is not permissible to follow an equally knowledgeable counterpart by way of *taqlid*, it is not permissible to follow, by way of *taqlid*, a counterpart who is more knowledgeable, just as is maintained in the case of the mufti.<sup>33</sup>

And because the *taqlid* that is impermissible for the mufti is impermissible for the judge, equal in effect to following another by way of *taqlid* in the face of univocal scripture.<sup>34</sup>

Al-Māwardī accepts the view that judges should seek the counsel of knowledgeable jurists on difficult questions.<sup>35</sup> But this counsel, he maintains, is only advisory, and in the end a judge must interpret the law according to his own lights.

He is not commanded to seek counsel in order to follow him via *taqlid*. Rather, he is commanded to do so for two reasons only: (1) in order

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, 1:647–48.

<sup>32</sup> *Ibid.*, 1:648.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* See also *ibid.*, 1:269–73.

<sup>35</sup> *Ibid.*, 1:260–61.

to gain access to probative evidence not in his possession; [e.g.] the one giving counsel may know of a Sunnah which has escaped his attention; and (2) so that he may gain a clearer understanding of the methods of *ijtihād*, by debating with them, and so that he may gain the keys to unlocking subtle meanings. For in the coming together of ideas via debate, clarification and discovery reach their apogee. It is for these reasons (alone) that he is commanded to seek counsel.<sup>36</sup>

Al-Māwardī's distaste for allowing *muqallids* to serve as judge is also echoed in the *al-Mustasfā* of al-Ghazālī (d. 505/1111). However, having lived a generation later, al-Ghazālī could not deny that non-*mujtahids* might and did ascend the bench. His attitude, however, was that this was only "out of the necessity of the times."<sup>37</sup> Normatively speaking, a judge had to be a *mujtahid*.<sup>38</sup>

The Ḥanbalite, Ibn 'Aqīl (d. 513/1119) also indicates that *ijtihād* was a requirement for judges, at least up to his time. In his *Kitāb al-funūn*, he records a disputation between himself and a Ḥanafī opponent over the possibility of the extinction of *mujtahids*. The Ḥanafī had opened with the following pointed question.

"Where are the *mujtahids*? This question closes the gate of judgeship (*bāb al-qaḍā'*)." To this Ibn 'Aqīl retorts,

[I]f the gate of judgeship is closed because it is required that the judge be a *mujtahid*, then the gate is (also) closed because you claim that the ruling (*hukm*) of the non-*mujtahid* judge is not valid until certified by a *mujtahid*. If you claim that *mujtahids* are not extant and if you need a *mujtahid* to guide judges and if you do not hold rulings to be nowadays invalid . . . then the *mujtahid* whom you need to validate the ruling of the non-*mujtahid* disproves your claim concerning the inexistence of the *mujtahid*.<sup>39</sup>

Careful examination of this exchange reveals that in the mind of both Ibn 'Aqīl and his opponent *ijtihād* remained a basic requirement for judgeship. To be sure, time appears to be wearing away at the ideal, but the requirement itself has not been completely abandoned.

The view of al-Māwardī and Abū Ya'lā is continued in still a later work by the great Ḥanbalite, Ibn Qudāmah al-Maqdisī (d. 620/1223). In his *al-Mughnī*, he states explicitly that a necessary qualification for judgeship is that the candidate "be of the people of *ijtihād* (*an*

<sup>36</sup> *Ibid.*, 1:268.

<sup>37</sup> *al-Mustasfā*, 2:384.

<sup>38</sup> *Ibid.*, 2:343-44.

*yakūna min ahli 'l-ijtihād*").<sup>40</sup> This is satisfied by his mastery of six things: the Qur'ān; the Sunnah; consensus; differences of opinion among the scholars (*khilāf*); analogy (*qiyās*); and the Arabic language.<sup>41</sup> Ibn Qudāmah insists further that since it is not permissible for a mufti to be a *muqallid* it is *a fortiori* not permissible for a judge to be one; for the ruling of a judge is more binding (*ākad*) than a mufti's *fatwā*.<sup>42</sup> Moreover, Ibn Qudāmah insists,

It is not stipulated that he (a judge) have mastered those questions of positive law laid down by the *mujtahids* in their manuals. For these questions were resolved by (these) jurists *after* they had reached the rank of *ijtihād*. It cannot, therefore, be incumbent upon this judge (to know these questions) while he is just coming into this rank.<sup>43</sup>

These views, all taken from the period prior to al-Qarāfī, indicate clearly that during this period it was the charge of judges to interpret scripture directly, deduce the legal rules therefrom, and apply these rules thus deduced to cases before them. The legal aspects of a judge's ruling were thus his own product, the result of his unfettered *ijtihād*. However, as we move closer to the period of al-Qarāfī, an important change appears to take place.

#### B. *Ijtihād No Longer Required*

In his *Adab al-qaḍā'*, the 7th/13th century Shāfi'ī judge and jurist, Ibn Abī al-Dam, (d. 642/1244) makes the following statement.

According to the doctrine of our Imām [i.e., al-Shāfi'ī], a precondition of a valid appointment to judgeship is that the candidate be a *mujtahid muṭlaq*. And to be so is to master the Qur'ān, the Sunnah, consensus, analogy, the views of the scholars, and the Arabic language.<sup>44</sup>

This is followed by a detailed explanation of this criterion, after the fashion of al-Māwardī and other representatives of the *ijtihād* tradition. Then he states:

<sup>40</sup> *al-Mughnī*, 9:40.

<sup>41</sup> *Ibid.*, 9:41.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* Emphasis added. Ibn Qudāmah, following al-Ghazālī, also held that a candidate for judgeship did not have to be a *mujtahid* in all areas of law. *Ijtihād*, as a potential, was not indivisible but could be divided into separate parts. Thus, one might be a *mujtahid* in contracts but not in criminal offenses, or a *mujtahid* in contracts of sale but not in those of usus or marriage. See also, al-Ghazālī, *al-Mustasfā*, 2:384.

Know that in our time these qualities are rarely found among any of the 'ulamā'. Nay, there does not exist a *mujtahid muṭlaq* in all the world. This is despite the fact that the scholars (of the past) laid down the books of exegesis, hadith, positive law (*fiqh*), analogy, jurisprudence (*uṣūl*), positive branches (*furū'*), and (the results of) their investigations into the status of narrators, their critiques (*jarḥ*) and or confirmation (*ta'dīl*) of them, uncovering their biographies, to the point that these scholars filled the earth with works which they compiled and innovated, and it became thus easy for the jurisconsults to acquire and memorize these things and to extract from them legal rulings, and to gain all of this by memorizing that which the scholars of the past toiled tirelessly to acquire. And despite this, there does not exist in a single spot on earth a *mujtahid muṭlaq*, nay, not even a *mujtahid* in the *madhhab* of an Imām, whose views are considered authoritative extrapolations (*wujūh mukharrajah*) in the *madhhab* of that Imām.<sup>45</sup>

Ibn Abī al-Dam then offers his explanation—couched mainly in eschatological terms—for the disappearance of *mujtahids*. Then he returns to the subject of the qualified judge in his day.

We return now to the subject at hand. Our [Shāfi'i] partisans have asked: "A *mujtahid* in a single *madhhab*, may he preside as judge and give *fatwās*?" There are two views. And my opinion—after all that has been said—is that absolute and restricted *ijtihād* (*al-ijtihād al-muṭlaq wa al-muqayyad*) were preconditions only in the early period (*al-zaman al-awwal*) during which every locale contained a group of upright *mujtahids* capable of serving as judge and giving legal opinions. As for this time of ours, the earth having been emptied of these scholars and the times made vacant of them, a decisive decision must be taken, and it must be affirmed absolutely that the appointment of one who may be described as knowledgeable in the *madhhab* of one of the Imāms is valid. And to be so is to be familiar with the major part of the latter's *madhhab*, his stated views, the opinions extrapolated on the basis of these, and the views of his disciples; knowledgeable of all of this, with a fine intellect, a healthy disposition, and sound thinking, committing the *madhhab* to memory, being correct (in his citation thereof) more often than not, capable of calling to mind the statements of the Imāms and of extracting the intended meanings from the expressions handed down (on their authority); familiar with the methods of investigation (*turuq al-nazar*), and of weighing probative evidence (*tarjih al-adillah*), possessing mastery of analogy; quick-witted, astute, capable of handling probative sources, of setting them up, arranging them, and adducing them for controversial

<sup>45</sup> *Ibid.*, 37.

(*mukhtalaf fih*) rulings; skilled at weighing probative sources one against the other.

It is one who possesses these attributes—no less—whose appointment to judgeship is valid in these times of ours. And in these times, when men of this calibre are rarely found, it must be declared openly that their judicial rulings are to be enforced, their appointment to judgeship held valid, and their *fatwās* accepted.<sup>46</sup>

In *Tabṣirat al-hukkām*, Ibn Farḥūn cites the views of a number of scholars who lived after al-Māwardī but before al-Qarāfi who confirm the position of Ibn Abī al-Dam that *mujtahids* no longer existed and that *ijtihād* was no longer a requirement for judges. For example, al-Māzarī (d. 536/1141), the great Sicilian jurist of the Mālikī school, asserted that in his time, "There does not exist in all the wide expanses a master-jurisconsult (*muftin nazẓār*) who has reached the rank of *ijtihād*."<sup>47</sup> "But," al-Māzarī cautions, "to prohibit *muqallids* from serving as judge would lead to the dismantling of the religious law, cause unrest, strife, and conflict. And (allowing) this (to happen) finds no support in the religious law."<sup>48</sup> The activity of these *muqallids*, according to a certain Abū Bakr al-Ṭarṭūshī (d. 566/1170), was not direct scriptural interpretation. Instead, he insisted in no uncertain terms, "Their *qur'ān* is simply the *madhhab* of their Imām" (*innamā muṣhafuhum madhhabu imāmihim*).<sup>49</sup>

Such citations reflect what appears to have been the gradual but certain ascendancy of *taqlid*, beginning probably sometime around the middle to latter half of the 6th/12th century. By al-Qarāfi's time the change appears to be all but complete. This is reflected in a number of statements in his *Tamyīz*.

First, in responding to a question about the qualifications for judgeship, al-Qarāfi completely ignores the stringent requirements cited by al-Māwardī and Abū Ya'lā. In particular, the requirement that a candidate be a *mujtahid* is conspicuously missing.

Question: What qualifies a person to originate binding decisions, which must be enforced and may not be overturned, in cases involving disputed questions of law (*ayu shay'in yufidu 'l-insāna ahliyata an yunshi'a hukman fī mawāṭini 'l-khilāfi fa yajibu tanfiduhū wa lā yajūzu naqduh*)?

<sup>46</sup> *Ibid.*, 41.

<sup>47</sup> *Tabṣirat*, 1:27.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, 1:29.

Is such the right of simply anyone, or is there a specific entitlement (*sabab khāṣṣ*) to this right? And what is this specific entitlement? Is there only one such entitlement, or are there many types?<sup>50</sup>

Response: There is no disagreement among the scholars that such is not the right of everyone. Rather, such is the right only of one who has obtained a specific entitlement. And that entitlement is the receipt (from an authorized authority) of a specific jurisdiction (*wilāyah khāṣṣah*).<sup>51</sup>

Second, al-Qarāfi asserts that all muftis—and therefore candidates for judgeship in his day—were *muqallids*. In his response to Qu. no. 3 of the *Tamyiz*, he analogizes the function of the mufti to that of a translator-interpreter who translates the words of his patron to those who do not understand the latter's speech. The patron served by the mufti is God. The subjects to whom he translates are Muslims who do not understand various aspects of God's speech. God's speech is of course His revelation. This analogy applies, however, only if the mufti in question is a *mujtahid*. If, on the other hand, continues al-Qarāfi,

he is a *muqallid*, as is the case in our time, then he is simply a representative of his Imām on behalf of whose conclusions he communicates to those seeking legal counsel.<sup>52</sup>

Similarly, al-Qarāfi adds, if this *muqallid* is a judge, he may

give judgements based on the view most widely subscribed to (*al-mashhūr*) in his school, even if he does not know this to be the view best substantiated by the evidence (*al-rājiḥ*), following in this the view of his Imām, just as he follows the latter in his *fatwā*.<sup>53</sup>

This of course violated the rule of old, according to which, as a *mujtahid*, a judge had always to rule on the basis of the strongest scriptural evidence (*al-rājiḥ*) and to apply the view which *he* believed to be most sound.<sup>54</sup>

Finally, al-Qarāfi states openly that the legal content of a judge's ruling must find precedence in the views of one of the recognized Imāms.

<sup>50</sup> *Tamyiz*, 156.

<sup>51</sup> *Tamyiz*, 156.

<sup>52</sup> *Tamyiz*, 29. Emphasis mine.

<sup>53</sup> *Tamyiz*, 79.

<sup>54</sup> Cf., for example, al-Māwardī, above, 154.

The view embodied in the ruling of a judge must be the view espoused by a recognized Imām (which is itself deduced) on the basis of sound scriptural evidence. . . .<sup>55</sup>

There is evidence from the 8th/14th century suggesting that *taqlid* continued its hegemonic advance into that century, confirming the restriction of the judicial function to the determination of facts. In his collection of *fatwās*, Taqī al-Dīn al-Subkī (d. 756/1255), the Egyptian and later Damascene jurist of the Shāfi'ī school, indicates that the legal content of a judge's ruling had to be the *fatwā* upheld in his *madhhab*. This occurs in his response to a question concerning the propriety of a certain rhyming cliché, "The judge dictates, while the mufti hallucinates" (*al-qāḍī yuḍī wa al-muftī yahdhī*),<sup>56</sup> by which was meant that the judge obliges absolutely, while the mufti does not. Al-Subkī responds that this is a "difficult" phrase and that one who uses it wantonly chances falling into disbelief. For the mufti is God's representative after the Prophet; far be his pronouncements from mere "hallucinations"!<sup>57</sup> As for judicial decisions, he goes on to indicate that they were still perceived to be the genetic offspring of the *fatwās* of the respective schools.

The mufti makes clear the ruling of God, and he is the inheritor of prophethood (*nubūwwah*).<sup>58</sup> This applies when he gives a response in accordance with the truth. God, the Exalted, has said: "Say, God gives you counsel (*allāhu yuḍīkum*). The judge (on the other hand) is the one who adjudicates and obliges, according to the dictates of the *fatwā*."

The mufti is highest; the judge follows him. And if there should occur a difference between the two, it would be due only to differences in *ijtihād* applied to the (various) *fatwā[s]*. For the judge must always follow the *fatwā* of his Imām—if he is a *mujtahid*, or the *fatwā* of another [*mujtahid*-jurist in the school of his Imām] if he is a *muqallid*.<sup>59</sup>

<sup>55</sup> *Tamyiz*, 31.

<sup>56</sup> Abū al-Ḥasan Taqī al-Dīn 'Alī b. 'Abd al-Kāfi al-Subkī, *Fatāwā al-subkī*, 2 vols. (Cairo: Maktabat al-Qudsi, 1365/1937), 2:543.

<sup>57</sup> *Ibid.*

<sup>58</sup> By prophethood al-Subkī is referring to the prophetic office of conveyor (*muballigh*) of God's will. This idea is apparently taken over from al-Qarāfi (see *Tamyiz*, 96ff.) as is suggested by al-Subkī's verbatim quoting of the latter throughout the latter part of the third volume of his *al-Ibhāj fī sharḥ al-minhāj*, which he co-authored with his son, Tāj al-Dīn. See *al-Ibhāj fī sharḥ al-minhāj*, 3 vols., ed. Sha'bān Muḥammad Ismā'il (Cairo: 1402/1982). For more on the prophetic office of *muballigh*, see my "Prophetic Actions".

<sup>59</sup> *Fatāwā*, 2:543. Emphasis mine.

In *Tabṣirat al-ḥukkām*, Ibn Farḥūn (d. 799/1396) indicates that judges in his day were *muqallids* and as such were bound to the views of the respective *madhhabs*. Citing the view of the Mālikī, Ibn 'Abd al-Salām (d. 749/1348), he agrees that

One should not, in these times of ours, appoint *muqallids* who are not capable of distinguishing and choosing the strongest of the various views [upheld in the *madhhab*]. For such an ability still exists, albeit rare. As for the rank of *ijtihād*, it has entirely disappeared from the West (*al-maghrib*).<sup>60</sup>

Ibn Farḥūn indicates further that *mujtahids*, such as Abū Bakr ibn al-'Arabī (d. 543/1148), Ibn Rushd (d. 595/1198), al-Bājī (d. 495/1101), and Ibn 'Abd al-Barr (d. 463/1071) were "non-existent in these times of ours, both in the East and West."<sup>61</sup> He goes on to lament that the scholars of the past had laid down instructions for judges who were *mujtahids* but that the function of the *muqallid*-judge had been ignored and that he would have to devote words to that topic in a later section of his book.<sup>62</sup> In the later section to which he refers, he treats the various definitions of "most widely subscribed to" (*al-mashhūr*) and "weightiest," or "best substantiated" (*al-rājih*), as part of an effort to instruct *muqallid*-judges on how to identify the two types of views to which they were now bound. One notices in his discussion, as could be detected in the above-cited statements by al-Subkī, that the word *ijtihād* quietly takes on a second meaning: Under the old order it meant to apply the methods of interpretation developed under the discipline of *uṣūl al-fiqh* directly to scripture. Here, under the régime of *taqlīd*, it comes to refer to the application of these methods to the responsa of the *mujtahid*-Imāms and ancient authorities.

### C. al-Qarāfi on the Judicial Process

In his *Tamyiz*, al-Qarāfi provides a brief outline of the judicial process in which he confirms the division of competences between judges and muftis as obtained under the régime of *taqlīd*. According to al-Qarāfi,

<sup>60</sup> *Tabṣirat*, 1:26.

<sup>61</sup> *Ibid.*, 1:25.

<sup>62</sup> The above-mentioned Abū Bakr al-Ṭarṭūshī had dealt with judicature in a work of his entitled "*Ta'liqat al-khilāf*." But, Ibn Farḥūn laments, "Shaykh Abū Bakr's statements were about *mujtahid*-judges; he did not treat the issue of *muqallid*-judges, as is the case in our day." *Ibid.* (emphasis mine)

the judicial process included three distinct stages: (1) plenary establishment of fact (*al-ithbāt*); 2) judgment (*al-ḥukm*); and 3) implementation (*al-tanfīdh*). Whenever a case was brought to court, it had to pass through at least two of these three stages in order to reach settlement.

When a case is brought to court, what is actually taking place is a dispute over the occurrence of some event that is being claimed as a legal cause (*sabab*) entitling one of the litigants to some right or relieving him of some obligation. The function of the judge is to establish first, as a matter of fact, whether or not the alleged event took place, and then to determine which, if any, legal rights this occurrence entitles the plaintiff to. In other words, the judge settles two questions: (1) Did X occur?; and (2) Which legal rights or obligations does the occurrence of X effect? The first of these questions is settled during *al-ithbāt*, plenary establishment of fact. The second is settled at either the *al-ḥukm* or *al-tanfīdh* stages.

#### 1. al-Ithbāt

According to al-Qarāfi, *al-ithbāt* is the process of "establishing the factual occurrence of a legal cause before a judge by way of valid courtroom evidence. . . ." <sup>63</sup> Emphasizing the fact that, in establishing the facts a judge must rely strictly upon the legally valid evidence presented, al-Qarāfi states that in the same way that scriptural evidence (*dalīl*) is the *sine qua non* of the mufti's legal ruling (*ḥukm*), "the effective cause (*sabab*) of a judge's ruling must be valid courtroom evidence (*ḥujjah*)."<sup>64</sup>

<sup>63</sup> *Tamyiz*, 134.

<sup>64</sup> *Ibid.*, 82. In *al-Furūq*, 1:129, al-Qarāfi places the number of legally valid forms of evidence at ten: (1) proof established by oral testimony (*al-bayyinah*); (2) confession (*al-iqrār*); (3) oral testimony joined by the plaintiff's sworn oath (*al-shāhid wa al-yamīn*); (4) oral testimony joined by (the defendant's) refusal to take an oath (*al-shāhid wa al-nukūl*); (5) sworn oath joined by refusal of the other party to take an oath (*al-yamīn wa al-nukūl*); (6) joint testimony of two women joined by sworn oath; (7) joint testimony of two women joined by refusal to take an oath; (8) joint testimony of two women [or four women according to al-Shāfi'i] in cases involving female matters; (9) testimony of minors; (10) mutual contradictory oaths taken by the plaintiff and the defendant (*al-tahā-luf*), according to Mālik, after which settlement is reached by having the two parties draw lots (*yaqtasimān*). Al-Qarāfi makes no mention of circumstantial evidence (i.e., *qarā'in al-aḥwāl*). However, in both *Tabṣirat al-ḥukkām*, (2:117-55) and *Mu'in al-ḥukkām* (166-79), Ibn Farḥūn and al-Ṭarābulusī discuss circumstantial evidence at length and cite al-Qarāfi as a major source. At *al-Furūq*, 4:44, al-Qarāfi cites the controversy over the legality of judges ruling according to what has come to their knowledge outside of court. The Ḥanbalis and Mālikis are reported to have disallowed it altogether. The Ḥanafis disallowed it in all criminal cases, with the exception of those involving calumny (*qadhf*). The well-known position of the Shāfi'is was that a judge could rule in every case according

When all of the evidence has been presented and the judge concludes that "X" did or did not occur, the *al-ithbāt* stage is concluded, and the judge must then give judgment.

If legally valid proof (*hujjah*) of the occurrence of a legal ruling's legal cause is presented and this proof is complete and there remains no doubt (in the judge's mind) and all of the necessary conditions and desiderata are satisfied, without doubt, it becomes incumbent upon the judge to give judgment immediately. For one of the litigants is unjust; and the removal of injustice is a duty that may not be postponed.<sup>65</sup>

## 2. al-Hukm or al-Tanfīdh?

Following plenary establishment of fact, the case enters either the *al-hukm* or *al-tanfīdh* stages. Whether it enters one or the other will depend on the status of the legal question under review. If the question is disputed (*mukhtalaf fih*), the judge must choose from among the views in his school a ruling, which will be implemented at the *al-tanfīdh* stage. If the question is one of consensus (*mujma' 'alayh*), he simply implements the view dictated by consensus.

### a. al-Tanfīdh:<sup>66</sup> *The Judicial Function in Mujma' 'alayhi Cases*

Consensus on a question has the following implications. First, both the status of the event as a legal cause, as well as the effected rule, are known and agreed upon.<sup>67</sup> Second, it is agreed that this rule applies to all cases where this legal cause is found. Finally, the view of consensus may not be passed over in favor of any other view. Al-Qarāfi summarizes *tanfīdh* in cases involving legal questions on which there is consensus as follows:

As for universally agreed upon questions, such as the obligation to cover losses in cases of property damage, retributory execution in cases of intentional homicide, the obligation to pay debts owed, or to pay the

to what he knew before becoming judge or what he learned outside of court during his judgeship.

<sup>65</sup> *Tamyiz*, 135.

<sup>66</sup> "*Al-Tanfīdh*," as employed by al-Qarāfi, has actually two meanings. Here it is used in the sense of applying the rule backed by consensus. For the second meaning, see below, 169.

<sup>67</sup> It is possible to have consensus on an event's status as a legal cause, while disagreeing on the legal ruling activated by it. For example, it is agreed that wine-drinking is a legal cause necessitating lashing; however, al-Shāfi'i held the required number of lashes to be forty, while Mālik and Abū Ḥanīfa held that the required number was eighty. See Ibn Rushd, *Bidāyat*, 2: 322-23. Similarly, it is agreed that divorce is a legal cause

agreed upon amount in a profit-sharing contract, or the amputation of a hand in cases of theft, in none of these cases does plenary establishment of fact require the origination of a ruling by a judge. Rather, the rulings governing these cases are already established, by consensus, in the body of the Law. The function of a judge in such cases is simply one of implementation (*tanfīdh*). Outside of this, he and the mufti are absolutely equal. For these cases in no way involve God's delegating to judges the issuance of a binding ruling. On the contrary, universally agreed upon rules follow their legal causes, automatically, be there a judge or not.<sup>68</sup>

In such cases, then, judges make no choice; their function is merely a quasi-executive one of informing the litigants that, according to the facts, a universally agreed upon rule applies to their case and that they must now comply with that rule.

### b. al-Hukm: *The Judicial Function in Mukhtalaf fih Cases*

The situation with cases involving disputed questions is different. The existence of disagreement (*khilāf*) on a question has two possible implications: (1) either the status of the event as a legal cause is disputed; or (2) the legal rule or status activated by this event is disputed, even after the event itself is universally recognized as a legal cause. In such cases a judge must therefore decide: (1) if the event is a legal cause; and (2) which legal rules it activates.

It is here, at the *al-hukm* stage in cases involving dispute questions, that the fundamental difference between the judicial function under the régime of *ijtihād* and the régime of *taqlīd* comes to the fore. Under the régime of *ijtihād*, in addition to resolving the factual question of the occurrence of X, judges also decided the legal question of whether or not X was a legal cause and which legal rules it activated. Under the régime of *taqlīd*, however, judges no longer decided questions of law, and their function was instead limited to resolving the question of the occurrence of the event being claimed as a legal cause. In resolving the legal aspects of a dispute, judges were now bound to the views upheld in their respective *madhhabs*. This division of competences is reflected in a number of al-Qarāfi's statements, such as the following:

for a man to pay a severance gift (*mut'a*); however, al-Shāfi'i held this to be obligatory (*wājib*), while Mālik held that it was only recommended (*mandūb*). *Ibid.*, 2:73-74.

<sup>68</sup> *Tamyiz*, 137.

... the judge follows legal courtroom evidence (*hujjah*), while the mufti follows scriptural evidence (*adillah/s. dalil*). The mufti, meanwhile, does not rely upon legal evidence (*hujjah*); rather, he relies strictly upon scriptural evidence. And scriptural evidence includes the Qur'an, the Sunnah and the like; while legal evidence includes proof established by oral testimony (*bayyinah*), confession (*iqrār*), and the like.<sup>69</sup>

In other words, because the occurrence of X is determined on the basis of courtroom evidence and because courtroom evidence is the exclusive preserve of judges, judges, and judges alone, decide on the question of X's occurrence. But because the status of X as a legal cause is determined on the basis of scriptural evidence, and because the interpretation of such evidence is the preserve of the *madhhab*, only the pronouncements of muftis on the question of X's status as a legal cause are authoritative. As a result of this division, the function of judges comes to resemble that of the jury in American law.

1. *The Judge's Choice in Mukhtalaf fih Cases: Rājih or Mashhūr?* As mentioned earlier, any number of views on a single question may be acknowledged within a school as plausible.<sup>70</sup> Among these, however, some acquire more weight than others both on the level of the individual as well as the group. Not surprisingly, the question arises whether judges are bound to apply the view most preferred by them as individuals, i.e., the *rājih*, or that most preferred by the *madhhab* as a whole, i.e., the *mashhūr*.

Al-Qarāfi's response is that only if a judge is a *mujtahid* is it incumbent upon him to apply the *rājih*. If, on the other hand, he is a *muqallid*, "he may apply the view most widely subscribed to in his *madhhab*, i.e., the *mashhūr*, even if he does not know this to be the view best substantiated by scripture, following in this the judgment of his Imām of whom he is a follower."<sup>71</sup>

There seems, however, to be a certain diffidence on al-Qarāfi's part concerning this issue. At one point, he states that judges may choose from among "one of the competing views" (*aḥadu 'l-mustawayn, aḥadu 'l-qawlayn*) and that they are not bound to perform *tarjih*.<sup>72</sup> He reminds his reader that judges are bound to courtroom evidence, im-

<sup>69</sup> *Tamyiz*, 30–31. See also *al-Furūq*, 1:129: "Scriptural evidence (*adillah/s. dalil*) is relied upon by the *mujtahids*; legal evidence (*hijājs. hujjah*) is relied upon by judges. . . ."

<sup>70</sup> See above, 83ff.

<sup>71</sup> *Tamyiz*, 79.

<sup>72</sup> *Ibid.*, 30, 65.

plying that measuring the substantive quality of views is not the vocation of the judge, qua judge. Later, however, al-Qarāfi equivocates, stating that it is conceivable that a judge rule according to the *rājih*, as it is conceivable that he apply a view that is not *rājih*, implying that whether he applies one or the other is a matter of choice.<sup>73</sup>

Why this vacillation? To my mind the explanation is to be found in the desire to allow judges enough discretion to be able to individualize cases. Assuming the strict application of the rule binding them to a solitary rule, judges would be poorly positioned to accommodate extenuating circumstances or to check ulterior motives. This would mean being forced, in a number of cases, to countenance known miscarriages of justice. This might prove particularly important to the Mālikīs, since they, in contradistinction to the Shāfi'īs, disallowed the practice of judges relying on information that comes to their attention outside of court.<sup>74</sup> At any rate, in order to circumvent this problem, it would be necessary to allow judges greater leeway in choosing their rulings, in other words, a less rigid application of the rule binding them to the *mashhūr*, and at least a tacit approval of judicial *tarjih* where warranted. The following example will add some clarity to this point.

According to the Ibn Rushd, himself a Mālikī, Mālik's view was that the wish of female family members was not considered in cases of intentional homicide where the victim's family made its choice on the fate of the murderer, i.e., execution, blood-money, or clemency.<sup>75</sup> He cites a difference of opinion on this question, however, some scholars holding that every family member, including females, who have a right to inheritance have the right to grant a murderer clemency.<sup>76</sup> The significance of this disagreement lies in the fact that execution requires the unanimous agreement of all those who have the right to choose; if one of them dissents, execution is stayed. Now, in *Bulghat al-sālik* (18th C.), the position cited for the Mālikī school

<sup>73</sup> *Tamyiz*, 80. This contradiction caught the attention of Ibn Farḥūn (*Tabṣirat*, 1:75) and Shaykh 'Ulaysh in his *Fath al-'alī al-mālik*. The latter attempted to resolve it, however, by arguing that *tarjih* was required where two views were found to be of unequal weight, whereas in the case of equivalent views, *tarjih* was not required. This explanation is of course defective; for determining the two views to be of equal or unequal weight to begin with would itself be an exercise in *tarjih*. *Tarjih*, then, would be a requirement in all cases. See *Tamyiz*, 80–82, nt. 1.

<sup>74</sup> See *al-Furūq*, 4:44.

<sup>75</sup> *Bidāyat*, 2:301–02.

<sup>76</sup> *Ibid.*, 2:302.



is that every family member, including females, who has a right to inheritance also has a right to a vote in cases of intentional homicide.<sup>77</sup> In other words, this had apparently become the *mashhūr* of the *madhhab*, the view of Mālik having been abandoned as the weaker, i.e., *marjūh* or *mahjūr* view.

Now, if a Mālikī judge is presented with a case of intentional homicide in which the wife of the victim wishes the murderer pardoned and it is discovered that she and the murderer were part of a conspiracy to get rid of the husband so that they could then be married, may the judge, in the interest of justice, by-pass the *mashhūr*, which grants all females a vote, in favor of the 'weaker' view of Mālik, which would deny the wife a vote?<sup>78</sup> Obviously, the answer to this question depends on the degree to which judges are to be held to the *mashhūr* of their *madhhab*. It was most probably this type of consideration that left al-Qarāfi unwilling to commit fully on the rule restricting judges to this view alone.

### c. Unprecedented Cases

Thus far the main focus has been on al-Qarāfi's doctrine as it relates to cases for the resolution of which a judge reclines upon views already espoused in his school. In Qu. no. 21 of *Tamyiz*, however, al-Qarāfi is asked whether his doctrine applies also to cases where the legal question is only "potentially controversial" (*qābilun li 'n-nizā'*), in other words, unprecedented but subject to disagreement among the *fuqahā'*.<sup>79</sup>

Al-Qarāfi's response is that it is not a precondition that a case be preceded in order for the judge's decision to enjoy full immunity. Rather, judicial rulings remain unassailable even in unprecedented cases. Here, however, al-Qarāfi adds that the criterion for a valid ruling is the same as that applied to rulings in precedential cases, and that if a judge's ruling violates any established legal precepts (*qawā'id*), it is to be overturned.

... if the question represented in a case has never been treated before (*maskūt 'anhā*) and the judge hands down a ruling that is plausible

<sup>77</sup> al-Ṣāwī, *Bulghat*, 2:391.

<sup>78</sup> According to the Ḥanafī, al-Ṭarābulusī, judges may not apply views that have been abandoned in the *madhhab*. For this, according to him, would constitute a *khilāf*, by which he means a violation of the going opinion, not an *ikhtilāf* or difference of opinion within the boundaries of multiple acceptable views. See *Mu'in*, 34.

<sup>79</sup> *Tamyiz*, 78.

(*hakama 'l-hākimu bimā hiya qābilah lah*), this ruling is not to be overturned. But, if in treating an unprecedented case he hands down a ruling that is in violation of established legal precepts (*qawā'id*), his ruling is to be overturned.<sup>80</sup>

As mentioned earlier, this emphasis on legal precepts (*qawā'id*) is significant. For it reinforces the notion that in extrapolating (i.e., performing *takhrīj*) in order to arrive at solutions for unprecedented questions, judges have access to the sources only through the lenses of the Imāms and ancient authorities.<sup>81</sup> This stands in sharp contrast with the situation of old, whereby judges were bound only to the universal sources and principles of law (viz., the Qur'ān, the Sunnah, Consensus, and analogy, i.e., *uṣūl*), and a ruling was valid as long as it did not violate any of these.<sup>82</sup> Here, however, when al-Qarāfi speaks of plausibility he means that in addition to not violating the sources, the ruling must also conform to the legal precepts (*qawā'id*) upheld in the judge's school.

### 3. al-Tanfīdh

*Al-Tanfīdh* has two applications: (1) a judge's application of the rule dictated by consensus in cases involving *mujma' 'alayh* questions; (2) the enforcement of the judge's decision in both *mujma' 'alayh* and *mukhtalaf fih* cases, following the act of choosing a ruling in the latter, and following establishment of fact in the former. Al-Qarāfi makes it clear, however, that enforcement, which entails the threat of force, is actually a part of public administration and, as such, is not necessarily the task of judges.

Public administration (*al-siyāsa al-'āmma*) is not the task of judges, especially weak judges who have not the power to enforce (their rulings): for example, a weak judge who issues a ruling against powerful kings. This judge levies an obligation upon this king, and it never crosses his mind to try to enforce it, due to his plain inability to do so. Rather,

<sup>80</sup> *Ibid.*

<sup>81</sup> See above, 91-94 on *qawā'id*.

<sup>82</sup> This is reflected, for example, in the criterion of al-Shāfi'i: "Whenever a judge rules according to his *ijtihād*, then realizes that his ruling was wrong, or another judge points this out to him, then, whether he violated the Qur'ān, the Sunnah, consensus, or what may be deduced from these (*ma kāna fī ma'nā hādihā*—al-Shāfi'i's locution for analogy), his ruling is to be overturned all the same." See al-Māwardī, *Adab*, 1:682. Similar versions of this early four-part criterion may be found in al-Khaṣṣāf, *Adab*, 338ff.; al-Māwardī, *ibid*, 1:261; al-Ghazālī, *al-Mustasfā*, 2:382-3; Ibn Qudāmah, *al-Mughnī*, 9:56.

a judge—qua judge—merely originates rulings, while the power to enforce these goes beyond judgeship. He may be authorized to enforce rulings, and he may not.<sup>83</sup>

#### IV. The Solution

##### A. The Khabar/Inshā' Dichotomy

Having described briefly the judicial function according to al-Qarāfi, it may help, as we enter our discussion of his proposed solution to the problem of exclusivism in the judiciary, to consider by way of comparison the views of an important American legal thinker, Jerome Frank (d. 1957). In an important work, *Law and the Modern Mind*, which first appeared in 1930, Frank inveighed against the common belief that judges did not make law but merely discovered already existing rules. Against this 'myth', Frank insisted that judges nearly always relied on personal discretion and in so doing inevitably created law. This, according to Frank, was not only unavoidable, it was proper. Thus he defended the practice of judges relying on enlightened, personal discretion, adding that this is what the judicial function had always been about, even if many in the legal community were unwilling to admit it.

It has sometimes been said that the Law is composed of two parts—legislative law and judge-made law, but in truth all the Law is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts. The courts put life into the dead words of the statute.<sup>84</sup>

One of the consequences of this view would be the recognition that to challenge the ruling of a judge would be to challenge not the law but the judge's interpretation of the law, which, according to Frank, was always more a matter of discretion than anything else.<sup>85</sup> Al-Qarāfi, by contrast, saw judicial decisions not as the product of the presiding

<sup>83</sup> Cited in Ibn Farḥūn, *Tabsirat*, 1:18.

<sup>84</sup> *Law and the Modern Mind*, 123.

<sup>85</sup> In criticizing Salmond and others who denied the fact and propriety of judges relying on personal discretion, Frank wrote: "[W]hat Salmond and others really mean when they state that the great value of following principles and rules in law is that thereby we diminish the effect of the personal biases and prejudices of the judges. What is nearer to the truth is that by habituating the judges to the practice of expressing themselves as

judge's independent interpretation but as the embodiment of the view of the latter's *madhhab*, to which he was bound. As such, to challenge the decision of a judge was to challenge not the latter's personal discretion but the law itself as articulated by his school. And since the interpretation of each school was, *ceteris paribus*, correct, all such challenges were illegal.

It may be noticed that al-Qarāfi is almost singularly concerned with preserving the integrity of judicial rulings, to the exclusion of legal opinions. The reason for this is that to challenge a view that has been issued as a legal opinion does not detract from its status as a valid *fatwā*; but to challenge a view that has been issued as a judicial decision denies it an essential characteristic of being a *ḥukm*, namely, that of being binding and unassailable. In other words, in responding to a petitioner's question, a Shāfi'i and a Mālikī mufti may each give contradictory responsa neither of which violates the other's status as a valid *fatwā*, since *fatwās* (as shall be further explained below) are by constitution binding only upon those who accept them. As such, neither the Mālikī or Shāfi'i mufti's view affects the other's status as a valid *fatwā*. For, a petitioner's original decision to follow the Mālikī view does not deny him the right of subsequently changing his mind and choosing to follow the Shāfi'i view. Judicial rulings, on the other hand, are by nature binding and unassailable. Thus, if a Shāfi'i issues a challenge to a Mālikī judge's ruling, he violates its fundamental constitution as a *ḥukm*. In order to safeguard the inviolable status of judicial rulings, it is necessary, therefore, to clarify the distinction between the *ḥukm* and the *fatwā*.

Al-Qarāfi attempts to clarify the distinction between the *fatwā* and the *ḥukm* by enlisting the service of a basic dichotomy maintained in medieval Muslim thought. He identifies the *fatwā* as a *khabar* (report, simple assertion) and the *ḥukm* as an *inshā'* (origination). The

if the primary emphasis in their thinking were on rules and principles, we make it appear, contrary to the truth, that the individual attitudes and predilections of the judges are inoperative." *Ibid.*, 133. "The fact is, and every lawyer knows it, that those judges who are most lawless, or swayed by the 'perverting influences of their emotional natures,' or most dishonest, are often the very judges who use most meticulously the language of compelling logic, who elaborately wrap about themselves the pretense of merely discovering and carrying out existing rules, who sedulously avoid any indication that they individualize cases." *Ibid.*, 137-38. It might be added here that even the principle of precedent or *stare decisis*, which binds judges to the holdings of previously adjudicated cases, would not fully eliminate judicial discretion. For it is essentially the presiding judge himself who determines what the previous holding was.

significance of this dichotomy for maintaining the distinction between the *fatwā* and the *ḥukm* lay in a number of fundamental differences between the *khābar* and the *inshāʿ*, chief among which include the following:

1. The *khābar* is subject to being believed (*taṣḍīq*) or disbelieved (*takdhīb*), while the *inshāʿ* is subject to neither of these.
2. The *khābar* is not a cause that brings its referent into actual existence, nor does its existence necessitate the existence of its referent. The *inshāʿ*, on the other hand, is a cause (*sabab*) which brings its referent into actual existence, and its existence brings about, necessarily, the existence of its referent.<sup>86</sup>

An assertion (*khābar*), e.g., "Zayd stood up," is not a cause producing the actual standing of Zayd. At most it produces in the mind of a listener the *belief* that Zayd stood up, at which time the listener will confirm this statement as truth. On the other hand, due to prior knowledge or subsequent investigation, this statement may not produce or sustain belief in this listener's mind, and he may repudiate it as false. This contingency, which is inherent to all simple assertions (*akhbār/s. khābar*), stands in sharp contrast to the self-sufficiency of statements that function as originations (*inshāʿ*). For the truth content of the latter inheres in the statements themselves. For example, when a man says to his wife, "You are divorced," or to his slave, "You are free," these statements, as originations, have the immediate and automatic effect of producing actual divorce and manumission; the bonds of matrimony and servitude are severed forthwith, and formerly licit actions are rendered thereby illicit.<sup>87</sup> As such, it would be superfluous for one to confirm or repudiate these statements. For, their truth content is confirmed by the words themselves.

Al-Qarāfī points out that there is an important difference between confirmation (*taṣḍīq*) and repudiation (*takdhīb*), on the one hand, and truth (*ṣidq*) and falsehood (*kadhīb*) on the other. The truth or falsity of a statement inheres in the statement itself; confirmation and repudiation are ontologically extraneous and come from without.<sup>88</sup> From a factual standpoint, therefore, while a *khābar* may be true, because

<sup>86</sup> *Tamyīz*, 48–49. A third difference is that the *khābar* is contingent upon the time frame of its referent (past, present, or future) whereas the *inshāʿ* is not. *Ibid.*, 48.

<sup>87</sup> On *inshāʿ* as a legal institution, see below, 175–77.

<sup>88</sup> *al-Furūq*, 1:18.

it is merely a *khābar*, it may be repudiated as false. Conversely, a *khābar* that is false may be accepted as truth. What is important in all of this is that, regardless of its actual truth content, any statement that is a *khābar* remains subject to the independent judgments of its recipient.<sup>89</sup> This contrasts sharply verbal formulae used for acts of *inshāʿ*, or origination. For the latter are self-confirming and are, as such, not subject to the independent judgments of their recipients.

The upshot of all of this for the *fatwā* and the *ḥukm* is as follows: (1) the *fatwā*, as a *khābar*, is subject to the independent judgments (belief or disbelief) of its recipient, whereas the *ḥukm*, as an *inshāʿ*, is not; (2) the binding force of a *fatwā* is thus contingent upon the assent of its petitioner, whereas the binding force of a *ḥukm* inheres in the decision itself; (3) while the recipient of a *fatwā* has a choice of accepting or rejecting it, a litigant in an adjudicated dispute has no choice before the *ḥukm* of a judge; and (4) whereas the *ḥukm* automatically disarms and silences all dissenters, the *fatwā* does not.

To be sure, al-Qarāfī's description of the *ḥukm* as an *inshāʿ* was not an idle innovation. In *Tamyīz* he had presented the traditional definition of the *ḥukm* as "(the imposition of) a binding obligation (*ilzām*)."<sup>90</sup> After pointing out a number of defects in this definition, he goes on to redefine the *ḥukm* as

... the origination (*inshāʿ*) of a disencumbrance (*itlāq*) or of an obligation (*ilzām*) in matters [i.e., legal questions] treated by acceptable *ijtihād* for dispute situations involving conflict over some worldly interest (*maṣāliḥ al-dunyā*).<sup>91</sup>

Al-Qarāfī cites a number of examples to clarify this definition, among them the following:

... if (a judge) rules that land conquered by force (*anwatan*) is free land (*ṭilq*), not *waqf* for the benefit of the conquerors—as Mālik and

<sup>89</sup> Al-Qarāfī cites two exceptions to this: (1) assertions (*akhbār*) made by God or His messenger, or backed by the consensus of the Community; and (2) assertions of a priori facts, such as one plus one equals two. See *al-Furūq*, 1:19. Al-Qarāfī's mention of Prophetic hadith should not be misunderstood: One may reject a hadith if one believes that the assertion of the person attributing it to the Prophet is false. It is only if one accepts that the Prophet asserted a thing that one must accept its contents as true.

<sup>90</sup> *Tamyīz*, 18.

<sup>91</sup> *Tamyīz*, 20. Ibn Farḥūn (*Tabṣīrat*, 1:11) and after him al-Ṭarābulisī (*Muʿīn*, 8) intimate that this definition of the *ḥukm* was al-Qarāfī's innovation. The notion itself, however, appears in an earlier work, *Adab al-qaḍāʾ*, 125, of Ibn Abī al-Dam, who died in 642/1244.

his followers hold—and the judge is a Shāfi‘ī, who holds that such lands are free, not *waqf*, this land is thereby rendered free.<sup>92</sup>

If a man says to a woman, “If I marry you, you are thrice divorced,” and then marries her and a judge rules that the marriage is valid, a (subsequent) judge, who holds that such statements necessitate divorce, would have to uphold this marriage, and he could not issue a *fatwā* obliging divorce.<sup>93</sup>

Again, the judge’s act of giving judgement immediately transforms the *fatwā* of those who hold land conquered by force to be free, and the subsequent marriage to be valid, into a binding, unassailable *ḥukm*. It is in this sense, i.e., of originating a *status—not a content*—therefore non-existent, that al-Qarāfi refers to the *ḥukm* as an origination.

This (binding and unassailable) status is a thing that comes into existence *after* the judge’s ruling, not before. Indeed, prior to this ruling the[se] case[s] remained open to every possible form of contestation and disagreement. And when we speak of origination (*inshā’*), we mean no more than this (effect).<sup>94</sup>

Al-Qarāfi’s case to his interlocutors was essentially that the ability to confer this status upon *fatwās* in this manner was precisely what judgeship was all about, and that it was only this authority (*wilāyah*) that separated the judge from the mufti. To challenge, let alone overturn, a judge’s ruling was to violate this very authority, which, as long as it was used to transform an orthodox *fatwā*, was properly exercised. This is why al-Qarāfi asserts that deputy judges are actually equal to their principals, the latter including even the chief justice himself.<sup>95</sup> For even though the authority of the former is derived from that of the latter, it remains, all the same, genuine authority. And as long as a deputy uses this authority to apply an authoritative *fatwā*, it remains just as illegal to challenge his ruling as it would be to challenge the ruling of the chief justice himself.

<sup>92</sup> *Tamyiz*, 20–21.

<sup>93</sup> *al-Furūq*, 2:103. Mālik held that such marriages were invalid and that the previously pronounced divorce was binding (*Tamyiz*, 65–66). Al-Shāfi‘ī, on the other hand, held that the previous pronouncement was void, arguing that a man could divorce a woman only after having already been married to her. This was his understanding of the hadith, “Divorce is the right of he who possesses the shank (*aṭ-ṭalāqu li man malaka ‘s-sāq*).” (*Tamyiz*, 73.) The subsequent marriage was thus valid.

<sup>94</sup> *Tamyiz*, 28. Emphasis mine.

<sup>95</sup> *Tamyiz*, 67.

### 1. *Why Inshā’?*

But judicial rulings are not unassailable *because* they are originations; this was only al-Qarāfi’s manner of theorizing about already existing traits. Al-Khaṣṣāf (d. 261/847), to take just one early example, upholds the inviolable status of judicial rulings without attributing this to their being acts of *inshā’*.<sup>96</sup> This raises the question of the possible advantages al-Qarāfi could have been seeking from this particular theoretical approach?

The answer to this query lies, I believe, in the fact that *inshā’* was the legal instrument par excellence in medieval Islamic law, and, as such, its binding and irreversible effect was deeply embedded in the collective conscience of al-Qarāfi’s times. By aligning the *ḥukm* with *inshā’*, al-Qarāfi hoped to gain for it the same sacrosanctity accorded all other acts of *inshā’*.

In his *al-Furūq*, al-Qarāfi defines *inshā’* as,

... any statement the existence of which engenders the existence of its referent, actually or concomitantly.<sup>97</sup>

These “statements” to which he refers are actually specified verbal formulae used to initiate certain legal actions provided for under the Law: e.g., eleemosynary gifts, contracts, legal testimony. These “formulae of origination” (*ṣiyagh al-inshā’*) include preterit verbs, imperfect verbs and active participles, each morphological form being used in a specified area of the Law. For example, preterit verbs are used to originate contracts: “I (have) sold” (*bi’tu*) and “I (have) bought” (*ishtaraytu*) for contracts of sale; “I (have) married to you” (*zawwajtuka*), and “I (have) accepted (*qabiltu*) for contracts of marriage. Present tense verbs are used when tendering testimony in court: One says, “I bear witness” (*ashhadu*); “I (have) born witness” (*shahadtū*) would not be valid.<sup>98</sup> Active participles, as in, “You are divorced” (*anti ṭāliq*) and “You are free” (*anta hurr*), are used to originate divorce and manumission; and so forth and so on.

Whenever these formulae are uttered, their effect is immediate, automatic, and irreversible. No one, including the utterer himself, may challenge, deny, or seek to reverse this effect in any way. That this type of recognition was uncontested and deeply ingrained in the legal

<sup>96</sup> *Adab al-qādi*, 338ff.

<sup>97</sup> *al-Furūq*, 1:21.

<sup>98</sup> *Tamyiz*, 53.

thinking of the times is reflected in a widespread problem taken up by al-Qarāfi in the latter part of *Tamyiz*.

This problem begins with the fact that, while God confers the rights actioned via acts of origination, the actual words to be used are not designated by God. Nor is the legal effect of these words intrinsic to them from the standpoint of language. It is rather custom and the customary exercise of legal rights via the use of certain verbal expressions that endows the latter with what may be called 'formula-of-origination status'. This is clearly stated by al-Qarāfi in his *al-Furūq*.

A man's statement to his wife, "You are divorced," does not effect divorce, according to the original meaning of these words (*bi 'l-waḍ'ī 'l-awwal*). Rather, the original meaning of this expression is that he informed (*akhbara*) her that he had divorced her thrice. Ordinarily speaking, these words would not legally bind him in any way. On the contrary, the effect of such a statement would be similar to what occurs were she to ask him about her status after a divorce and he were to respond, "You are thrice divorced," informing her that divorce had taken place. This is the original effect of these words. And they have only come to acquire the ability to bring divorce into actual existence by the fact that custom has converted them from a mere assertion (*khbar*) into an origination (*inshā'*) (*wa innamā ṣārat tufīdu 't-ṭalāqa bi sababi 'n-naqli 'l-'urfīyī 'ani 'l-ikhbāri ilā 'l-inshā'*). This is how all such (legally binding) formulae work.<sup>99</sup>

Al-Qarāfi cites a number of areas in which changes in custom had divested one-time formulae of origination of their legal effect: e.g., sale, *murābahah*, commercial transactions, divorce, etc. Because these formulae had lost their legal status, it was illegal, al-Qarāfi insisted, to hold the laity to the legal effects of these outdated phrases simply because they had at one time been used as formulae of origination and handed down as such in the manuals of *fiqh*. It was wrong, according to al-Qarāfi, to inform a layman that his saying to his wife, "You are devoid of obligation (*anti khalīyah*)," or "I have given you to your family (*wahabtuki li ahliki*)," actioned divorce. For although these phrases had been identified by Mālik in *al-Mudawwanah* as formulae for divorce, it was no longer the custom of the people in 7th/13th century Egypt to use these phrases for this purpose. In fact,

<sup>99</sup> *al-Furūq*, 1:23.

many people no longer even knew what such phrases meant.<sup>100</sup> Thus, al-Qarāfi protested,

You know that you do not find anyone using these phrases today. On the contrary, whole lifetimes pass, and no one hears anyone say to his wife when he wants to divorce her, '*anti khalīyah*,' or '*wahabtuki li ahliki*'. No one hears anyone use these phrases (today), neither to sever the marital bond, nor to designate the desired number of divorces.<sup>101</sup>

In sum, al-Qarāfi's argument was that since it was custom that endowed words with legal force it was to custom and not the words themselves that one had to look. For most of the men of his time, however, it was inconceivable that a formula of origination could ever be anything but a formula of origination; words used in this capacity could never lose their legal effect. On this understanding, they continued to give *fatwās* based on outdated formulae, holding people to the legal implications of words which they had little to no understanding. And, despite his eloquent campaign against this practice, al-Qarāfi was ultimately forced to concede defeat.

... most of our partisans and the scholars of our time do not support this position of mine. In fact they condemn it. And I believe their position to be in violation of the consensus of the Imāms. Indeed, this position (which I have articulated here) is clear to anyone who contemplates it with a sound mind and a critical eye, free of the partisan biases of the *madhhabs*, which is unfitting for anyone who truly fears God Almighty.<sup>102</sup>

This problem and the fact that it thwarted al-Qarāfi's efforts to overcome it reflects the deeply ingrained sacrosanctity of anything associated with *inshā'*. By redefining the *ḥukm* as an *inshā'*, al-Qarāfi's aim was thus to reinforce its inviolableness by equating it with an instrument whose legal status and effects were readily conceded and whose violation was unthinkable. It is perhaps significant that it was the Shāfi'is, and not the Ḥanafis, who went along with al-Qarāfi in identifying legal actions (e.g., sale, divorce, etc.) as acts of *inshā'*.<sup>103</sup> This suggests that his main target was, again, the Shāfi'is, and it was hoped and anticipated that his theory would achieve its greatest success with them.

<sup>100</sup> *Tamyiz*, 237-38.

<sup>101</sup> *Tamyiz*, 238.

<sup>102</sup> *Tamyiz*, 241.

<sup>103</sup> *Tamyiz*, 58-59.

B. *Apropos the Shāfi'i Doctrine on Principal/Deputy Disparity*

Having established the *khavar/inshā'* dichotomy, al-Qarāfi was left to contend with the Shāfi'i doctrine which allowed principals to filibuster rulings—even after these had been recognized as rulings—by simply refusing to implement them, “neither enforcing nor overturning [them], but simply leaving the matter as it is”.<sup>104</sup> The problem here begins essentially with the fact that even where there was mutual recognition across *madhhab* lines, when it came to *interaction* between members of disparate schools it was one's own view that would be relied upon to determine the legality of the shared act. As such, a Shāfi'i principal would be well within his right to judge the ruling of his Mālikī deputy to be inadmissible, since it contradicted the view of the Shāfi'i school. Al-Qarāfi had two responses to this problem: the first was based on the idea of taking the perspective of those with whom one interacts; the second was based on the legal principal of giving precedence to specific categories over general ones (*taqdīm al-khāṣṣ 'alā al-'āmm*).

1. *Taking the Perspective of the Other*

It may be recalled that some Shāfi'is, among whom should be included Ibn bint al-A'azz, insisted that where a principal believed the ruling of his deputy to be wrong, he was not bound to confirm it. This was based on the notion that to do so would be tantamount to forcing the principal to give a ruling which he believed to be incorrect.<sup>105</sup> This position turns on the idea that interaction with another party cannot be justified by the fact that the shared action is in conformity with the latter's view; on the contrary, shared actions are valid only if they conform to the doctrine of one's own school. Against this more parochial stance, al-Qarāfi introduces the argument that the propriety of interaction cannot be judged solely on the basis of one's own view; rather, as long as one's initiating counterpart does not contradict *his* school, it is legitimate to interact with him, even if the shared action goes against the view of one's own *madhhab*. On this understanding, principals are justified, indeed bound, to enforce the rulings of their deputies, as long as these are sound according to the school of the latter.

The most useful discussion of the issue of interaction appears in response to the question of whether it is permissible for a Shāfi'i to

<sup>104</sup> *al-Furūq*, 2:104.

<sup>105</sup> See above, 66.

be led in prayer by a Mālikī, and vice versa, “despite the fact that each believes that his counterpart commits acts (in connection with prayer) which would render the prayer invalid were he himself to commit them; for example, one who wipes only a part of his head (in ablution), or omits the *basmalah* [in reciting the Opening Chapter], or fails to rub (*tadlik*) when performing ritual washing.”<sup>106</sup> To be sure, these questions were not new.<sup>107</sup> And al-Qarāfi's position can perhaps be best appreciated by way of comparison with the responses of two Shāfi'i jurists, Abū Ḥamid al-Ghazālī and al-'Izz ibn 'Abd al-Salām.

Al-Ghazālī's response to the question of whether a Shāfi'i could be led by a Ḥanafī was in the negative. The reason for this was that the Shāfi'i did not believe the Ḥanafī's to be a valid prayer. In other words, were the Shāfi'i himself to pray in this manner, his prayer would not be valid. Al-Ghazālī notes that in and of itself the Ḥanafī's prayer would be valid for the Ḥanafī, because it is the result of his Imām's *ijtihād*. But for a Shāfi'i, who believes not Abū Ḥanīfa but al-Shāfi'i to be correct, to be led in prayer by a Ḥanafī would result in an invalid prayer.<sup>108</sup>

Al-'Izz, on the other hand, had a different approach. Apparently failing in his attempt at a logically consistent solution, he threw theory aside, choosing instead to attack the problem from a more practical angle: If it is maintained that a Shāfi'i cannot be led by a Mālikī (and vice versa), the numbers in attendance at congregational prayers will decrease. This is an unacceptable vitiation of the basic imperative to worship God as a unified community.<sup>109</sup> Therefore, al-'Izz held, it was permissible for a Shāfi'i to be led by a Mālikī, although this was for him clearly an exception to the rule.<sup>110</sup>

<sup>106</sup> *Tamyiz* 227.

<sup>107</sup> See, for example, al-Ṣawī, *Bulghat*, 1:160, where it is reported that Ibn al-Qāsim (d. 191/806), the early disciple of Mālik, was asked a similar question to which he responded, “If I know that a man does not recite [*al-Fāṭihah*] in the last two units of his prayer, I do not pray behind him.” Aḥmad Ibn Ḥanbal (d. 241/855), on the other hand, was asked if he would pray behind a man who did not renew his ablution following a nose bleed, to which he responded, “How am I to refuse to pray behind the likes of Imām Mālik and Sa'īd b. al-Musayyib?” See Shāh Walī Allāh al-Dahlawī, *Hujjat allāh al-bālighah*, 2 vols. (Cairo, n.d.), 1:159.

<sup>108</sup> *al-Mustasfā*, 2:370–71.

<sup>109</sup> See *Tamyiz*, 228; *al-Furūq*, 2:100.

<sup>110</sup> At one point, for example, al-'Izz is asked if it is permissible for a Shāfi'i to do business with a Mālikī who seizes some commodity or makes a contract by means believed by the Shāfi'i to be illegal, affirming in both cases that these actions are permissible according to the *madhhab* of Mālik. Al-'Izz responds: “A Shāfi'i should not do this; this

For his part, al-Qarāfi differs with both al-‘Izz and al-Ghazālī. He differs with al-Ghazālī in that for al-Qarāfi a Shāfi‘ī should judge the validity of a prayer led by a Ḥanafī according to Abū Ḥanīfa’s criterion, not that of al-Shāfi‘ī. And as long as the Ḥanafī does nothing to contradict Abū Ḥanīfa’s doctrine, the prayer is valid, both for the Ḥanafī and the Shāfi‘ī. Al-Qarāfi points out that were a Shāfi‘ī to be led by another Shāfi‘ī who did not recite the entire Opening Chapter (*al-Fātiḥah*) or the *basmalah*, his prayer would be invalid; for these things are required according to the *ijtihād* of al-Shāfi‘ī. Likewise, were two Shāfi‘īs to disagree on whether a body of water had been polluted by a small amount of ritually impure substance, the Shāfi‘ī who believed the water to be ritually impure (*najis*) could not pray behind the other, even if the other did not believe the water to be ritually impure. The reason for this—and herein lies al-Qarāfi’s contribution—is that small amounts of ritually impure substances pollute entire bodies of water, according to the *ijtihād* of al-Shāfi‘ī. Thus Shāfi‘ī “A” who sees Shāfi‘ī “B” perform ablution from such water believes the latter to be in violation of his own *madhhab*. It would be illegal, therefore, for “A” to accept “B’s” leadership in prayer, even if the latter does not believe himself to be in violation. Were a Mālikī, however, to come along and perform ablution from this same body of water, it would be permissible for Shāfi‘ī “A” (or any other Shāfi‘ī) to be led by this Mālikī in prayer. For small amounts of ritually impure substances do not pollute entire bodies of water according to the *ijtihād* of Mālik, which, as indicated earlier, is orthodox for Mālik and all who follow him. Thus Shāfi‘ī “A” does not believe the Mālikī to be in violation of orthodoxy. And for this reason, his prayer behind the latter must be considered sound.<sup>111</sup>

As for the view of al-‘Izz, al-Qarāfi points out that it is inconsistent. For if the interest of maintaining large numbers can justify a Shāfi‘ī’s praying behind a Mālikī, it should also justify one’s praying behind another with whom he disagrees on the direction of prayer (*qiblah*). But neither al-‘Izz nor anyone else allows this.<sup>112</sup> Having made this point, however, al-Qarāfi goes on to concede that the two cases are

accords best with true piety. But if he follows Mālik in this and similar issues, there is no harm (in this transaction), even if he is a Shāfi‘ī following Mālik on this particular question only. And perhaps this is among those things that are intensely discouraged (*yashaddu karahatuh*), owing to its weak justification.” See *Fatāwā*, 38–39.

<sup>111</sup> See *al-Furūq*, 2:100–02, esp. 102.

<sup>112</sup> *Tamyiz*, 228.

actually different; for facing the direction of prayer is a universally agreed upon (*mujma‘ ‘alayh*) question; rubbing (*tadlik*), reciting the entire *al-Fātiḥah*, etc. are disputed (*mukhtalaf fih*). Thus, if a person believes another not to be facing the direction of prayer, he believes that person to be in violation of consensus, i.e., the *madhhab* of the *ummah*, unlike the situation where one omits portions of *al-Fātiḥah* or fails to rub when performing ablution.<sup>113</sup>

## 2. Taqdīm al-Khāṣṣ ‘alā al-‘Āmm

Al-Qarāfi’s proposal to take the perspective of the other was a new idea for which he claimed credit as the innovator. Another solution to the filibuster tactic was based on a long-established principle in *uṣūl al-fiqh* which stipulated that whenever there was conflict between a general and a specific injunction, precedence was to be given to the specific. This appears to be the argument most favored by al-Qarāfi, perhaps because he realized that being more clearly grounded in the tradition it would stand a better chance of success.

The principle, “giving precedence to the specific over the general,” (*taqdīm al-khāṣṣ ‘alā al-‘āmm*) may be summarized as follows: Expressions may connote a broad radius of meanings. For example, the Arabic word, “*ayn*,” may refer to an eye, a gold coin, a spy, a spring of water. To understand this expression in its general sense (*‘āmm*) would be to include all of these constituents, and, on this understanding, a prohibition on touching an *ayn* would proscribe all of these things. On the other hand, expressions may also denote, i.e., they may be used to refer to only a subset of all possible referents. This is usually achieved via the use or reliance upon some extraneous or contextual “specifier,” or “*mukhaṣṣis*,” and the resulting denotatum is referred to as specific, *khāṣṣ*.<sup>114</sup> Understood in its specific sense, a prohibition on touching an *ayn* might include only gold coins. According to al-Qarāfi, there was consensus among legal theoreticians (*uṣulīs*) that whenever there was conflict between two injunctions, one being understood to be of general signification (e.g., “Do not hold to the bonds of matrimony with unbelieving women” [Q 60:10]), the

<sup>113</sup> *Ibid.*, 229–30; *al-Furūq*, 2:101.

<sup>114</sup> There was actually wide disagreement among classical jurists as to whether words in and of themselves could convey general or specific signification. The resulting debate produced four distinct theses: (1) general signification; (2) specific signification; (3) homonymity; and (4) a non-committal stance. For the most exhaustive treatment of this subject, see B. Weiss, *Search*, 402ff.

other being understood to be of specific signification (e.g., "Made lawful to you from this day on are . . . chaste women from among the People of the Book" [Q 5:5]), precedence was to go to the specific, and the general injunction was to be understood in its light.<sup>115</sup> The reason for this was that to give precedence to the general injunction would be to obliterate the specific one, while giving precedence to the specific injunction would not completely obliterate the general one, since some portion of the latter would remain. In other words, to break bonds of matrimony with all unbelieving women would obliterate the permission to marry chaste Jewish and Christian women; but to marry only Jewish and Christian women would not completely obliterate the command to break bonds with unbelieving women, since unbelieving women other than Jews and Christians would remain unlawful. Moreover, in the face of such apparent contradictions it must be assumed that the intended meaning of "unbelieving women" excluded Jewish and Christian women to begin with.<sup>116</sup> Thus, particularizing general statements (*takhsīṣ al-‘āmm*) actually constitutes a means of removing textual ambiguities and apprehending the originally intended meanings of words.<sup>117</sup>

Al-Qarāfi applies this principle to judicial rulings in the face of dissenting views, the latter of course including the view of a dissenting chief justice.

God the Exalted has delegated to judges the right to originate rulings in specific cases involving disputed legal questions. Therefore, when a judge rules, by God's permission, and his ruling on behalf of God is substantively correct, this ruling becomes as a text from God (*kāna dhālika naṣṣan wāridan min Allāh*) upon the tongue of His represen-

<sup>115</sup> See *Tamyiz*, 67, 77, 85, 122, and passim. The notion that words denote and that it is often necessary to set their general meaning aside is found in Aḥmad b. Ḥanbal's polemics against the Mu'tazilites, where, for example, Jahm b. Ṣafwān argues that the Qur'ān must be created because God says that He is the Creator of *all* things (*khāliq kulli shay'*), to which Ibn Ḥanbal responds that "all" in this case is a denotatum. Among his proofs is the fact that while God says of the Queen of Sheba, "She was given of everything," (27:23) the kingdom of Solomon was a thing of which she was not given. See Aḥmad b. Ḥanbal, *al-Radd 'alā al-zanādiqah wa al-jahmīyah*, (Cairo: Salafiyah Press, 1399/1979), 33–34.

<sup>116</sup> *Sharḥ*, 203–04.

<sup>117</sup> Particularizing general statements appears to be a method favored by the Mālikis, who see general statements as conjectural and specific ones as certain. This contrasts, the view of the Ḥanafis, for example, who consider both types certain and resort in the face of apparent contradictions to the method of abrogation (*naskh*). See 'Umar F. 'Abd Allah, *'Amal*, 149–54.

tative, who is His representative on earth and successor to His prophet, regarding this particular case. This case must therefore be removed from the sphere of (cases treated by) the dissenter's *madhhab*. For the legal proof relied upon by the dissenter is general, while this "text" (from the judge) is specific to a particular species of this genus of case. There is, thus, concerning this particular species, a conflict between the specific proof, i.e., the ruling of the judge, and the general proof, i.e., what the dissenter believes to be correct. And in such cases, the specific is to be given precedence over the general, as has been established according to the science of legal methodology (*uṣūl al-fiqh*).<sup>118</sup>

The view of each school of law represents a subset of the mother-set of valid views on the question under review. When a judge chooses as his ruling the view of his school, he renders this view specific, identifying it as the view specifically intended by God to be applied to the case under review. As the specific, this view takes precedence over all of the remaining views, according to the agreed upon principle, *taqdīm al-khāṣṣ 'alā al-‘āmm*. In this way the judge's ruling "denies the dissenter the right to follow his own school, and forces him to accept the view represented in the judge's ruling."<sup>119</sup>

The ruling of the judge is also specific in another sense, namely, that it applies only to the case under review; it has no probative weight outside this specific case. Judicial rulings do not affect the views of the schools in cases other than the one adjudicated, even where the generic question is identical to that settled at court. It is in this context that the oft-cited rule to the effect that the ruling of a judge ends the dispute among the *fuqahā'* must be understood:<sup>120</sup> It ends the dispute only as regards the adjudicated case; generically speaking, the legal question continues among the *madhhabs* as a disputed question of law. On the other hand, *fatwās* (and all views, including those of a chief justice, are in the face of a valid decision only *fatwās*<sup>121</sup>) that go against judicial rulings are of no effect whatever,

<sup>118</sup> *Tamyiz*, 122.

<sup>119</sup> *Tamyiz*, 70. For a more concrete example of how this principle is applied, see the example of a case involving a man who says to a woman, "If I marry you, you are thrice divorced," at *Tamyiz*, 65–66. See also al-Qarāfi's lengthy response to Qu. no. 26 at *Tamyiz*, 110–22, where he argues that the decision of a judge in effect changes the *fatwā* normally given by a *madhhab* as regards the adjudicated dispute.

<sup>120</sup> Cf., G. Makdisi, *Rise*, p. 201. "... [o]n the other hand, the qadi's hukm was a decision, a judgment, which in putting an end to differences of opinion, put an end also to the free play of ideas leading to the strongest opinion accepted by the consensus of the community."

<sup>121</sup> See "Obiter Dictum," below, 213–17.



and litigants may not take them as a means of extricating themselves from judicial decisions.<sup>122</sup>

Again, the principle, *taqdīm al-khāṣṣ ‘alā al-‘āmm*, only reinforced the already existing consensus prohibiting challenging and overturning valid rulings in cases involving disputed questions of law. By virtue of this principle, al-Qarāfi notes that such rulings are actually more inviolate than those in cases where the legal question is one of consensus. For, in the latter case, he points out, there is only one impediment to challenges, namely, consensus, whereas in the former there are two impediments: consensus and “giving the specific precedence over the general”. Marvelling at this plainly unexpected result, al-Qarāfi gloats triumphantly, “It is indeed strange how judicial rulings in cases involving disputed questions become stronger than those in cases where the legal question is one of consensus.”<sup>123</sup> This incredulity was of course entirely feigned; for it was his very intention from the beginning to reinforce the authoritativeness of disputed views. After all, it was in their subscription to their respective views on disputed questions that one *madhhab* distinguished itself from the other. By reinforcing, therefore, the authoritativeness of disputed views, al-Qarāfi advanced yet another step towards his ultimate goal of insulating the *madhhabs* and ensuring that the views of each school retained their status as *bona fide*, applicable law.

<sup>122</sup> *Tamyiz*, 126–27.

<sup>123</sup> *Tamyiz*, 66–67.

## DEFINING THE LEGAL JURISDICTION OF THE STATE: AGAINST THE TYRANNY OF GOVERNMENT

Where law ends, there begins tyranny.<sup>1</sup>

### I. General Introductory

There is something intuitively compelling about these words. Almost effortlessly they seem to comport with what is normally perceived to be the function of law in any society. For his part, however, al-Qarāfi seems to harbor some misgivings about this notion too uncritically indulged. From his perspective, not only could law be used as a means to tyranny but as a rather effective means at that. In other words, al-Qarāfi appears to entertain the suspicion that where law *begins* so do the avenues to tyranny. This perspective was conditioned of course by the fact that Islamic law in his time was backed by a power-wielding Muslim state, one of whose primary functions was to guarantee conformity to the *sharī‘ah*. In such a context, especially from the vantage-point of the politically weaker schools, it is easy to understand the fear that the state may use its authority as executor as an excuse to fordize the law, the Caliph or Sultan simply assuming the prerogative of adopting Ḥanafī or Shāfi‘ī views and imposing these on the community as the uniform law of the land. This becomes an especially imminent and intractable danger given the corporate status of the *madhhabs* and the unimpeachable authority it confers upon the said Ḥanafī or Shāfi‘ī doctrines. For on such an understanding, there can be little grounds on which to oppose the state as it goes about the business of fordizing the law, even if such a process should imply undermining the authority of all other views. At bottom, however, this very possibility begins with the fact that the religious law endows the state with the executive authority necessary to the pursuit of any

<sup>1</sup> These words appear in the entrance to the Justice Building in the small town of Bloomington, IN, where I presently reside. They are attributed to a certain “Pitt,” whom I take to be the 18th century Earl of Chatham, William Pitt the Elder (1708–78).

such fording policy. And it is here, in the fact that the state functions as the legitimate executive overseer of the religious law, that we find the origins of the idea that where law (or the idea of legal jurisdiction) begins, so do the possibilities for tyranny.

One way of dealing with at least some aspects of this problem would be to show that not all Ḥanafī or Shāfi'ī views were *legal* in the strict sense, the point being that, with few exceptions, only *legal* views were enforceable as bonafide law. Another approach would be to invoke the corporate status of one's own *madhhab*, including the right to follow its doctrines and to ignore extraneous views. These lines of argument, again, to my knowledge unique to al-Qarāfi, have already been discussed in chapters three and four. A third means of limiting the state's authority would be to limit the scope of the area over which it could claim legal jurisdiction. This, the subject of the present chapter, al-Qarāfi attempts to do by pointing to the distinction between law, on the one hand, and the legal process, on the other, and then restricting the state's jurisdiction to the latter, itself limited to specified areas of concern. Though al-Qarāfi himself does not speak precisely in these terms, the law/legal process dichotomy has proven a valuable tool in penetrating the ultimate aims and objectives behind his thought. However, as this approach will likely appear a tad unique, if not suspect, I shall preface my discussion of the limits of government with an attempt at vindicating this methodology. This will include some suggestions about the advantages to be derived from this particular approach as well as some of the pitfalls that can result when the distinction between law and the legal process is not duly observed.

## II. *The State Between Law and the Legal Process*

"The sacred law of Islam," wrote the late Joseph Schacht,

is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects; it comprises *on an equal footing* ordinances regarding worship and ritual, as well as political and (in the strict sense) legal rules.<sup>2</sup>

<sup>2</sup> *Intro*, 1. Emphasis mine.

This statement by this eminent authority on Islamic law is undeniable in its basic assertion. It is the product, however, of a very particular approach to the study of law itself, namely, that which views law from the perspective of legal rules. Since the rise of American Legal Realism, however, it has been demonstrated that law can be viewed from another perspective, namely, that of the legal process. This is the approach taken, for example, by Alan Watson in his insightful and provocative work, *The Nature of Law*. On this approach, the issue becomes not one of identifying those areas of human activity that are subject to legal contemplation; the issue becomes, rather, one of identifying those areas that are regulated by rules that are backed by sanctions via some sort of legal process. One advantage of this approach is that it provides a more useful framework within which to examine the relationship between law and government. For, while it is government, backed by the state, that assumes the right and responsibility of implementing legal sanctions, in seeking to carry out this executive function, it is also bound to operate within certain limits designed to restrict its role to that of executor. The distinction, thus, between law and the legal process becomes not only significant on the level of theory but extremely operative on the level of practical application. For it places a clearer demarcation between the more primary act of making or interpreting law and the secondary (though equally important) activity of legal implementation.

It is important, in attempting to define the interconnectedness between Islamic law and government, to recognize the distinction between these two approaches to the study of law. For, whether one proceeds on the basis of one or the other will inform one's understanding of such truisms as Islam's non-recognition of any distinction between the secular and the profane, which in turn will affect one's understanding of the resulting relationship between Islamic law, the state and the individual. Schacht, for example, who held an LL.D. (Doctor of Laws) undoubtedly understood the importance of this distinction. He was certainly aware that not every rule of the *sharī'ah* carried sanctions to be implemented in the here and now. But the distinction between these two approaches has been less appreciated by other writers at whose hands descriptions of Islamic law such as the above of Schacht have contributed to the notion that government in Islam is as all-encompassing as Islamic law. This is the view with which one emerges, for example, from Professor A.K.S. Lambton's influential study, *State and Government in Medieval Islam*.

According to Professor Lambton, the state in Islam "exists for the sole purpose of maintaining and enforcing the law".<sup>3</sup> As Islamic law is said to be all-encompassing, government is assumed to have jurisdiction coextensive in scope with that of the law. On such a scheme, there can be no question of limited government.<sup>4</sup> And it becomes reasonable to assert, as does Professor Lambton, that, "The state is 'given', and it is not limited by the existence of an[y] association claiming to be its equal or superior, to which it can leave the preaching of morality and the finding of sanctions for its truth. It has itself to repress evil and show the way to righteousness; there is no clear-cut boundary between morality and legality".<sup>5</sup> The state, in other words, is the executor of the all-encompassing religious ideal.<sup>6</sup> And, as the Community itself exists to bear witness to God, i.e., by adhering to His sacred law, there can be no conflict between the interests of the individual and those of the state. For, the good of the individual is the same as that of the state.<sup>7</sup> Thus, "the antithesis between the individual and the state or the government is not recognized . . .",<sup>8</sup> and, "criticism of, and opposition to, the state involve[s] apostasy and heresy."<sup>9</sup>

Viewed from the perspective of legal rules, it may be correct to describe Islamic law, in the words of Schacht, as all-encompassing. But from the perspective of the legal process one would have to concede that Islamic law is limited to specified areas of concern. The question to be asked of course is whether government in Islam presides in fact over the law or simply over the legal process, a question, given the opaque locution of many if not most medieval jurists, that is admittedly often difficult to answer. But the question itself, fundamental though it may be, seems to be one that scholars such as Professor Lambton never seriously contemplate. The result is that not only Islamic law but Islamic government is presented as all-encompassing. In the end, one emerges with an almost Hegelian-historicist notion of the medieval Islamic state whose sovereignty over its citizens is deemed not as a functional requirement but a moral necessity, and

<sup>3</sup> *State and Government*, XV.

<sup>4</sup> Cf., Professor Lambton's view that medieval Muslims never developed an effective basis for the concept of limited government. *State and Government*, 63-64.

<sup>5</sup> *Ibid.*, XV-XVI.

<sup>6</sup> *Ibid.*, XIV.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, 307.

whose absolutism assumes almost the virtue of moral truth.

This vision of the nature and function of the Islamic state is not the exclusive preserve of scholars like Professor Lambton whose primary area of specialization was not law but political science. In his "The State and the Individual in Islamic Law," Professor N.J. Coulson, who was both formally trained as a lawyer and a leading authority in the field of Islamic legal studies, expresses essentially the same ideas.<sup>10</sup> Islamic law, according to Professor Coulson, sees as its essential function the establishment of an ideal relationship between man and the Creator. To this end, the regulation of all human relationships, whether among individuals or between the individual and the state, is rendered subsidiary to this ultimate purpose. "Because," moreover, "a properly constituted political authority, representing the rule of divine wisdom, guarantees the welfare of the subject in this world and in the world to come, it follows that the interests of the State and not those of the individual will constitute the supreme criterion of the law."<sup>11</sup> The stress, then, adds Professor Coulson, throughout the entire *shari'ah* lies upon the duty of the individual to act in accordance with the divine injunctions. But, "since the conscientious application of these divine injunctions is the declared purpose of the political authority, the jurists did not visualise any such conflict between the interests of the ruler and the ruled as would necessitate the existence of defined liberties of the subject."<sup>12</sup> As such, "no opposition, from criticism or abuse of the leaders to open and armed revolt, is to be tolerated."<sup>13</sup> In short, "No adequate machinery . . . is provided by the legal theory to protect the individual against the State."<sup>14</sup> For, it is assumed that under this ideal form of government all men will naturally receive their due rights.<sup>15</sup>

This extensive quoting of these scholars should not be taken as a coded indictment of the excesses of Western scholarship. To begin with, this is not the view of all Western scholars. Professor W.M. Watt, for example, holds the basic purpose of the Islamic state to reside in providing security to individuals so that they may be able

<sup>10</sup> *International and Comparative Law Quarterly* vol. 6 (Jan. 1957): 49-60.

<sup>11</sup> *Ibid.*, 51. Interestingly, Professor Coulson notes that this is a view particularly endorsed in the Mālikī school, based on their endorsement of *istiṣlāḥ*, or public welfare.

<sup>12</sup> *Ibid.*, 50-51.

<sup>13</sup> *Ibid.*, 56.

<sup>14</sup> *Ibid.*, 59.

<sup>15</sup> *Ibid.*, 56.

to fulfill their religious duties, especially those of ritual worship.<sup>16</sup> Moreover, the tendency to view the Islamic state as a totalitarian repository of legal and religious authority is not exclusive to non-Muslim scholars in the West. Modern Muslims appear equally prone to endorse this vision of Islamic government under whose sovereignty no question of individual-state conflict arises. In her recent study, *Islam and Human Rights*, A.E. Mayer cites the views of a number of modern Sunni writers and activists from various countries throughout the Muslim world all of whom endorse, *mutatis mutandis*, some version of this essentially totalitarian view. To take just one random but extremely important example, the influential Muslim thinker and activist from Pakistan, Abū al-A'la al-Mawdūdī, was of the opinion that

... the order of the State, be it palatable or unpalatable, easy or arduous, shall have to be obeyed under all circumstances, [save when this means disobedience to God] ... a person should truly and faithfully and with all his heart, wish and work for the good, prosperity and betterment of the State...<sup>17</sup>

As Mayer points out, no government that purports to follow Islamic law will ever concede that its commands and prohibitions in any way contravene those of God. As such, there will never be grounds on which citizens might claim the right to disobey. The proviso, therefore, that state injunctions conform to the rule of God affords little if any real protection. In essence, the state is seen as the embodiment of the religious ideal, the role of the individual residing in little more than promoting its sanctity and welfare. It is interesting that, according to Mayer, modern Muslim activists are quite comfortable with tracing this vision of the Islamic state back to the classical tradition.<sup>18</sup>

This vision of the relationship between law, government and the community of individual Muslims does not comport with what one finds in al-Qarāfi. To begin with, while al-Qarāfi recognizes the need for the state to sustain enough authority and power to maintain order

<sup>16</sup> *Islamic Political Thought*, 96.

<sup>17</sup> Ann Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder and San Francisco: Westview Press, 1991), 65. A similar attitude by a modern Muslim writer is reflected in a recent essay by Muhammad Selim El-Awa, "A Response to N.J. Coulson's A History of Islamic Law," *Journal of Islamic Studies*, vol. 2 no. 2 (1991):143-79. At one point, for example, the author states emphatically: "In all matters prohibited by the Qur'ān it is possible for the appropriate authorities to fix and carry out discretionary punishment whenever they deem it necessary". *Ibid.*, 150, nt. 21. Emphasis mine. On the Shi'ite side, mention has been made of Khumayni's expanded notion of *velayat-e faqih*. For more on that topic, see Mallat, *Renewal*, 90ff.

and ensure the general welfare of the community, he is far from the Hegelian-historicist notion of the state as some sort of transcendent abstraction that leads or even should lead a reified existence above and beyond the competing hegemonies within society. The state, in his view, and after it its government, is simply that group within society that has managed to outcompete its rivals, amassing thereby enough power to be able to impose a modicum of order over the remaining units of society. At the same time, however, the competition that produces this group is both continuous and dialectical. As such, both the state and its government remain players (though superior to others) inextricably ensconced in the tangle of competing hegemonies within society. The following example from al-Qarāfi's 7th/13th century Egypt will serve, perhaps, to explicate this point of view.

As mentioned earlier, Ḥanafism began its rise in Shāfi'i-dominated Egypt beginning in the first half of the 7th/13th century. In the year 665/1267, Baybars' Ḥanafī vice gerent (*nā'ib al-salṭanah*), the powerful 'Izz al-Dīn al-Ḥillī, completed renovations on the famous al-Azhar mosque, including the installation of a *minbar*, and planned to reestablish the Friday prayer there. To his disappointment, however, the Shāfi'i chief justice, Ibn bint al-A'azz, objected to this plan. Al-Ḥillī, now seeking to circumvent the chief justice, took the matter up with Baybars, who proceeded to try to persuade Ibn bint al-A'azz to relax his position. But the latter persisted, holding, as had Ṣadr al-Dīn b. Darbās (the first Shāfi'i chief justice appointed by Ṣalāḥ al-Dīn on the eve of the latter's takeover from the Fāṭimids) that the sultan's name could be read in only one Friday prayer in a city. For this reason, Ibn Darbās had ordered that al-Azhar be shut down, which it was. Meanwhile, al-Ḥillī, though a Ḥanafī, established a Shāfi'i *madrasah* at al-Azhar,<sup>19</sup> and, with the approval of a number of jurists along with the Ḥanafī chief justice, proceeded with his plan to hold the Friday prayer.<sup>20</sup> But when he invited Baybars (himself now a convert to Shāfi'ism) to inaugurate the first Friday service, the Sultan declined, choosing instead to stay away along with chief justice Ibn bint al-A'azz.<sup>21</sup> Eventually, however, Friday prayer was reestablished at al-Azhar.<sup>22</sup>

<sup>19</sup> Ibn 'Abd al-Zāhir, *Rawḍ*, 277.

<sup>20</sup> See al-Suyūṭī, *Ḥusn al-muḥāḍarah*, 2:252.

<sup>21</sup> See al-Maqrīzī, *Sulūk*, 1:556-57.

Whatever one makes of all the bits and pieces here, it is clear that both the state and its government were players whose policies were affected by the ongoing competition within society, just as the outcome of this competition itself was often determined by the amount of support the state gave one party or the other. To al-Qarāfi's eyes, there was thus little incentive, and less justification, for treating either the Mamlūks or their government as neutral abstractions hovering benevolently above the fray. Both were, on the contrary, visibly caught in the tangle of competing hegemonies within the community at large. Consequently, it was not law but only the legal process that al-Qarāfi was willing to cede to government. And even this, which he saw largely as a *functional* requirement, he wanted to limit to what was absolutely necessary for the preservation of order and security. For to the extent that government's jurisdiction remained limited, so too would the area in which dissident views could be said to constitute an affront to proper authority. At the same time, however, even in areas where government's jurisdiction was recognized, al-Qarāfi attempts to sidestep the problem of dissidence by introducing the concept of *obiter dictum*, by virtue of which the pronouncements of government become *fatwās* that must compete with other contending views and the corporate status of the remaining *madhhabs*. Finally, the notion that individuals are endowed with *sui juris* confers upon them the right (and responsibility), albeit qualified, to conduct their affairs autonomously, in accordance with the law. On this concept, government intervention becomes the exception rather than the rule.

#### A. The Legal Process

According to Alan Watson, on whose description I shall rely, the legal process is the institutionalized process which has the essential function of resolving actual or potential disputes by means of a decision. This decision is of course backed by force. The disputes that may be presented or summoned for adjudication are identified by the legal rules, which define the rights, privileges and obligations to which citizens may lay claim. In this capacity, legal rules provide the means of invoking or calling the legal process into operation.<sup>23</sup>

It is a common feature of modern secular systems that their legal processes do not invade every aspect of life. There are indeed "sensi-

<sup>23</sup> *Nature of Law*, 20-22.

tive areas" in which the principle 'Law stays out' is vigorously invoked. What is recognized as a sensitive area will differ of course from system to system, as will the means of regulating this sphere of concerns, e.g., popular morality, tradition, malicious gossip, religion. For the most part, however, the scope of the secular legal process is directly proportional to the scope of the system's body of rules. Every rule represents a means of calling the legal process into operation; in fact, this appears to be the very *raison d'être* of a rule's existence. Similarly, the principle 'Law stays out' protects sensitive areas not by placing them directly out of reach of the legal process per se but by insisting that these are areas in which legal contemplation itself simply has no place. As such, there remains no way of calling the legal process into operation because there are no legal rules regulating these areas of concern. To give an example, the Prussian code (*Allgemeines Landrecht für die Preussischen Staaten*) of 1794 states that a healthy mother is under the obligation of suckling her child herself; how long she must keep the child at breast is determined by the father's decision.<sup>24</sup> Now, clearly, this is an area in which most Americans would insist that not only do the courts have no business intervening but that law itself in assuming the right to speak on such matters oversteps its proper boundaries. In other words, this is an area in which there should be neither legal contemplation nor a legal rule.

By insisting that certain matters are beyond the scope of legal contemplation, secular systems prevent the emergence of legal rules that would otherwise govern these matters. By doing so, government is kept at bay, since, in the absence of such rules, there remains no means of invoking the legal process. In other words, the scope of the legal process is controlled by setting limits to the scope of the system's body of legal rules.

The situation in Islamic law, however, at least according to al-Qarāfi, is patently different. Here the scope of the legal process is restricted not by narrowing the scope of matters that may be made the subject of legal rules but by placing limits directly on the legal process itself. This is achieved by restricting the scope of the latter's effective instrument, namely, the *hukm* (binding decision). Since it is the *hukm* that terminates disputes and carries the threat of force, any limits placed on this instrument will amount to limits on the legal process, since the effectiveness of the latter can extend only as far

<sup>24</sup> See *ibid.*, 97.

as the former takes it. The result is a range of matters for which there exist legal rules but whose implementation lies beyond the jurisdiction of the state. In other words, neither the state nor its government is the executor of every legal rule, because not every legal rule has the capacity to call the legal process into operation. This is the point al-Qarāfi is clearly making when he makes such statements as the following.

The rules of Islamic law are divided into two categories: (1) those that may be treated by both the *ḥukm* of an official (*ḥākim*) and the *fatwā* (of a jurisconsult), this category being subject thus to two types of ruling; and (2) a category that may be treated only by the *fatwā*.<sup>25</sup>

Now, though al-Qarāfi uses the phrase, "*ḥukm al-ḥākim*," literally, "the decision (*ḥukm*) of one who decides (*al-ḥākim*)", he has in mind not simply judicature but government in the broadest sense. "*Al-ḥākim*," it is true, is most commonly used in legal contexts to refer to judges and in a broader context to the caliph or sultan, in which latter case it means simply "ruler". But, according to al-Qarāfi's locution, "*al-ḥākim*" is not confined to these three authorities alone; nor is "*ḥukm*" confined to the decision handed down by a judge in court. Rather, the *ḥukm* is any legally sanctioned decision issued by an authorized government official; and any government official authorized to issue such decisions is, accordingly, a *ḥākim*. These include, according to al-Qarāfi, the following:

caliph (*al-imām al-akbar*)  
 secretary of state (*wazīr al-tafwīd*)  
 military governor (*al-amīr al-muwallā 'alā al-bilād*)  
*wazīr al-tafwīd* of military governors  
 military and other specialized government administrators (*al-amīr al-khāṣṣ 'alā tadbīr al-jaysh wa siyāsāt al-ra'iyah wa ḥimāyat al-baydah*)  
 judges (principals)  
*mazālim* court magistrates  
 deputy judges  
*muhtasibs*  
 court magistrates (e.g., 'justices of the peace,' etc.)  
 alms collectors  
 crop appraisers  
 arbitrators (*muḥakkams*)<sup>26</sup>

<sup>25</sup> *al-Furūq*, 4:52.

<sup>26</sup> *Tamyīz*, 156-73.

One may notice here that the sultan was not explicitly mentioned. This was either the result of a simple oversight on al-Qarāfi's part, or perhaps the sultan was meant to be included under the category of "military governors". At any rate, al-Qarāfi's failure to make explicit mention of the sultan was certainly not an attempt to challenge the legitimacy of the office. For, simply stated, al-Qarāfi was too much of a realist. This is clearly evidenced in his *Tamyīz* where he affirms, for example, that the title "Imām" is conferred upon powerless individuals only honorifically and the true head of state is whoever enjoys "*al-saltānah al-'āmmah*", i.e., the ability to impose his will over the remaining units of society.<sup>27</sup> Later, in *al-Furūq* he uses the term *imām* more explicitly to refer to the sultan.<sup>28</sup>

All of the above-named officials, including the sultan, are authorized to issue binding decisions. In taking up the issue of the jurisdictional boundaries of the *ḥukm*, al-Qarāfi's intention was thus to deal with the jurisdictional boundaries of government as a whole, the *ḥukm* being the only legally binding instrument in Islam. The limitations, in other words, he seeks to impose on the *ḥukm* are meant to translate into limits on government. Thus understood, al-Qarāfi would appear to contradict the view of Professors Coulson, Schacht and others who seem to see in the state a perennial effort to limit the competence of judges (i.e., what is apparently perceived to be strictly Islamic government) against the wishes of the *fuqahā'*, who want instead to keep judicial competence as broad as possible.<sup>29</sup> For al-Qarāfi at least, it appears to have been the other way around: the state sustained an interest in expanding the jurisdiction of government against the wishes of the '*ulamā'*'. The idea, of course, that the state wanted to limit the competence of the judiciary would imply that it derived or sought to derive some palpable advantage from doing so. But there is no precise explanation as to exactly what this advantage could have been. There was certainly little for the state to fear from the judiciary: Muslim rulers were never subjected to the judicial process via any means other than their own voluntary consent, and Islamic law never developed a preoccupation with the issue of how to enforce the law against the ruler. At the same time, as previously noted, outside

<sup>27</sup> *Tamyīz*, 94.

<sup>28</sup> *al-Furūq*, 3:6.

<sup>29</sup> See, e.g., Schacht, *Intro*, 55-56, 106; Coulson, *History*, 121-23. See also Watt, *Islamic Political Thought*, 94-95.

a few local statutes promulgated and abrogated from time to time, the medieval Muslim state as such did not possess any law other than the *sharī'ah*.<sup>30</sup> As such, a strong judiciary with the broadest possible jurisdiction could only operate in the state's favor. For, in addition to bolstering the latter's legitimacy, it provided the most efficient means via which it could exercise and at times abuse its power. What al-Qarāfi's writings seem to indicate is that if there was a group in whose interest it was to place limits on the judiciary, it was not the central power but rather the *fuqahā'*, especially the politically disadvantaged among them. For only in this way could the latter hope to stem the unlawful encroachments of a government backed, on the one hand, by a power-wielding state yet based, at the same time, on legal doctrines alien to their own.

At any rate, returning to the *ḥukm*, it is, again, on al-Qarāfi's scheme, the only legally binding, unassailable instrument that can be legally imposed via the threat or use of force. This in turn informs his desire to distinguish those aspects of official pronouncements that are binding, i.e., constitutive of a *ḥukm*, from those that are not. More specifically, al-Qarāfi wants to establish the fact that not everything that issues from a caliph, sultan or other government official constitutes a binding decree. This is for him a goal of the highest priority, one that is clearly reflected in the title of one of his most important and, to my knowledge, most unique, works, *Kitāb al-ihkām fī tamyīz al-fatāwā 'an al-aḥkām wa taṣarrufāt al-qādī wa al-imām* (*The Book of Perfection in Distinguishing Legal Opinions from Binding Decisions and the Discretionary Actions of Judges and Rulers*). In this work, the legal opinion and discretionary action are consistently contrasted to the *ḥukm*; but this is done negatively, i.e., in such a way that their importance is presented as residing not in their constituting legal opinions or discretionary actions but in the fact that, though they may issue from legitimate government authorities, they do *not* constitute binding, unassailable decrees.

### 1. *The Jurisdictional Limits of the Ḥukm*

According to al-Qarāfi, the *ḥukm* is restricted in two ways. First, the subject matter over which it may claim jurisdiction is limited roughly

<sup>30</sup> See above, 69. Even the so-called *Yāsā*, which the Mamlūks allegedly took over from the Mongols, would seemingly not apply here. Al-Qarāfi, at any rate, certainly makes no mention of it in any of his works.

to civil and criminal matters, i.e., the *mu'āmalāt*. "Religious observances" (*'ibādāt*) and the like lie outside government's jurisdiction. Second, within the area of the so-called *mu'āmalāt*, only rules from the obligatory (*wājib*), neutral (*mubāḥ*) and forbidden (*ḥarām*) categories may be imposed via the threat of force. Government may not impose rules from the recommended (*mandūb*) or discouraged (*makrūh*) categories.

#### a. *The Ḥukm Restricted to Mu'āmalāt*

It may be recalled from the previous chapter that, according to al-Qarāfi, the *ḥukm* constitutes an origination or *inshā'*. By this is meant that judges and other government officials are authorized to identify particular views as binding and unassailable with regard to particular cases. This applies, however, only where the case at hand involves a disputed (*mukhtalaf fih*) question of law. Where the legal question is one of consensus, the ruling issued is, technically speaking, not an origination. The judge or official simply implements the rule identified by consensus. That al-Qarāfi should approach the matter in this way certainly stands to reason. For where the Mālikīs and Shāfi'īs agree on a question, the power differential between them remains ineffectual. His real concern was thus with instances of disagreement among the schools and the manner by which this was to be accommodated. His discussion of the *ḥukm* and the limits of the legal process assumes thus a backdrop of cases involving disputed questions of law.

Returning to the question of the jurisdictional scope of the *ḥukm*, according to al-Qarāfi, the *ḥukm* may be invoked only for the purpose of resolving disputes that arise in pursuit of "worldly interests (*maṣāliḥ al-dunyā*)". This, according to him,

precludes matters disputed in the area of religious observances and the like (*al-'ibādāt wa naḥwuhā*). For conflicts concerning the latter do not involve the interests of this world; rather, they arise in pursuit of the Hereafter. Thus the decisions of government officials (*ḥukm al-ḥākim*) have no place at all in (resolving) such matters.<sup>31</sup>

This notion is further elaborated in *al-Furūq*.

Know that all of the *'ibādāt*, without exception, are absolutely immune to the decisions of government officials. Rather, these may be treated only by legal opinions (*fatwās*). Thus, every pronouncement we encounter

<sup>31</sup> *Tamyīz*, 23–24.

concerning a matter of the *'ibādāt* is no more than a legal opinion. It is thus not the right of an official to rule that the prayer of a certain individual is invalid; nor may he rule that a certain body of water is less than two *qullahs* in volume, rendering it ritually impure and, therefore, impermissible for a follower of the Mālikī school to use. Rather, everything that is said concerning these matters constitutes no more than a legal opinion. If these statements comport with the view of one who hears them, he may follow them; if not, he may ignore them and follow his own *madhhab*.<sup>32</sup>

The seriousness with which al-Qarāfi intends that this principle be applied is clearly reflected in what he has to say concerning the necessity of gaining the caliph's or sultan's permission to establish the Friday prayer (*ṣalāt al-jum'ah*).

[I]f the Imām says, "Do not hold the Friday prayer without my permission," this would not constitute a binding decree, even if the question of whether the Imām's permission is required to hold the Friday prayer is a disputed (*mukhtalaf fih*) question. Rather, it remains the right of the people to hold this prayer without the Imām's permission, unless doing so constitutes an open display of defiance, an assault upon the lineaments of proper authority, a manifestation of disrespect and outright snubbing. Under these circumstances, it becomes impermissible to establish the prayer without the Imām's permission—but for this reason, and not because this is a disputed question in which an authority has issued a binding decree (*ḥukm*).<sup>33</sup>

Al-Qarāfi indicates that this was a matter of considerable disagreement among the *fuqahā'*, some of them holding that whenever the caliph or sultan issued a statement regarding *ṣalāt al-jum'ah* this constituted a binding *ḥukm*. But this, he says, is simply incorrect.<sup>34</sup> For Friday prayer is a religious observance an aspect of which remains disputed among the *fuqahā'*. As a constituent of "religious observances and the like," it lies outside the scope of the legal process.

By "religious observances and the like" (*al-'ibādāt wa naḥwuhā*), al-Qarāfi has in mind a range of matters significantly broader than the "acts of worship and ritual," or "the pillars of Islam." A clearer

<sup>32</sup> *al-Furūq*, 4:48. See also his discussion at *ibid.*, 4:50ff. See also, *Tamyīz*, 182–83, where he insists that the authorities' announcements indicating the obligation to wage war (*jihād*) are only legal opinions that may be accepted or rejected, not binding decisions that must be adhered to.

<sup>33</sup> *al-Furūq*, 4:49.

<sup>34</sup> *Ibid.*

indication of the scope of this designation appears in his response to a question in *Tamyīz*. There he is asked, If a case is controversial (*mukhtalaf fih*) because the form of evidence adduced is controversial, does the judge's decision terminate, along with the litigants' dispute, the dispute over the admissibility of the evidence?<sup>35</sup> Al-Qarāfi's response is that, while the judge's decision must be upheld, it does not and cannot resolve the dispute over the admissibility of the evidence. This, he says, is because the ruling of a judge may be called upon only to resolve "conflicts over worldly interests," which, according to him, exclude matters such as the admissibility of various forms of courtroom evidence. For,

conflicts concerning the scriptural sources and (the admissibility of various forms of) controversial evidence, such as the lone witness joined by the plaintiff's sworn oath, and the like, arise strictly out of pursuit of the affair of the Hereafter, not out of pursuit of any benefit that is to accrue to any of the disputing parties here and now. Nay, disputes concerning these matters are as disputes in the area of religious observances. For the goal of each disputant is to establish, according to the principles of the *sharī'ah*, what is binding upon every legally responsible person (*mukallaf*) until the Day of Judgment, not simply to establish what is (binding) upon him only (here and now).<sup>36</sup>

In other words, while the judge's ruling cannot be challenged on grounds that he relied on controversial evidence, the admissibility of the evidence itself must remain a controversial (*mukhtalaf fih*) question among the *fuqahā'*, and the position of each school must be acknowledged as a constituent of the disputed tier of orthodox law. Herein lies another manifestation of how the doctrine of the limits of the legal process overlaps with and insulates that of the corporate status of the *madhhabs*, the goal, of course, in each instance being basically the same: to limit the extent to which government can violate the sovereignty of the *madhhabs* as repositories of authoritative legal interpretations. It is quite clear from this exchange that al-Qarāfi's "*al-'ibādāt wa naḥwuhā*" include significantly more than prayer, fasting and what one would normally consider religious or ritual observances.

It should be noted, however, that in describing differences over religious observances as arising out of the pursuit of the Hereafter, al-Qarāfi was not intimating any disinclination on the part of jurists

<sup>35</sup> *Tamyīz*, 75.

<sup>36</sup> *Ibid.*, 76.



to dispute over religious matters for worldly gain. His familiarity with some of the more colorful figures of 7th/13th century Cairo left him all too aware that this was simply not the case. In his view, however, the ultimate benefit to be derived from an act of *'ibādah* accrued to an individual not in this world but in the next. This was for him the crucial distinction between religious observances and worldly interests. On such an understanding, it might be objected that if, as is commonly accepted, Islam recognizes no distinction between the religious and the secular, every action must at some level be performed in pursuit of the Hereafter. This in turn begs the question of what exactly al-Qarāfi could have held to be the dividing line between "religious observances" and "the interests of this world"? The answer to this question, or at least the closest we may be able to come to one, lies, I believe, in a fair appreciation of al-Qarāfi's understanding of intention (*niyah*) and its role in Islamic law.

#### 1. Intention (*niyah*)

Intention, or *niyah*, according to al-Qarāfi, is not the mere volition that accompanies the performance of an act; nor is it the resolution in one's mind to perform a particular act. These descriptions correspond to *irādah* and *'azm*, respectively.<sup>37</sup> Intention, on the other hand, is "the will to exploit an action for some result which that action is capable of yielding—not the desire to perform the act for its own sake."<sup>38</sup> In other words, the object of an intention must be not an action itself but rather some goal that lies beyond that action, which the latter may be reasonably taken as a means to achieve. To illustrate: One may seek through a single act of prayer a number of purposes. One may pray as an act of drawing near to God, or in order to fulfill the obligation to perform obligatory prayers; or one may pray simply to be seen among men, or because one's religious post obliges one to do so. The mere fact that a prayer is willfully offered does not implicate any of these objectives as the intended aim. This is, rather, the role of intention, i.e., to isolate (*yumayyiz*) the specific objective for which a willful act is performed. According to al-Qarāfi, it is only when there enters the will a desire to exploit an act for some specific purpose beyond the act itself that an intention is constituted.

<sup>37</sup> See Shihāb al-Dīn al-Qarāfi, *al-Umnīyah fī idrāk al-nīyah* (Beirut: Dār al-Kutub al-ʿIlmiyah, 1404/1984), 7–9.

<sup>38</sup> *Ibid.*, 9.

And, without this vision towards what lies beyond an act, there is no intention.<sup>39</sup>

Now, according to al-Qarāfi, God legislates commands and prohibitions for the purpose of realizing certain benefits (*maṣāliḥ/s. maṣlahah*). Of these, some can be realized through the mere occurrence of the commanded act itself. Others are realized only if the performance of the act is accompanied by the proper intention. "Religious observances and the like (*al-ʿibādāt wa naḥwuhā*)" correspond roughly to the latter category, while 'civil transactions', i.e., the *muʿāmalāt*, correspond to the former. This is the understanding with which one emerges from al-Qarāfi's *al-Umnīyah fī idrāk al-nīyah*:

Commands are of two categories. The first comprises those acts the mere occurrence of which is sufficient to bring about the primary benefit for which they were commanded. (These include) payment of debts, returning entrusted property, and forwarding support payments to spouses and relatives. For, the benefit sought from these acts is the benefit that accrues to the recipients involved [here and now]. And (the realization of) such benefits does not depend on the intention of the agent. Thus one (who performs these acts) is relieved of the responsibility of realizing this interest (immediately upon his performance of the act), even if it is not his intention that his action should result in such (a benefit to the recipient).

The second category comprises commands the mere compliance with which is not sufficient to bring about the benefit for which they were enacted. These would include acts such as prayer, ritual purification, fasting, and the ceremonials of pilgrimage. For, the interest sought from compliance with these commands is the glorification of God and open submission to Him. And this can be realized only if the performance of these acts is sought for the sake of the Exalted Himself. . . . This is the category of the Law concerning which the Lawgiver has required intention.<sup>40</sup>

It should be noted that it is not al-Qarāfi's contention that acts of the first category are not religious acts. On the contrary, these too should be performed with the intention of worshipping God and winning salvation in the Hereafter. His point, however, is that the rules of the first category are designed first and foremost for the benefit of man here and now. As such, whenever they are complied with,

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 27–28.

man benefits, even if God does not. Or, to state the matter more precisely, whenever one complies with a rule from the first category, he benefits some other party here and now, even if he does not benefit himself in the Hereafter by performing this act with the intention of worshipping God.

On this distinction between *'ibādāt* and *mu'āmalāt*, we may resume our discussion of the limits of the legal process. The legal process may be invoked to enforce any rule which has been legislated primarily for the benefit of man in the present life. Government may thus be called upon to safeguard the rights of creditors, buyers, spouses, beneficiaries to estates, and the like, in short, to enforce any rule the realization of whose primary benefit does not depend on the intention of the doer. When a judge rules that A is indebted to B and orders that the latter be paid, B's right is thereby ensured and he derives the benefit of being paid, independent of whether it is A's intention that this be the result. As a consequence of the judge's ruling, the benefit sought from the rule on paying debts is realized, regardless of the intention of the doer. It is for this reason that government may be called upon to enforce such rules.

On the other hand, a judge's ruling could not produce in a person's heart the intention to glorify God through the performance of ablution, pilgrimage, *jihād*, abstaining from eating pork, and the like. And if these acts are not accompanied by the appropriate intention, the benefit for which they were legislated cannot be realized. A judge's ruling is thus superfluous as regards these acts.<sup>41</sup> And it is for this reason that they are placed beyond the scope of the legal process.

This particular reading of al-Qarāfi, though I believe it to be correct, raises a number of questions, particularly regarding such rules as that governing apostasy and other cognate offenses, such as abandoning prayer (*tark al-ṣalāh*). For, whereas belief in Islam is clearly a matter of religious observance, it was universally agreed that apostates could be tried and, if convicted, executed.<sup>42</sup> As for the five daily prayers, it would appear that if the Friday congregational prayer is excluded from the legal process, so should the daily *ṣalāh*, on *a fortiori* grounds.

<sup>41</sup> Cf., however, the view of Tyan, who on the authority of al-Maqrizi, writes "... sous la dynastie des Mamluks, 'rien de ce qui était de nature religieuse n'échappait à la compétence kādi al-kudāt.'" *Histoire*, 1:116.

<sup>42</sup> See, e.g., Ibn Rushd, *Bidāyat*, 2:343. For a modern rejection of this 'classical' view, see Abdul Hamid Abu Suleiman, *The Islamic Theory of International Relations: Its Relevance Past and Present* (Ph.D. diss., The University of Pennsylvania, 1973), 162-64.

Rather than risk falling into what Quentin Skinner refers to as a "mythology of coherence,"<sup>43</sup> according to which the complexities and inconsistencies in an author's writings are sacrificed in favor of a logically consistent presentation of his thought, I prefer to state openly that al-Qarāfi is not altogether consistent in this regard. I should add, however, that logical consistency should itself be recognized precisely for what it is, namely, a means to gaining assent. Its presence or absence from aspects of a thinker's doctrine should not in all instances be mistaken as a justification for accepting or rejecting the validity of his goals. As R.A. Posner reminds us (in pointing out the difference between pure and practical reason), one's inability to *prove* (i.e., by logically unassailable arguments) that napping babies is wrong does not at all imply one's (or even one's adversary's) inability to *know* that such action is wrong.<sup>44</sup>

In the case of the five daily prayers, what al-Qarāfi wants to protect is not the right to abandon the *ṣalāh* altogether; for this he cannot do, since the obligation to perform the ritual prayers is established by consensus. What he wants to protect, however, is the right to offer prayer in a fashion perhaps unique by comparison with others, e.g., the right to pray without reciting the *basmalah* or the entire Opening Chapter, issues over which there is disagreement among the schools of law. Regarding these issues, al-Qarāfi wants to insist that government has not the authority to intervene and impose any particular modality of compliance upon the Community. In other words, it is because these are issues over which the *fuqahā'* have differed that they remain beyond the realm of what government may regulate in the area of *'ibādāt*. This would apply as well to the case of Friday prayer: Government can enforce the basic obligation to perform this ritual; for this is a matter of consensus. When, however, i.e., the exact time, the prayer is offered, and whether the Imām's permission is required are questions over which there is disagreement. Al-Qarāfi's point is simply that, as such, these disagreements in the area of the *'ibādāt* must be left standing and cannot be resolved by government. For, in offering the prayer according to their respective interpretations the Mālikis or Shāfi'is pursue the affair of the Hereafter, not any interest that is to accrue to any of them in this life.

<sup>43</sup> See his "Meaning and Understanding in the History of Ideas," *History and Theory* 8 (1969): 17ff.

<sup>44</sup> *Problems of Jurisprudence*, 76-77.

A similar explanation may be offered regarding apostasy, although here the issue becomes a bit more complicated, since it includes the question of what actually constitutes apostasy and what happens in the event that the apostate wishes to return to the fold. Al-Qarāfi would seem to have little problem with government enforcing the basic rule on executing apostates, assuming that this is established by consensus; for in such a case government would simply be doing what any and all of the schools would do. If, however, the apostate repents, there is disagreement among the *fuqahā'* as to what his ultimate fate should be. Some hold that he must still be executed; others, e.g., al-Qarāfi, say that execution is to be stayed.<sup>45</sup> Al-Qarāfi gives no indication as to how exactly this controversy would work itself out on the ground, and one can only assume that if an apostate repents before a Mālikī judge, he would hold that the government cannot persist in pursuing execution. Conversely, if a Shāfi'ī judge refuses to set execution aside, government cannot insist on a pardon. Here, however, i.e., in seeking to justify his overall position on apostasy, greater reliance might have to be made on the corporate status of the *madhhabs*, since in preserving or not the very life of the erstwhile apostate the judge's ruling cannot be said to apply to what is strictly a matter of religious observance pursued in the interest of the Hereafter.

As for the question of what exactly constitutes apostasy, here we enter the much more volatile and complicated area of theology. Earlier it was stated that al-Qarāfi was himself quite tolerant of those with whose theological views he disagreed. For example, while he considers incorrect the view of those "*hashwīyah*" who hold that God is located in a specific place or direction, he insists all the same that they are not to be excluded from the Faith. By this it can only be understood that he does not condemn them as heretics whose theological indiscretions have reached the point of apostasy. Some confirmation of this more lenient attitude might be drawn from a report on the authority of al-Ṭarābulisī, who states that al-Qarāfi once issued a *fatwā* exonerating a man who had been charged with apostasy for saying about a fellow Muslim, "May God cause him to die an unbeliever".<sup>46</sup> This went against the view of his teacher, Sharaf al-

<sup>45</sup> *al-Furūq*, 4:181. Al-Qarāfi's interlocutor objects that setting the punishment aside in this manner will only encourage people to apostasize. To this al-Qarāfi responds that on the contrary this will encourage them to return to the fold. At any rate, he insists, the fears of his interlocutor are unfounded, since apostasy itself is so very rare.

<sup>46</sup> *Mu'in*, 191.

Dīn al-Karakī, who held that these words constituted unbelief in that they expressed a desire that unbelief occur. On this view, according to al-Karakī, the utterer of this statement was to be counted an apostate.<sup>47</sup> Al-Qarāfi responded that the man did not desire that unbelief occur but merely to insult the individual in question; the words he used were merely a figure of speech the implications of which should not be over-inflated.<sup>48</sup>

In short, al-Qarāfi's writings appear to indicate that his position on theology was essentially the same as his position on law: only where a heretical view violated consensus could the rule on apostasy be invoked. It should be noted, however, that al-Qarāfi was of the opinion that consensus could not be made the basis for establishing the heretical status of a view that appeared before the consummation of the consensus proscribing it. In other words, in a dispute over a theological question over which there did not exist an already established consensus, the majority could not condemn a minority on the basis of consensus, since this would require that the minority first be excluded from the Community such that its disagreement would not overturn the would-be consensus. For this would require a consensus to the effect that the minority was to be excluded (i.e., as heretics), which itself assumes that the majority who wish to exclude them constitute the entire Community. The majority, in other words, could only exclude the minority by consensus; but the very consensus by virtue of which they could exclude them would have to include them in order to constitute a valid consensus.<sup>49</sup> Meanwhile, according to al-Qarāfi, where there are long-standing disagreements within the Community, such disagreements simply have to be allowed to continue and cannot be resolved by government. For such disagreements arise clearly out of the pursuit of the Hereafter. It is interesting to note in this regard that while imprisoned in Egypt during his heresy trials from 705–712/1305–1312, the celebrated Ḥanbalite, Ibn Taymiyah (d. 728/1328), who we know was familiar with al-Qarāfi's writings, invoked a principle strikingly reminiscent of al-Qarāfi's on the limits of the state's jurisdiction. Against his inquisitors and those who goaded them on

<sup>47</sup> *Mu'in*, 191. On Sharaf al-Dīn al-Karakī, see above, 7.

<sup>48</sup> This comports, incidentally, with a view al-Qarāfi cites on the authority of "the scholars" to the effect that whenever a conflict obtains between the common sense and the literal sense of an expression, precedence is to go the common or customary usage. See *Tamyiz*, 235ff.

<sup>49</sup> See *Sharḥ*, 336.

from behind the scene, Ibn Taymiyah objected that they had no right whatever to subject him to a trial. For,

the charges made against me do not relate to criminal acts and personal rights, such as murder, slander, money, and the like, such that would justify judicial intervention. On the contrary, the present matter is an intellectual one of universal concern, like exegesis, hadith, *fiqh*, and the like. These matters include questions over which the community has agreed, as well as some over which they have disagreed. But where the community disagrees on the meaning of a verse, or a hadith, or the status of an assertion or a request, the correctness of one view and the incorrectness of the other cannot be established by the ruling of a judge. Rather, judicial rulings take effect only in connection with "specific matters" (*umūr mu'ayyanah*), not in matters of universal concern. Otherwise it would be possible for a judge to rule that the meaning of God's statement, "They shall wait three periods (*thalāthata qurū'*)," is the menstrual period, or the cessation of the menstrual period, and this interpretation would be a ruling, binding on all the people. . . . Likewise, the community has differed on the meaning of His statement, 'The Merciful has mounted the Throne (*ar-rahmānu 'alā 'l-'arshi 'stawā'*): Some say that He literally mounted the Throne and that He is literally above it, and that the meaning of 'mounted' (*istawā*) is known, while the modality thereof is not. And others have said that there is no lord above the Throne, and that the meaning of the verse is that He seized sovereignty over the Throne (*qadara 'alā 'l-'arsh*), etc. Here again, however, there would be absolutely no probative value in the statement of a judge to the effect that one of these views was correct, the other incorrect.<sup>50</sup>

There is other evidence suggesting that al-Qarāfi's notion of the corporate *madhhab* was not unknown to Ibn Taymiyah and those who participated in his earlier trials in Damascus in 705/1305. At one point, for example, in an effort to terminate the dispute, the suggestion was made that Ibn Taymiyah exchange recognition of his view as the *Hanbalī position* in exchange for recognition of the view of his opponents.<sup>51</sup> Mention has been made already of some of the political realities that Ibn Taymiyah shared with al-Qarāfi. Here again one is tempted to ask what this might have contributed to the commonalities between their thought. Perhaps more important, however, is the question

<sup>50</sup> See Ahmad Ibn Taymiyah, *Majmū' al-fatāwā*, 37 vols., ed. 'Abd al-Rahmān b. Muḥammad Qāsim al-'Āṣimī al-Najdī al-Ḥanbalī (Beirut: Dār al-'Arabīyah, 1398/1977) 3:238–39.

<sup>51</sup> See S.A. Jackson, "Ibn Taymiyah on Trial in Damascus," *Journal of Semitic Studies*, vol. 39 no. 1 (1994): 56, and esp. 81.

of whether these characteristics are reflective of the views and sentiments of a broader category of '*ulamā'*' from whom we have yet to hear but who shared similar political and social realities.

b. *The Hukm Restricted to Rulings from Specific Legal Categories*

The second restriction on the binding decision pertains to the category of rulings that may be enforced by government. As has been explained in chapter four, legal rulings (*aḥkām taklīfiyah*) fall into five categories: obligatory (*wājib*), recommended (*mandūb*), neutral (*mubāḥ*), discouraged (*makrūh*), and forbidden (*ḥarām*).<sup>52</sup> At one point in *Tamyīz*, al-Qarāfi is asked:

If the decision of a judge (*ḥākim*) is the origination of a binding legal ruling, is it conceivable that it be drawn from any of the five legal categories which are included in the Law of God, or is such not possible?<sup>53</sup>

In his response, al-Qarāfi indicates that government is bound to rules from the obligatory, neutral, and forbidden categories only; no legal ruling from the recommended or discouraged categories may be imposed as binding judgments.

As for the categories "recommended" and "discouraged", these may be drawn upon by the authorities only for use as legal opinions, not as binding decisions. For example, a Mālikī judge's ordering a man to pay a severance gift (*mut'ah*) upon divorcing his wife, and other such recommended acts . . . such statements constitute mere legal opinions (*fatwās*), not binding decisions that may quell the dispute. And the reason for this is that statements about what is recommended or discouraged cannot terminate disputes. Yet, the reason God commissioned officials to impose decisions in the first place was for the very purpose of terminating disputes. . . . But "recommended" and "discouraged" admit the permissibility of doing a thing, as well as the permissibility of not doing it. Thus, rules from these two categories are not capable of terminating disputes.<sup>54</sup>

In other words, according to the Mālikī school, it is only recommended (*mandūb*) that a man pay his wife a severance gift upon divorcing her. A Mālikī judge could thus only *recommend* this to a litigant; he could not impose it as a binding obligation. According

<sup>52</sup> See above, 117–18.

<sup>53</sup> *Tamyīz*, 55.

<sup>54</sup> *Ibid.*, 55–56.

to Shāfi'is, however, payment of a severance gift is obligatory.<sup>55</sup> Thus, a Shāfi'i judge could obligate a man to forward a sum to his wife upon divorcing her. This principle, simple and straightforward though it may seem, has potentially far-reaching implications, as the following example will demonstrate.

According to the law of profit-sharing (*qirād, muḍārabah*), the owner of a commodity hires an agent to sell his goods at retail in return for a known percentage of the profit gained.<sup>56</sup> According to Malik, however, it was reprehensible (*makrūh*) for the agent himself to purchase from the supplier any portion of the commodity being sold.<sup>57</sup> The reason for this was apparently the belief that the agent would offer to do this only if he believed that such would bring him a greater profit, which was likely to result from market manipulation. Now, an owner hires an agent to sell a quantity of oranges in return for twenty percent of the profit. The market price is believed to be about one hundred dollars. The agent first agrees to this but then offers instead to purchase the oranges outright for eighty dollars. The supplier agrees but later learns that the oranges were sold not for a hundred but for a hundred and fifty dollars. He files suit against the agent to have the original sale overturned on grounds that it was inadmissible, according to the law of profit sharing, or that he be reimbursed for forty dollars (the difference between \$80.00 and \$120.00, i.e., 80% of \$150.00 instead of 80% of \$100.00). A Mālikī judge could not strike down the initial sale of eighty dollars; nor could he force the agent to reimburse the owner for the difference. For, the original sale of eighty dollars was not forbidden according to the Mālikī school but only discouraged. Were this case tried, however, by another judge, according to whose *madhhab* the law of profit-sharing forbids such practices, the sale of eighty dollars could be reversed and or the agent could be forced to reimburse the supplier for the difference.

The idea that "law" or judicial decisions are exclusive of rules from the recommended and discouraged categories is not new. This has been clearly articulated, in fact most recently, by Professor Bernard Weiss.<sup>58</sup> What has not received in my opinion ample recognition,

<sup>55</sup> See Ibn Rushd, *Bidāyat*, 2:73. This also raises of course the issue of venue and *madhhab* disparity between judge and litigant or litigant and litigant. On venue, see below, 210.

<sup>56</sup> *Ibid.*, 2:178.

<sup>57</sup> *Ibid.*, 2:182.

<sup>58</sup> *The Search for God's Law*, 9: "No dispute capable of being brought before a judge

however, is the fact that the very assumption that judges function in this manner implicitly assumes a régime of *taqlid*. For under an arrangement where judges actually interpreted scripture directly, it would be possible to reverse this original sale and to obligate a divorcing husband to pay a severance gift to his departing wife by simply insisting that, on the judge's interpretation, these actions fell into the forbidden and obligatory categories, respectively. Moreover, under a régime of *ijtihad*, a rule holding judges to rules from specific legal categories would be difficult if at all possible to enforce, since they would be reinterpreting scripture anew with each individual case, and it would be difficult to tell them that they were wrongly imposing rules from the discouraged or recommended categories if they themselves concluded that they were not. In short, the idea that judges are restricted to rules from certain legal categories, in order to have any real meaning, must assume that these rules are already recognized as such prior to the time the judge comes to adjudicate the case. In other words, the function of the judge must be understood to be simply one of *applying* rules that have already been established as such in his *madhhab*.

Before concluding this discussion on the categories of rules that may be applied by judges or other officials, a word must be said about al-Qarāfi's inclusion of rules from the neutral or *mubāh* category. At first blush, this would appear to be something of an anomaly, inasmuch as one would expect 'rules' from the neutral category to fall less within the province of the courts than do those of the recommended or discouraged categories. Al-Qarāfi's point, however, is simply that judges have the ability not only to impose obligations but also to establish disencumbrances (*iṭlāq*). Thus, when a judge rules that a missing husband is legally lost or that a certain peice of land has not been reclaimed and rendered the property of one who claims it, his action renders the erstwhile wife and the land in question licit, i.e., *mubāh*, to subsequent suitors and those who wish to reclaim. This neutral or licit status is rendered, moreover, 'binding' and unassailable in that it becomes illegal for anyone to challenge the licitness of marrying this woman or of reclaiming this land. It is in this sense, i.e., that the judge 'imposes', as it were, a disencumbrance which establishes the permissibility of performing certain acts that al-Qarāfi

can arise in connection with a failure to perform a recommended act or with the performance of a disapproved act. A judge is not, in his role as arbiter of conflicting claims, concerned with recommending or disapproving. . . ." See also *ibid.*, 3-4.

speaks of judges having the authority to impose rules from the neutral category. Again, his locution and the examples he adduces indicate that he has in mind rules that are already recognized within the respective *madhhabs* as falling into this neutral category.<sup>59</sup>

### c. Venue

The foregoing discussion raises a number of questions concerning the important if as yet little-understood issue of venue. To begin with, the outcome of any case will depend on certain presumptions of guilt or innocence and the resulting burden of proof born by the plaintiff or defendant. This will differ, however, from individual to individual (both judge and litigant), depending on the actual legal doctrine of his school. For example, where a Shāfi'i wife wants to submit a claim of non-marriage against her Ḥanafī husband on grounds that she was not represented by a male guardian (*walī*), the presumption will differ depending on whether the judge approaches the case from a Shāfi'i or Ḥanafī perspective. Similarly, if what can be imposed as a binding obligation will differ according to the *madhhab* of the presiding judge, one would want to ask how the *madhhab* of this judge is determined and to what extent, if at all, the *madhhab* of the litigant is of any relevance in determining the judge assigned to the case. Where there is *madhhab* disparity between litigant and judge, are there any circumstances under which this might affect the status of the latter's ruling? These are obviously very serious questions in whose answering we could learn a great deal about medieval Muslim society, law and politics. Unfortunately, neither space nor my present degree of knowledge allow for a detailed treatment of this issue. Having found no direct treatment of these issues in any of the works of al-Qarāfi or his contemporaries, the most I can offer is an interpretation of certain statements by al-Qarāfi that appear, in the light of later developments, to have some bearing on these issues of venue.

We may begin with a statement found in *Sharḥ al-majallah* to the effect that if two people have a dispute and one wants to take it before a Shāfi'i judge while the other wants to take it before a Mālikī, the choice of judge is to go to the party who is the defendant, *al-mudda'ā*

<sup>59</sup> See *Tamyiz*, 20–21: "... if a judge rules that a piece of land that has been conquered by force (*anwatan*) is licit (to all who wish to establish property rights therein, i.e., via sale or renting) not a *waqf* for the exclusive enjoyment of the actual conquerors, as Mālik and those who follow him hold, and this judge is a Shāfi'i who holds that such lands are licit and not a *waqf*, this land is rendered thereby licit..."

*'alayh*.<sup>60</sup> The reason given is that the defendant is seeking to absolve himself from a charge of which it must be assumed he is innocent, according to the principle of presumption of innocence (*al-barā'ah al-aṣliyah*). To force him to go before a judge whose *madhhab* differs from his own might violate this principle and result in a wrong conviction, since the judge may hold him responsible for things he does not recognize according to his school. A case in point would be the above-cited example of the Shāfi'i wife who wanted to make a claim of non-marriage to her Ḥanafī husband. To allow her the choice of a Shāfi'i judge would wrongfully empower her to overturn this marriage, even if she had originally agreed to it. At the same time, to allow any plaintiff his choice of judge would lighten his burden of proof, which, according to the principle of presumption of innocence, always falls upon the plaintiff, since claims of legal wrongdoing are assumed to go against the assumed norm.

In *al-Furūq*, al-Qarāfi relies upon this same principle, *al-barā'ah al-aṣliyah* to identify who in a case is the plaintiff and who the defendant. The plaintiff is not simply the one who initiates the charge; the plaintiff is he whose claim goes against the assumed norm, which in the absence of scriptural directives is determined on the basis of custom. For example, an orphan who charges that he had not received his inheritance from his step-father or guardian would be the defendant, while the step-father or guardian would be the plaintiff, and the burden of proof would fall upon the latter. This is because the assumed norm is that the money has not been paid.<sup>61</sup> From his discussion on this matter, it appears to be fairness and the desire to protect people from false and injurious claims that prompts al-Qarāfi to place the burden of proof on the plaintiff and to stipulate that "plaintiff" be defined as he whose claim goes against the assumed norm. On this view, it would appear that, in a similar manner, he would demand that the choice of judge go to the defendant, as stated in the *Sharḥ al-majallah*. In this he would differ, for example, from Ibn Rushd, who states that under such circumstances the plaintiff and defendant are simply to draw lots.<sup>62</sup>

On the question of the extent to which litigants are bound to judicial rulings even when there is *madhhab* disparity between litigant and

<sup>60</sup> Salīm Rustum Bāz al-Lubnāni, *Sharḥ al-majallah* (Beirut: Dār Ihyā' al-Turāth al-'Arabī, 1406/1986), 1171.

<sup>61</sup> *al-Furūq*, 4:74–76.

<sup>62</sup> *Bidāyat*, 2:345.

judge, mention has been made of al-Qarāfi's doctrine concerning the relationship between judicial rulings and opposing views: judicial rulings are specific (*khāṣṣ*); dissenting views are general (*ʿāmm*); the specific takes precedence over the general.<sup>63</sup> On this principle, litigants have no choice whatever before the ruling of a judge, regardless of differences in *madhhab*. This view is confirmed by a Shāfi'i contemporary of al-Qarāfi, Shihāb al-Dīn Ibn Abī al-Dam, who served himself as a chief justice in Aleppo and died in 642/1244, not long before the appearance of al-Qarāfi's *Tamyiz*.

If a Hanafi ferments some wine and a Shāfi'i destroys it and they come before a Hanafi judge and the plaintiff provides proof that the Shāfi'i destroyed the wine after it had fermented and the judge rules that the latter is liable for its dollar-value, the Shāfi'i must comply, absolutely, according to the ruling of the judge.

(This holds) even if the plaintiff is unable to provide proof and the defendant gives a sworn oath (*yamīn*) that he is not responsible for anything. (For in such a case) this oath would be considered untrue and false testimony. For what is considered (in such a case) is the view of the judge, not the view of the defendant.<sup>64</sup>

Ibn Abī al-Dam operated in Aleppo, where the situation was apparently similar if not identical to that of Cairo prior to the reforms of Baybars. While there existed any number of deputy-judges from other schools, the chief justice was always a Shāfi'i who had the final say in all cases. The assignment of jurisdictions, in other words, appears to have been geographical, the chief justice holding universal jurisdiction, deputy-judges being assigned to specified areas, all of whose residents came under his jurisdiction regardless of *madhhab*. Why, under such an arrangement, a Shāfi'i chief justice might install a deputy from another school is not quite clear. Nor is it clear whether this deputy was to play some kind of special role in hearing cases presented by members of his school. The picture becomes even more

<sup>63</sup> See above 181–84.

<sup>64</sup> See Ibn Abī al-Dam, *Adab*, 118; see also his discussion on p. 166–20. See also al-Ṭarābulusī, *Mu'in*, 27. The point of the second paragraph is that, ordinarily speaking, if a plaintiff cannot provide proof of his claim, the judge may oblige the defendant to give a sworn oath of innocence in order to absolve himself. In the present case, however, the defendant refuses to swear that he did not destroy the Hanafi's wine (as a matter of fact) but insists only that he is not legally liable for the destroyed property (since, according to the Shāfi'i school, wine is not a valuable commodity). Ibn Abī al-Dam's point is that this will not avail this Shāfi'i, since legal liability is determined on the basis of the judge's school, not the defendant's.

blurred following the reforms of Baybars. For this led to the installation of four chief justices (one from each school) all of whom apparently enjoyed universal jurisdiction.

At any rate, the rule binding litigants to the rulings of presiding judges, applied absolutely in cases where a judge ruled *against* a litigant. There is a difference of opinion, however, where a judge grants a litigant a right that is not permissible according to the latter's school. The well known position of the Hanafi school was that a judge's ruling rendered a thing permissible absolutely, even if it was not permissible according to the *madhhab* of the litigant, and even if the latter knowingly presented false evidence. Thus, if a man knowingly presented false evidence to the effect that a woman was his wife and a judge ruled that they were married, the man could cohabit with the woman, even if he knew her not to be his wife prior to that ruling.<sup>65</sup> The Hanafis base their opinion, according to Ibn Rushd, on an analogy to cases of mutual repudiation (*li'ān*), where the judge's ruling renders the woman marriable to another man, even though it is known that one of the spouses is lying and that in reality there may be no reason for her to become licit to another man.<sup>66</sup> The Mālikis, by contrast, and some Shāfi'is, disagreed with this position, insisting that a judge's ruling did not render a thing known to be impermissible permissible, nor vice versa. Thus, if a Hanafi judge granted a Mālikī the right of preemption on grounds of neighborliness (*shuf'at al-jār*), the latter was not to accept it. Likewise, if a person knows the judge to be mistaken in his ruling, he was not to partake of a right granted on this mistaken pretext.<sup>67</sup>

### III. *Obiter Dictum*

Al-Qarāfi's doctrine on the limits of the legal process was designed to limit the range of matters over which government could legally claim the authority to resolve disputes. There would remain, however,

<sup>65</sup> See Ibn Rushd, *Bidāyat*, 2:345–46.

<sup>66</sup> *Ibid.*, 2:347. *Li'ān* is where a husband accuses his wife of infidelity without proof. If the wife denies this charge, both take sworn oaths, after which the marriage may be annulled. See Ibn Rushd, *Bidāyat*, 2:86. Ibn Farḥūn had stated that this Hanafi view applied only to cases of marriage and that even some Mālikis agreed with them in this regard. He insists that in money matters, however, all agree that where a judge wrongly grants a party some right, his ruling does not render it licit.

<sup>67</sup> See *Tamyiz*, 111.

even on the complete acceptance of this doctrine, a sizeable area of civil and criminal matters, the so-called *mu'āmalāt*, in which government authority would have to be recognized. In addition, al-Qarāfi openly cedes to the state certain discretionary powers through which it discharged such duties as raising armies, declaring war, making appointments to public office and the like. Given this undeniably broad area in which government enjoys either direct legal jurisdiction or discretionary powers, the issue for al-Qarāfi would become how to preserve some measure of autonomy, including the right to dissent, in areas where the state acts within its recognized realm of authority. This al-Qarāfi attempts to achieve through the introduction of two more apparent innovations. The first of these is his novel use of the term, "fatwā". The second is the premise that the office of head of state (*Imām*), i.e., the caliph or sultan, includes the authority to issue *fatwās*. Taken together these two innovations come down to the following: Any action or statement by a caliph or sultan bears any one of three possibilities; (1) that it is a binding decision (*ḥukm*); (2) that it is a discretionary action (*taṣarruf*); (3) that it is a *fatwā*. As mentioned in chapter four, there is, ordinarily speaking, a fundamental distinction between the discretionary action and the *fatwā*. In the present context, however, this distinction wanes in importance in that, despite all the differences separating the two, they are united in the fact that both are subject to being legally challenged or overturned.<sup>68</sup> In other words, when speaking of the pronouncements of government officials, a *fatwā* becomes any statement that is not binding and is thus subject to challenge. One might gain greater appreciation of the meaning of this innovation by way of comparison with the views of an earlier jurist, the Ḥanbalite, 'Abd al-Raḥmān b. al-Jawzī (d. 597/1200).

In response to a problem of a growing number of unauthorized would-be muftis setting themselves up to give legal opinions, Ibn al-Jawzī wrote a small tract entitled *Ta'zīm al-futyā* (On the Gravity of Issuing Legal Opinions).<sup>69</sup> In this work he attempted to dissuade some of his more sophomoric students from prematurely issuing statements that might be taken by the laity as authoritative *fatwās*. According to Ibn al-Jawzī, a true *fatwā* was an opinion given only by a licensed jurist, and a petitioner was to act only on opinions whose issuers were thus authorized. Al-Qarāfi, meanwhile, shifts his emphasis from the

<sup>68</sup> On the discretionary action, see *Tamyiz*, 177-93.

<sup>69</sup> Chester Beatty Library, Arabic MSS. no. 3829.

substantive qualities of a valid *fatwā* and the formal qualifications of those who issue them to jurisdictional considerations and the non-binding status of any and all statements made on certain matters connected with the law. Whereas Ibn al-Jawzī would in all likelihood deny that statements issued by the caliph or sultan were at all *fatwās*—unless these officials happened also to be authorized muftis—al-Qarāfi states openly that the right to issue *fatwās* is basic to the very office of *Imām* itself.<sup>70</sup> This was not to say, of course, that all heads of state were qualified in any formal sense to speak on the law. The point, however, was simply that their 'right' to issue *fatwās* had to be acknowledged in order to ensure that their statements on certain issues at certain times be taken as no more than *fatwās*, i.e., *obiter dicta* in effect.

Having asserted the possibility of the pronouncements of the head of state constituting *fatwās* and having redefined the *fatwā* as essentially *obiter dictum*, al-Qarāfi goes on to imply that the overwhelming majority of the head of state's pronouncements constitute *fatwās*. This he does by insisting that the majority of the Prophet Muhammad's actions were *fatwās*. This does not detract from the Prophet's religious authority; for even his *fatwās* qua *fatwās* were binding, as an extension of his *risālah* or messengership, by virtue of which he was protected (*ma'ṣūm*) from committing errors of interpretation. Since, meanwhile, the office of head of state descended from the Prophetic office of *imām*, the implication to be drawn from the view that the majority of the Prophet's pronouncements were *fatwās* is that the majority of what the post-Prophetic head of state declares also constitute *fatwās*. Here, however, there is a fundamental difference: The *fatwās* of the head of state or *imām* are rendered non-binding and subject to challenge by the fact that divine protection (*iṣmah*) does not extend to the caliph or sultan. What this achieves in effect is the right to voice dissent on any number of issues on which the state or government has issued pronouncements by simply insisting (or assuming) that these pronouncements are only *fatwās* and thus neither binding nor immune to challenge. This is clearly the spirit in which al-Qarāfi states the following.

Among their (i.e., the state or government's) discretionary actions are their *fatwās* concerning the rulings on such things as religious observances

<sup>70</sup> *Tamyiz*, 32.



and the like, e.g. the licit or illicit status of certain arrangements of sexual usus (*tahrim al-abdā'i wa al-intifā'i bihā*), the ritual purity of certain bodies of water, or the ritual impurity of certain objects, or the obligation to wage *jihād*, etcetera. None of their pronouncements regarding these matters constitute binding decisions. On the contrary, anyone who does not believe these statements to be correct may issue a *fatwā* in opposition to that of this judge or caliph (*bal li man lā ya'taqidu dhālika an yuftī bi khilāfi mā aftā bihi 'l-hākimu awi 'l-imāmu 'l-a'zam*). Likewise, if they command us to perform an act which they believe to be good, or they forbid us to perform one which they believe to be evil, it remains the right of anyone who disagrees with them not to follow them . . . other than (in circumstances where it is feared that) opposing the Imām will constitute an act of sedition. . . .<sup>71</sup>

In addition to establishing the fact that not all directives issued by a caliph or sultan, including those on such matters as waging war, constitute binding decrees, this passage provides some insight into the pragmatist in al-Qarāfi. He is clearly not a revolutionary hell-bent on the right to dissent at all costs; nor is he insensitive to the need on the part of the state or government to protect its "*haybah*," or ability to inspire awe, not merely for the purpose of sustaining itself in power but as necessary to the maintenance of its position as final arbiter in Community disputes. But, again, al-Qarāfi wants to cede to the state no more than is absolutely necessary to promote the public welfare and maintain order. The rest can be left to individuals. This point will be discussed in greater detail in the following section on *sui juris*. For now, it is enough to note that al-Qarāfi's *obiter dictum* is not limited to the area of *ibādāt* but has some application even in the area of *mu'āmalāt*. This emerges clearly from his discussion in *Tamyiz* of the differential treatments meted out by the first two Caliphs, Abū Bakr and 'Umar I, in connection with the captured rebels from Banū Hanīfa during the wars of *riddah*.

Upon the death of the Prophet Muḥammad, a number of tribes in Arabia revolted against the government of the first Caliph, Abū Bakr. In the mind of Abū Bakr, this act of sedition turned out to be hardly distinguishable from apostasy. At the same time, the very critical nature of this moment in the history of Islam in Arabia rendered it virtually impossible to tolerate such open acts of rebellion against the Prophet's city. On this understanding, Abū Bakr set out to return these rebel tribes to their rightful place under the government of Medīna. In the

<sup>71</sup> *Tamyiz*, 182-83.

process of doing so, a number of tribes were subdued, and the question arose as to what their status should be. One such tribe was that of the false-prophet, Musaylamah, the Banū Hanīfa. Abū Bakr's decision was that the captives from Banū Hanīfa were to be enslaved.

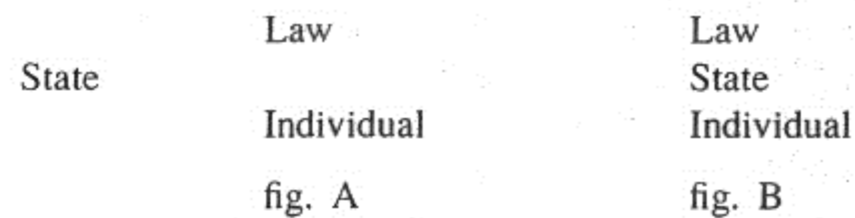
Now, according to al-Qarāfi, Abū Bakr's decision to enslave the captives of Banū Hanīfa constituted a *fatwā*, not a binding decision, which would have rendered these captives the unalienable property of the Muslims. As such, Abū Bakr's successor, 'Umar I, was justified in reversing this action and ordering that these captives be released.<sup>72</sup> In other words, according to al-Qarāfi, 'Umar recognized the action of Abū Bakr as constituting no more than a *fatwā* or *obiter dictum* in response to which he executed a *fatwā* of his own. While it seems obviously anachronistic to suggest that any such reasoning entered the mind of either 'Umar or Abū Bakr, what is important here is that al-Qarāfi identifies the action of a caliph on a clearly legal matter in the area of the *mu'āmalāt* as having constituted a *fatwā*. And it is here that al-Qarāfi seems to have achieved his ultimate goal of opening up a modicum of breathing room in which dissent could be expressed on issues where the state has legal jurisdiction. In effect, he allows the pronouncements of the head of state, again, even in this area where the state acts clearly within its recognized jurisdiction, to be brought into competition with those of the remaining *fuqahā'*. The net result is likely to be that those official pronouncements that are opposed by a sizeable enough segment of the legal community stand subject to being treated as *obiter dicta*. The exact circumstances under which the state might acquiesce in the face of such opposition will depend of course on the status of the various competing hegemonies within society at any given time. It seems reasonable, however, that rather than ignore or reject the impact of this competition in medieval Muslim politics, one might allow that al-Qarāfi assumed its presence to be an operative component affecting the degree of success or failure confronting his theories.

#### IV. *Sui Juris*

It was, or so it seems, H.A.R. Gibb who first made the observation that, "The law [of Islam] precedes the State, both logically and in

<sup>72</sup> *Tamyiz*, 109.

terms of time; and the State exists for the sole purpose of enforcing the law."<sup>73</sup> This master principle, certainly valid on its face (at least in terms of the chronological relationship between the state and the law) has often been pointed to in the context of efforts to explain the place of the individual in Islam. Since the state exists for the purpose of enforcing the law, and since the law precedes the state, the individual's relationship to the law, it is commonly argued, must be mediated by his relationship to the state. The state, in other words, stands between the individual and the law. On such an arrangement, the individual is necessarily rendered subordinate to the state, since the only legal rights (and to a lesser degree, obligations) he can possibly enjoy are those that are confirmed or recognized by the state. This at least would constitute the primary relationship, exceptions being ceded only where unavoidable. There is, however, another way of configuring this equation, namely, by assuming that not only the law but also the individual precedes the state. On such a view, the individual would enjoy a much more direct relationship with the law, and though the state might be said to occupy an intermediate position, it would stand not directly but much more peripherally between the individual and the law, its intervention being the exception rather than the rule. In other words, the relationship between the law, the individual and the state would look more like figure A below than figure B.



This is the perspective from which al-Qarāfi appears to view the matter. And it is this perspective that informs his doctrine of *sui juris*, by virtue of which the free agency of the individual becomes the rule and government intervention the exception.

According to al-Qarāfi, the rights and obligations contained in the *sharī'ah* are direct and automatic. Whenever a legal cause (*sabab*) obtains, there remains no need for a judge, caliph, or any other official to sanction the effected privilege or confirm the resulting prohibition. Individuals, according to him, are endowed with *sui juris*: they have both the right and the obligation to conduct their affairs autonomously, according to the provisions of the Law.

<sup>73</sup> Cited in Coulson, "The State and the Individual," 49.

This notion of *sui juris* is quite basic to al-Qarāfi's concept of Islamic law in general, one he traces in fact back to the Prophet Muhammad himself. As stated previously, according to al-Qarāfi, the majority of the Prophet's statements and actions constituted *fatwās* and were executed in his capacity as mufti. In this capacity, his function was analogous to that of a translator-interpreter who translates the meaning of his patron's speech to those who do not understand it. The patron served by the mufti is God. Those translated to are Muslims who do not understand certain aspects of God's speech. God's speech is of course His revelation.<sup>74</sup> At bottom, the basic task of the mufti is to identify those actions or occurrences recognized by God as legal causes (*asbāb/s. sabab*) and then to identify the legal rules (*ahkām/s. hukm*) that are activated by the occurrence of these causes. Thus, a mufti would identify the sun's passing its zenith as a legal cause obliging the performance of the noon-prayer, or one's causing damage to another's property as a legal cause obliging reimbursement.<sup>75</sup> While the Prophet also functioned as Imām (head of state) and judge (*qāḍī*), al-Qarāfi insists that the majority of his time was spent "inform[ing] the people, on behalf of God, of the rulings he found (in the revelation)."<sup>76</sup>

Since what the Prophet communicates in his capacity as mufti he does so on behalf of God, it follows that what he conveys will also constitute a direct authorization on the basis of which a person may act. This particular characteristic of the *fatwā* extends even into the post-prophetic era, the only difference being that the authority and correctness of the Prophet's *fatwās* stood as a given, based on his having been divinely protected from error (*ma'sūm*), whereas the post-prophetic mufti's *fatwā*, as a *khbar* (report),<sup>77</sup> remains subject to the independent judgments of recipients. Both, however, have the capacity to endow individuals with rights or impose obligations which may or must then be discharged independent of any other authority. This, according to al-Qarāfi, is basic to the very constitution of the *fatwā*. At bottom, it is this very capacity within the *fatwā* that endows individuals with *sui juris*.

<sup>74</sup> *Tamyīz*, 29.

<sup>75</sup> *Tamyīz*, 96.

<sup>76</sup> *Tamyīz*, 86.

<sup>77</sup> See above, 171-73.

As for his (the Prophet's) acting as mufti, *rasūl* and *muballigh*, what he says in these capacities constitutes universal law which remains binding until the Day of Judgment. We are thus obligated to follow every regulation he conveyed to us on the authority of his Lord upon the occurrence of its legal cause (*sabab*) without giving any regard to the decision of any judge or the permission to be granted by any Imām. For he, God's blessings and peace be upon him, merely conveyed to us the relationship between particular legal causes and their corresponding legal rules. Then he left the affair between us and God. He was neither originating a binding decision from himself, nor providing one on the basis of what the public interest (*maṣlahah*) dictated. Rather, he did no more than convey this information directly from his Lord, such as [he did in the case of] prayer, alms, acts of worship, acquiring property through contracts of sale, eleemosynary actions, etc. Thus, anyone may undertake these actions; and their legal causes may obtain to anyone, at which time their corresponding rules are (automatically) activated, without there being a need for any judge to originate a decision nor for a caliph to renew a license.<sup>78</sup>

This concept of *sui juris* operates, however, only as a general principle. There are, on the other hand, circumstances under which confirmation or some other sanctionative action by a representative of officialdom will be required for a legal cause to activate its corresponding rule. In *Tamyīz* al-Qarāfi is asked to enumerate these.

What is the general rule (*dābiṭ*) by which it is determined which legal rules require the ruling of a judge, the mere occurrence of their legal causes not being sufficient (for their application), and which rules do not require the ruling of a judge, the mere occurrence of their legal causes sufficing (to bring them into effect)?<sup>79</sup>

Al-Qarāfi indicates that the need for government intervention is engendered by any of three possible circumstances:

1) Where the implementation of the resulting legal rule requires investigation, precise clarification, and exertion of effort by a perspicacious scholar and just arbiter, in order to confirm the existence of the legal cause and the extent to which it calls the corresponding legal rule into effect.<sup>80</sup>

<sup>78</sup> *Tamyīz*, 96.

<sup>79</sup> *Tamyīz*, 146.

<sup>80</sup> *Tamyīz*, 146.

2) Where leaving the privilege of implementing legal rules upon the occurrence of their legal causes to the public is likely to lead to public strife, rancor, manslaughter, fighting, and the corruption of souls and property.<sup>81</sup>

3) Where there exists strong disagreement (*khilāf*) (among the jurists-consults), accompanied by a conflict between the rights of God (*ḥuqūq Allāh*) and the rights of man.<sup>82</sup>

The examples given under the first category include rules of two types: (1) those whose legal causes are accompanied by substantial legal prerequisites (*shurūṭ/s. shart*) or impediments (*mawānī/s. mānī*); and (2) those whose legal causes are not fixed but of a desultory or amorphous nature.

An example of the first type would be the case of divorce on grounds of the husband's insolvency. Ordinarily, a husband's inability to support his wife is a legal cause granting the wife the right to annulment. However, in such a case, the wife could not, according to al-Qarāfi, action this right herself. Rather, annulment would have to be executed by a judge. This is because such a matter requires additional investigation, in order to determine if "insolvency" and "inability to support" actually exist. Likewise, it must be determined whether or not the rule governing insolvency applies to this particular husband. For, according to Malik, for example, if the husband's indigence was known by the wife at the time of marriage, his subsequent inability to support her ceases to be a legal cause granting her the right to annulment.<sup>83</sup>

A second example adduced under the first category involves the non-prescribed disciplinary sanctions known as *ta'zīrāt/s. ta'zīr*. These, according to al-Qarāfi, require investigation in order to determine the extent of the offense, as well as the status of the perpetrator and the victim. For example, if a person is caught breaking and entering another's property, it must be determined that he was not doing so in order to retrieve a thing that rightfully belonged to him; for some jurists hold that one may repossess his property without the permission of the one in whose possession it is found.<sup>84</sup> Or, if a person is charged with publicly defaming (*shatm*, to be distinguished from *qadhf*)

<sup>81</sup> *Tamyīz*, 148.

<sup>82</sup> *Tamyīz*, 148.

<sup>83</sup> On the issue of divorce on grounds of insolvency, see above, 150-52. This stipulation by Mālik is a legal impediment to applying the rule on divorce on grounds of insolvency.

<sup>84</sup> *Tamyīz*, 100.

another, it must be determined, first, that the words used were considered defamatory by those in whose company they were said, and second, that the blood relationship between the two is not an impediment to the application of the rule on defamation. There are no legal sanctions, for example, against a father verbally abusing a son.<sup>85</sup>

Under the second category, al-Qarāfi cites the imposition of the prescribed punishments, *al-hudūd*. Here the underlying necessity for official intervention is plainly the preservation of public order, a universal imperative which all legal systems are called upon to promote. Al-Qarāfi notes, however, that, unlike the case of the non-prescribed punishments, the legal causes that engender *hudud* punishments are both known and generally of a fixed constitution. There is thus no question of determining their proportions and no need for a judge or other official to investigate. However, were the implementation of these rules left to the general public, civil strife and social upheaval would be the inevitable result. Thus, the Law has removed the application of these rules from the public's hands and delegated this task to those in authority (*wulāt al-umūr*).<sup>86</sup>

Under the third category, al-Qarāfi cites among his examples the case of a debtor who frees his slave. This action, according to him, engenders a conflict of rights: (1) the creditors to whom this debtor owes money have a right to the slave's dollar-value; (2) the debtor has a right to choose between settling his debts and performing an act of *qurbah*, or drawing near to God; (3) God has a right to the debtor's act of *qurbah*, represented in manumission. Moreover, there is sharp disagreement among the schools of law as to whose right is to take precedence.<sup>87</sup> This original act of manumission must thus be reviewed by a judge, who will either confirm or override it, deciding whose right is to take precedence over whose.

As indicated in some of the examples above, al-Qarāfi recognizes that there is often disagreement over whether or not certain rules require judicial action. For example, if a person ends up the slave of a well-to-do relative, it is said that the latter must free him. But does this act of manumission require the ruling of a judge? The most widely held view was that it did not, but some jurists insisted that a judge's ruling was necessary.<sup>88</sup> If a seller and a buyer disagree over

<sup>85</sup> See al-Māwardī, *al-Aḥkām al-sultāniyah*, 226.

<sup>86</sup> *Tamyiz*, 148.

<sup>87</sup> *Tamyiz*, 150–51.

<sup>88</sup> *Tamyiz*, 153.

the terms of a contract which has already been consummated and each takes a sworn oath (*tahālafā*) out of court affirming his position, does the nullification of this contract then require the ruling of a judge? Scholars differed over this question.<sup>89</sup> Al-Qarāfi gives no actual account of how such differences would be worked out on the ground. The very fact, however, that they are subject to dispute would suggest that government intervention would apply. One can imagine that their piecemeal resolution would produce over time a custom that would subsequently be institutionalized and no longer questioned.

Generally speaking, however, the three primary considerations cited by al-Qarāfi remain in his view the only justifications, *mutatis mutandis*, for government intervention. Whenever, in the absence of these three circumstances, a legal cause obtains, its corresponding legal rule is activated automatically, and there remains no need for any action on the part of a judge, caliph, or anyone else. In al-Qarāfi's words:

These are the three reasons for which the implementation of a legal rule will require the action of a judge or government official. And whenever none of these circumstances are found to exist, a legal rule is to follow its legal cause (automatically), regardless of whether an official rules or not.<sup>90</sup>

It has been suggested that the concept of freedom and individual rights never had a place in Islamic political or legal thought. W.M. Watt suggests that this may have been related to the idea that man in Islam was considered a slave ('*abd*) of God,<sup>91</sup> and, as such, any concept of freedom would tend to connote some sense of revolting against God's authority. This is not to say that freedom as an ideal was completely unknown; but "as a political force it lacked the support which only a central position within the political organism and system of thought would give it".<sup>92</sup> While there may remain some question as to how functionally central the concept of *sui juris* was to system of Islamic legal and political thought as a whole, it certainly appears to occupy a central position in al-Qarāfi's thought. On this recognition, it becomes difficult, at least to my mind, to ignore the possible connections it must have had to the ideas of freedom and individual

<sup>89</sup> *Tamyiz*, 154.

<sup>90</sup> *Tamyiz*, 151.

<sup>91</sup> *Islamic Political Thought*, 97.

<sup>92</sup> Watt, *Islamic Political Thought*, 97. The quoted segment is actually from F. Rosenthal's *The Muslim Concept of Freedom*.

rights. Professor Watt has himself expressed the suspicion that there was probably somewhere in Islamic thought a combination of ideas that performed essentially the same function as the concept of freedom in modern Western thought.<sup>93</sup> Perhaps al-Qarāfi's *sui juris* might be looked upon as one such specimen.

As in the case of defining the limits of the legal process, however, al-Qarāfi indicates clearly that he is willing to adjust the principle of *sui juris* according to the dictates of need and propriety. It is, indeed, not a hermetically conceived doctrine impervious or oblivious to political and social reality. It seeks, however, to establish the basic premise that government intervention is, or at least should be, the exception rather than the rule. The state, even as executive, is not the repository of religious authority. Nor does the individual exist for the sake of the state. It is rather the state, at least in al-Qarāfi's view, that exists to promote the welfare of the individual. The individual, who again actually precedes the state, is beholden, in the final analysis, only to God. In the end, the state is justified only to the extent that it promotes the efforts of the individual to obey and worship the Creator.

<sup>93</sup> *Islamic Political Thought*, 97. Professor Watt opines additionally that, "The greatest pressure to conform . . . came not from the government action but from the sense of solidarity with the community. In many cases this seems to have made a man *want* to be the same as his fellows and to feel that there was something wrong with him if he behaved or thought differently. To belong to the community meant so much to him—life apart from the community was unthinkable—that everything that threatened to separate him from his fellows was to be avoided." *Ibid.*, 98.

## CONCLUSION

Codification, even as the rise of the nation-state, is a modern phenomenon in the Muslim world. Yet, beneath the surface of the medieval "jurists' law," especially following the settling down of the *madhhabs*, there lurked the possibility of the emergence of an order whose operation could produce similar if not identical effects. For, where the medieval Muslim state or central power chose to erect its government on the doctrines and personnel of a particular *madhhab*, this resulted in the inevitable displacement (or at least marginalization) of the views of the remaining schools. At the very least, under such circumstances, the power advantage enjoyed by the incumbent school would confer an added authenticity upon its views. At most, it would confer upon these doctrines ultimate and exclusive authority.

This was the situation facing Shihāb al-Dīn al-Qarāfi in early Mamlūk Egypt around the middle of the 7th/13th century. The preeminence of the Shāfi'i school, punctuated by the installation of a lone Shāfi'i chief justice to preside over the judiciary, threatened not only to displace the views of the remaining schools as authoritative legal alternatives but to substitute power for consensus as the mechanism for settling and managing inter-*madhhab* disputes. Whereas consensus (*ijmā'*) had traditionally admitted the possibility of divergent yet equally authoritative legal interpretations, now where the ruling of a Mālikī judge contradicted the opinion of the Shāfi'i chief justice, there remained no guarantees that this ruling would be implemented. This possibility crystalized into reality following the ascension to the chief judgeship of the pertinacious Tāj al-Dīn Ibn bint al-A'azz, a man who, though incorruptible in his own right, pursued exclusivist and prejudicial policies.

In reality, however, Ibn bint al-A'azz represented only the tip of the proverbial iceberg. His policies underscored not only the power differential separating the schools of law but also the fact that government was not above the petty rivalries and competing hegemonies percolating within the Community at large. There was, in reality, no reason to expect that the differences separating Shāfi'is from Mālikis would disappear upon the ascension of either to power. On the contrary, these would continue; only now, one party would speak in the name

of government, placing behind its views the salutary arm of the state. It was, as such, not simply a matter of the fate of Mālikī judicial rulings but of Mālikī views overall (e.g., fasting when the Shāfi'ī chief justice announces the beginning of Ramaḍān) in the context of a legal order sponsored by a Shāfi'ī-dominated government.

This is the context in which al-Qarāfi's attitude toward government per se is best understood. Government, in his view, is not an idealized abstraction hovering benevolently above the fray. It is, rather, a functional necessity that emerges out of the dialectical interaction of competing forces within society. Its primary function is to promote order and secure the rights of citizens. It is not the repository of legal or religious authority; nor does it enjoy the right of artificially fordizing the law, divesting in effect the views of those with whom it disagrees of all functional authority. While the state does enjoy an executive authority, al-Qarāfi wants to limit this to that which is absolutely necessary for the fulfillment of its basic function. This is why the individual in his scheme is endowed with *sui juris*, as a result of which government intervention becomes the exception rather than the rule. Moreover, the range of matters on which government can legitimately exercise its executive authority is limited by restrictions placed on the legal process, as a result of which government intervention is confined roughly to the area of civil and criminal disputes, i.e., the *mu'āmalāt*, "religious observances and the like," "*al-'ibādāt wa nahwuhā*," lying beyond the scope of the legal process. But even in the area of the *mu'āmalāt*, al-Qarāfi seeks to preserve a modicum of autonomy by introducing the concept of *obiter dictum*, as a result of which government pronouncements can be looked upon as constituting "fatwās", or non-binding dicta that can be legally challenged or opposed.

Yet, the basic unit in al-Qarāfi's constitutional scheme is not the individual but, rather, the *madhhab*, or school of law. Indeed, the *madhhab* emerges in his thinking as the sole repository of legal authority. As such, it is the *madhhab* that confers upon the individual the right to follow certain views or to claim exemption from others. It is also the fact that a Mālikī judge's ruling embodies a view endorsed in the Mālikī *madhhab* that renders it exempt from all challenges. This ability to authorize and protect the actions of its constituent members constitutes what I refer to as the corporate status of the *madhhabs*. On this concept, the burden of proof lies upon those who wish to challenge the view of a school. Otherwise, the views of all of the schools are deemed orthodox and protected as

constituents of the *mukhtalaf fih* tier of orthodox law.

In this capacity, however, the *madhhab*, itself emerges as the product of a significant degree of evolution. No longer a loose association of jurisconsults held together by their mutual subscription to a set of open-ended jurisprudential concepts and principals, the *madhhab* is now constituted by its members' mutual subscription to a concrete body of legal rules. This is effected via the institution of *taqlīd*, by means of which each school is able to establish and maintain genetic links with the *mujtahid*-Imāms and ancient authorities of the past. It is essentially by virtue of their association with the ancient masters that the *madhhabs* are all deemed orthodox, since the views of the ancient *mujtahids* themselves were all deemed valid, or at least plausible enough to be followed with impunity. *Taqlīd* in this capacity is not synonymous with "blind following," or "servile imitation". In fact, it may not be at all incorrect to say that *taqlīd* represents a more rather than less advanced phase of legal development. There is certainly a sense in which the formal qualifications required of one who sought to engage in *taqlīd* exceeded those required of the earlier *mujtahids*. At any rate, it is primarily authority, not substance, that is borrowed from the ancient Imāms. As such, *taqlīd* precludes neither legal change nor the continuation of innovative and creative thinking. What it does promote, however, is a situation wherein change and innovation assume more cumbersome and indirect forms, e.g., *takhrīj*, or extrapolating from the views of the ancient Imāms, or the more involved enterprise of creating genetic links between novel and ancient views, or the even more complex exercise of what I refer to in chapter three as legal scaffolding.

*Taqlīd* was essential to maintaining the corporate status of the *madhhabs*; otherwise, the *madhhabs* would remain without an already established source of authority upon which to recline. New sources of authority would have to be produced by each generation. But this would mean that the authority of a view would remain open to question until its advocate could establish himself as an authority, a feat of no small magnitude and in no ways guaranteed. At the same time, *taqlīd* and the corporate status of the *madhhabs* diminished the effect of any power differential among the advocates of competing views, since the views of all schools were, *ceteris paribus*, equally authoritative regardless of political standing. As such, the *madhhab* comes to operate as an instrument against tyranny in the form of the arbitrary and artificial fordizing of the law.

As corporate entities, however, the *madhhabs* would themselves come to pose a number of distinct liabilities. To begin with, corporate status, if enjoyed by one *madhhab*, would have to extend to the *madhhab* in power as well. More importantly, however, if *everything* espoused by a *madhhab* were accorded the status of law or protected speech, there could be no limit to the range of matters on which the *fuqahā'*, including those in power, could claim legal authority. Law and legal sanctions, in other words, could be carried into every area of human activity, including some in which they were never intended to go. At the same time, the *madhhabs'* corporate status would promote and provide additional camouflage for the dreaded practice of extending legal authority to views that were actually not legal. In this capacity, the *madhhab*, though initially conceived of as a defense against tyranny, could also become an instrument of tyranny. Recognizing this liability, al-Qarāfi attempts to limit the jurisdiction of the *madhhabs* by restricting its authority to strictly legal matters. Non-legal or para-legal views are not protected as orthodox law. In this way al-Qarāfi intends not only to check the tendency of government officials to pass off their personal preferences and predilections as authoritative, bona fide law but also, or perhaps especially, to check the tendency on the part of private jurists to 'legalize' non-legal views.

At bottom, al-Qarāfi's thought revolves around the issue of power. As an Ash'arite who welcomed the demise of Mu'tazilite objectivism, he was acutely aware of the hidden but inescapable effects of power in determining the outcome of legal and intellectual disputes. For even assuming the existence of a single, objectively correct view, there was no way, in the absence of consensus, of knowing which party had apprehended it. As such, where one party to a controversy was unable to defeat the other in the arena of open debate the resulting differences simply had to be left standing. But, as a member of one of the politically weaker schools, al-Qarāfi could not escape the realization that the power differential among the *madhhabs* was not without practical implications and often determined the result. For when a Shāfi'i chief justice overturned a Mālikī judge's ruling, this was not because the former's school had defeated the latter's in open debate; this was simply because the Shāfi'is were in power. One of the main objectives of al-Qarāfi's campaign became thus to devise a theory capable of neutralizing the effects of power. While his theories reflect a subtle and innovative mind, there remains some question as to their ultimate success. For, al-Qarāfi himself appears not fully capable of resisting

the inflationary effects of power. His early views, for example, expressed as late as his writing of *Tamyīz*, to the effect that Ḥanafīs who drink *nabīdh*-wine in public should be punished, and Ḥanafī judicial rulings granting preemption rights to neighbors (*shuḥ'at al-jār*) should be overturned,<sup>1</sup> can only be explained in terms of his having perceived the Ḥanafīs at that time to have been in a politically inferior position. One notices that these views seem to disappear altogether from his later writings, as the Ḥanafīs obviously gained more political ground. Though these later capitulations might be taken as a vindication of al-Qarāfi's campaign overall, in the final analysis, his efforts, no less than his lapses, reflect the fact, as do the more recent debates over codification, that in attempting to establish and preserve the rule of law, Islam, then as now, cannot avoid the issue of power in both its most manifest and its most subtle forms.

<sup>1</sup> See above, 56, and note 100.

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