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In defense of two-tiered orthodoxy: A study of Shihāb al-Dīn al-Qarāfī's "Kitāb al-Iḥkām fīTamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qādīwa al-Imām"

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In Defense of Two-Tiered Orthodoxy:

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Kitāb al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qādī wa al-Imām

Sherman A. Jackson

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Contents

A Note On Abbreviations

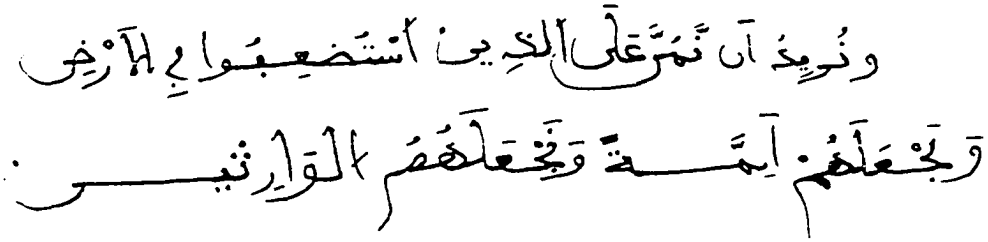
In order to limit the number of footnotes to a minimum, I have used the following abbreviated symbols, followed by page numbers or volume and page numbers, between brackets in the body of the text to refer to frequently cited works by al-Qarāfī or the Qur'ān:

T= *Kitāb al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām*
(All references are to the 1967 edition of 'Abd al-Fattāḥ Abū Ghuddah.)

F= *Al-Furūq*

S= *Sharḥ Tanqīḥ al-Fuṣūl*

Q= Qur'ān



I begin with the praise of God, to Whom my debt increases with every act of praise for having guided me to praise Him. May God's peace and blessings be upon my master and teacher, His final prophet, Muhammad ibn 'Abd Allah.

To my mother, Mrs. Evelyn Wise

and to the memory of my father, Mr. Samuel Jackson

ABSTRACT

IN DEFENSE OF TWO-TIERED ORTHODOXY: A STUDY OF SHIHĀB AL-DĪN AL-QARĀFĪ'S KITĀB AL-IḤKĀM FĪ TAMYĪZ AL-FATĀWĀ ᶜAN AL-AḤKĀM WA TAṢARRUFĀT AL-QĀDĪ WA AL-IMĀM

by

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ADVISOR: GEORGE MAKDISI

This is a study of a monograph written by a Mālikī jurist in 7th/13th century Ayyūbid-Mamlūk Egypt.

Chapter One is an overview of the life and times of Shihāb al-Dīn al-Qarāfī (d.684/1285). It also traces the relationship among the schools of law in Ayyūbid-Mamlūk Egypt.

Chapter Two looks into the immediate historical circumstances that prompted al-Qarāfī to write this work. In particular, I discuss the problematic relationship between the Shāfiᶜī Chief Justice of Egypt and judges from the remaining schools of law.

Chapter Three is a detailed analysis of al-Qarāfī's defense of the inviolable status of the rulings handed down by judges from all four schools, even when these happen to differ from the view of the Chief Justice.

Chapter Four treats the madhhab (school of law), including al-Qarāfī's perspective on ijtihād and taqlīd, the manner by which the view of a school is reached and the status of the various views within a school. I also discuss his distinction between law and non-law and its impact on the function of muftīs as interpreters of the religious law.

Chapter Five treats the judicial process, its limits and the limits placed on judges in adjudicating the law. According to al-Qarāfī, judges have jurisdiction of fact but not of law, the latter being the preserve of the madhhab. This is why the rulings of judges are inviolable; for they represent not the view of the judge but of his school, which is orthodox,

by consensus.

Introduction

This is a study of a monograph, the *Kitāb al-Iḥkām fī Tamyīz al-Fatāwā ʿan al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām* (The Book of Perfection in Distinguishing Legal Responsa from Judicial Decisions and the Discretionary Actions of Judges and Caliphs), by a great but heretofore unheralded Egyptian jurist of the Mālikī school, Shihāb al-Dīn al-Qarāfī. This work, hereafter referred to as the *Tamyīz*, was written sometime around the year 660/1261,[1] shortly after the ascension of the Mamlūk general, al-Malik al-Ẓāhir Baybars al-Bunduqdārī, to the Sultanate of Egypt. It was primarily a scholarly protest against the systematic refusal (or failure) on the part of the Chief Justice of Egypt, who, according to the prevailing system was necessarily a Shāfiʿī, to recognize the inviolable status of certain judicial rulings which, although controversial (*mukhtalaf fih*), were substantively valid according to the school of the issuing judge. This practice of the Chief Justice was in turn reciprocated by the jurisconsults of the remaining schools, who apparently responded by issuing legal opinions against judicial rulings with which they disagreed. According to al-Qarāfī, these actions of challenging and overturning substantively valid rulings violated the universally agreed upon principal of two-tiered orthodoxy, a term which I have coined to refer to the notion that 1) orthodoxy[2] in Islamic law is made up of a) universally agreed

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[1]See below, p.56.

[2]It has been aptly pointed out by Prof. G. Makdisi that, "The use of the term 'orthodoxy' implies the possibility of distinguishing between what is true and what is false. This term implies the existence of an absolute norm as well as an authority which has the power to excommunicate those whose doctrines are found to be false or heretical. Such an authority exists in Christianity, in its councils and synods. It does not exist in Islam." See "Hanbalite Islam," in *Studies on Islam*, ed. Merlin Swartz (Oxford:Oxford University Press, 1981), p.251. Earlier, I. Goldziher had pointed out that while Consensus (*ijmāʿ*) in Sunni Islam may be considered the counterpart to the Christian Church, it is nevertheless "an expandable spring, difficult to specify and diversely defined.... What one party regards as such, another will reject." *Ibid.* p.252. Despite these problems posed by Consensus, it remained, nonetheless, the basis of orthodoxy in medieval Sunni Islam. "Sunnism, Goldziher correctly observe[d], is a church based on *ijmāʿ*." *Ibid.* p.253. In this study I use the term "orthodoxy" to refer to that body of views believed to have gained the support of the doctors' consensus. This consensus, however, is two-pronged and may take as its object one or a multiplicity of views on a single question, whence the possibility of two tiers of orthodoxy. For more on the two-pronged capacity of Consensus, see below, p.9-10, and p.90-1. For more on the problem of identifying which views are the object of Consensus, see, p.90, nt. 4.

upon (*mujma' 'alaihi*) rules and b) disputed (*mukhtalaf fihi*) rules; 2) as long as a disputed view is endorsed by an orthodox school of law, it is orthodox -- equal in effect to views supported by unanimous consensus; and 3) any disputed view endorsed by an orthodox school is authoritative when it appears in the form of a legal opinion (*fatwā*), and binding and unassailable when issued in the form of a judicial ruling (*ḥukm*).[3]

At bottom, according to al-Qarāfī, the problem of violating two-tiered orthodoxy stems from the "extreme subtlety" of the dividing line separating legal opinions (*fatāwā/s. fatwā*) from judicial decisions (*aḥkām/s. ḥukm*).[4] This exposes the latter to being treated as if they were the former, and to violations, therefore, of their binding, unassailable, status. This constitutes a violation of two-tiered orthodoxy in that two-tiered orthodoxy, again, *protects the views of any orthodox madhhab, both as legal opinions and as judicial rulings* . Al-Qarāfī's primary aim in the *Tamyīz* is thus to clarify the distinction between the *fatwā* and the *ḥukm*, in order to safeguard the provisions of two-tiered orthodoxy and the inviolable status of judicial rulings.

Two Tiers Versus Two Levels of Orthodoxy

There is, however, a broader context in which the *Tamyīz* must be read and understood. The term "two-tiered orthodoxy" was inspired by a similar thesis articulated by Prof. G. Makdisi, according to whom there were "two levels of orthodoxy in classical Islam."[5] One level was the unanimous consensus of the doctors (*ijmā'*). A second level consisted of those questions on which there was no consensus but regarding which

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[3]For a more detailed treatment of this concept, see "In Defense of Two-Tiered Orthodoxy:Theory," below, p.88ff.

[4]See below, p.94-5.

[5]See G. Makdisi, "Scholasticism and Humanism in Classical Islam and the Christian West," *Journal of the American Oriental Society* 109.2 (1989), p.177.

authorized muftis had issued legal opinions. All of these opinions were considered orthodox, and as such it was permitted to any layman to choose freely from among the various responses given. "Orthodoxy," according to Prof. Makdisi, "thus functioned on two levels." [6] Two-tiered orthodoxy, on the other hand, differs from Prof. Makdisi's concept of two levels of orthodoxy in that, according to the latter concept, it was the *ijtihād of the individual jurisconsult* that rendered views on the disputed level orthodox, whereas, according to the concept of two-tiered orthodoxy, it is the endorsement not of the individual jurisconsult but of *the association of jurisconsults as a whole*, i.e., the *madhhab*, that renders a view orthodox. This shift in the basis of authority corresponds with a fundamental development in Islamic legal history by virtue of which the *madhhab*s, i.e., the schools of law, were transformed from associations only loosely bound together by legal doctrines into associations in which subscription to a specific body of legal rules became part and parcel of a jurist's membership in a particular school. [7]

In sum, Prof. Makdisi's notion of two <u>*levels*</u> of orthodoxy reflects the Islamic legal tradition as it operated under the regime of *ijtihād*. Al-Qarāfī, on the other hand (who died sometime between 682/1283 and 684/1285), writes in the more general context of the regime of *taqlīd*. His defense of two-<u>*tiered*</u> orthodoxy reflects the situation in Islamic law following the transformation from the regime of *ijtihād* to the regime of *taqlīd*. The *Tamyīz* is in turn thus not a defense of the individual jurisconsult per se, but of the 'corporate'

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[6] *Ibid.* "In this process [of issuing and accepting legal opinions] two freedoms were involved:the freedom of the professor to profess his own personal opinions independently of all forces, both within and without the guild in which he was a member; no power could compel him to give a predetermined opinion. The second freedom was that of the layman, who was free to ask the same question of a number of professors of the law, and to make his own choice from among the answers received. *Orthodoxy thus functioned on two levels.* The chosen opinion was considered orthodox on the first level; the second level of orthodoxy was that of the unanimous consensus of the professors on a given point of law." (emphasis not added)

[7] This new development and the changed understanding of "*madhhab*"emerges clearly in al-Qarāfī's definition and discussion of "*madhhab*, " particularly when his definition is compared to previous notions. See below, p.139ff.

status of the *madhhab* as an association and of the notion that what it endorses is, willy-nilly, orthodox.[8]

The terms, "regime of *ijtihād*," and "regime of *taqlīd* " are not new. They were first employed by J. Schacht in his 1964 publication, *An Introduction to Islamic Law* .[9] Schacht had put forth the view that, beginning in the 4th/10th century, a consensus was gradually established 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."[10] From this time on, argued Schacht, the law would have to be accepted as taught by one of the recognized schools, which were themselves covered by consensus.[11] Schacht had not been the first to affirm this "closing of the door of *ijtihād*."[12] But he was at the time the leading scholar of Islamic law, about whom G.E. von Grunebaum would later write, "Muslim law['s] ... origin and structure no longer can be seen except through his eyes."[13] Schacht's endorsement of this view thus conferred upon it an added authenticity and rendered it the '*mashhūr*,' or going opinion in the field at large.[14]

In 1981, this near-consensus was broken when Prof. G. Makdisi raised what was perhaps the first voice of dissent.[15] But the status of Schacht's view as the going opinion

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[8]See below, p.43, nt.84, for my vindication of the use of the term "corporate," despite the fact that the *madhhabs* were not the creation of the state.

[9]J. Schacht, *An Introduction to Islamic Law* (Oxford:Clarendon Press,1964), p.71.

[10]*Ibid.*

[11]*Ibid.*

[12]See, for example, H.A.R. Gibb, *Mohammedanism* (London:Oxford University Press,1949), p.97-8.

[13]G. E. von Grunebaum, "Presentation of Award to Second recipient, Joseph Schacht," *Theology and Law in Islam* (Weisbaden:Otto Harrassowitz, 1971), p.1. This was part of a speech delivered at the second Giorgio Levi Della Vida Conference in Los Angelos in 1969, at which Schacht received the Levi Della Vida prize.

[14]On *mashhūr*, see below, p.167ff.

[15]G. Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh:Edinburgh University Press, 1981), p.199. "The mufti had to practise his own ijtihad, his private judgment, in arriving at authoritative answers to questions addressed to him, answers based on the

was not really challenged until the appearance, in 1984, of Wael B. Hallaq's now well-known article, "Was the Gate of Ijtihad Closed?"[16] Focusing on Schacht as his main target (Hallaq's aim being clearly to dislodge the incumbent view), Hallaq argued that throughout the medieval era the requirements for *mujtahid*s remained relatively easy to meet;[17] and he produced the names of a number of scholars who interpreted scripture independently and openly contradicted the views of their respective schools.[18] He cited other scholars who openly proclaimed it the duty of all jurisconsults to perform *ijtihād*.[19] And the existence of the medieval controversy over the extinction of *mujtahid*s was proof, according to Hallaq, that no consensus on the closing of the gate of *ijtihād* had ever been reached.[20]

It was originally not my intention in this study to take a position for or against either of these views. In the absence of replies to Makdisi or Hallaq, however, I proceeded on the assumption that *ijtihād* never ceased in medieval Islam.[21] Subsequently, however, it became clear to me that al-Qarāfī's defense of two-tiered orthodoxy presupposed a regime of *taqlīd*. It was upon this realization that I was forced to look into this matter anew. And it was on this realization that the question of *ijtihād* versus *taqlīd* came to constitute one of the main axes around which this study revolves.

The results of my investigation confirm, ceteris paribus, the view of Schacht. This must be understood, however, given the following modifications: 1) the transfer from the

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sources of the law. In doing so, he had to avoid taqlid, servile imitation of other jurisconsults. Furthermore, in the best tradition of ijtihad, he had to act independently of all outside forces, including his own madhab, and especially the sovereign power."

[16]W.B. Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16 (1984):3-41.

[17]*Ibid*, p.4.

[18]*Ibid*, p.15, and passim.

[19]*Ibid*, p.27, and passim.

[20]*Ibid*, p.4.

[21]There were other factors contributing to this approach. See below, p.116ff., esp. nt. 42 (p.116).

regime of *ijtihād* to the regime of *taqlīd* occurred not in the 4th/10th century but between the 6th/12th and 7th/13th;[22] 2) the regime of *taqlīd* was a *modus vivendi* in response to concrete historical circumstances; it was not the result of a gradual disappearance of qualified jurists;[23] nor did it result from a group decision that "all essential questions had been thoroughly discussed and finally settled;"[24] 3) *taqlīd* did not equal the absence of independent reasoning; nor -- as will be seen in the case of al-Qarāfī -- did it preclude innovative thought and scholarly achievement.[25]

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The notion of two-tiered orthodoxy does not originate with al-Qarāfī; nor does the concept of the *madhhab* as an association committed to a specific body of legal rules; nor does recognition of the transformation to the regime of *taqlīd* . These developments all originate in an earlier period. However, they affect fundamentally al-Qarāfī's perception of the problem confronting him in 7th/13th century Egypt, as well as his approach to its resolution. In particular, under the regime of *taqlīd*, judges were divested of jurisdiction of law. As a consequence, they no longer interpreted scripture directly but had instead to rely upon the views upheld in their respective schools. This gave rise to a 'genetic' relationship between the *fatwā*s upheld in the schools of law and the decisions delivered at court.[26] It was on this new genetic relationship that al-Qarāfī described the distinction between the *fatwā* and the *ḥukm* as "extremely subtle," "so subtle that I have found no one who is able

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[22] See below, p.124ff., esp. p.126.

[23] See below, p.131-4, and p.219.

[24] *Intro*, p.70.

[25] See below, p.149-54, esp. nt. 18 (p.150). See also p.161-3. I should add that the overall spirit of jurisconsults working under the regime of *taqlīd* was not one of withdrawal and resignation, as Schacht, and especially N. J. Coulson seem to imply. See N. J. Coulson, *A History of Islamic Law* (Edinburgh:Edinburgh University Press, 1964), p.81.

[26] See below, p.94-5, p.115ff.

to pinpoint and explicate it with precision." [27] This in turn defines his agenda in the *Tamyīz* .[28]

From the Regime of *Ijtihād* to the Regime of *Taqlīd*

What were the major forces that brought about these changes? When did they come about? To be sure, the sources do not identify as a cause any specific event or set of events. To my mind, however, the transformation from the regime of *ijtihād* to the regime of *taqlīd* represents a second stage in the internal development of the Islamic schools of law. The first stage had occurred back in the 3rd/9th century, with the collapse of the geographical schools (e.g., the school of 'Irāq, the school of Medīnah) into the personal schools of law (e.g., the school of Abū Ḥanīfa, the school of Mālik).[29] However, the reasons behind the first phase of the *madhhab* 's development were mainly theological. As such, although the *madhhab*s were schools of law, they could remain nonetheless uncommitted to any set body of legal rules, undergoing instead only a diminution in numbers. But the reasons behind the second phase of the *madhhab* 's development appear to my mind to have been legal. As a consequence, they constrict doctrinally, endorse not merely broad principles but specific rules, and sanction ultimately a regime of *taqlīd* .

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[27] *Al-Furūq*, 4 vols. (Beirut: 'Ālam al-Kitāb, n.d.), 2:106.

[28] "And whoever wishes to comprehend this difference [between a disputed *fatwā* before and after a judicial decision]," al-Qarāfī continues, "should consult the *Kitāb al-Iḥkām fī al-Farq Baina al-Fatāwā wa al-Aḥkām*. For that work is devoted entirely to a discussion of this difference alone. But it is laid out over forty questions, including various (other related) issues, so that the intended meaning emerges with the utmost clarity and exactness." *Ibid.*

[29] It is said that around the year 300/900 some five hundred schools of law went out of existence. See G.Makdisi, *Rise*, p. 2.

Phase One; Phase Two

The first phase of the *madhhab* 's development has been eloquently described by Prof. Makdisi.[30] According to Prof. Makdisi, the reasons for the initial amalgamation of schools was the desire on the part of the Traditionalist jurisconsults to close ranks in order to combat the speculative rationalism of the Mu'tazilite theologians, who had succeeded in gaining government support and implementing the Great Inquisition (*miḥnah*) in which jurisconsults were beaten, jailed, or even killed unless they conceded the Mu'tazilite doctrine of the created nature of the Qur'ān (*khalqu 'l-qur'ān*).[31] 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 His revelation and the Sunnah of His Prophet. Right theological investigation was thus juridical. And in order to defend juridical theology and the primacy of law over speculative theology and ethics,[32] the jurisconsults began to amalgamate into larger blocs, the better to be able to resist the enemy.

The Inquisition lasted for fifteen years (218-34/833-48), through the successive reigns of three ʿAbbāsid caliphs, al-Ma'mūn, al-Mu'taṣim, al-Wāthiq, and two years of a fourth caliph, al-Mutawakkil, who instituted a counter-ukase. Prof. Makdisi sees in this failed attempt a decisive turning point in the history of Islam: The 3rd/9th century Mu'tazilite debacle marked the triumph of Traditionalism and the juridical approach over

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[30]*Ibid*, p.6-9, esp.p.7.

[31]*Ibid*, p.7.

[32]The Mu'tazilites 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 Mu'tazilite ethical rationalism" *International Journal of Middle East Studies* 7 (1976), p.59-87, esp. p. 62, where the Traditionalist counter-thesis is given: "Man can know values only by revelation directly, or by reasoning on the data of revelation, but never by any process of reasoning independent of revelation."

speculative rationalism. And, from that point on, law, as opposed to theology, became Islam's legitimizing agency and the highest expression of its genius.[33]

The end of the Inquisition marked the beginning of the professionalization of law and the organisation of the jurisconsults into *madhhab*-guilds.[34] As I understand it, the system erected subsequently provided not only a super-structure enabling the *fuqahā'* to remain united, but also a device for preventing the emergence of any new schools, and a theoretical basis for maintaining mutual recognition among those in existence.

The device via which the number of schools was held to a minimum was an apparent innovation in *uṣūl al-fiqh* which broadened the concept of consensus. According to this new understanding, the object of consensus did not always have to be a single, solitary view; it could be two views, or perhaps even three. However be its object singular or plural, consensus not only established as orthodox the agreed upon view or views, it also proscribed and invalidated all extraneous conclusions. This expanded understanding of consensus seems to make its appearance in the 5th/11th century.[35] In the *al-Mu'tamad fī Uṣūl al-Fiqh* of Abū al-Husayn al-Baṣrī, who died in Baghdad in 436/1044, there appears the following heading: "Concerning That Which Has Not Been

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[33]On law as the legitimizing agency, following the triumph of Traditionalism over Rationalism, Prof. Makdisi writes:"[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 legal system." See "Ash'ari and the Ash'arites in Islamic Religious History," *Studia Islamica* vol. 17 (1962), p.46.

[34]See G. Makdisi, "La Corporation a l'epoque 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), p.203-4: "C'est donc a partir de cette epoque, vers la fin du troisieme/neuvieme siecle --debut du quatrieme/dixieme siecle, que les *madhhabs* commencerent a se professionaliser dans leur organisation, surtout pour l'enseignement du droit, depuis l'apprentissage jusqu'a la maitrise de leur profession juridique."

[35]I am not able to say exactly how far back it goes. Between the *Risālah* of al-Shāfi'ī (d.204/819), where even the concept of consensus itself is significantly narrow, and the next major work on *uṣūl al-fiqh*, *al-Mughnī* of the Mu'tazilite 'Abd al-Jabbār (d.410/1019) there is a two century hiatus. The *al-Muqaddimah fī Uṣūl al-Fiqh* of Ibn al-Qaṣṣār (d.297 a.h.) Mss. [170] 5786, catalogue no. 2, al-Azhar collection, appears roughly in the middle 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.

Considered Consensus While In Point Of Fact It Is" (*fīmā ukhrija mina 'l-ijmā' wa huwa minhu*). Under this heading al-Baṣrī writes:

> 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.[36]

The ultimate effect of this doctrine, should it ever gain full acceptance, seems to me to be that while it would be possible for the number of schools to decrease, it would not be possible for any new schools to come into existence; for this would imply that the consensus holding that only the existing views were correct was itself incorrect. It is perhaps a testimony to the speed with which this doctrine spread [37]that, while it appears in the beginning of the 5th/11th century, by the latter half of this same century the Baghdādian, Abū Isḥāq al-Shīrāzī (d.476/1083) would place the total number of schools at five: the Ḥanafī, Mālikī, Shāfi'ī, Ḥanbalī, and Ẓāhirī schools.[38] The last member of the Ẓāhirī school would die in 475/1082,[39] leaving the number at four. Four is the number of "reputable schools" (*al-madhāhib al-mashhūrah*) recognized by al-Qarāfī (T.200). This is the number at which they have remained down to the present day.

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[36]Abū al-Husayn al-Baṣrī, *Kitāb al-mu'tamad fī uṣūl al-fiqh*, 2 vols. ed. Muḥammad Ḥamīd Allāh (Damascus:Al-Ma'had al-'Ilmi al-Faransi li al-Dirāsāt al-'Arabiyah, 1383/1964), 2:505. Al-Baṣrī cites the Ẓāhirīs as the only group who disagreed with this doctrine. See *ibid*, 2:505-8, esp. 508. See also 2:506 ff., where it is stated that al-Baṣrī's Mu'tazilite teacher, 'Abd al-Jabbār (d.410 a.h.), also agreed with this doctrine.

[37]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. 'Abd al-'Azīm al-Dīb (Cairo:Dār al-Anṣār, 1400/1980), 1:706-9. It is interesting that al-Juwaynī's star pupil, al-Ghazzālī (d.505/1111), who was a staunch proponent of the right and, indeed, 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-Mustaṣfā min 'ilm al-uṣūl*, 2 vols. ed. Muḥibb al-Dīn b. 'Abd al-Shakūr (Bulaq: al-Maṭba'ah al-Amīriyah, 1322/1905), 1:207: *fa inna 'l-khilāfa fīhā [al-mujtahadāt] maqrūnun bi tajwīzi 'l-khilāfi wa taswīghi 'l-akhdhi bi kulli madhhabin mina l-madhhabayn*.

[38]*Ṭabaqāt al-fuqahā'*, ed. Iḥsān 'Abbās (Beirut:Dār al-Rā'id al-'Arabī, 1970).

[39]Makdisi, *Rise*, p.4. It is interesting that the great Indian Muslim scholar, Shāh Walī Allāh al-Dahlawī, identified the 5th/11th century as the time when the schools of law finally settled down to four. See *Ḥujjat allāh al-bālighah*, 2 vols. (Cairo:Dār al-Turāth, n.d.), 1:152. Schacht had cited the 7th/13th century as the date when mutual recognition among the schools was established. *Intro*, p.67. Coulson had identified the 3rd/9rd century. See *History*, p. 89, but see also p.87-9.

This final stage of diminution was recognized by some medieval writers as "the settling down of the *madhhabs*" (*istiqrār al-madhāhib*).[40] Simultaneous with this development, mutual recognition among all the schools was established as the rule. This is clearly reflected in an opinion cited by the Ḥanafī jurist, Ibn Amīr al-Ḥajj (d.879/1474) in defending the validity of tacit consensus (*ijmā' sukūtī*). Generally speaking, tacit consensus occurs when one jurist issues an opinion, and the remaining jurisconsults remain silent. Given the opportunity to respond, the assumption is that the remaining scholars would remain silent only if they found no objections to the original opinion. Their silence is thus taken as a vote of approval, whence the term *ijmā' sukūtī* (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 which 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.[41]

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 jurisconsult remained autonomous in his interpretation of the law. This is reflected in the

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[40]See, for example, Ibn Amīr al-Ḥājj (d.879/1474), *al-Taqrīr wa al-taḥbīr* , 3 vols. (Beirut: Dār al-Kutub al-'Ilmiyah, 1403/1983), 3:106. Ibn Amīr al-Ḥājj's work is diachronic, cataloguing views from several centuries back. The phrase, "*istaqarrati 'l-madhāhib* " occurs also in al-Mawārdī's (d.450/1058) *Adab al-qāḍī*, 2 vols., ed. Muḥyī Hilāl Sirḥān (Baghdad:al-Irshad Press, 1391/1971), 1:645.

[41]Ibn Amīr al-Ḥājj, *ibid* .(emphasis added)

opinions of a number of scholars from the 5th/11th, 6th/12th and even 7th/13th centuries: e.g., the Shāfi'ī al-Māwardī (d.450/1057), the Ḥanbalites Abū Ya'lā (d.458/1065), Ibn 'Aqīl (d.513/1119) and Ibn Qudāmah (d.620/1223). All of these scholars insisted that once qualified each individual jurist was duty-bound to exercise independent *ijtihād*. Al-Māwardī even went on to state explicitly that it was permissible for a Ḥanafī to appoint a Shāfi'ī as judge, because judges had the right to rule according to their own *ijtihād*; and, once appointed, it was not incumbent upon a Shāfi'ī judge to follow the opinions of his Ḥanafī principal.[42] This held all the more, according to al-Māwardī, since judges were not even bound to the views of their *mujtahid*-Imāms.[43] It seems, however, that things would not be able to remain this way forever. For if law was to become the legitimizing agency in Islam, it would be through law that the government would seek to co-opt religion.

The threat of the Mu'tazilites had been that they sought to legitimize speculative rationalism, which was bound, ultimately, to lead to the overriding of scripture by human reasoning. The object behind the initial amalgamation and professionalization of the schools (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 only 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 the question,"What is God's nature?") subscribing, meanwhile, to only broad, still open-ended legal principles and methods attributed to one of the Imāms.[44] In terms of

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[42]Abū al-Ḥasan 'Alī b. Muḥammad b. Ḥabīb al-Māwardī, *al-Aḥkām al-sulṭāniyah*, ed. Muḥammad 'Abd al-Qādir (Bulāq:Maṭba'at al-Waṭan, 1298/1880), p.64.

[43]Al-Māwardī, *Adab al-qāḍī*, 1:644-5. For citations from other scholars of this period who held this view, see also below, p.118-24.

[44]None of the early Imāms, save al-Shāfi'ī, wrote works on legal methodology. Their method, it seems, was, rather, deduced from the aggregate of their opinions on individual questions. A good example of this early deduction is seen in the *Muqaddimah fī Uṣūl al-Fiqh* of Ibn al-Qaṣṣār al-Baghdādī (d.297/909), fol. 2 recto ff., where he systematically deduces "Mālik's method," (*madhhabu mālik*) from various opinions of Mālik on individual questions of positive law (*furū'*).

concrete rules, a jurist could and often did contradict the view of his Imām.[45] This arrangement, however, bore a particularly heavy liability; for if jurisconsults were free to interpret scripture according to their own lights, and if layman were completely free to choose from among the various responses given, then so would the government be free to pick and choose in the same way. And, the inevitable existence of mercenary and less conscientious members within the legal community would make clean work of the government's effort to co-opt the law.

At this point in my research I can offer only a hypothesis about the crucial developments which must have taken place during the latter part of the 6th/12th century and the early part of the 7th/13th.[46] What is certain, however, is that a change did take place. For throughout the 5th/11th century *ijtihād* and the two-levels of orthodoxy remained in operation. With al-Qarāfī in the middle of the 7th/13th century, however, *taqlīd* and two-tiered orthodoxy become the rule:[47] *madhhab* comes to constitute not merely a broad method of legal reasoning (e.g., a *ṭarīqah*) but a specific body of legal rules;[48] legal precepts (*qawā'id*) displace legal principles (*uṣūl*) as the mainstay of the jurisconsult; [49] and the normative practice of judges is no longer to interpret scripture directly but rather to rely on the legal doctrines of the respective schools of law.[50] These facts suggest, again, that the reasons behind these developments were not theological (as had been the case during the first stage of development) but rather legal. My hypothesis, the evidence for which I present in chapter three, is that the jurisconsults came to the conclusion that in

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[45]See, for example, Wael Hallaq, "Gate," p.11, where the author cites a number of followers of individual *madhhabs* who openly contradicted the views of their eponyms. Note, however, that all of the scholars mentioned by Hallaq died in the 4th/10th century.

[46]See below, "A Tentative Hypothesis," p.131ff., where I suggest that it was in an attempt to neutralize judges as agents of the government that the regime of *taqlīd* was opted for.

[47]See below, p.126ff.

[48]See below, p.139ff.

[49]See below, p.166ff.

[50]See below, p.126ff., esp. p.130-1.

order to safeguard the law, strict limits would have to be set beyond which no legal interpretation would be accepted; the degree of latitude allowed jurisconsults would have to be significantly limited; and jurisconsults themselves would have to be placed within the confines of set body of legal doctrines. This was the beginning of the regime of *taqlīd* and two-tiered orthodoxy.[51]

Al-Qarāfī and the Regime of *Taqlīd*

This is the broader context in which Shihab al-Din al-Qarafi lived and wrote. The transformation to the regime of *taqlid* had endowed the *madhhab* with what I have chosen to refer to as 'corporate' status.[52] Bound to the views of his school, a jurisconsult's declarations were now authoritative because he spoke in the name of his school. And as long as a view maintained the endorsement of one of the schools, it was, willy-nilly, orthodox. This was the essence of two-tiered orthodoxy.

It should be noted, however, that al-Qarāfī, and, no doubt, his predecessors before him, recognized the regime of *taqlīd* exactly for what it was: a contrived *modus vivendi* designed to protect the sanctity of the law. *Taqlīd* was not an ideal;[53] nor did it lack its own liabilities;[54] nor did al-Qarāfī believe that *ijtihād* was no longer possible.[55] What he

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[51]See below, "From *Ijtihād* to *Taqlīd*: The Pre-Qarāfian Backdrop," p.115ff.

[52]See below, p.43, nt.84, for my vindication of the use of the term "corporate," despite the fact that the *madhhabs* were not the creation of the state.

[53]Some modern scholars seem to be of the view that *taqlīd*, if it existed, had to have been an ideal or doctrine deduced on the basis of some legal source or principle. In studying this issue they thus turn to the sources on legal theory, and, finding no support for it there, they deny its existence. See, for example, the discussion by M.A. Abdur Rahim, *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali Schools* (Lahore: All Pakistan Legal Decisions, 1963) p.171-5; Hallaq, *Gate*. To my mind, these scholars appear to confuse the question of what was with the question of what should have been. On the other hand, my research suggests that *taqlīd* did exist, although it was not a doctrine but a *modus vivendi* resorted to in the absence of a better solution to specific historical circumstances. Its origins are to be found not in the books on legal theory, but rather in the musty recesses of history. On the other hand, my conclusions should not offend the Modernists and others who see the damaging effects of *taqlīd* today; for if history can usher in a regime of *taqlīd*, it can, with equal vigor, usher it out.

[54]This is clearly manifested in al-Qarāfī's restrictions on *taqlīd* and his careful delineation between proper and improper *taqlīd*. See below, p.146ff. See also p.208ff., on his diffidence on the rule binding judges to apply the *mashhūr* of their school, and his desire to preserve for them the right to individualize cases.

did believe was that two-tiered orthodoxy provided the best possible solution to the problem in 7th/13th century Egypt, short of government intervention.[56] And of this latter al-Qarāfī was deeply apprehensive and ever desirous to keep at an absolute minimum.[57] It was perhaps for this reason that he endorsed the regime of *taqlīd*.

Al-Qarāfī in Western Scholarship

Western scholarship to date has taken only slight notice of al-Qarāfī. J. Schacht, for example, (under the rubric, "Works on furuk") cites al-Qarāfī's *al-Furūq* in the bibliography to his *An Introduction to Islamic Law*.[58] In his *A History of Islamic Law*, N. J. Coulson makes mention of al-Qarāfī, referring to him as "the great Egyptian Mālikī jurist and mufti of the fourteenth [sic] century."[59] Franz Rosenthal catalogues some of al-Qarāfī's views on the legal status of hashish, in his interesting study on that topic.[60] However, to my knowledge, there have been no comprehensive studies devoted specifically to al-Qarāfī nor any aspect of his thought.[61] Perhaps the absence of an entry on him in the *Enyclopedia of Islam* is a telling testimony to his perduring anonymity in Western scholarship.

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[55] See below, p.162-3, where al-Qarāfī states that there is no difference between the *muqallid* and the *mujtahid* inasmuch as both must master the discipline of *uṣūl al-fiqh*. See also my comments on p.162-3.

[56] See below, p.86-7, and my concluding comments, on p.225.

[57] Al-Qarāfī's discomfort with government involvement becomes most clear perhaps in his discussion of supplementary judicial actions, where it is clear that his aim is to confine the government's power of implementation to what is absolutely necessary for the maintenance of order, the better to check the government's propensity to impute to its discretionary powers meanings which these were never meant to bear. See below, "Obiter Dictum," p.193-5.

[58] J.Schacht, *Intro*, p. 265.

[59] N. J. Coulson, *History*, p.143.

[60] F. Rosenthal, *The Herb: Hashish Versus Medieval Muslim Society* (Leiden: E.J. Brill, 1971), p.108-10, 120-1,124,181-3, 190-2, and passim.

[61] There is a Cairo University Ph. D. dissertation on al-Qarāfī by 'Abd Allāh Ibrāhīm Ṣalāḥ, *Imām Shihāb al-Dīn al-Qarāfī wa Atharuhu fī Uṣūl al-Fiqh*, which, after repeated attempts, I was unable to obtain.

Sources

The most important source for this study is of course the *Tamyīz* . It consists of forty questions along with their responses. There are two printed editions of this work. The 1938 edition of Maḥmūd 'Arnūs was produced on the basis of a single poorly preserved manuscript from the Egyptian National Library.[62] This edition is replete with mistakes and is at times confusing. 'Arnūs, himself a Sharī'ah court judge and a scholar of some repute, was aware that in relying on this single manuscript he might be producing an imperfect edition. Nevertheless, he felt that the work was so important and such a brilliant testimony to al-Qarāfī's acumen as a legal thinker that readers were likely to benefit from it despite whatever inaccuracies it might contain.[63]

The next edition of al-Qarāfī's work appeared in 1967. This is a fine edition by 'Abd al-Fattāḥ Abū Ghuddah.[64] It is annotated and accompanied by some helpful notes and cross references. It was produced on the basis of four manuscripts: 1) Mss. from the personal library of Shaykh 'Ārif Ḥikmat at Medīnah, Saudi Arabia (no. 3, *fatāwā*); 2) Mss. from the Aḥmadīyah library at Aleppo (no. 306, amid a collection of books on hadith), copied in 738/ 1337 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-Khālidī 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 copyist.[65]

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[62]Shihāb al-Dīn al-Qarāfī, *Kitāb al-iḥkām fī tamyīz al-fatāwā 'an al-aḥkām wa taṣarrufāt al-qāḍī wa al-imām*, ed. Mahmūd 'Arnūs (Cairo:Anwār Press, 1357/1938).

[63]*Ibid*, see his introduction and postscript.

[64]Shihāb al-Dīn al-Qarāfī, *Kitāb al-iḥkām fī tamyīz al-fatāwā 'an al-aḥkām wa taṣarrufāt al-qāḍī wa al-imām*, ed. 'Abd al-Fattāḥ Abū Ghuddah (Aleppo: Maktabat al-Maṭbū'āt al-Islāmīyah, 1387/1967).

[65]This information is taken from the preface to Abū Ghuddah's edition.

There is a fifth manuscript of the *Tamyīz* which I procured from the Princeton University library (no. 826, Yahudah collection, shelf no. 488).[66] This manuscript is apparently not identical to any of those relied upon by Abū Ghuddah, as it differs in places where he says all of his sources agree.[67] These differences are mostly minor, however, and did not significantly affect my reading of the text.

There are three other works of al-Qarāfī on which I rely to gain a better understanding of his thought in the *Tamyīz* . Listed in order of importance, these are:1) *Al-Furūq* , an impressive four volume work on legal precepts (*qawā'id*)[68] written after the *Tamyīz* ;[69] 2) the *Sharḥ Tanqīḥ al-Fuṣūl*, a commentary on Fakhr al-Dīn al-Rāzī's *al-Maḥṣūl* on *uṣūl al-fiqh* ;[70] 3) *al-Umnīyah fī Idrāk al-Nīyah*,[71] a small tract written on intention and the law.

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Methodology

My approach in this study is largely but not wholly revisionist: I proceed on the assumption that the text of the *Tamyīz* alone cannot sufficiently communicate al-Qarāfī's intended meaning and that it is necessary, therefore, to read it against the background of the relevant historical factors that may have prompted its writing. History, on the other hand, while providing impetuses, cannot be taken as the sole determinant of human action; otherwise, all who share a common history would act in the same way. It is therefore

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[66]I wish to thank Dr. Chris Taylor of Yale University for his kind assistance in obtaining this manuscript.

[67]For example, on p. 268 nt. 2 of the Abū Ghuddah edition the editor states that all of his sources read:"*li ghairihi mina 'l-fuqahā'i 'l-ladhīna yataṣawahhamu munāza'atah* ," whereas fol. 54 recto of the Princeton mss. reads,"*li gharirihi mina 'l-fuqahā' 'l-ladhī* . . . . "

[68]Shihāb al-Dīn al-Qarāfī, *al-Furūq* (also known as *Anwār al-Burūq fī Anwā' al-Furūq*) 4 vols. (Beirut: 'Ālam al-Kitāb, no date).

[69]This is confirmed at *al-Furūq*, 2: 106 , where al-Qarāfī refers his reader to the *Tamyīz* .

[70]Shihāb al-Dīn al-Qarāfī, *Sharḥ tanqīḥ al-fuṣūl*, ed. Ṭāhā 'Abd al-Ra'ūf Sa'd, (Cairo: Maktabat Kulliyāt al-Azhar, 1393/1973). This work was completed on the 10th of Sha'bān, 677/1279. *Ibid*, p. 460. See also p.441, where the *Tamyīz* is mentioned by name:"*al-Iḥkām fī al-farq bayna al-fatāwā wa al-aḥkām wa taṣarruf al-qāḍī wa al-imām.*"

[71]Shihāb al-Dīn al-Qarāfī, *Al-Umnīyah fī idrāk al-nīyah* (Beirut: Dār al-Kutub al-'Ilmīyah,1404/1984).

necessary to locate those aspects of the historical environment that are likely to have had meaning *for al-Qarāfī*, given his particular perspective on the subject. My attempt is to gather a basic understanding of this perspective from the text, and then to rely on this to guide me in locating the relevant historical factors. With this internal and external evidence combined, I then attempt to present a more detailed description and analysis of al-Qarāfī's thought.

While in general I observe the revisionist postulates articulated by Q. Skinner,[72] I also observe an important objection made against him, namely, that thinkers generally operate as participants in long-standing traditions, and as such their thought is often transcendent of their immediate environment.[73] This is especially true of Muslim jurists, with their reliance upon sources and authorities located in the past. On this understanding, the meaning and illocutionary force of al-Qarāfī's statements in the *Tamyīz* must be understood not only against the immediate background of Ayyūbid and Mamlūk Egypt, but also in the broader context of the running history of the Islamic legal tradition. It is on the basis of this postulate that I attempt, beginning in chapter three, to look into the period prior to al-Qarāfī to see what aspects of his thought were shaped by developments from earlier times.[74]

Format

I have divided this study into two parts. Part one, which includes chapters one, two and three, treats the main problem of the *Tamyīz*, including the historical circumstances out of which it evolved, and al-Qarāfī's perception and proposed solution to this problem. Part two, including chapters four and five is more general in approach and looks at, among

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[72]See his classic article, "Meaning and Understanding in the History of Ideas," *History and Theory* 8 (1969), p. 1-53.

[73]See Joseph Femia, "An Historicist Critique of Revisionist Methods for Studying the History of Ideas," *History and Theory* 20 (1981), p. 115.

[74]See below, p.115ff., "The Pre-Qarāfian Backdrop."

other things, "the view of a *madhhab*," and the judicial process, and the relationship of interdependence between these two.

Chapter one begins with a biographical profile on al-Qarāfī, and moves through the political situation in 7th/13th century Ayyūbid-Mamlūk Egypt and the relationship among the schools of law during this period. I also discuss the *madhhab* as a guild and give what I believe to be evidence that it functioned in al-Qarāfī's period as a corporate entity.

Chapter two enters more specifically into the historical aspect of the main problem of the *Tamyīz*. Here my primary aim is to show that I have correctly located the historical circumstances in which the *Tamyīz* was written. In addition, I try to identify the various parties involved and to depict the reasons underlying the positions they took.

Chapter three is a detailed treatment of al-Qarāfī's defense of two-tiered orthodoxy. Here my aim is, first, to clarify the meaning of two-tiered orthodoxy and the theory behind al-Qarāfī's defense of it. Second, I attempt to look at the problem from al-Qarāfī's perspective and to understand why he perceives it in the manner in which he does. Then I move on to al-Qarāfī's proposed solutions to the problem. Finally I back-track into the period prior to al-Qarāfī in an effort to locate the historical developments that provided the general framework in which he lived and wrote. It is here that I attempt to support my claim that the Islamic legal tradition underwent a transformation from a regime of *ijtihād* to a regime of *taqlīd*.

Chapter four begins part two of the study. Here, after having established the transformation to the regime of *taqlīd*, I attempt to describe the process through which the view of a *madhhab* is reached. In particular, I discuss the technical modality of *taqlīd*, as a process of legal reasoning, al-Qarāfī's restrictive concept of *taqlīd*, the various levels of

taqlīd, and the role of the *madhhab* as an association in determining the content of the law under the regime of *taqlīd*.[75]

Chapter five is a discussion of the judicial process. Here, my primary aim is to show the relationship between the judicial function and that of the jurisconsults of the *madhhab*s, in particular, the relationship of dependence of the former upon the latter for the legal (as opposed to the factual) content of judicial rulings. In addition, I treat a number of other issues which appear to have been of significance to al-Qarāfī, or which I feel might advance our knowledge on the subject of judicature in Islam. Chapter five is followed by my conclusion.

Persisting Problems

Of the problems I encountered in this study, the most significant relate to the nature of the sources relied upon. By sources I do not mean the works of al-Qarāfī mentioned above, but rather the ancillary sources, chiefly those relied upon for information concerning legal history, e.g., the development of the *madhhab*s and the history of judicature in Islam. To begin with, these sources evince a tendency, common perhaps to most legal cultures,[76] to disguise rather than acknowledge -- let alone explain -- change and evolution. This renders the meaning of key words such as *"madhhab"* or *"ijtihād"* difficult to determine in various contexts. One example of this may be seen in the work on judicature

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[75]In describing the situation in Islamic law following the transfer to the regime of *taqlīd*, Schacht pointed out, "The details of the growth of doctrine within each school, though amply documented by the existing works, still remain a subject for scholarly investigation." See *Intro*, p.71.

[76]See J. Frank, *Law and the Modern Mind* (New York, 1930), p. 22 ff., where he discusses the manner in which changes in the U.S. Supreme Court's interpretation of the Constitution are disguised in order to preserve a semblance of continuity and permanence of truth. "But when Justice White's view became that of the majority he, strange though it may seem, refused to acknowledge that the Court had changed its mind. Instead he insisted that the "rule of reason" had always existed in the Court's opinions, albeit burried beneath some of the more opaque verbiage." *Ibid*, p.24.

of the 9th/15th century al-Ṭarābulusī (d.844/1440), who, while implicitly acknowledging the regime of *taqlīd*, continues to use the word *ijtihād* as if no transformation had ever taken place.[77] In the face of such opaqueness, one is forced not to take these sources at their word, but to read between the lines in the light of the more general facts of history. But when does one stop reading between the lines? At what point does this cease to be judicious reading and become instead a false creation of facts?

A second problem with ancillary sources concerns sources on judicature in particular. The sources that have come down to us on this subject come from different centuries, different geographical areas, and from the pens of scholars from different schools of law. One cannot always be certain, therefore, about the degree to which his sources represent isolated views and phenomena or more general and consistent trends. These gaps in time and place make it difficult to avoid guessing, and at the same time easy to fall victim to historical anachronisms. For example, between Ibn Abī al-Dam's (d.642/1244) *Adab al-Qadā'* and Ibn Farḥūn's (d.799/1396) *Tabṣīrat al-Ḥukkām* -- to my knowledge, the only available sources from these respective periods -- there is a gap of over one hundred and fifty years, a difference in geographical origin, and a difference in perspective between two schools of law. How safe is it, given these differences, to assume that the similarities between these works point to universal trends or successive and uninterrupted stages in a single evolutionary chain?

77'Alā' al-Dīn Abū al-Ḥasan 'Alī b. Khalīl al-Ṭarābulusī, *Mu'īn al-ḥukkām fīmā yataraddadu bayna al-khaṣmayn min al-aḥkām* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī and Sons, 1393/1973). On p. 26, for example, while citing *ijtihād* as a requirement for judges, al-Ṭarābulusī cites the view of the 6th/12th century al-Sarkashī:"Whoever memorizes *al-Mabsūṭ* [a work on *fiqh*, not *uṣūl* !] has reached the rank of *ijtihād*." On the very next page, he uses the term in the sense of sifting through and choosing the most probative of the views of Abū Ḥanīfa, Abū Yūsuf, and Muḥammad ibn al-Ḥasan al-Shaybānī. Obviously, these usages do not reflect the meaning of *ijtihād* as it was understood in the early period, namely, the exertion of one's utmost effort to understand the meaning of *scripture*. (See, for example, the views of al-Māwardī and Ibn Qudāmah, below, p.118-24.) However, al-Ṭarābulusī gives no indication that he is aware of a change in meaning.

Similarly, it is often difficult to determine the meaning and significance behind an author's words and locutions: At times he may appear to misread his tradition; at other times that he is attempting to introduce a new idea in old guise; still at other times that he is attempting to resurrect a meaning or institution from a by-gone era. I have tried in this regard to interpret my sources objectively. I can only hope that future research will confirm my conclusions.

Finally, a word should be said about Western sources that deal with the history and development of Islamic law. In terms of actual research, Western scholars appear to have concentrated on two major periods: 1) the early "classical" period, i.e., up to the 5th/11th century; and 2) the modern period, going back as far as the Ottoman Empire. My research has led to the suspicion that al-Qarāfī lived in what may be called a "middle period," falling roughly half-way between the two periods most seriously studied. This "middle period," viz., from the 6th/12th to the 9th/15th century, suffers greatly from the fact that it is only indirectly studied: various assumptions are made about it based on what happened before or after, but little is said on the basis of actual research on the period itself.[78] As a result, this period and its significance in the development of Islamic law remains shrouded in a cloud of obscurity. My research has suggested that much could be learned from further investigation into the developments of the 6th/12th and 7th/13th centuries in particular, with special attention paid to the historical circumstances out of which these developments emerge. It is my hope that this study will be a contribution in this area and that, in addition

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[78]Again, this is most sorely felt when dealing with the issue of *ijtihād* versus *taqlīd*. On the one hand, there seems to be a tacit assumption that *ijtihād* continued from earlier times into the period of al-Qarāfī, as there is no suggestion that judges in this period were bound to the views of their respective schools, and one must assume, therefore, that they ruled on the basis of their own interpretations of scripture, i.e., *ijtihād*. On the other hand, the *taqlīd* of later times is assumed to have begun sometime earlier, which, if one considers, for example, the writings of the 10th/16th century al-Suyūṭī and his campaigns in favor if *ijtihād*, al-Qarāfī's period is again subject to be taken as the beginning of this new development. Yet, in terms of actual research, little has been done to determine exactly what went on in al-Qarāfī's period and what role, if any, it played in the development of Islamic law as a whole.

to providing a partial framework for future studies, it will raise some of the questions upon which future investigations might proceed.

Part One

Chapter One

Shihāb al-Dīn al-Qarāfī: Life and Times

I. Biographical Profile

A. Birth, Origins and Death

Shihāb al-Dīn Abū al-'Abbās Aḥmad b. Idrīs al-Qarāfī was of Berber origin, a member of the Sanhājah tribe, large segments of which migrated to Egypt from North Africa. [1] The name "al-Qarāfī" reportedly attached to him while still a young law student at the *Ṣāḥibīyah* college in Egypt. Unable to recall his proper name, the roll-caller at this college was advised by the other students simply to write "al-Qarāfī," because they noticed that he used to approach the school from the direction of al-Qarāfah, the region just south of the Cairo citadel in the city's old section.[2] Of the few medieval sources that give biographical information on him, none give a date of birth. A modern biographer, Ismā'īl Bāshā al-Baghdādī (d.1339/1920), puts it at 626/1228.[3] This date, however, is suspect on at least two accounts. First, in a later work of his al-Qarāfī mentions the urgency of completing his project before he should be visited by death.[4] As he died sometime between 682/1283 and 684/1285, a birth date of 626/1228 would mean that he was

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[1]On the Sanhājah Tribe, see Ibn Khaldūn, *Kitāb al-'ibar wa diwān al-mubtada' wa al-khabar fī ayyām al-'arab wa al-'ajam wa al-barbar wa man 'āsarahum min dhawī al-sulṭān al-akbar*, 7 vols. (Beirut: Mu'assasat al-'Ālam li al-Maṭbū'āt, 1391/1971), 5:152-76.

[2]Ibn Farḥūn, *al-Dībāj al-mudhahhab fī ma'rifat a'yān 'ulamā' al-madhhab* (Beirut: Dār al-Kutub al-'Ilmīyah, no date), p.66. The college in question is referred to by al-Maqrīzī as *aṣ-ṣāḥibīyah*, which was founded by the Mālikī *wazīr*, Ṣafī al-Dīn Ibn Shukr (584/1188-622/1225). See Taqī al-Dīn al-Maqrīzī, *al-Mawā'iẓ wa al-i'tibār fī dhikr al-khiṭaṭ wa al-āthār*, 2 vols. (Cairo: Maktabat al-Thaqāfah al-Dīnīyah, 1987), 2:371-3, where he also speaks of the exploits of the tempestuous Ibn Shukr. Al-Ṣafadī, on the other hand, simply refers to this college as the college of Ibn Shukr. See Ṣalāḥ al-Dīn Khalīl ibn Aybak al-Ṣafadi, *al-Wāfī bi al-wafayāt*, 22 vols. ed. S. Dedering (Weisbaden: Fritz Steiner Press, 1392/1982), 6:233. (Editor and publisher's names written in Arabic script.)

[3]Ismā'īl Bāshā al-Baghdādī, *Hadīyat al'ārifīn asmā' al-mu'allifīn wa āthār al-muṣannifīn*, 2 vols. (Istanbul, 1951), 1:99.

[4]See Shihāb al-Dīn al-Qarāfī, *al-Istighnā' fī al-istithnā'*, (Beirut:Dār al-Kutub al-'Ilmīyah,1406/1986), p.10.

contemplating imminent death while still in his mid fifties. Second, as shall be seen below, there is evidence that the *Tamyīz* was written sometime shortly before the year 660/1262.[5] In addition, its contents reflect the thought and experiences of a seasoned veteran. A birth date of 626/1228, however, would lead to the unlikely conclusion that al-Qarāfī composed this work while still in his early thirties. On these observations, perhaps al-Qarāfī's actual date of birth is closer to 616/1219 than to 626/1228.

As his death date, the Mālikī biographer Ibn Farḥūn (d.799/1396) gives 684/1286.[6] This is the date cited by the later al-Suyūtī (d.911/1505) and the one repeated by most modern scholars.[7] The Shāfi'ī, al-Ṣafadī (696/1296-764/1363), on the other hand, puts it at 682/1283.[8]

B. Activities and Reputation

Al-Qarāfī's extant works show him to have been a deep, innovative thinker, a man with a passion for knowledge and a firm belief in speaking his mind. His *al-Furūq* (on legal precepts) reveals that, in addition to the traditional sciences, he was adept in mathematics, astronomy, and a number of other sciences -- even magic.[9] In his *al-Ajwibat al-Fākhirah 'an al-As'ilat al-Fājirah* , a refutation of certain Jewish, but especially Christian charges, he flaunts his knowledge of Hebrew, quoting and translating the Old Testament (in Arabic script).[10] He is reported to have written in excess of twenty works on topics

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[5]See below, p.56.

[6]*Al-Dībāj*, p. 66.

[7]See Jalāl al-Dīn al-Suyūtī, *Ḥusn al-muḥāḍarah fī tārīkh miṣr wa al-qāhirah*, 2 vols. ed. Muḥammad Abū al-Faḍl Ibrāhīm (Cairo: Īsā al-Bābī al-Ḥalabī and Sons, 1387/1967), 1:316. See also *GAL*, S. I., p.665.

[8]*Al-Wāfī*, 6:234.

[9]*Al-Furūq*, 4 vols. (Beirut:'Ālam al-Kitāb, no date), 4:142-5. See also Umar F. 'Abd Allah, *Mālik's Concept of 'Amal in the Light of Māliki Legal Theory*, (Ph.D. diss., The University of Chicago, 1978), p. vi, where it is reported that al-Qarāfī used algebra to compute inheritance and astronomy to figure out the direction of prayer. Al-Zirikli says of al-Qarāfī that he was adept at making astronomical instruments. See *al-A'lām* (Beirut:Dār al-'Ilm li al-Malāyīn,1986), 1:95.

[10]*Al-Ajwibat al-fākhirah 'an al-as'ilat al-fājirah*, ed. Bakr Zakī 'Awaḍ (Cairo:Maktabat Wahbah, 1407/1987), p.396.

ranging from theology, law, legal methodology, mathematics, comparative religion, Arabic language, and related topics.[11] He is remembered primarily for his *al-Furūq*, his *al-Dhakhīrah* (an opus on Mālikī law) and his *Kitāb al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām*.

During his lifetime, al-Qarāfī was hailed as one of the greatest scholars of his day. Ibn Farḥūn relates in this regard the statement of the Chief Justice, Taqī al-Dīn b. Shukr [12]: "The Shāfi'īs and Mālikīs agree that the greatest scholars of our time in Egypt are three; al-Qarāfī in old Cairo (*miṣr*), Shaykh Nāṣir al-Dīn b. Munīr in Alexandria, and Shaykh Taqī al-Dīn b. Daqīq al-'Īd in Cairo (*al-qāhirah al-mu'izzīyah*)."[13] In his *Ḥusn al-Muḥāḍarah*, al-Suyūṭī places al-Qarāfī on his list of *mujtahid muṭlaqs* and, while acknowledging him as a Mālikī, deletes him from their rank-and-file, implying thus that al-Qarāfī ultimately transcended the Mālikī system altogether.[14] Al-Ṣafadī says of al-Qarāfī that "he was one of the Imāms of the Mālikīs."[15] His acumen as a lawyer notwithstanding, al-Qarāfī never served as judge.

Given the high regard in which he was held as a scholar, one is struck by the paucity of citations on al-Qarāfī in the standard chronicles and biographical dictionaries. Even authors who are aware of him fail to pay him individual notice. For example, in his *Shadharāt al-Dhahab*, the Ḥanbalite, Ibn al-'Imād, cites a disputation between al-Qarāfī and a Shāfi'ī judge, Wajīh al-Dīn 'Abd al-Wahhāb b. al-Ḥasan, under the year 686/1287,

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[11] 'Abd al-Fattāḥ Abū Ghuddah cites twenty four (24) works and intimates that his list is not complete. See *Tamyīz*, p.16. See also *GAL*, S.I., p.665-6, where eleven (11) works are cited.

[12] In the list of Chief Justices given by al-Suyūṭī, there is no Mālikī named Taqī al-Dīn Ibn Shukr; there is a Taqī al-Dīn b. Shās and a Nafīs al-Dīn b. Shukr. Nafīs al-Dīn died in 680/1281. Taqī al-Dīn b. Shās died in 685/1286. See *Ḥusn*, 2: 188.

[13] *Al-Dībāj*, p. 65. Ibn Farḥūn adds that, "All of these scholars were Mālikīs, except Ibn Daqīq al-'Īd, who was a Shāfi'ī-Mālikī eclectic (*jama'a baina 'l-madhabain*), p. 65-6. This is apparently an exaggeration on the part of Ibn Farḥūn, the implication being that Ibn Daqīq al-'Īd's greatness was due, at least in part, to his apparent Mālikī leanings.

[14] *Ḥusn*, 1:316, and ff.

[15] *Al-Wāfī*, 6:233.

the year of Ibn al-Ḥasan's death.[16] However, nowhere in this work does he devote a biographical notice to al-Qarāfī specifically, neither under the year 684/1285, nor under the year 682/1283. This lack of recognition is repeated in the massive *Siyar al-A'lām al-Nubalā'* of the great Shāfi'ī historian and biographer, Shams al-Dīn al-Dhahabī (d.748/1347).[17] In a similar manner, none of the Egyptian historians or biographers, including Ibn 'Abd al-Ẓāhir (620/1223-692/1292), al-Maqrīzī, Ibn Iyās, and Ibn Taghribirdī, seem to be aware of al-Qarāfī. The only two works in which I was was able to locate individual biographical notices on him were the *al-Wāfī bi al-Wafāyāt* of al-Ṣafadī, and the *al-Dībāj al-Mudhahhab* of Ibn Farḥūn.[18] The fullest citation, of course, appears in the work of Ibn Farḥūn. This work, however, treats scholars of the Mālikī school exclusively.

C. Teaching Posts

The paucity of biographical information on al-Qarāfī 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 Ṣāliḥīyah super-college. Given his interests and his reputation as a great scholar, one would think that al-Qarāfī had a more active teaching career than this. It seems, however, that we are simply ill served by the sources in this regard.

The Ṭaybarsīyah college was founded by the amir, 'Alā' al-Dīn Ṭaybars al-Wazīrī, in 677/1279 with an endowment for thirty students, fifteen Shāfi'ī and fifteen Mālikī.

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[16]Abū al-Falāḥ 'Abd al-Ḥayy b. al-'Imād, *Shadharāt al-dhahab fī akhbār man dhahab*, 8 vols. (Beirut: Dār al-Āfāq al-Jadīdah, no date), 5:396.

[17]Shams al-Dīn Muḥammad ibn Aḥmad b. 'Uthmān al-Dhahabī, *Siyar al-a'lām al-nubalā'*, 35 vols. (Beirut: Mu'assasat al-Risālah, 1409/1988). Volume 35 has an index of all scholars cited. Al-Qarāfī appeared neither under "al-Qarāfī," "Shihāb al-Dīn," nor "Aḥmad (ibn Idrīs)."

[18]*Al-Wāfī*, 6:233-4; *al-Dībāj*, p.62-7.

According to Ibn Duqmāq, al-Qarāfī was the first to occupy the Mālikī professorship there.[19] Al-Ṣafadī reports that al-Qarāfī also taught at the Cairo Friday-mosque. He does not indicate, however, whether this was a formally endowed post or simply a *ḥalqah*,[20] and I have come across no information on the activities of this mosque in either al-Maqrīzī or Ibn Duqmāq. At any rate, al-Qarāfī's most important post was his professorship in Mālikī law at the famous Ṣāliḥiyah super-college. This college had been founded by the Ayyūbid Sultan, al-Malik al-Ṣāliḥ Najm al-Dīn Ayyūb, in 641/1243 and was the first of its kind ever in Egypt, holding as it did a chair in *fiqh* for each of the four schools[21]. As it housed professors and students from all four *madhhab*s, it was a hot-bed for intercommunal debates and a testing ground where a scholar would go to prove himself. Al-Ṣafadī reports that al-Qarāfī assumed his tenure there following the death of his predecessor, Sharaf al-Dīn al-Subkī.[22] This would mean that he assumed this post after 669/1270, the date of al-Subkī's death.[23] However, it is possible that he taught at the Ṣāliḥiyah prior to this date (perhaps as a repetitor (*mu'id*) or substitute). The Shāfi'ī, Ibn bint al-A'azz, for example, who died in 665/1267 and who also taught at the Ṣāliḥiyah, wrote *ta'liqahs* on two of al-Qarāfī's works.[24] As the Mālikī-Shāfi'ī Ṭaybarsiyah college had not been established until 677/ 1278, it is almost certain that these exchanges between al-Qarāfī and Ibn bint al-A'azz took place at the Ṣāliḥiyah. Thus, even if his formal

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[19]Ibrāhīm b. Muḥammad Aydmar al-'Alā'ī, better known as Ibn Duqmāq, *Kitab al-intiṣār li wāsiṭat 'aqd al-amṣār*, ed. K? Vollers (Cairo: Bulāq Press, 1310/1893), p.97. Al-Maqrīzī cites the Ṭaybarsiyah as a Shāfi'ī college and does not indicate that it housed a chair for Mālikī law, nor that al-Qarāfī taught there. See *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-Maqrīzī. It is also possible that 'Alā' al-Dīn Ṭaybars established more than one Ṭaybarsiyah.

[20]*Al-Wāfī*, 6:233.

[21]For the fullest description of the Ṣāliḥiyah, see *Khiṭaṭ*, 2:374-5.

[22]*Al-Wāfī*, 6:233.

[23]On al-Subkī, see 'Imād al-Dīn Abū al-Fidā' Ismā'īl ibn 'Umar Ibn Kathīr, *al-Bidāyah wa al-nihāyah*, 14 vols. (Beirut: Maktabat al-Ma'ārif, 1405/1985), 13:260.

[24]*Al-Wāfī*, 6:233. On the *ta'liqah*, see G. Makdisi, *Rise*, p.114. "The Ta'liqah was a product of either master or advanced student of law. In the case of a master jurisconsult, it could be a set of lecture notes for personal use in teaching his own course, or a finished product that could be used by other professors of law. In the case of the advanced student, it could be the collection of notes taken from the lectures of his master, or from the master's lectures and notes, then studied, memorized and submitted to the master for examination."

professorship did not begin until after 669/1271, it is almost certain that al-Qarāfī frequented the Ṣāliḥīyah and interacted there on a regular basis prior to that date.

D. Theology

In theology al-Qarāfī was apparently an Ash'arī. This is in line with the statement of the Ash'arite propagandist, Tāj al-Dīn al-Subkī (d.771/ 1369):"God has kept pure the Mālikīs; never have we seen a Mālikī who was not an Ash'arī!"[25] In the *Tamyīz* al-Qarāfī states indeed that the expressions of the Qurān are "merely indications of God's rulings," not the rulings themselves (*innamā hiya adillatuhu lā huwa*). (T.44). This notion, which implies that God's expressions are created, while the meanings He imparts are uncreated, was the Ash'arite alternative to the Mu'tazilite doctrine of the createdness of the Qurān. The Traditionalists, meanwhile, had rejected this notion. Thus, for example, the Ḥanbalite Ibn Taimīya states in his *al-Munāẓarah fī al-'Aqīdat al-Wāsiṭīyah* that it is not permissible to say that the Qurān is a report about God's metacognition (*hikāyah 'an kalām Allah*), or anything of this sort; rather, the Qurān is the actual speech of God which He himself actually uttered.[26] Other evidence of al-Qarāfī's Ash'arism comes from his *al-Furūq*, where he states that God's corporeality (*jismīyah*), occupying places (*makān*) and being located in a certain direction (*jihah*) are doctrines of the "*Ḥashwīyah*," a pejorative term used typically by Rationalists against Traditionalists, especially Ḥanbalites.[27] By condemning such doctrines as anthropomorphic, the Ash'arites likewise proscribed Traditionalist doctrines such as God's mounting the Throne (*al-istiwā'*) . Al-Qarāfī clearly

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[25]See Tāj al-Dīn al-Subkī, *Mu'īd al-ni'am wa mubīd al-niqam*, (Beirut:Mu'assasat al-Kutub al-Thaqāfīyah, 1407-1986), p.62.

[26]Taqī al-Dīn Ibn Taimīya, *Majmū' al-rasā'il al-kubrā*, 2 vols. (Cairo: Muḥammad 'Alī Ṣubayḥ, no date), 1:419

[27]See, for example, Ibn Rushd, *Kashf 'an manāhij al-adillah fī 'aqā'id ahl al-millah* (Cairo:Maḥmūd 'Alī Ṣubayḥ, 1353/1935), p.42: "As for that party referred to as "*Ḥashwīyah*," 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 (*ṣāḥib al-shar'*)." See also, Wael Hallaq, *Gate*, p.9.

advocates the Ash'arite position when he states that the position of the people of Truth (*ahl al-ḥaqq*) is that such attributes (i.e., being located in a specific direction (*jihah*) etc.) may not be applied to God. (F:4:128, F.4:113-14)

At the same time, al-Qarāfī's Ash'arism does not show the fanaticism of a Tāj al-Dīn al-Subkī. In fact, his *al-Furūq* shows him to be extremely tolerant and conscientious in his judgments of others. Thus, for example, while he condemns the doctrines of the "*Ḥashwīyah* " as anthropomorphic, he insists all the same that they do not constitute unbelief and that their advocates are not to be excluded from the pale of the Faith. (F.4:128)[28]

II. Al-Qarāfī's Teachers

In the *al-Dībāj al-Mudhahhab*, Ibn Farḥūn lists the following as teachers of al-Qarāfī: Shams al-Dīn al-Khusrushāhī (d.652/ 1254), Shams al-Dīn Abū Bakr Muḥammad ibn Abī al-Surūr (603/1206-676/1277), Sharaf al-Dīn Muḥammad b. 'Umrān al-Karakī (d.688 or 9-1289 or 90), and 'Izz al-Dīn b. 'Abd al-Salām (d.660/1262).[29] These scholars represent a cross-section of affiliations and tendencies and show the variety of influences that shaped al-Qarāfī's intellectual perspective. Al-Khusrushāhī, for example, was a Shāfi'ī and an accomplished legal theoretician (*uṣūlī*) and rationalist theologian (*mutakallim*). He had studied with the celebrated Fakhr al-Dīn al-Rāzī and was apparently deeply influenced by the latter.[30] His influence on al-Qarāfī can be seen in the fact that the latter wrote both an abridgment to Fakhr al-Dīn al-Rāzī's work on *Uṣūl al-Fiqh, al-Maḥṣūl*

28See also his discussion in *al-Furūq*, 4:114-37, where he distinguishes between indiscretions that constitute unbelief and those that do not.

29*Al-Dībāj*, p.63, and p. 73, where he states that al-Khusrushāhī was one of al-Qarāfī's mentors.

30See Jamāl al-Dīn Abū al-Maḥāsin Yūsuf Ibn Taghribirdī, *al-Nujūm al-zāhirah fī mulūk miṣr wa al-qāhirah*, 16 vols. (Cairo:al-Mu'assasat al-Miṣrīyah al-'Ammah li al-Ta'lif wa al-Tarjamah wa al-Nashr, n. d.), 7:32.

(al-Qarāfī's *Tanqīḥ al-Fuṣūl*) and an important commentary on this abridgment, the *Sharḥ Tanqīḥ al-Fuṣūl* .

Ibn Abī al-Surūr, on the other hand, was a Ḥanbalite, and presumably Traditionalist, jurisconsult and hadith expert who taught at the famous Ṣāliḥīyah super-college. He became the first Ḥanbalite Chief Justice (*qāḍī al-quḍāt*) in Egypt following the establishment of four Chief Justices under Baybars in 663/1265.[31]

Sharaf al-Dīn al-Karakī was a Mālikī who had migrated to Egypt from North Africa. He studied with the famous Shāfi'ī jurist, 'Izz al-Dīn b. 'Abd al-Salām, and was said to have mastered both the Shāfi'ī and Mālikī systems of law.[32] As a Mālikī, al-Karakī was apparently al-Qarāfī's professor proper, that is to say, his professor of law.[33] Ibn Farhun reports that al-Qarāfī *worked* under al-Karakī (*ishtaghala'alayh*),[34] which suggests further that it was probably al-Karakī who granted al-Qarāfī his licence to teach and to issue legal opinions (*al-ijāzah li't-tadrīs wa'l-iftā'*).

By far, however, the most important among al-Qarāfī's teachers was the redoubtable Shāfi'ī jurist, 'Izz al-Dīn ibn 'Abd al-Salām. According to Ibn Farḥūn, al-Qarāfī "took much of his knowledge from th[is] great Imām."[35] Ibn Abd al-Salām's importance, however, lies not only in his direct influence on al-Qarāfī as a thinker, but also in the massive influence he wielded in Egypt, both within the legal community, and among the Ayyūbid andMamlūk officials. He counts as a major opponent in al-Qarāfī's defense of

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[31] *Shadharāt*, 5:353-4.

[32] *Al-Dībāj*, p.332.

[33] "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 determinée par celle de son professeur de droit (*fiqh*)." 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 Pres, Inc., 1989), p.196 . Al-Qarāfī apparently studied other ancillary topics, such as hadith and *uṣūl al-fiqh* with the other scholars mentioned.

[34] *Al-Dībāj*, p. 332. On *ishtighāl*, see Makdisi, *Rise*, p. 206-10.

[35] *Al-Dībāj*, p. 63.

two-tiered orthodoxy. His role, however, can be fully appreciated only against the background of the political situation in Egypt, especially the preferred position of the Shafi'is over the remaining schools of law.

III. The Schools of Law in Egypt

Al-Qarāfī apparently spent his entire life in Egypt. Though there may be some question about his exact date of birth, it is almost certain that he spent the better part of his youth during the reign of the Ayyūbid Sultan, al-Malik al-Kāmil (regency: 615/1218-635/1237). He lived subsequently through the following successive reigns:

Ayyūbids
al-Malik al-'Ādil (635/1237-636/1238),
al-Malik al-Ṣāliḥ Najm al-Dīn (636/1238-647/1249)
al-Malik al-Mu'aẓẓam Turān Shāh (648/1249) (approx. 40 days)
Shajarat al-Durr (648/1249) (approx. 80 days)

Mamlūks
al-Malik al-Mu'izz Aybak (648/1249-655/1257)
al-Malik al-Manṣūr Nūr al-Dīn Alī (655/1257-657/1258)
al-Malik al-Muẓaffar Sayf al-Dīn Qutuz (657/1258-658/1259)
al-Malik al-Ẓāhir Baybars al-Bunduqdārī (658/1260-676/1277)
al-Malik al-Sa'īd Barakah Khān (676/1277-678/1279),
al-Malik al-'Ādil Sayf al-Dīn Salāmish (678/1279)
al-Malik al-Manṣūr Qalawūn al-Alfī (678/1279-689/1290)

Throughout this period, at least up to the establishment of the four Chief Justices in 663/1265, the Shāfi'ī association of jurisconsults continued to outstrip its counterparts, both in prestige and influence. At its origins, this Shāfi'ī preeminence had come as a direct result of the policies of the first Ayyūbid Sultan, Ṣalāḥ al-Dīn Yūsuf ibn Ayyūb (Saladin) (regency: 564/1168-589/1193). This situation was for the first time modified, however, when during the subsequent reign of al-Malik al-Ṣāliḥ Najm al-Dīn Ayyūb, large numbers ofMamlūk mercenaries were brought to Egypt. It was apparently the backing of these Turkish amirs that reestablished the Ḥanafis, who, after a long silence, became once again a force to be reckoned with. The Ḥanbalites, what few there were, never had been

contenders for preeminence in Egypt. It was for the Mālikīs, however, that these developments had come as a set-back, and, relative to what their position had been in the past, they were fast losing ground.[36]

A. The Rise of the Shāfi'īs in Egypt

Prior to the coming of the Fāṭimids, it was the Mālikīs and the Shāfi'īs who competed with each other for preeminence in Egypt. When the Fāṭimids moved their capital to Cairo in 363/973 the *qāḍī* of Egypt was a Mālikī, Abū al-Ṭāhir al-Dhuhlī (d.367/978), who had been installed by the Ikhshīdid ruler, Kāfūr, and remained in this position for sixteen years.[37] The Fāṭimid Caliph, al-Mu'izz, confirmed al-Dhuhlī in this post, but later removed him in 366/976, when al-Dhuhlī's health failed him. The office was then passed on to the Ismā'īlī propagandist, 'Alī b. Nu'mān, and then to his son, al-Ḥusayn, who was installed in 389/998, and who was the first to hold the formal title of Chief Justice, *qāḍī al-quḍāt* .[38] The Chief Justiceship apparently remained in Ismā'īlī hands until the year 525/1140, when the Imāmī *wazīr*, Ibn al-Afḍal, seized de facto rule and instituted a system of multiple Chief Judgeships, appointing four independent judges, "each judging and looking into inheritance matters according to his own school."[39] The names and school affiliations of these judges were was follows:

-- Abū 'Abd Allāh Muḥammad ibn Hibat Allāh ibn Muyassar al-Qaysarānī (Imāmī)
-- Abū'l-Faḍl Hibat Allāh ibn 'Abd Allāh, known as Ibn al-Azraq (Ismā'īlī)
-- Sulṭān ibn Ibrāhīm al-Maqdisī, known as Ibn Rāshā (Shāfi'ī)

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[36]The competition among the schools of law was both real and serious. And it is perhaps no exaggeration to say that if the government wanted the support of the *fuqahā'* , the latter were no less eager to gain the support of the government, even if at times this meant going against the sister schools. As observed by Prof. Makdisi,"There was rivalry among the various legal systems for greater membership. Greater membership led to greater influence in the community; and this influence led, in turn, to greater financial support from those in power who were interested in controlling the masses." *Ash'ari and the Ash'arites* , p.45.

[37]*Ḥusn*, 2:148.

[38]See Adel Allouche, "The Establishment of Four Chief Judgeships in Fatimid Egypt," *Journal of the American Oriental Society* , vol. 105 no.2 (1985), p.317.

[39]*Ibid.*

-- Muḥammad ibn 'Abd al-Mawlā al-Lubnī (Mālikī)[40]

The list of Ibn al-Afḍal's appointments suggests that the Mālikīs and Shāfi'īs were recognized as equals among the Sunnis of Egypt during this period of Shiite reign. However, both groups subsequently suffered losses, and their Chief Judgeships were reappropriated to Shiites. This is suggested by the report of Ibn Iyās, who says that when Ṣalāḥ al-Dīn (Saladin) removed the incumbents in 566/1170, he did so "because they were all Shiites."[41]

It was indeed during the reign of Ṣalāḥ al-Dīn, first as *wazīr* to the last Fāṭimid Caliph, al-'Āḍid, then as Sultan, that the Shāfi'īs were propelled to the forefront. When he ousted the Shiite judges in 566/1170, he consolidated their offices into one and replaced them with a single Chief Justice, a Shāfi'ī, Ṣadr al-Dīn b. Darbās.[42] This move was subsequently institutionalized when Ṣalāḥ al-Din became Sultan in 568/1172 , and for almost a century, i.e., up to the reign of Baybars, the Shāfi'īs enjoyed an absolute, uncontested, monopoly over the Chief Justiceship of Egypt. [43] This move by Ṣalāḥ al-Dīn had a monumental impact on the political situation in Egypt, and, as it turns out, it set the stage for the main problem of the *Tamyīz* . For under this new arrangement, the Shāfi'īs were put in a position to sit in judgment over the remaining schools, second-guessing the rulings handed down by the latters' judges.[44] And this they would be able to do with full

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[40]*Ibid*, p.319-20. See also, however, his entire argument, beginning at p.317, and especially note no.11 on p. 318, where he points out that the fourth appointment by Ibn al-Afḍal was not a Ḥanafī, pace S. M. Stern, but a Mālikī.

[41]Ibn Iyās, *Badā'i' u 'z-zuhūr fī waqā'i'i 'd-duhūr*, 6 vols. ed. Muḥammad Muṣṭafā (Cairo: al-Hay'ah al-Miṣriyah al-'Ammah li al-Kitāb, 1402/1982), 1:233.

[42]*Ibid.*

[43]See *al-Nujūm* , 7:134. See also, *Badā'i'* , 1:233, where it is reported that Ṣalāḥ al-Dīn "removed all of the incumbent judges because they were Shiites. Then, he appointed the Shāfi'ī, Ṣadr al-Dīn b. Darbās, and installed Shāfi'īs as deputy judges in the remaining districts of Egypt, establishing thereby the grandeur of the Shāfi'īs over the remaining schools." The year 568/1172 is the year of al-'Āḍid's death, at which time Ṣalāḥ al-Dīn became formally the ruler of Egypt. He had ruled de facto, however, for at least four years prior to.

[44]Under the Ayyūbids, the Chief Justice enjoyed the right to review the rulings of his deputy appointees. See "*tasjīl*," below, p.63-4.

impunity, since the remaining schools would never get the opportunity to second-guess Shāfi'ī rulings.[45]

Further indications of Shāfi'ī preeminence may be seen in the patterns of endowments for colleges of law during this period of Ayyūbid and earlyMamlūk reign. Of the twenty-seven colleges listed by al-Maqrīzī and Ibn Duqmāq whose school affiliations I was able to determine and whose dates of foundation appear to fall between 568/1172 and 663/1265 (the date of the establishment of the four chief justiceships under Baybars), fifteen (15) were exclusively Shāfi'ī institutions, four (4) were exclusively Mālikī institutions, four (4) were exclusively Ḥanafī, and none were exclusively Ḥanbalī;[46] one (1) was a Shāfi'ī-Mālikī institution, two (2) were Shāfi'ī-Ḥanafī, none were Shāfi'ī-Ḥanbalī, and one (1), the Ṣāliḥiyah, had a chair for each of the four schools. There were no combinations such as Ḥanafī-Mālikī which excluded the Shāfi'īs.[47]

Not only did the rulers of this period support the Shāfi'īs with positions of prestige and political importance, they even became Shāfi'īs themselves upon their ascension to power. Ibn Iyās reports on the authority of Abu Shāmah (d.665/ 1267) that:"No Sultan ever sat on the throne of Egypt as a follower of any *madhhab* other than that of al-Shāfi'ī but that he was quickly ousted or killed."[48] As an admonishment to posterity, the case of theMamlūk, Sayf al-Dīn Qutuz, is held up as the exception which proves the rule. When he became Sultan, he remained a Ḥanafī. He was killed, however, only months into his reign by his leading general and successor, Baybars, who, on the other hand, became a

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[45]This appears to be a fundamental departure from what the situation had been in Baghdād, where the Chief Justiceship apparently rotated among the various schools. See the list of judges by L. Massignon, "Cadis Et Naqibs Baghdadiens," *Opera Minora*, 3 vols. (Beirut: Dar al-Maaref, 1963), 1:259-62.

[46]Ibn Iyās reports, however, that Ṣalāḥ al-Dīn established a college for the Ḥanbalīs in the area around the royal mint. See *Badā'i'* , 1:243.

[47]The page numbers in Ibn Duqmāq are 92-99, and in Maqrīzī's *Khiṭaṭ*, 2:362-405.

[48]*Badā'i'* , 1:308.

Shāfi'ī,[49] reigned for seventeen years, and died what is believed to have been a natural death.[50]

This Shāfi'ī preeminence notwithstanding, during the reign of the Ayyūbid, al-Malik al-Ṣāliḥ Najm al-Dīn, two new elements were added to the political equation of Egypt. First, in order to establish a new power base, al-Malik al-Ṣāliḥ imported Turkish slaves to serve in his army. Second, in order to gain legitimacy with the *fuqahā'* of Egypt, he founded the Ṣāliḥiyah super-college, which had a chair for each of the four schools of law. These initiatives, which were not unrelated, altered the balance of power among the schools of law in Egypt. On the one hand, the Ḥanafīs gained a foothold and began to compete with the Mālikīs and Shāfi'īs. Secondly, the Ṣāliḥiyah brought all the schools together as equals in an open arena where each could challenge its counterparts and argue the superiority of its own position, regardless of the relative strength or weakness of its political standing.

Al-Malik al-Ṣāliḥ's decision to import Turkish slaves came in an attempt to resolve a political crisis. This crisis goes back to the reign of his father, al-Malik al-Kāmil. Pressed in his confrontation with his brother and governor of Syria, al-Malik al-Mu'aẓẓam, al-Kāmil agreed in 620/1223 with Frederick II that the latter could take Acre and the Levantine coastal areas, including Palestine, in order to divert the efforts of al-Mu'aẓẓam's forces, who had their eyes on Egypt.[51] Al-Mu'aẓẓam died, however, in 624/1326, before this confrontation reached a head, and al-Kāmil sent his son, al-Malik al-Ṣāliḥ Najm al-Dīn, to Syria to fill the power vacuum. Al-Ṣāliḥ was at this time, however, al-Kāmil's heir apparent to the throne in Egypt, which he was to assume upon his father's death.

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[49] *Ḥusn*, 2:166.

[50] This, adds Abu Shāmah, is "one of the secrets behind the legacy of Imām al-Shāfi'ī, the patron of Egypt (*wa hādhā sirrun fi'l-imāmi 'sh-shāfi'ī ṣāḥibi miṣr*)!" *Badā'i'*, 1:308.

[51] *Khiṭaṭ*, 2:376; Ibn Wāṣil, *Mufarrij al-kurūb fī akhbār banī ayyūb*, 5 vols. ed. Ḥassanayn Muḥammad Rabī' and Sa'īd 'Abd al-Fattāḥ 'Ashūr (Cairo:Maṭba'at Dār al-Kutub, 1977), 4:241-3.

Meanwhile, the Crusaders arrived in Palestine in 626/1228, and al-Kāmil was forced to surrender Jerusalem, as per their agreement. As if this were not enough to embarrass al-Ṣāliḥ, al-Kāmil then revoked from al-Ṣāliḥ his promise of Egypt and gave it to another son of his, al-Malik al-'Ādil, who had been the viceroy of Egypt (*nā'ib al-salṭanah*) while al-Kāmil was away campaigning in Mesopotamia.[52] When, upon al-Kāmil's death in 635/1237, al-'Ādil ascended the throne, al-Ṣāliḥ came to Egypt, fought and defeated al-'Ādil's forces, and condemned the latter to the citadel prison, crowning himself Sultan in 636/1238. However, the Kurdish amirs in Cairo had sided with al-'Ādil, and al-Ṣāliḥ was thus without a reliable base of power in Egypt. It was in response to this dilema that he decided to import Turkish slaves. In doing so, he was the first Ayyūbid ruler ever to man his army with Turks, and hisMamlūks very quickly displaced the Kurdish soldiery in Egypt.[53]

This move, however, proved very quickly to bear its own liabilities. TheseMamlūks were foreign implants, and they wreaked havoc on the Egyptian population, who in turn despised them and called down the wrath of God upon al-Ṣāliḥ for bringing them there.[54] In order to avoid further problems, al-Ṣāliḥ decided to separate hisMamlūks from the population, and in 638/ 1240 he began building special military barracks on an island called *al-Rawḍah*, just outside of Cairo.[55] These Mamlūks came later to be known as "*al-Baḥrīyah,* "[56] because they resided in these military barracks on the Nile.

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[52]*Ibid*, 2:377; *Bada'i'* , 2:268.
[53]See *Bada'i'*, 1:269; *al-Nujūm*, 6:331, where he states also that the Mamlūkes were given precedence over the Kurds.
[54]Ibn Iyas, *Bada'i'*, 1:269.
[55]*Ibid*, 1:269-70.
[56]*Al-Nujūm*, 6:331.

It was probably in a similar attempt to ingratiate himself with the Egyptians and to bolster his legitimacy among the *fuqahā'* of Egypt that al-Malik al-Ṣāliḥ came up with the idea of a super-college with a chair for each of the four schools of law. Thus in 641/1243, he opened the famous Ṣāliḥīyah madrasah. This super-college was the first of its kind ever in Egypt, holding as it did a chair for all four schools; and in its founding al-Ṣāliḥ appears to have begun a precedent for subsequent Egyptian rulers, who from that time on appear to have made a habit of establishing mixed colleges.[57]

The coming of theMamlūks bolstered the position of the Ḥanafis in Egypt. A number of occurrences reflect this growing trend. Prior to the appointment of four Chief Justices by Baybars in 663/1265, there had not been a Ḥanafī Chief Justice since before Fāṭimid times.[58] Nevertheless, among all the appointees of 663, it was the Ḥanafī Chief Judge alone who objected to the Shāfi'ī monopoly over religious endowments (*awqāf/ s.waqf*) and the estates of orphans, demanding instead that these jurisdictions be shared with the Ḥanafīs. [59] This same year saw also the first appointment of a Ḥanafī to the *Khiṭābah* (Friday sermon giver) of Cairo.[60] Earlier, theMamlūk Sultan, al-Malik al-Muẓaffar Sayf al-Dīn Qutuz (657-8), had gone against the unbroken tradition of adopting the Shāfi'ī school upon assuming the Sultanate; he remained, instead, a Ḥanafī. And despite the fact that Baybars himself became a Shāfi'ī upon becoming Sultan, when he founded his Ẓāhirīyah college in 662/1263, he provided not only for a chair in Shāfi'ī law but also for a chair in Ḥanafī law.[61] By the end of the 8th/14th century, the Ḥanafīs were openly recognized as equals to the Shāfi'īs in Egypt. On official occasions at *Dār al-'Adl*,

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[57]On the Ṣāliḥīyah, see *Khiṭaṭ*, 2:374-5. One notices from the lists of al-Maqrīzī and Ibn Duqmāq that mixed colleges do not begin to proliferate until after the founding of the Ṣāliḥīyah.

[58]Ibn Taghribirdī, himself a Turk and a Ḥanafī, admits this in *al-Nujūm*, 7:133.

[59]On the Shāfi'ī monopoly over these jurisdictions, see below, p.56-7. On the Ḥanafī objections to this, see *Badā'i'*, 1:322.

[60]See Jorgen S. Nielsen, "Sultan al-Zahir Baybars and the Appointment of Four Chief Qadis, 663/1265," *Studia Islamica* 60 (1984), p.174.

[61]*Khiṭaṭ*, 2:378-9. Interestingly, the first professor of law at this college was the son of a Mamlūk amir, Majd al-Dīn 'Abd al-Raḥmān b. Kamāl al-Dīn 'Umar b. al-'Adīm. See *Khiṭaṭ*, 2:379.

the Sultan was now flanked on either side by the Ḥanafī and Shāfi'ī Chief Justices, followed by the Mālikī and then the Ḥanbalī.[62]

Throughout the period in question, however, (i.e., up to the year 663/1265) the Shāfi'īs maintained their position of preeminence. The office of Chief Justice remained an exclusively Shāfi'ī privilege. The number of law colleges established for Shāfi'īs far exceeded those established for others. And although the Ḥanafīs were beneficiaries of the largess of Baybars and his Ẓāhirīyah college, he himself upon becoming Sultan became a Shāfi'ī.[63]

A. Al-'Izz ibn 'Abd al-Salām

It is against this background that the career of al-Qarāfī's most influential teacher, the Shāfi'ī, 'Izz al-Dīn ibn 'Abd al-Salām, may be fairly assessed. '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, came to Cairo in 639/1241 from Damascus, where he was born in 577 or 8/1181 or 2. Throughout his life he maintained the reputation of a fearless, no-nonsense advocate of the truth, a real tough customer. In Syria, in his capacity as Friday preacher (*khaṭīb*) at the Umayyad mosque, he lashed out at what he saw as unsanctioned innovations practiced by other preachers. As a protest against these practices, he refused to wear black, refused to say his sermons in rhymed prose (*saj'*), refused to praise the princes -- but used instead to ask God to pardon their indiscretions -- and put an end to certain unsanctioned superogatory prayers (*al-raghā'ib*). When the viceroy, al-Malik al-Ṣāliḥ Isma'il (not to be confused with al-Malik al-Ṣāliḥ Najm al-Dīn) surrendered Tyre and the citadel of Shaqīf to the Crusaders, al-'Izz condemned him publicly from the pulpit! The

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[62]Nielsen, *Sultan al-Zahir*, p.175-6.
[63]*Ḥusn*, 2:166.

viceroy had him jailed, but later released him, afterwhich time he came to Egypt, in 639/1241.[64]

Upon his arrival in Egypt, al-'Izz was welcomed by the Ayyūbid Sultan, al-Malik al-Ṣāliḥ Najm al-Dīn Ayyūb, who appointed him Chief Justice of Fustat and the delta.[65] But even in the face of this hospitality, al-'Izz 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, al-'Izz asked him if he would be content with being included among those condemned in the Qurān who will say on the Day of Judgment."We found our fathers following a way, [and we are following their example]". The Sultan was forced to have the house shut down.[66] Later, when al-Malik al-Ẓāhir Baybars ascended the Sultanate, al-'Izz refused to swear allegiance to him until he had seen satisfactory proof that Baybars had passed through the necessary steps to becoming a freed slave.[67] And he did not to stop at this: Ibn Iyas reports that al-'Izz even insisted once on selling theMamlūks in a public auction and spending the proceeds for the benefit of the Muslims, arguing that their status as slaves denied them the right to hold public office.[68]

According to Ibn Kathīr, al-'Izz was the head of the Shāfi'īs of Egypt: *intahat ilaihi riyāsatu 'sh-shāfi'īyah* . He held the Shāfi'ī chair at the Ṣāliḥīyah, and his *fatwās* were sought from far and wide.[69] Zakī al-Dīn al-Mundhirī (581/1185-656/1258), the Shāfi'ī jurisconsult, hadith expert and author of the famous *Kitāb al-Targhīb wa al-Tarhīb* , is

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[64]*Shadharāt*, 5:301-2.
[65]See Ibn Ḥajar al-'Asqalānī, *Raf' al-'isr 'an qudāt miṣr*, 2 vols. ed. Ḥāmid 'Abd al-Majīd (Cairo: al-Hai'ah al-'Āmmah li Shu'ūn al-Maṭābi', 1961), 2:351.
[66]*Ibid* , 2:352. The Qur'anic reference is 43:22 -3.
[67]Nielsen, *Sultan al-Zahir*, p.172.
[68]*Badā'i'* , 1:274.
[69]*Al-Bidāyah*, 13:235.

reported to have said: "We used to give legal opinions before Shaykh 'Izz al-Dīn arrived in Egypt; now that he is among us, we no longer do so."[70] Ibn al-'Imād reports that al-'Izz reached the rank of *ijtihād*.[71] And al-Suyūtī adds that near the end of his life al-'Izz transcended the Shāfi'ī system altogether and interpreted scripture directly, according to his own lights.[72]

Al-'Izz also bore the sobriquet, "*Sulṭān al-'Ulamā'* ."[73] The events of his day indicate that this title was well deserved, that he was *the* representative and legitimizing authority among the *fuqahā'* of Egypt. In fact, his many crucial roles and the fact that he was called also "*Shaykh al-Islam*" give the impression that in the same way that each school was headed by a *Shaykh* or *ra'īs* , the legal community as whole may have been headed by a headmaster whose title was *Shaykh al-Islam* and whose function it was to oversee the interests of the *fuqahā'* (as well as their following), and mediate between them and the central power.[74] When in 657/1258 al-Malik al-Muẓaffar Sayf al-Dīn Qutuz wanted to levy a tax to assist him in his effort against the Mongols, he dared not do so without first procuring a *fatwā* from al-'Izz.[75] When a member of the 'Abbāsid house made his way to Cairo from Baghdād, which had been sacked by the Mongols, and was installed as Caliph in 659/1260, al-'Izz was the first to be called upon to swear allegiance, despite the fact that by that time he was retired as Chief Justice and thus not serving in any

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[70]*Badā'i'*, 1:317. On al-Mundhirī, see *Shadharāt*, 5:277-8.

[71]*Shadharāt*, 5:301. Ibn Ḥajar, himself a Shāfi'ī, appears to have his doubts about this. See *Raf'* , 2:351, where he says, "he was described (passive) as having reached the rank of *ijtihād*. "

[72]*Ḥusn*, 1:314.

[73]*Raf'* , 2:350. This title was reportedly given him by Ibn Daqīq al-'Īd.

[74]For references to al-'Izz as *Sheikh al-Islam*, see *Badā'i'* , 1:314; *Raf'* , 1:350; *al-Nujūm*, 7:72, where it is stated that at the meeting between Qutuz and representatives of the legal community to discuss the matter of levying a tax to raise an army against the Mongols, "the final word in the matter was left to Ibn 'Abd al-Salam (*kāna 'l-i'timādu 'ala mā yaqūluhu 'bnu 'abdi 's-salām).*" While this informal office may be the precursor to the Ottoman *Sheikh al-Islam*, it differed from the latter in that 1) it was informal, and 2) the Ottoman *Sheikh al-Islam* was a government appointee and representative. Schacht, for example, gives the impression that the function of the Ottoman *Sheikh al-Islam* was to represent the government before the legal community and the masses, sort of as a legitimizer of government policy. See *Intro*, p.88-9, and p. 74 for the pre-Ottoman *Sheikh al-Islam*.

[75]See Taqī al-Dīn al-Maqrīzī, *Kitāb al-sulūk fī ma'rifat al-mulūk*, 3 vols. ed. Muḥammad Muṣṭafā Ziādah (Cairo: Maṭba'at Lajnat al-Ta'līf wa al-Tarjamah wa al-Nashr, 1956-7), 1:416-17.

official capacity. [76] When in 660/1262, Baybars decided to appoint deputy judges from each of the remaining schools, he dared not do so until the month of Dhū al-Ḥijjah, that is, six months *after* al-'Izz's death.[77] When al-'Izz died in 660/1262, Baybars is reported to have breathed a sigh of relief, saying, "Now my reign is secure; for were this patron (*Shaykh*) to incite the people against me, my kingdom would be snatched away."[78]

All of this has important implications for al-Qarāfī's campaign in defense of two-tiered orthodoxy. For despite the many benefits he apparently derived from al-'Izz as a thinker,[79] he disagreed fundamentally with the latter on a number of issues relating to the orthodox, and therefore unassailable, status of the views of each of the four schools of law[80]. He differed with him also in his understanding of the 'corporate' status of the *madhhab*s and the proper relationship among the schools, one to another.[81] Needless to say, given al-'Izz's standing in the community at large, such disagreements with the revered *Shaykh al-Islam* would make for al-Qarāfī a very tough time indeed.

IV. Al-Qarāfī:Head of the Mālikī Guild

According to Ibn Farḥūn, it was al-Qarāfī who served as head of the Mālikīs of Cairo: *intahat ilayhi riyāsatu 'l-fiqhi 'alā madhhabi mālik*.[82] My research suggests that it

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[76] *Shadharāt*, 5:297; *Badā'i'*, 1:314.

[77] See *Sulūk*, 1:472, where it is reported that the appointment of the deputy judges (*nuwwāb*) took place in Dhū al-Qi'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), p.529.

[78] *Shadharāt*, 5:302. See also Tāj al-Dīn al-Subkī, *Tabaqāt al-shāfi'iyah*, 6 vols. (Cairo: Ḥusainiyah Press, 1324/1906), 5:84.

[79] That al-Qarāfī was deeply influenced by al-'Izz as a thinker may be seen in statements of his such as the following made in his *al-Furūq*. After having resolved a difficult question, al-Qarāfī adds: "And I have seen no one throw this question into relief as did Sheikh 'Izz al-Din b. 'Abd al-Salām, may God shew him mercy and sanctify his soul. For indeed, he had a striking ability to resolve questions -- both textual and methodological -- 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." *Al-Furūq*, 2:157.

[80] See below, p.74-9.

[81] See below, p.79-80.

[82] *Al-Dībāj*, p. 62.

was in this capacity that al-Qarāfī wrote the *Tamyīz* . This hypothesis raises of course a number of questions about the structure and function of the *madhhab* as an association, as well as the role of the *ra'īs* within that structure. Moreover, it is important to understand the structure of the *madhhab*, inasmuch as the nature of any activity, legal interpretation or other, is fundamentally affected by the organizational framework within which it takes place.[83] For the purpose of highlighting what I believe to be the *corporate* nature of the *madhhab*, I shall refer to it as a guild.[84] In doing so I echo, albeit qualifiedly, the view of Prof. G. Makdisi.

A. The *Madhhab* as Guild

The *madhhab* was first described as a guild by Prof. Makdisi in an article entitled, "La Corporation à l'époque classique de l'Islam," which had been written before 1984 but which did not appear until 1989. [85] In this essay, Prof. Makdisi picked up on a controversy begun back in 1920 with the appearance of Louis Massignon's "Les Corps de métiers et la cité islamique."[86] Massignon's thesis had been that guilds ("corporation" in

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[83]See in particular, "Levels of *Taqlīd* ," below, p.155ff.

[84]Before going on, I would like to clear up the confusion that is otherwise certain to result from my use of the term "corporate". The problem with this term is that it is generally understood that corporations come into existence by leave of the state. As such, the term corporate could never be use to describe the *madhhab*, since it is well known that the latter came into existence spontaneously, in complete independence from --and even in opposition to -- the state. I am not suggesting in my use of the term "corporate" that the *madhhab* was in any way a creation of the state. Rather, my use of the term focuses on another essential aspect of the corporation, namely, "that in all its relations with other organs of society *it shall act and be acted upon as a unit.*" See 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:The Knickerbocker Press, 1905), 1:24. (emphasis added) As for the notion that any group that is to function as a corporation must necessarily be created by the state, the same author writes:"The corporate form or sum of peculiar relations subsisting between the members of the corporate group and between them and other members of society is created by the state, *or, after spontaneous origin and maintenance by force of custom, is approved with the same legal effect as if created by it* ." *Ibid*, 1:16. (emphasis added)

[85]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. E. Bosworth et. al. (Princeton: The Darwin Press, 1989), p.193-209. This article is alluded to in his "The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court," *Zeitschrift fur Geschichte der Arabisch-Islamischen Wissenschaften*, Band 1 1984, p.242. The *madhhab* was also described as a guild in this article.

[86]In *Revue internationale de sociologie* (September, 1920), p.473-89. This thesis reappeared in Massignon's 1935 entry in the Encyclopedia of Islam, "*Ṣinf* ": "The organization of labour and 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

French) existed in classical Islam and that they had influenced and perhaps inspired the guilds of the medieval Christian West.[87] The controversy sparked by this thesis was not over the existence of guilds in pre-modern Islam; it had been generally admitted that guilds did exist in late medieval and early modern times. The controversy was over whether or not these guilds existed in *classical Islam* , dating back, say, to the 3rd/9th century.[88] The view of those who disagreed with Massignon may be summed up in the words of G. Baer: "We have no definite information about the existence of guilds, let alone their structure or functions, before the fifteenth century," in Egypt, Syria, or Turkey. [89]

For his part, Professor Makdisi sees in the early development of the schools of law, the *madhhab*s, the beginning of guild organisation in Islam. He defines a guild as, "une association de personnes professionelles, groupées dans le but de réglementer leur profession et de defendre leurs interets."[90] Professor Makdisi argues that as early as the 3rd/9th century, the loosely organized jurisconsults who made up what were then the geographical schools of law began to close their ranks and organize themselves more tightly into professional corps. The impetus for this retrenchment was their desire to combat the rationalist tendencies of the Mu'tazilite theologians, who were speculative in their approach and who placed human reason above divine revelation. For the

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view, positing the existence of guilds in classical Islam, was repeated in 1937 by Bernard Lewis in his "The Islamic Guilds," *Economic History Review* 8-9 Nov.- May 1937-9, p.20-37. The most serious objections to this thesis appeared between 1969 and 1970: S.M. Stern's "The Constitution of the Islamic City," in *The Islamic City*, ed. H. Hourani and S. M. Stern (Oxford and Philadelphia, 1969); 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-til des corporations professionnelles dans le monde musulman classique ?" in *The Islamic City* .

87Makdisi, *La Corporation*, p.193.

88Massignon's thesis divided the scholarly community. H. A. R. Gibb, A. von Kremer, and J. Sauvaget, for example, agreed with him. C. C. Nallino, S. D. Goitein, S. M. Stern, C. Cahen, and G. Baer rejected Massignon's view. See Makdisi, *La Corporation*, p. 208, nt. 3.

89G. Baer, "*Guilds in Middle Eastern History* ," p.27. For the period prior to the fifteenth century, it is admitted that there were guild-like organizations, but these are seen as lacking some essential aspect of a guild. For Baer, for example, it was the fact that these organizations were not *professional*, as well as the fact that they do not appear to have been independent of the state. For Stern, it is the apparent lack of corporate status that makes these organizations something other than a guild. See below, p.46ff.

90*La Corporation*, p.194.

Traditionalists, God's will, even as His nature and attributes, was discoverable not through speculative inquiry but through earnest study of His revelation, including the Sunnah of His Prophet. Right theological investigation was thus juridical, i.e., based on what God had imparted about Himself. And as the Traditionalists ultimately triumphed over the Rationalists, law, not theology, became the legitimizing agency in Islam and the truest expression of its genius.

The move to professionalize legal education culminated in the establishment of the *madrasah* -colleges. These institutions were set up for the benefit of one group exclusively: the jurisconsults and their students. Degrees were thus granted in one field only: law. The goal of these colleges was to establish and maintain a professional standard of legal interpretation. Successful students were thus trained from the rank of beginner up to the point that they became masters. And only those who had passed through this system of education and received an authorization, or licence --known as *al-ijāzah li 't-tadrīs wa 'l-iftā'* -- from a recognized master-jurisconsult could teach, issue legal opinions, and grant authorizations to subsequent candidates.[91]

Professor Makdisi sees in the *madrasah* -colleges an analogue to the work-shops of the craftsmen. He refers to them thus as "ateliers."[92] He points out, against the view of S. M. Stern, that 1) the *madrasah* was a private institution, neither established nor controlled by the state; only the founder could dictate who was to teach, and even when the founder happened to be a state official, he acted in his capacity as a *private* citizen;[93] and 2) instruction in the *madrasah* was private, between the individual master and his student; and although the founder could determine who was to teach, conferring authorizations upon students remained the prerogative of the individual professor, who acted at his own

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[91]Makdisi, *La Corporation*, p.202-5.

[92]*Ibid*, p.206.

[93]*Ibid*, p.196: "La *madrasah* n'était pas fondee par l'Etat, mais par des particuliers; et quand le fondateur était un homme d'Etat, il accomplissait son acte de fondation en tant que particulier musulman."

discretion: "Ni le calife, ni le sultan, ni leurs vizirs, ni personne d'autre ne pouvait conferer cette licence, ou obliger le professeur de droit à la conferer."[94]

Of those who rejected the existence of guilds in classical Islam, the fullest criterion for what constituted a guild was given by Gabriel Baer. According to Baer, to be a guild an association had to be 1) professional; 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). Professor Makdisi responds to each constituent of this criterion one by one: the *madhhab*, according to him, was professional (it sought to preserve a standard of performance); it occupied a specific segment of the 'economy' (law); it engaged in restrictive practices and sought to establish a monopoly (through the licence to teach and give legal opinions); it was autonomous (the government neither brought a *madhhab* into existence nor terminated it); and it had a framework of officers or functionaries chosen from among its members (e.g., professors, deputy-professors, repetitors, monitors, etc.), headed by a headman (i.e., the *ra'is* , the head of the *madhhab* in a given locality).[95] Thus, even on the criterion of his most circumspect opponent, it appears that Professor Makdisi is able to sustain his thesis that the schools of law were guilds. To my mind, however, there remains in all of this one final issue, namely, that raised by S.M. Stern over the corporate status of the *madhhab* .

B. On the Corporate Status of the *Madhhab*-Guilds

In his article, Stern made the point that none of the organizations in classical Islam appear to have possessed that propensity, which he refers to as corporate, to protect the interests of its members through formally recognized statuses and persons. Citing the view

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[94]*Ibid*, p. 206.
[95]G. Makdisi, *The Guilds of Law*, p. 239-40.

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 the collectives of persons such as guilds."[96] In his *La Corporation,* Professor Makdisi responded to this objection but dealt with it from a perspective that is somewhat different from my own. Professor Makdisi pointed out that while it is true that Islam, unlike the medieval Christian West, did not recognize juristic persons, this did not prove that guilds did not exist in classical Islam; for at their origins, neither were European guilds based on juristic persons.[97]

My understanding of Stern's objection, however, is somewhat different. To my mind he seems to be referring to the absence of any protected status that the *madhhab* or any other organization in Islam confers upon its members by virtue of their membership in that particular group. Stern states that while all sorts of corporate institutions proliferated in Europe, these were entirely absent in Islam.[98] The clue to what he means by "corporate" appears on the first page of his article, 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 and character, but *in the narrower sense of the word*.[99] In other words, there were no groups or individuals in the Islamic city who enjoyed privileges or exemptions from state authority by virtue of their membership in a particular association.

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[96]S.M. Stern, "The Constitution of the Islamic City," in *The Islamic City*, ed. A. Hourani and S. M. Stern (Oxford: Bruno Cassirer Publishers Ltd., 1970), p.49. The quote is from D. Santillana's *Instituzioni di diritto musulmana malichita.*

[97]*La Corporation*, p.196: "... les corporations au debut de leur existence en Europe n'étaient pas douées de personalité morale." See also, *ibid* , p.207: "Ces deux types de corporation se ressemblaient en ce qui concerne leurs membres, leur hierarchie sociale, mais non pas toujours en ce qui concerne leur statut juridique. Le type islamique se basait sur le *waqf*; celui de l'Occcident, sur la corporation-personnalité morale, *pas à l'origine, mais au treizième siècle* ." (emphasis added)

[98]Stern, *Constitution*, p.47.

[99]*Ibid*, p. 25. "... one of the main points which I wish to make is that the Islamic city has no constitution in this [narrower] sense."

My research suggests that this is not so in the case of the *madhhab*, particularly in the state to which it had evolved by the time of al-Qarāfī.[100] In fact, it is just this corporate status that lies at the basis of al-Qarāfī's defense of two-tiered orthodoxy. For the sake of brevity, one example of what I am talking about will have to serve.

In his *al-Furūq* al-Qarāfī makes the following statement:

> If a lone witness cites the crescent marking the beginning of Ramaḍān and a Shāfi'ī judge announces throughout the city that the month of obligatory fasting has thus begun, such an announcement would not make it obligatory upon a member of the Mālikī *madhhab* to fast .... (F.4:48)[101]

Two points are in order here. First, announcing the beginning of the month of fasting was, in the time of al-Qarāfī, an official function carried out by the Shāfi'ī Chief Justice in his capacity as representative of the government. It is essential to understand this point in order to appreciate the full implications of al-Qarāfī's statement. Second, any individual's membership in the Mālikī *madhhab* renders him immune to sanctions that may be applied to other members of society who eat in public following the official announcement by the Shāfi'ī *qāḍī al-quḍāt*. This, for all intents and purposes, is corporate status: the individual enjoys this right not as an individual, but due to his membership in the Mālikī guild of law.[102] And where this status is violated, it is the Mālikī guild, not simply the individual, that will rise and demand its right to corporate exemption.

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[100] See, for example, my comments above, p.3, and below, p.91-2, where I argue that the corporate status of the *madhhab* replaced *ijtihād* as the determiner of orthodoxy.

[101] See also, *Tamyīz*, p.180: "A Mālikī reserves the right not to fast in Ramaḍān if a Shāfi'ī determines the crescent to have appeared on the basis of a lone witness; for this is not a decree (*ḥukm*); rather it is the assertion of the occurrence of a legal cause (*sabab*). And for whomever this is not a legally established legal cause, he is not bound to accept the ruling activated thereby." On legal causes and rulings, see below, p.141ff.

[102] J.P. Davis writes in his *Corporations*: "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, for the state is itself, like the corporation, a group (though superior to all others), acting through or within certain self-imposed forms; 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." *Ibid*, p.16.

Examples such as the above could be multiplied many times: A Ḥanafī's getting married without a guardian (*walī*) representing the bride, or his drinking *nabīdh*-wine in public; a Ḥanbalī's beginning the Friday congregational prayer before the sun passes its zenith; a Shāfi'ī's consuming meat slaughtered without the mention of God's name.[103] The fact that these individuals are members in their respective *madhhab*s renders these actions permissible and protected *for them.* It is in this sense that it seems that the *madhhab* may be viewed as a corporate entity, and that its corporate status may very well have been an integral part of the constitution of the Islamic city.

C. The Headmaster: *Shaykh al-Madhhab*

Returning to the criterion of Baer, there is more to be said of "the framework of officers headed by a headmaster who performs some specific function" (al-Qarāfī having been identified as the head of his school). The headmaster of the *madhhab*, as indicated by Professor Makdisi, is the *ra'īs*, sometimes referred to as the *Shaykh.* To him refers the oft-repeated phrase, "*intahat ilayhi riyāsatu* ... " (leadership of [the Shāfi'īs or Mālikīs] ended up with him). Among the functions of the headmaster was that he represent the interests of the guild before the central power. Perhaps an example of such representation can be seen in the activities of al-'Izz ibn Abd al-Salām, the headmaster of the Shāfi'īs. However, another not wholly unrelated function of the headmaster would be to defend the rights of the guild before the encroachments of other guilds, and to be its spokesman in the face any and all threats. Thus, the more serious controversies of the day would be addressed not by the rank and file members but by the headmaster. One might recall in this

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[103] See Tāj al-Dīn al-Subkī, *Mu'īd al-ni'am,* p.76. Another example of this corporate status is, I think, to be seen in the problem of certain Shāfi'īs who subscribed to the view that a principal was not bound to enforce the ruling of his deputy judge if that ruling went against the doctrine of the principal's school. Even the Sultan could not force the Shāfi'ī Chief Justice to go against this view, which was, incidentally, the view of only some members of the Shafi'ī school. It was the corporate status of the schools and the Sultan's resulting inability to force a compromise that ultimately forced him to institute the system of multiple Chief Justices, one for each school. See below, p.62ff., "A Closer Look at the Problem of Ibn bint al-A'azz," and my comments in the conclusion to this study, p. 224f.

regard the statement of the Shāfi'ī, Zakī al-Dīn al-Mundhirī: "We used to issue legal opinions before Shaykh 'Izz al-Dīn arrived in Egypt; now that he is here, we no longer do so."[104] This statement was of course not meant literally; rank and file jurists would still respond to ordinary questions, including even some fairly complicated ones. But the pressing controversies of the day would remain the preserve of the masters and especially the headmaster. The Ḥanafī jurist, Ibn al-Humām (d.861/ 1456) seems to confirm this notion when, in arguing the validity of tacit consensus (*ijmā' sukūtī*), he points out: "The normal practice of every age is that the master-jurisconsults (*al-akābir*) speak, while the lesser jurisconsults (*al-aṣāghir*) remain silent, out of deference ...."[105]

The position of *ra'īs* satisfies another aspect of Baer's criterion in that the *ra'īs* was not a government appointee. Rather, he earned his position when he outstripped his counterparts as a jurisconsult, winning thereby *their* recognition as the group's top man.[106] His primary allegiance, therefore, was not to the government but to the members of his guild.

D. Rank and Authority

On the question of the relationships of rank and authority among the members of the *madhhab*, I have found evidence only of an informal hierarchy whose recognition, it

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[104]*Badā'i'*, 1:314. One gets the impression from a number of sources that the term "*aftā*" in many contexts applies only to giving legal opinions on major and or unprecedented matters. It has thus a double meaning; 1) to relay the view upheld in the *madhhab*; and 2) to give a legal opinion on an issue not treated in the *madhhab*. It is in this latter sense that al-Qarāfī says at one point that it is forbidden to most jurisconsults to give legal opinions (*yaḥrumu 'alā akthari 'n-nāsi 'l-fatwā*). See *al-Furūq*, 2:110. See also "Extrapolation," below, p.158-67.

[105]Ibn Amīr al-Ḥājj, *al-Taqrīr wa al-taḥbīr*, 3 vols. (Beirut: Dār al-Kutub al-'Ilmīyah, 1403/1983), 3:102. This work is a commentary on the *al-Taḥrīr* of al-Kamāl Ibn al-Humām. Ibn al-Humām's point here is that tacit consensus is probative because it represents the silence of the *masters* on the *pressing issues* of the day.

[106]See G. Baer, *Constitution*, p.15, where he states that the existence of *'arīfs* does not prove the existence of guilds because these functionaries were appointed by the government. On *riyāsah* within the *madhhabs*, see G. Makdisi, *Rise*, p. 129-33. On the problem of overzealous junior-jurisconsults going beyond their rightful limits in pursuit of *riyāsah* (preeminence), see Ibn al-Jawzī, *Ta'ẓīm al-futyā*, (Chester Beatty Library, Arabic Mss., 3829).

seems, was basic to the overall function of the *madhhab*-guild. [107] The evidence I have in mind appears in the last segment of the *Tamyīz* in which al-Qarāfī gives directions to jurisconsults on how to give *fatwās*.

According to these directions, if a petitioner brings his question to a mufti after having already received a *fatwā* from another mufti, the second mufti should observe proper protocol: If he agrees with the first mufti's response and the latter is of the highest standing, he should write, "Like this is my response (*ka dhālika jawābī*)." (T.264) Less deferential, however, is for him to write, "My response is like this (*jawābī ka dhālika*)." (T.264) Still less deferential and tending towards haughtiness is for the second mufti simply to repeat the response of the first in his (the second's) own words without making any reference to it. (T.256) More haughty and less respectful is for the second mufti to write, "The response is correct," or "The response is sound." (T.265) "These latter expressions should be used only if it is proper for the second mufti to authorize the first mufti to give *fatwās* (*yujīzuhu*) or that he act as overseer of the latter's work, and that the relationship between the two be as that between teacher and student [the first being the student, the second the teacher]." (T.265)

If the second mufti is deferring to the first, he should write his response beneath that of the first. If he is assuming superiority, he should write parallel to it. Here, however, there are grades of superiority: If he wishes to show modesty, he should write to the left of the response; if such is not his wish, he should write to the right of it. (T.265-6)

These directions reflect highly formalized and institutionalized means of recognizing rank within the *madhhabs*. Their very existence shows in itself that ranks existed. Al-

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[107] Professor Makdisi had observed that the members of a *madhhab* were divided into three ranks: *mutafaqqih* (beginner), *ṣāḥib* (graduate student) and *mufti*/ *mudarris* (master/teacher). However, he did not discuss the lines of authority among these figures nor the means and manifestations through which such authority was recognized, since this fell outside the purview of his insightful study. See *La Corporation*, p.204-6, esp. 204.

Qarāfī gives the sense that one could not easily violate this code with impunity. This stands to reason, since the granting of licences to teach and to give legal opinions was a private act by the individual master who did so at his own discretion. Thus, in violating this code one stood to alienate his superiors, jeopardizing, thereby, his reputation and his career.

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The *madhhab*, then, for all intents and purposes, may be characterized as a guild, a structured, professional, autonomous organization, capable of conferring upon its members certain privileges and protection by virtue of its 'corporate' status. At the head of the *madhhab*-guild stood the *ra'īs*, who represented the group before officialdom and defended its corporate status and ideology against would-be detractors.

E. Al-Qarāfī: *Shaykh al-Mālikīyah*: When?

As *ra'īs* of the Mālikī guild, al-Qarāfī would fulfill the duties of the headmaster outlined above. One final matter concerning his service in this capacity has to do with the question of timing: When did al-Qarāfī become head of the Mālikīs? If, as I contend, the *Tamyīz* was written just before the year 660/1261 and if al-Qarāfī authored this work in his capacity as *ra'īs* of the Mālikī guild, and if we take even the earlier birth date of 616/1219, this would mean that al-Qarāfī became head of the Mālikīs prior to his forty-fourth birthday, over the heads of many older members of the group. This in itself poses no problem, except for the fact that age, one gets the impression, was a concomitant of authority in medieval Muslim society. Looking at the career of the head of the Shāfi'ī guild, al-'Izz ibn 'Abd al-Salām, for example, it seems almost certain that he was aided in his exploits during the years after 650/1252 by the fact that he was an elder statesman, an esteemed Septuagint! There are exceptional cases, however, that prove the possibility of al-Qarāfī becoming the head of his guild at this relatively early age. The famed Shāfi'ī *Shaykh al-Islam* , Muḥyī al-Dīn al-Nawawī, was born in the year 631/1232 and died in

676/1277, at the age of forty-five, obviously having reached the rank of *Shaykh al-Islam* before this age. It is interesting, and perhaps telling, however, that in speaking about al-Nawawī, the Shāfi'ī jurist, al-Isnawī, adds the comment: "His [al-Nawawī's] beard was tempered with gray (*kāna fī liḥyatihi sha'arātun bīḍ*)."[108]

[108]*Shadharāt*, 5:354-6 for the full notice on al-Nawawī, and 5:356 for al-Isnawī's comment.

Chapter Two

The *Tamyīz* : Background and Purpose

General Remarks

In the introduction to the *Tamyīz*, al-Qarāfī prefaces his impending discussion with the following statement:

> To proceed: Indeed there has run over the course of time between myself and some of the notables (from among the jurisconsults) discussions concerning the matter of the difference between the *fatwā*, in the face of which the *fatwā* of a dissenter remains valid and standing (*tabqā ma'ahu futyā 'l-mukhālif*), and the *ḥukm*, which may not be violated by a dissenter (*la yanquḍuhu 'l-mukhālif*); and between the discretionary actions of judges (*taṣarrufāt al-ḥukkām*) and those of the holders of political authority (*taṣarrufāt al-a'immah*). And there is disagreement concerning the establishment of the crescent, marking the beginning of Ramaḍān, on the basis of the testimony of a lone witness: 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 or not a judge's selling some property belonging to an orphan constitutes a judicial ruling (*ḥukm*), affirming the validity of the sale which may then not be challenged subsequently. Or if he rules that a certain individual's testimony is valid and admissible (*ḥakama bi 'adālati insān*), is it then permissible for some other judge to reverse this; or does this constitute a binding judicial decree (*ḥukm*) which may not be overturned? And similar questions. (T.18)

This introductory raises a number of issues.[1] A cursory reading of the *Tamyīz* reveals, however, that al-Qarāfī's main preoccupation lies with one major theme: substantively valid rulings handed down by a judge from any orthodox *madhhab* are inviolable; *ḥukmu 'l-hākimi la yunqaḍ* ; they may be neither challenged nor overturned by

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[1]Namely, 1) the difference between the *fatwā*, the *ḥukm*, and the *taṣarruf* (discretionary action) of judges and political leaders; 2) the corporate status of the *madhhab*s (see above, p.46-9, and below, p.74-9); and 3) the question of what is legal (i.e., a constituent of law properly speaking) versus what is non-legal, on the basis of which it can be determined which aspects of judicial or caliphal actions are binding and which are not. See below, p. 145-6 and p.189-93.

anyone. Why should it be necessary to reiterate this theme? Who were the major characters involved in striking down valid judicial rulings; by what means; for what reasons? Why should a member of the Mālikī guild in particular rise in opposition? Of the Mālikīs, why al-Qarāfī?

It was primarily the partisan policies of the Shāfi'ī Chief Justice, Taqī al-Dīn ibn bint al-A'azz, that prompted al-Qarāfī to write the *Tamyīz*. In particular, the Chief Justice had adopted a policy of refusing to enforce rulings handed down by judges from the other schools when these violated too sharply the view of the Shāfi'ī guild. This filibuster tactic amounted essentially to overturning these rulings, since, in the absence of the Chief Justice's confirmation, they remained without force.[2] By this action the Chief Justice thus usurped and, in al-Qarāfī's view, violated an authority that rested properly with the Community's consensus, a consensus that had guaranteed protection to all four guilds, as constituents of the disputed (*mukhtalaf fihi*) tier of orthodox law. [3]

The exclusivist policies of Ibn bint al-A'azz struck particularly hard at the Mālikīs. First of all, there was a fundamental difference between the Shāfi'ī and Mālikī approaches to law and jurisprudence.[4] This placed the latter all too often on the wrong side of Ibn bint al-A'azz's point of view. Second, the Mālikīs by this time were without strong political backing in Egypt, which meant that it would not be difficult for local politicians to ignore their plight. The situation was thus for the Mālikīs a serious one indeed, and as headmaster of the Mālikī guild, al-Qarāfī was duty-bound to rise to their defense.

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[2]See below, p.63-4.
[3]See "Two-Tiered Orthodoxy," below, p.88 ff.
[4]See below, "Countervailing Considerations," p.80 ff.

I. Dating the *Tamyīz*

Internal evidence suggests that the *Tamyīz* was written sometime around the year 660/1262. The key to this date lies in a citation in the text of a view belonging to al-'Izz ibn 'Abd al-Salām. Al-'Izz, as mentioned earlier, died in the year 660/1262. However, where he is cited in the *Tamyīz*, no panegyrical formula, e.g., "May God shew him mercy," follows his mention. Instead, one reads simply, "And one of the moderns among the Shāfi'īs has put forth the view that ...." (T.228) The view in question appears again in al-Qarāfī's *al-Furūq* , where it is attributed to al-'Izz by name. (F.2:100)[5] Here, however, al-Qarāfī speaks in the past tense (*kāna 'sh-Shaykhu 'bnu 'abdi 'salām* ...), as he also adds the panegyrical formula, "May God shew him mercy (*raḥimahu Allāh*) following al-'Izz's mention. This suggests that the panegyrical formula was omitted from the *Tamyīz* because at the time of its composition al-'Izz was still alive, which in turn means that the *Tamyīz* was written before 660. The relevance of its theme to certain contemporary events suggests that it had not been written long before this date. I shall turn now to these relevant contemporary events.

II. The Problem of Ibn bint al-A'azz

In Dhū al-Ḥijjah of 660/1262, the Mamlūk Sultan, al-Malik al-Ẓāhir Baybars al-Bunduqdārī, ordered the Shāfi'ī Chief Justice, Ibn bint al-A'azz, to appoint three deputy judges (*nuwwāb/s. nā'ib*), one from each of the remaining guilds.[6] These deputies were to be recognized not merely as representatives of the Chief Justice but as direct appointees of the Sultan. This accorded them privileges normally reserved to the Chief Justice.[7] The

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[5]The view in question is al-'Izz's response to whether or not it is permissible for a Shāfi'ī to be led in prayer by a Mālikī, and vice versa, despite their disagreement on what constitutes a valid ablution and a valid prayer. For more on this problem, see below, p.109 ff. The *al-Furūq* was written after the *Tamyīz*, as is confirmed at F. 2:106, where the latter work is mentioned.

[6]*Sulūk*, 1:472.

[7]Namely, the right to appoint their own deputies and, more important, the right to *tasjīl*, i.e., to confirm and enforce the rulings of deputy judges. This is confirmed in the report of Ibn Ḥajar, himself a Chief Justice, who says that these deputies were all appointed "by leave of the Sultan, " and that this "made things easier on the people in their rulings." See *Raf'* 2:381. On *tasjīl*, see below, p.63-4.

appointment of these deputies was apparently a trial run, and in 663/1265, Baybars, in a monumental gesture, reintroduced the system of multiple Chief Justices in Egypt. In addition to the Shāfi'ī Chief Justice, he appointed one from each of the remaining Sunni guilds. Each of these was authorized to appoint deputy judges and to oversee judicial affairs, just as the Shāfi'ī Chief Justice had done. The Shāfi'īs maintained, however, exclusive control over religious endowments (*waqf*), the public treasury (*bayt al-māl*), and the trusteeship of orphans.[8]

What were the reasons behind this move? At least two explanations have been given by medieval Muslim historians. The first of these appears in *al-Rawḍ al-Zāhir fī Sirat al-Malik al-Ẓāhir*. This work was a biography of Baybars, written by Ibn 'Abd al-Ẓāhir, who served as the Sultan's secretary and wrote this work out of appreciation of his master's kindness to him. According to Ibn 'Abd al-Ẓāhir, Baybars was moved to install the four independent chief judges by the expanding population of Cairo, the fact that it was now the seat of government (*dār al-mulk*) and that scholars from all four schools of law now gathered there.[9] This account, however, though plausible on its face, raises a problem upon closer examination. For the underlying implication here is that the population of Egypt increased as a result of migration from Syria, following the Mongol occupation of the Syrian provinces and their subsequent advance against Damascus. But if this is true and as a result Egypt's population increased, then the population of Syria must have decreased by a similar proportion. Yet it is reported that Baybars instituted this same system of multiple chief judgeships in Syria in the same year of 663/1265.[10] It would

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[8]See Nielsen, *Sultān al-Ẓāhir*, p.167-71; Joseph H. Escovitz, *The Establishment of the Four Chief Judgeships*, p. 529-31; al-Subkī, *Ṭabaqāt*, 3:134.

[9]See Syedah Fatima Sadeque, *Baybars I of Egypt* (Pakistan:Oxfrod University Press, 1956), p.197. This work includes the Arabic text of an incomplete rescension of *al-Rawḍ* from the British museum. For the Arabic text on the reasons for installing the four chief judges, see p.89 of the Arabic rescension.

[10]*Shadharāt*, 5:312.

seem, then, given these facts, that the move to multiply the number of chief judges in Egypt was also unrelated to the relative size of its population.

The second explanation given by Arabic sources is that found in works such as al-Nuwayrī's *Nihāyat al-'Arab fī Funūn al-Adab*,[11] Ibn Furat's *Tārīkh al-Duwal wa al-Mulūk* [12] and al-Maqrīzī's *al-Sulūk*. According to this account, Baybars was moved to install the four chief judges following a confrontation one day at the House of Justice (*Dār al-'Adl*) between Ibn bint al-A'azz and a favored amir, Jamāl al-Dīn Aydughdī. Aydughdī is reported to have disliked Ibn bint al-A'azz -- and apparently all judges -- for his circumspection and his refusal to implement rulings that went against the view of his guild.[13] On this particular day, a petition was presented in which the daughters of an amir named al-Nāṣir claimed that they had purchased a mansion from the previous Chief Justice, Badr al-Dīn al-Sanjār, while he was alive but that upon his death his heirs claimed that the property had been bequeathed to them as a charitable trust (*waqf*). Upon hearing the heirs' claim, Aydughdī launched into an attack on the religious officials. The Sultan followed,

> Qadi, is this how the qadis are?
> The Qadi said, "There are complications in everything."
> The Sultan said, "What is the situation here?"
> "If the Waqf is confirmed, the price is returned by the heirs."
> The Sultan said, "and if the heirs have nothing?'
> [The Qadi] said, "The Waqf is returned to its original state,
> and the price is not returned."[14]

Before this issue could be settled, several other people came forth with complaints about the Chief Justice's handling of their affairs. One amir complained that Ibn bint al-A'azz had refused to accept his testimony in a case. When questioned by the Sultan, Ibn bint al-A'azz responded, "I accept the testimony of no one before I have established his

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[11] See Escovitz, *ibid*, p.529, note no. 6.
[12] Nielsen, *Sulṭān al-Ẓāhir*, p. 169, note no. 4.
[13] Escovitz, *ibid*, p.529; Nielsen, *Sulṭān al-Ẓāhir*, p. 169.
[14] Nielsen, *Sulṭān al-Ẓāhir*, p.170. Nielsen's translation.

uprightness."[15] When the amir, joined by the Sultan, asked why he had not been accepted as an upright witness, the Chief Justice replied, "There is no need to go into that here."[16] At this point, now unable to restrain himself, Aydughdī exclaimed, "O Qāḍī, you may have your Shāfi'ī *madhhab*; we shall appoint a qāḍī from each of the *madhhabs*." [17] The Sultan, who is said to have trusted Ayudaghdī's judgment, accepted the amir's suggestion and appointed Chief Justices from the Ḥanafī, Mālikī, and Ḥanbalī guilds.

A. Some Modern Interpretations

Modern scholars, rightfully so, have not taken the above account at face value. J. H. Escovitz, for example, suggests that the real reasons for Baybars' decision go back to the time of al-Malik al-Ṣāliḥ Najm al-Dīn Ayyūb. Escovitz hints that the establishment of the Ṣāliḥīyah super-college was the first phase of a plan aimed ultimately at breaking the Shāfi'ī monopoly over the judiciary. The Ṣāliḥīyah was to provide the Sultan with a ready source of judges from all four guilds.[18] Al-Malik al-Ṣāliḥ died, however, in 647/1249, apparently before being able to bring this plan to fruition. Following the mini-reigns of Turān Shāh and Shajarat al-Durr, the first Mamlūk Sultan, al-Malik al-Mu'izz Aybak, was thwarted in his attempt to complete this plan by henchmen who assassinated him in 655/1257 at the command of his jealous and over-ambitious wife, the legendary Shajarat al-Durr.[19] It was not until the ascension of Baybars in 658/1260 -- and then only after he had crushed the Mongols at 'Ain Jālūt, reinstituted the 'Abbāsid caliphate, and restored a semblance of order in the kingdom -- that the plan first conceived by al-Malik al-Ṣāliḥ (who, by the way, was Baybars' master) could be resumed. When he appointed the

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[15] *Sulūk*, 1:539.

[16] *Ibid.*

[17] *Ibid.* See also Escovitz, p.529; Nielsen, p.170.

[18] Escovitz, p. 529.

[19] See *Shadharāt*, 5:267, where it is reported that al-Mu'izz's planned additional marriage to the governor of Mosul's daughter angered Shajarat al-Durr, who had him killed out of jealousy. See also *Sulūk*, 1:401, where it is reported that al-Mu'izz had received word of Shajarat al-Durr's political intrigues and was thus planning on having her done away with.

deputy judges (*nuwwāb*) in 660/1262, they all came from the Ṣāliḥiyah.[20] They were all confirmed as Chief Justices in 663/1265.

According to J. S. Nielsen, the appointment of independent Chief Justices was designed specifically to diminish the authority of Ibn bint al-A'azz, the better to offset his potentially dangerous ties with the Ayyūbids and his close links with the mainly Shāfi'ī population of Egypt.[21] Nielsen suggests further that Baybars wanted to weaken the Shāfi'ī domination over the judiciary in order to open up the way for the Mamlūk military class to establish links with the Ḥanafīs of Egypt.[22] In a similar vein, E. Tyan suggests that the Mamlūk amirs -- who were Turks of the Ḥanafī school -- were uncomfortable with the lack of a Ḥanafī Chief Justice. As a solution, Baybars decided to install judges from all four guilds in order to avoid the appearance of a spoils system.[23]

B.Critique

The above theses appear to turn on what Albert Hourani has called the "political-institutional" approach to the study of Islamic history.[24] This approach proceeds on the assumption that society was molded by political power. In its most extreme form, governments are presented as "bodies acting freely upon a mass of passive subjects."[25] This approach, in my opinion, does a disservice to its subject. For such an exaggerated emphasis on power inevitably obstructs other factors that may be equally or perhaps even more operative.

It is assumed, for example, that the reorganization of the judiciary was a top-down initiative, with Baybars and his amīr, Aydughdī, at the head. The activities and attitude of

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[20]*Sulūk*, 1:472.
[21]Nielsen, p.171-2.
[22]*Ibid*, p. 173.
[23]E. Tyan, *Histoire de l'organisation judicaire en pays d'islam*, 2 vols. (Leiden: E.J. Brill, 1960), 1:139-40. The notion that Baybars wanted to avoid the appearance of a spoils system is my own.
[24]Albert Hourani, "History," *The Study of the Middle East*, ed. Leonard Binder (New York: John Wiley and Sons, 1976), p.114.
[25]*Ibid*, p.118.

the remaining guilds of law --who were to be directly affected by these changes-- are never duly contemplated. Meanwhile, there is strong evidence that Baybars was not simply waiting for the opportunity to implement a preconceived plan but that he was simply *responding* to a situation that had grown out of hand.[26] Similarly, given the sustained Shāfi'ī monopoly over the judiciary, it would seem that such a radical change would require something of a mandate from the community of jurisconsults at large.[27] Otherwise, it is likely to have been viewed with suspicion and to have been short lived. One might recall that the move of 663 was preceded by a trial run in 660 with the appointment of deputy judges (*nuwwāb*), as opposed to full Chief Justices equal to the Shāfi'ī *qāḍī al-quḍāt* . This was almost certainly designed to test the reaction of the *fuqahā'*. Yet, in the above hypotheses, nothing is said of the possible role of the *fuqahā'* in supporting, opposing or bringing this change about.

Regarding the view of Escovitz, it seems somewhat strange that Baybars would be able to accomplish in two years what al-Malik al-Ṣāliḥ was unable to achieve in six, i.e., from 641 (the date of the establishment of the Ṣāliḥīyah) to 647, the year of his death. The same might be said of al-Malik al-Mu'izz, who reigned for seven years. Similarly, if Baybars' move was an extension of al-Malik al-Ṣāliḥ's alleged plan, why did his Ẓāhirīyah *madrasah*, which was founded in 662/1263, not have a chair for each of the guilds of law to supply him with loyal candidates?[28]

Of the thesis of Nielsen, and to a lesser extent, Tyan, one might ask why Baybars should be more concerned about the Ayyūbids and replacing the Shāfi'īs with the Ḥanafīs

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[26]See below, p.62 ff., "A Closer Look at the Problem of Ibn bint al-A'azz."

[27]There is evidence, for example, that the Shāfi'īs, and especially Ibn bint al-A'azz, were not pleased with this change. One indication of this is the last line of a poem by the famed al-Būṣīrī cited in Ibn Ḥajar's *Raf'*, 2:382: "Generosity has made their [Christian] patron happy with the trinity, while stinginess has made our judge unhappy with quadrupling (the number of judges) (*fa 'l-jawdu as'ada bi 't-tathlīthi ṣāḥibahum wa 'l-bukhlu anḥasa qāḍīnā bi tarbī'*)." My suspicion is that this al-Būṣīrī was a Mālikī. See below, p.73, nt.58.

[28]Baybars' college was instead for Shāfi'īs and Ḥanafīs only. See *Khiṭaṭ*, 2:378-9.

of Egypt than was al-Malik al-Mu'izz. After all, al-Mu'izz was the first Mamlūk Sultan, and it is customary for new arrivals to purge their ranks and make radical changes in the basis of their support. If the Shāfi'īs were going to be replaced by the Ḥanafīs, it seems that this should have begun during the reign of al-Mu'izz. Likewise, if fear of an Ayyūbid riposte was a motive, then al-Mu'izz should have been the one to initiate these changes, since it was he who for a time had to share his throne with the Ayyūbid, al-Malik al-Ashraf, who had been set up by a group of Mamlūks loyal to al-Malik al-Ṣāliḥ! [29]

C. An Alternate Explanation

Politicians are practical men; they give their support where it is most likely to result in success, ideally, where there is already a cause in motion. Al-Malik al-Ẓāhir Baybars' rearrangement of the judiciary was the result of a mandate received from the *fuqahā'* of the remaining orthodox guilds. The exclusivist policies of the Shāfi'ī Chief Justice, Ibn bint al-A'azz, who became *qāḍī al-quḍāt* for the first time in 654/1256, had brought much resentment and consternation to the legal community, and this culminated in a call for a Chief Justice -- or at least an independent representative -- for each guild, as a means of protecting its views from being overturned. The appearance of the *Tamyīz* around 660/1262 shows how much attention this problem had come to demand. In essence, it was a scholarly protest by al-Qarāfī against the exclusivist policies of Ibn bint al-A'azz.

III. A Closer Look at the Problem of Ibn bint al-A'azz

A. Refusal to Enforce Rulings

In their accounts, Ibn al-'Imād, al-'Aynī, and Ibn Kathīr all state explicitly that the reason Baybars installed the remaining Chief Judges was the repeated refusals on the part of Ibn bint al-A'azz to enforce rulings handed down by other judges. Under the year 663/1265, Ibn al-'Imād states:

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[29]See Ibn Iyas, *Badā'i'*, 1:289 ff.

> And in this year the system of having four judges, one for each school of law, was reintroduced, due to the refusal (*tawaqquf*) on the part of Tāj al-Dīn Ibn bint al-A'azz to enforce rulings handed down in many cases. (This action on the part of Ibn bint al-A'azz) resulted in many affairs being brought to a standstill. So Kamāl al-Dīn [sic] Aydughdī al-'Azīzī made the suggestion, which pleased the Sultan, and the latter carried it out at the end of the year.[30]

A similar report had been given earlier by Al-'Aynī, who died in 855/1451, and, who in addition to being an historian also served as deputy judge (*nā'ib*) under his father. According to al-'Aini, Baybars was prompted to install the four Chief Justices by "the repeated instances of refusal (*kathratu 't-tawaqquf*) on the part of judge Tāj al-Dīn Ibn bint al-A'azz."[31]

The report of Ibn Kathīr went even further to indicate that the rulings refused by Ibn bint al-A'azz were sound, according to the school of the issuing judge. But the Chief Justice refused to enforce them anyway, because they went against his own Shāfi'ī view.

> And in this year [663] (Sultan al-Malik) al-Ẓāhir appointed judges from the remaining schools of law in Egypt, all of whom were authorized to appoint judges in the various districts as the Shāfi'ī judge had done. Tāj al-Dīn 'Abd al-Wahhāb (Ibn bint al-A'azz) assumed the post for the Shāfi'īs, Shams al-Dīn Sulaymān for the Ḥanafīs, Shams al-Dīn al-Subkī for the Mālikīs, and Shams al-Dīn Muḥammad al-Maqdisī for the Ḥanbalīs. This occurred on Monday, 22 Dhū al-Ḥijjah, at *Dār al-'Adl*. And the reason for it was the repeated instances of refusal (*kathratu 't-tawaqquf*) by judge Ibn bint al-A'azz to enforce rulings that went against the view of the Shāfi'ī school *while agreeing with the view of one of the other schools*.[32]

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[30] *Shadharāt*, 5:312.

[31] Badr al-Dīn Muḥammad al-'Aynī, *'Iqd al-jumān fī tārīkh ahl al-zamān*, 2 vols. ed. Muḥammad Muḥammad Amīn (Cairo, 1407/1987), 1: 408.

[32] *Al-Bidāyah*, 13:245. (emphasis added) The first names of the Mālikī and Ḥanafī judges are incorrect. The correct names are Sadr al-Dīn Sulaymān for the Ḥanafīs, and Sharaf al-Dīn 'Umar al-Subkī for the Mālikīs. See *Sulūk*,1: 472.

B. The Office of Chief Justice and Overturning Judicial Rulings

The problem of overturning judicial rulings was engendered by a particular feature of the Ayyūbid and, later, Mamlūk judicial systems, a feature perhaps common throughout the medieval Muslim world. Though there was ostensibly no hierarchy of regular courts, i.e., no formally recognized higher courts[33] authorized to review and if necessary overrule 'lower court' decisions, in actual practice the office of the Chief Justice allowed him this privilege.

There were two categories of judges in medieval Islam: principals and deputies. The authority of deputies was not original but derivative of that of their principals.[34] Principals in turn could reserve to themselves the right to review all rulings handed down by their deputy appointees. Moreover, whenever a principal stipulated his wish to do so, a deputy's ruling remained unenforceable until it had been reviewed and confirmed by the authorizing principal. This practice of reviewing rulings was part of an operation known as *tasjīl* (registration). It included two basic steps: 1) entering the deputy's ruling into the official judicial register (*diwān al-ḥukm*), and 2) issuing to the winning litigant a notarized copy of the confirmed ruling. In his encyclopedic *al-Mughnī*, the Ḥanbalite Ibn Qudāmah (d.620/1223) gives a sample of an official document whose form I take to reflect the operation of *tasjīl*.

In the name of God, the Beneficent, the Merciful

> This is what [deputy] judge _____ has had witnessed before [principal] judge ____, official representative of Imām ____ over district ____, at his court and (official) place of adjudication, located at ____, on day ____:The contents of the following document have been established before me via the testimony of ____ and ____ [full geneology], their qualifications as upright witnesses having been established. (He then copies the document if he has it, or the official court transcript indicating the ruling.) Thus I [the principal]

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[33]This excludes of course the much talked about and overrated *maẓālim* courts. At any rate, the latter were not regular courts.

[34]See E. Tyan, *Histoire*, 1:11, 1:100-10, and passim.

> ruled on the basis thereof, implemented and authorized (the ruling of the deputy), having been requested to do so by ____ (the defendant or plaintiff).[35]

C. *Tasjīl* and Deputy Judges

As an automatic right, *tasjīl* was apparently the preserve of principals only. The only exception to this rule was where a deputy had been assigned to a principal by direct order of the Sultan.

In commenting on a statement by al-Qarāfī asserting full equality between deputies and principals,[36] Ibn Farḥūn states that if the deputy in question is appointed by the Imām, then this statement is correct; if not, he continues, then "that which has been transmitted via the books of the Mālikī guild contradicts this statement."[37] He then quotes another Mālikī jurist, Ibn Rāshid (d. circa., 731/1330), who at one time studied with al-Qarāfī:

> If the judge has been appointed with the Sultan's direct permission (*bi idhni 's-sulṭān*), he enjoys the right of *tasjīl* ; if not, he presents to the (principal) judge that which has been established before him, in the presence of two upright persons who are to be his witnesses at the time he informs (his principal). At that time, the (principal) judge must enforce the deputy's action and make a record of his ruling on behalf of the litigant. [38]

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[35]Abū Muḥammad 'Abd Allāh ibn Aḥmad b. Muḥammad b. Qudāmah al-Maqdisī, *al-Mughnī*, 9 vols. ed. Muḥammad Rashīd Riḍā (Cairo: Dār al-Manār, 1367/1947), 9:75. I have read the Arabic, *hādhā mā ashhada 'alayhi 'l-qāḍī fulānu 'bnu fulānin qāḍīya 'abdi 'llāhi 'l-imām*, with the first judge as deputy and the second (here in the accusative) as the principal. This second judge is also the subject of, "Thus I ruled on the basis thereof, implemented and authorized the ruling ...."

[36]Al-Qarāfī had stated that the only difference between the two is that principals preside over a larger volume of cases and may remove their deputies from office. These, however, according to him, were "only differences; they did not constitute any increase in jurisdiction (on the part of the principal)." See *Tamyīz*, p.167. For the real significance of this assertion by al-Qarāfī, see below, p.104.

[37]Ibn Farḥūn, *Tabṣirat al-ḥukkām fī uṣūl al-aqḍiyah wa manāhij al-aḥkām*, 2 vols. ed. 'Abd al-Ra'ūf Sa'd (Cairo: Maktabat Kulliyāt al-Azhar, 1406/1986), 1:19.

[38]*Ibid.* On Ibn Rāshid, see *al-Dībāj*, p. 334-6, esp. p.335, where it is said that he studied under "the Imām and great scholar," Shihāb al-Dīn al-Qarāfī. For a glowing appraisal of al-Qarāfī by Ibn Rāshid, see Aḥmad Bābā al-Timbuktī, *Nayl al-ibtihāj bi taṭrīz al-dībāj* (Beirut:Dār al-Kutub al-Ilmiyah, n.d.), p.235.

Ibn Farḥūn goes on to quote a Damascene Shāfi'ī jurist, Ibn al-'Aṭṭār (654/1256-724/1323).

> A deputy judge should not register his own rulings (*yusajjil*). If he does, his registration is null and void, and the person who actually makes the entry will have no excuse, unless the principal authorized him to do so prior to his death or before his removal from office. But if the deputy has been appointed on the Sultan's behalf and in accordance with the latter's wish and this is known far and wide, as is the Sultan's appointment of the principal, the deputy may register (his rulings) and enforce them without permission from the principal, and it becomes illegal thereupon for anyone to challenge or overturn these rulings in any way.[39]

Deputy judges, then, if not authorized by their principals or appointed by the Sultan, heard cases and issued rulings on the basis of their findings. These rulings remained unenforced, however, until the principal had reviewed them, entered them into the judicial register, and issued an official document of verification to the winning litigant. As the Sultan's direct and highest representative, the Chief Justice was the principal of all other judges on the circuit. It was thus he who presided over the judicial register and the issuance of documents of verification. By refusing, then, to register these rulings and issue the appropriate documents, the Chief Justice was in a position to block any ruling with which he disagreed.

1. Proof from the *Tamyīz*

While the above description is based on external evidence gleaned largely from the period after al-Qarāfī, a number of statements in the *Tamyīz* itself confirm that this system was in actual operation existence in al-Qarāfī's Egypt. For example, in a number of places al-Qarāfī mentions the practice at court whereby judges informed 'witness-notaries'

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[39]*Tabṣīrat*, 1:61. Ibn al-'Aṭṭār was one-time professor of the Nāẓiriyah college and wrote a number of works on law. He was the foster brother of the famed Shams al-Dīn al-Dhahabī. Ibn Ḥajar remarked, however, that he was not as skilled as the great contemporaries of his day. See al-Zirikli, *al-A'lām*, 4:251.

(*shuhūd*) of the ruling reached and requested from the latter that they bear witness of this at the appropriate time: "Be it witnessed that I have ruled such and such;" (T.45,46,51) "Bear witness in my behalf of such and such." (T.50) It was apparently the function of these witness-notaries to sit at court and witness the rulings of deputy judges and then testify before the principal that this ruling had been reached. It was almost certainly to these fiduciaries that Ibn Rāshid (above) referred when he spoke of "two upright persons who are to be (the judge's) witnesses at the time he informs his principal."[40]

Similarly, there are repeated references to situations wherein one judge rules, and then the case is brought before another judge. (T.177-93) Assuming that there is no system of appeal in Islamic law,[41] this would seem to refer to *tasjīl* . This, however, is not the only possible explanation. A case may involve multiple legal questions arising at different points in time. For example, a judge may rule that a certain contract is valid. Subsequently, one of the litigants may sue for fraud or non-payment. This second dispute, however, may be brought before a different judge, who sees it as his duty to review the legality of the contract before ruling on the matter of fraud or non-payment. On such an occurrence, the ruling of the first judge would effectively be reviewed by the second judge, despite the fact that the latter is not the former's principal.[42]

Finally, apparently with the process of *tasjīl* in mind, al-Qarāfī states in Qu. no. 36 that when it is said to "an enforcer" (*munaffidh*), "It has been established before me that such and such has been established before judge so and so," this statement does not constitute a ruling by the enforcer. (T.183) Likewise if the enforcer himself says, "It has

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[40]See above, p.65.

[41]See, for example, Schacht, *Intro*, p.189; E. Tyan, "Kadi," *Encyclopedia of Islam (new edition)*, 4: 373; W. Juynboll, "Kadi," *Shorter Encyclopedia of Islam*, p. 201; N. J. Coulson, *History*, p.163. See, however, *Tabṣirat* , 1:90-2, where what might be taken as a procedure for 'appeal' is described. See also below, p.192f.

[42]See, for example, Tāj al-Dīn al-Subkī, *Mu'īd*, p. 50. Al-Subkī notes that a judge may rule that a contract is valid if the product sold has been amply described, on the grounds that descriptions are as valid as actual seeing. This does not prevent a subsequent judge, however, from invalidating the contract on some other grounds.

been established before me that (judge) so and so ruled such and such." (T.183) My understanding of these statements is that the "enforcer" in question is the principal judge, e.g., the Chief Justice. For after stating that these pronouncements do not constitute rulings, al-Qarāfī adds:

> On the contrary, if he [the enforcer] believes that the reported ruling is in violation of consensus, it is proper for him to say, "It has been established before me that such and such was established before judge so and so;" for wrong and inadmissible actions may be established before the (principal) judge, so that he can arrange for the judge (responsible for these irregularities) *to be disciplined or removed from office* . (T.183) (emphasis mine)

D. The Guilds of Law and the Judicial Set-Up

In his *Mu'īn al-Ḥukkām* , the Ḥanafī jurist, 'Alā' al-Dīn al-Ṭarābulusī (d.844/1440) indicates that the above arrangement of the judiciary could lead to serious problems, particularly where the principal belonged to one guild of law and his deputy to another.[43] There being prior to the year 663/ 1265 only one Chief Justice, a Shāfi'ī, who appointed deputies from the remaining schools, the danger posed by this guild-disparity was immanent enough.[44] To make matters worse, however, there was a view espoused exclusively in the Shāfi'ī school according to which principals were not obliged to enforce rulings of deputies with which they disagreed.

According to al-Ṭarābulusī, the clear position of the Ḥanafī school was that whenever a principal was presented with a ruling of a deputy from another school, he was bound to enforce it, even if it went against the principal's school. He notes, however, that other scholars outside the Ḥanafī school disagreed with this principle, holding that to force the principal to enforce such a ruling was tantamount to forcing him to give a ruling which

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[43] 'Alā' al-Dīn Abū al-Ḥasan 'Alī b. Khalīl al-Ṭarābulusī, *Mu'īn al-ḥukkām fīmā yataraddadu bayna al-khaṣmayn min al-aḥkām* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī and Sons, 1393/1973), p.52-3.

[44] Ibn Iyās confirms the fact that Ibn bint al-A'azz "used to appoint and dismiss deputies from the remaining schools at his own discretion, without having to consult the Sultan." See *Badā'i'* , 1:273.

he believed to be incorrect (presumably on the understanding that deputies rule on their principal's behalf). Therefore, they held, in such a case the principal was simply to "stop short" (*yaqif*), neither implementing nor overturning the ruling, apparently leaving the case pending. Al-Ṭarābulusī observes that such "stopping short" was tantamount to overturning the ruling and this, to his mind, rendered such action illegal. He goes on to state explicitly that he has never known anyone in the Ḥanafī school to endorse the "stopping short" view.[45]

According to the Ḥanbalite, Ibn Qudāmah (d.620/1223), if a judge is presented with another's ruling, he is not to overturn it, "unless it violates a univocal verse of the Qur'ān, a hadith or consensus." [46] Ibn Qudāmah cites no disagreements in the Ḥanbalī school on this point.

In the manual for judges written by the Mālikī jurist, Abū al-Walīd al-Bājī (d.495/1101), the position given for the Mālikī school is that "a judge must (always) implement (*yunaffidh*) what is communicated to him by another judge, whether he (the second judge) agrees with this, according to his own school, or not." [47] Al-Bājī is quick to add, however,

> This holds as long as what is communicated is an actual ruling that has already been handed down. If, on the other hand, he simply informs the second judge of the facts established, the second judge should rule only in accordance with his own school. This is the position of our mentors.[48]

It was, again, in the Shāfi'ī school, however, that disparity between the school of a principal and his deputy became a problem. According to Ibn Abī al-Dam (d.642/1244),

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[45]Al-Ṭarābulusī, *ibid.*

[46]*Al-Mughnī*, 9:56.

[47]Abū al-Walīd b. Khalaf b. Sa'd ibn Ayyūb b. Wārith al-Bājī, *Sharḥ fuṣūl al-aḥkām wa bayān mā maḍā bihi al-'amal 'ind al-fuqahā' wa al-ḥukkām* (Arabic Mss. no. 142 Fiqh Mālikī, Dār al-Kutub al-Miṣriyah), fol. 51, verso.

[48]*Ibid*.

himself a Shāfi'ī who served as judge and spent some time in Egypt, there were two positions in the Shāfi'ī school. According to the first, if a judge took over from a predecessor from another school, he was to uphold the latter's rulings, even if these went against his school. Thus, for example, if a Shāfi'ī found that a Ḥanafī judge (according to whom wine is a valuable commodity permitted to Jews and Christians (*dhimmī*s)) had jailed someone in lieu of payment for destroying a *dhimmī* 's wine, the Shāfi'ī was not to overturn this ruling, even if he did not consider wine valuable; he was rather to uphold this decision as the Ḥanafī's legitimate juristic choice. The second view was that of "stopping short" (*tawaqquf*), according to which if the Shāfi'ī disagreed with the ruling of a predecessor or deputy, he was not to enforce it. Thus, in a case such as that involving the *dhimmī* 's wine, a Shāfi'ī judge might seek to effect a compromise (*ṣulḥ*) between the litigants. But under no circumstances would he be bound to uphold the Ḥanafī ruling.[49]

E. Ibn bint al-A'azz's Stopping Short

The "stopping short" (*tawaqquf*) attributed to Ibn bint al-A'azz apparently occurred at that stage in the judicial process where a deputy judge's ruling would normally be confirmed and enforced. By refusing to do so, however, the Shāfi'ī Chief Justice effectively overturned these would-be rulings. That this "stopping short" had become a problem in al-Qarāfī's day is clearly reflected in his *al-Furūq* . There he states that the majority from all the guilds agree that new arrivals and principals must enforce the rulings of their predecessors and deputies, regardless of whether they agree with these decisions or not. "But," he then laments,

> one of the Shāfi'īs 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

[49]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), p. 74. Ibn Abī al-Dam was born in Aleppo in 538/1143. He travelled to Baghdād, where he learned law. He dictated hadith in Cairo and many parts of Syria. He served as judge in Hamadhān. See *Shadharāt*, 5:213.

> to enforce it nor overturn it; he simply leaves the matter as it is (*yatrukuhu 'alā ḥālih*). (F.2:104)

It was this exclusivist policy that raised the ire of the remaining guilds in Egypt, culminating in a call for changes that would protect their views from being overturned. This call was preceded, however, by a scholarly protest, the most eloquent constituent of which was al-Qarāfī's *Kitāb al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām*.

IV. The Mālikī Predicament Under Ibn bint al-A'azz

Of all the guilds of law in Egypt, the Mālikīs seem to have been the most susceptible to the exclusivist policies of Ibn bint al-A'azz. At one point, for example, the Chief Justice is reported to have remarked:

> 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 endorsed in my guild is such and such." I remain silent, not uttering a word. Then he goes and adjudicates the case. Then when he is reproached (for having given this ruling) he exclaims, "I gave this ruling only after having reviewed it with judge Tāj al-Dīn (Ibn bint al-A'azz)!".[50]

No such remarks are related about judges from the other schools, not even the Ḥanbalī. A major factor contributing to this antipathy towards Mālikī views seems to have been Ibn bint al-A'azz's close relationship with al-'Izz ibn 'Abd al-Salām. The latter was openly critical of the Mālikī tendency to go beyond the four corners of scripture, as he was also hostile towards 'concessions' made under the pretext of the corporate status of the guilds and the doctrine of two-tiered orthodoxy. However, al-'Izz's influence alone cannot account for Ibn bint al-A'azz's attitude; for al-'Izz undoubtedly influenced other Shāfi'īs who sat as Chief Justice prior to Ibn bint al-A'azz, Chief Justices who apparently did not

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[50] *Raf'*, 2:382. Again, the whole point of al-Qarāfī's campaign was that as long as the Mālikī judge's ruling was endorsed *by the Mālikī school*, there was neither need nor justification for reprimanding him. See "In Defense of Two-Tiered Orthodoxy," below, p.88ff.

pursue the latter's exclusivist policy. There must have been something particular, then, about the personality or experience of Ibn bint al-A'azz that motivated his actions. I turn now to a brief profile on him.

A. Ibn bint al-A'azz

Born in 604/1207, 'Abd al-Wahhāb ibn Abū al-Qāsim Khalaf ibn Abū al-Thanā Maḥmūd b. Badr al-'Alāmī, better known as Ibn bint al-A'azz, lost his father at a very young age. There is evidence suggesting that he was originally born to a prominent Mālikī family. After his father's death, he was taken into the care of his maternal grandfather, al-A'azz Fakhr al-Dīn Ibn Shukr, who raised him. This al-A'azz Ibn Shukr was a Mālikī judge and *wazīr* and the stepfather of the tempestuous Mālikī *wazīr*, Ṣafī al-Dīn Ibn Shukr, whose mother married al-A'azz after his natural father's death. It was through Fakhr al-Dīn Ibn Shukr that Ibn bint al-A'azz got his name, "the son of the daughter of al-A'azz".[51] For reasons that remain entirely unknown, however, Ibn bint al-A'azz subsequently broke away from his Mālikī family and became a Shāfi'ī. In doing so he began a long line of prominent Shāfi'ī judges.[52]

As a Shāfi'ī, Ibn bint al-A'azz held some of the most important positions in the Mamlūk state, including that of *wazīr* under al-Malik al-Mu'izz,[53] al-Malik al-Manṣūr,[54] and al-Malik al-Muẓaffar Saif al-Dīn Qutuz.[55] He is said to have been an able jurisconsult, who, had he devoted himself solely to the religious sciences, would have surpassed the

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[51] *Raf'*, 2:375-6. On the Mālikī *wazīr*, Ṣafī al-Dīn Ibn Shukr, see *Khiṭaṭ*, 2:371-3. If Ṣafī al-Dīn's mother was also the mother of Ibn bint al-A'azz's mother (which is not certain, since Fakhr al-Dīn could have had more than one wife), Ibn bint al-A'azz would also be the nephew of Ṣafī al-Dīn, whose cruelty and vindictiveness al-Maqrīzī describes as almost reaching the point of madness. See *Khiṭaṭ*, 2:372-3.

[52] See, for example, the list of Mamlūk judges in Kamal S. Salib's "Listes chronologiques des grands cadis de l'egypt sous les mamelouks," *Revue des etudes islamiques* (1957), p.82 ff.

[53] *Sulūk*, 1:404.

[54] *Ibid*, 1:405.

[55] *Ibid*, 1:417.

leading Shāfi'ī jurist of his day, al-'Izz ibn 'Abd al-Salām. He taught Shāfi'ī law at the Ṣāliḥiyah college and at the mausoleum of Imām al-Shāfi'ī.[56]

Despite his involvement in the turbulent politics of the day, Ibn bint al-A'azz managed to maintain the reputation of a just and incorruptible Chief Justice, following his assumption of that post for the first time in 654/1256.[57] However, the thing that impressed his biographers most was his extremely stern and unbending character, a trait which he apparently acquired as a child. Ibn Ḥajar, for example, relates a rumor that Ibn bint al-A'azz never had a childhood. When the other students would complete their studies and take time out for fun and games, young Tāj al-Dīn would never join them. And, "when they saw him coming, they would abruptly end their playing, in awe of him."[58] This stern disposition accompanied Ibn bint al-A'azz to the bench. In his rulings he was said to be gratuitously severe, a man never given to compromise.[59] When he died in 665/1266, ambivalence toward him, born of his uprightness alongside his sometimes partisan policies, was expressed in a tercet eulogizing him.

> It has pleased us that the judges are three
> Because you Tāj al-Dīn are the fourth of them
> By them the pillars of Islam are made sound
> And how could they not be?; they are its foundation
> So many licences and duties they have made known to us
> Which guide us, indeed, like rising stars
> So despair not that God has made broad the path to salvation
> Upon knowledge stand our *madhhab*s, and God is magnanimous
> Opinions have varied, but the religion is one;
> all of these revert to a view of truth
> This is a difference that exists for the sake of ease
> Just like the difference between the fingers on the palms.[60]

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[56]See al-Subkī, *Ṭabaqāt*, 5:134.

[57]*Raf'*, 2:377.

[58]*Ibid*, 2:376.

[59]*Sulūk*, 1:472.

[60]*Raf'*, 2:383. This poem is by Sharaf al-Dīn al-Būṣīrī (608/1212-696/1296), author of the famous panegyric of the Prophet, "*al-burdah*". The sources give no information on his *madhhab* affiliation. However, he was from al-Qarāfī's North African Berber tribe of Sanhājah, which raises the likelihood that he was a Mālikī. See Muḥammad b. Shākir al-Kutubī, *Fawāt al-wafāyāt wa al-dhayl 'alayhā*, 5 vols. ed. Iḥsān 'Abbās (Beirut: Dār al-Thaqāfah, no date), 3:362-9; Al-Ṣafadī, *al-Wāfī*, 3:105-12; *Shadharāt*, 5:432.

B. Ibn bint al-A'azz: Protege of al-'Izz ibn 'Abd al-Salām

The sources indicate that Ibn bint al-A'azz was a protege of 'Izz al-Dīn ibn 'Abd al-Salām . When al-'Izz retired from public life and was consulted about having his sons succeed him in his posts, he responded, "None of them are suited for the[se posts]; but they (the posts) would suit Tāj al-Dīn Ibn bint al-A'azz."[61] Ibn al-'Imād reports that Ibn bint al-A'azz became Chief Justice specifically at the behest of al-'Izz (*bi ta'yīni 'sh-shaykhi "izzi d-dīni 'bni 'abdi 's-salām*).[62] Obviously, al-'Izz saw in the younger Ibn bint al-A'azz an able proponent of some of his own ideas, including some that conflicted with al-Qarāfī's notion of two-tiered orthodoxy. In particular, al-'Izz and al-Qarāfī differed fundamentally in their understanding of the corporate status of the guilds, on the question of whether better substantiated interpretations of scripture automatically dislodged views endorsed by the guilds, and on the question of "countervailing considerations" (*mu'āridat/s. mu'āriḍ*), on the basis of which scriptural injunctions could be set aside.

V. Between al-Qarāfī and al-'Izz ibn 'Abd al-Salām

A. Scripture versus the Corporate Status of the *Madhhab*

At bottom, the conflict between al-'Izz and al-Qarāfī revolves around the question of *ijtihād* versus *taqlīd* . This issue will be treated more thoroughly in chapters three and four below.[63] For now, suffice it to say that, in the context of 7th/13th century Egypt, al-Qarāfī's disacknowledgment of *mujtahids* was due in no small part to the immediate consequences that acknowledging them would pose for the politically weaker guilds. For to acknowledge a Chief Justice (or anyone else) as a *mujtahid* would also be to acknowledge his right to second-guess deputy judges on the basis of his own subjective

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[61] *Raf'*, 2:253.
[62] *Shadharāt*, 5:319..
[63] See below, p.115ff., esp. p.134.

judgments. Consequently, only rulings that satisfied *his* view of correctness would pass judicial muster. The absence of *ijtihād* , on the other hand, would grant a broader measure of protection to the politically weaker guilds, since, under such an arrangement, there could be no 'superior' interpretations claiming the right to displace their views.

As mentioned earlier, toward the latter part of his life, al-'Izz is said to have transcended the Shāfi'ī system altogether and insisted on interpreting scripture directly, according to his own lights.[64] Similarly, scripture came to be the starting point and sole standard in his assessments of the legal doctrines of the sister guilds. In this regard he insisted that 1) *ijtihād* was an obligation upon all jurists; 2) only those views shown to comport *best* with scripture had the right to protection; and 3) where a guild's view was found 'weak', it was to be abandoned in favor of the 'stronger' interpretation. For al-'Izz, the *madhhab* was not a corporate entity that provided automatic protection for its members' views; nor did it automatically authorize them to act on these doctrines. Rather, all views were to be scrutinized on their own merits, and individuals were to follow the view best substantiated by scripture, regardless of the dictates of their school of law.[65]

> Question: What qualifies one for the post of mufti? What renders one deserving of such a post?
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> Response: It is a precondition for the post of mufti and judge that one be a *mujtahid* in the principles of the law (*uṣūl al-sharī'ah*), knowledgable of the sources of the law. And if one is unable to attain this, then he should be a *mujtahid* in the doctrine of one of the schools of law. And if he is unable to attain this, he may give responsa concerning

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[64] See above, p.40-1.

[65] It has been pointed out that al-Qarāfī was an Ash'arī. Al-'Izz's brazen vigilance and his position on *ijtihād*, might, on the other hand, give the impression that he was a staunch Traditionalist. Wael Hallaq, for example, has shown that it was the Traditionalist Hanbalites above all others who denied even the theoretical possibility of the extinction of *mujtahids*. See *Gate*, p.23. However, al-'Izz's *Fatāwā* appear to indicate that he was an Ash'arī. At one point, for example, he includes the Traditionalist doctrine of God's mounting the Throne in His essence, attributed to a certain Abū Zayd al-Mālikī, among the heretical theological innovations (*bida'*). See *idem*, *Fatāwā sultān al-'ulamā' al-'izz ibn 'abd al-salām*, ed. Muṣṭafā 'Āshiq (Cairo:Maktabat al-Qur'ān, n.d.), p.103.

> matters about which he is absolutely certain and has no doubt .... [66]

> Question:Should a mufti ask a petitioner (*mustafti*), "What is your school of law?; if you are a Ḥanbalī, the ruling is such and such; but if you are a Shāfi'ī, the ruling is such and such." Or should the mufti simply cite what he believes to be the correct ruling, according to his own school?
>
> Response: The mufti should not ask about the petitioner's school. This is the practice of the Companions, Successors, and muftis, ancient and modern -- *especially if the view of the petitioner's school is weak, deficient*. [67]

For al-'Izz, then, whenever a jurisconsult was capable of *ijtihād* -- and all jurisconsults were to strive to attain this level -- the results of his earnest study and what he believed to be the intent of scripture were to take precedence over all existing views. The primary obligation of jurisconsults was not to the guild to which they belonged but to God and the faithful communication of His will. The mere fact, then, that a view had been endorsed by one of the guilds rendered it neither correct, nor authoritative, nor protected, nor unassailable.

Al-Qarāfī, on the other hand, had a different perspective. To him, the position of al-'Izz was fine as long as one was a Shāfi'ī, given the political situation of the times. But it was no secret that ultimately the destiny of a view would be determined not by its intrinsic quality but by the judgments passed on it by the holders of official power. 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 of scripture that determined the result. And here it is important to note that it was not merely the interpretation of any *mujtahid* that mattered; it was only the interpretation of the *mujtahid* in power.

66*Ibid*, p.127.

67*Ibid*, p. 106. The italicized segment is typical of al-'Izz's attitude as a whole. See also, however, *ibid*, p. 38, where he states: "It is permitted to (any layman) to follow any one of the four Imāms, may God be pleased with them. And it is permissible for any (layman) to follow any one of them on one question and another on another. And it is not obligatory to follow any one in particular on every question. But hunting for licenses (*tatabbu'u 'r-rukhas*) is forbidden."

One example will clarify 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 guardian (*walī*), usually the father.[68] In al-'Izz's collection of responsa, however, one reads the following:

> Question: Is it permissible for a Shāfi'ī to approve a ruling which he does not believe to be permissible (*hal yajūzu li 'sh-shāfi'ī 'l-madhabi tajwīzu qaḍīyatin la ya'taqidu ḥallahā*)? (For example, if he is presented with) a Ḥanafī's marriage of a girl who has no father or grandfather, or with testimony to the effect that the marriage was contracted based on the girl's consent.
>
> Response: If he follows the dissenter (*in qallada'l-mukhālifa*) in the latter's position [on this matter], he may do so; if not he may not.[69]

In practical terms, then, al-'Izz's doctrine amounted to the following: If the Chief Justice was a Ḥanafī (or followed Abū Ḥanīfa on this particular question), this marriage would pass judicial muster; but if he was a Shāfi'ī who did not endorse Abū Ḥanīfa's point of view, it would not. Clearly, however, the question here is not simply one of valid *ijtihād* ; for Abū Ḥanīfa's *ijtihād* is obviously valid to him and the Ḥanafīs. The question is rather one of *whose ijtihād.* And under the prevailing arrangement the answer had to be that it is the *ijtihād* of the *mujtahid* in power.

This is the context in which al-Qarāfī's alternative approach must be understood. For al-Qarāfī, the starting point is not scripture per se but the principle that as corporate entities the views of all of the guilds are protected and considered valid unless proven otherwise. To be sure, al-Qarāfī admits that subjected to close scrutiny all of the guilds will

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[68]See Ibn Rushd, *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*, 2 vols. (Beirut: Dār al-Fikr, no date) 2:7. The Ḥanafīs base their opinion on the fact that in the Qur'ān God attributes the act of marriage to women via the transitive verb *n-k-ḥ* : *an yankiḥna azwajahuna* [2:232]; and *an tankiḥa zawjan ghairah* [2:230]. They also adduce an accepted hadith of the Prophet in which he says, "Matrons have more rights over themselves than do their guardians; virgins, however, should seek counsel, and their approval is their silence."

[69]Al-'Izz, *Fatāwā*, p.41.

be found to contain views in which it is not permissible to follow the *mujtahid*-Imāms. (T.129) And whenever this proves to be the case, it becomes obligatory to switch guilds, either on the individual question, or altogether. (T.225) But al-Qarāfī differs with al-'Izz in that he sees a fundamental difference between 'wrong' and 'weak': 'weak' is a much more subjective judgment, which, depending on how far one wants to carry it, may be levied against almost any opposing view; 'wrong', on the other hand, applies only to those views that violate 1) univocal verses of scripture (*naṣṣ*); 2) consensus; 3) a fortiori analogy (*qiyās jalī*); and 4) established legal precepts (*qawā'id*)[70] -- all in the absence of some countervailing consideration (*mu'āriḍ*).[71] (T.128-9; F.2:109) On this criterion, there may be substantial disparity in the degree of strength and weakness among the views endorsed by the guilds. But as constituents of the disputed (*mukhtalaf fih*) tier of orthodoxy, all of these views are authoritative and protected as orthodox law.[72] Unless a view is proven <u>wrong</u> , i.e., unorthodox, it must simply be accepted as authoritative for all who subscribe to it, and the question of its relative strength or weakness must be left to debate and voluntary reconsideration. In this way the views of all the guilds are assured greater protection, especially if it is assumed that there are no *mujtahid*s. For on such an assumption, there can be little second-guessing the guilds, and the number of views proven wrong will thus be far fewer.

An example exemplifying this point of view is al-Qarāfī's response to Qu. no. 17 of the *Tamyīz*. Here the claim of some unspecified jurists is that certain controversial (*mukhtalaf fih*) forms of courtroom evidence, such as the testimony of minors, custom (in support-payment disputes), and the testimony of a lone witness joined by the plaintiff's sworn oath, are so weak as to constitute no evidence at all. The question for al-Qarāfī is thus whether or not rulings based on such evidence may be overturned, on grounds of

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[70]For more on legal precepts, see below, p.163ff.
[71]This criterion for the disputed (*mukhtalaf fih*) of orthodoxy will be treated further in chapter three.
[72]For a more detailed description of orthodox law, see below, p.145-6.

insufficient evidence. (T.68) Al-Qarāfī's response is that controversial evidence is of two types: 1) severely weak (*fī ghāyati 'd-da'f*), and 2) evidence whose admissibility is the subject of "acceptable disagreement" (*khilāf muṭāqarib*). (T.69) "Severely weak" is further defined as that which contradicts precepts of the religious law without a valid countervailing justification. (T.68) In other words, such applies to evidence that is doctrinally wrong, i.e., unorthodox. Rulings made on the basis thereof are therefore to be overturned. However, no one can say of those forms of evidence that are the subject of "acceptable disagreement" that they are so weak as to constitute no evidence at all. "For these are legally valid according to those judges and muftis who subscribe to them." (T.70) Rulings made on the basis of this evidence are thus valid and must be upheld. Claims of inadmissibility are valid, again, only "where a judge rules on the basis of 'severely weak' evidence, as has preceded." (T.70)

1. Corporate Status Protects and Restricts

On the question of ignoring petitioners' guild affiliation and advising them on the basis of one's own *ijtihād* (or in the absence of that, the view of one's own guild), al-Qarāfī insisted that the position of al-'Izz was thoroughly illegal.[73] Here the disagreement is apparently over the corporate status of the guilds and the degree to which this determines the activities of guild members. Al-Qarāfī wants to impute to the guilds highly defined borders, borders that both protect as well as restrict the movements of individual members. In the *Tamyīz*, for example, he complained bitterly about jurisconsults who would respond according their own views, "even if the petitioner said expressly, 'I am a Shāfi'ī,' or 'I am a Mālikī'." (T.247-8) According to al-Qarāfī, a member of the Mālikī guild is not bound by what al-Shāfi'ī says; nor vice versa. Nor may a Mālikī partake of a thing forbidden according to Mālik's *ijtihād*, even if it is permitted according to al-Shāfi'ī or Abū Ḥanīfa. For it is the consensus of the Community that "God's ruling for both the *mujtahid* and

[73]See above, p.75-6, where al-'Izz's view on advising petitioners from other schools is cited.

those who follow him is the ruling concluded by the respective *mujtahid* " (T.219) --not the conclusions of some other Imām. (T.248) 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 backed by consensus, and it is forbidden for anyone to violate it. (T.220)[74]

This position may appear somewhat extreme and inconsistent with the generally progressive character of al-Qarāfī's thought. One would not have to look very far, however, for a justification: Corporate status, like pregnancy, is a zero sum entity; either it exists in full, or it does not exist at all. If individuals are permitted to violate guild restrictions, what is to stop the government from following their lead? If a Mālikī can claim Shāfi'ī rights and exemptions, what is to stop 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 the testimony of a lone witness?[75]

B. Countervailing Considerations

The second major point of disagreement between al-Qarāfī and al-'Izz was over the permissibility of violating scriptural injunctions and universal principals of law (*uṣūl*) in light of so-called "countervailing considerations" (*mu'āriḍāt* /s.*mu'āriḍ*). Here, however, the conflict stemmed more specifically from a fundamental difference between the Shāfi'ī and Mālikī approaches to law and jurisprudence. It is thus more likely that Ibn bint al-A'azz would join al-'Izz in his criticisms in this regard.

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[74]Concerning the matter of legal eclecticism (*talfīq*), al-Qarāfī gives the Mālikī position as being flatly against it. (T.274) He intimates that at least a good number of Shāfi'īs allowed it (T.250) (probably an opinion he took over from al-'Izz. See *Fatāwā*, p.38 and nt. 65 above). However, al-Qarāfī adds a stipulation: When combining the views of disparate schools, one must not violate consensus. For example, the Ḥanafīs allow women to marry without male guardians; the Mālikīs hold that witnesses are not an absolute prerequisite but that the marriage may be simply announced publicly after the fact. No one has ever allowed, however, marriages with neither a guardian nor witnesses. Such a combination would thus be a violation of consensus. A later Ḥanafī view cited by Ibn al-Humām is supportive of *talfīq*. See *al-Taqrīr* , 3:250-3, along with the commentary of Ibn Amīr al-Ḥājj. The editor of the *Tamyīz* cites as the best modern work in defense of *talfīq* the *'Umdat al-taḥqīq fī al-taqlīd wa al-talfīq* of Sa'd al-Bānī al-Dimashqī (Damascus, 1341/1922). (T.251)

[75]See above, p.48.

The problem begins with the fact that these countervailing considerations were based either on *maṣlaḥah* (articulated broader interests) or the more subjective principle of *maṣlaḥah mursalah* (unarticulated broader interests).[76] These principles had been rejected by al-Shāfi'ī and were an affront to the strong legal positivism which he brought to Islamic law and raised to the level of a canon.[77] For al-Shāfi'ī, law was simply what God said it was. There could be no amorphous concepts, such as justice or morality, hovering above the law as a 'higher standard' to which one could appeal. Justice and morality were simply what God had commanded, and the sole test for a rule's validity was thus not its content but its pedigree.[78] To this end al-Shāfi'ī laid down his famous maxims: "Whenever a hadith proves sound, it is my doctrine."(S.450) And, "Whoever resorts to equity violates God's rightful monopoly as Lawgiver (*mani 'staḥsana fa qad shara'a*)." [79] Al-Shāfi'ī's approach was thus a ruthless deductive syllogism: All scriptural sources are binding; "X" is a scriptural source; The contents of "X" are therefore binding.

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[76]In the *Sharḥ tanqīḥ al-fuṣūl*, p.446, al-Qarāfī divides "broader interests" (*maṣāliḥ*) into three categories: 1) interests whose consideration has been acknowledged in the body of the law (*mā shahida 'sh-shar'u bi"tibārih*); 2) interests whose non-consideration the law has acknowledged (*mā shahida 'sh-shar'u bi 'adami "tibārih*); and 3) interests neither the consideration nor non-consideration of which have been acknowledged by the law. The first type of *maṣlaḥah* al-Qarāfī 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." *Ibid*, p. 391. As an example of the second type, he adduces the allowance of growing grapes, noting that fear of them being used to make wine is a non-consideration acknowledged by the law (*mā shahida 'sh-shar'u bi 'adami "tibārih*). This, however, is known only via inference from the sources. And since these interests can be inferred from the sources, I have chosen to refer to this type of *maṣlaḥah*, along with certain applications of the first, as " articulated broader interests." The third type of *maṣlaḥah* is identified as *maṣlaḥah mursalah*, which I render "unarticulated broader interests," since no direct textual basis at all can be found for them.

[77]By "legal positivism," I refer to the notion that law is simply the command of a sovereign backed by a sanction, and that there is no essential connection between law and morality. This is the basic contention of the leading Legal Positivists, including H. L. A. Hart, John Austin, and Hans Kelsen. See Alan Watson, *The Nature of Law* (Edinburgh: Edinburgh University Press, 1977), p.3.

[78]For more on this point, see Ihsan Bagby, *Utility in Classical Islamic Law: The Concept of Maṣlaḥah in Uṣūl al-Fiqh* (Ph.D. diss., The University of Michigan, 1986), p.11-14.

[79]See Aḥmad b. 'Alī b. Burhān al-Baghdādī, *al-Wuṣūl ilā al-uṣūl*, 2 vols., ed. 'Abd al-Ḥamīd 'Alī Abū Zayd (Riyāḍ: Maktabat al-Ma'ārif, 1403/1983), 2:320

Against this legal positivism of al-Shāfi'ī stood such Mālikī concepts as *maṣlaḥah* and *maṣlaḥah mursalah*. The basic notion underlying these principles was that an overarching aim of the law is to promote the legitimate interests of society and to prevent harm and hardship from coming to it. Where society is found in need of provisions not contained in the law, or where the application of a rule stands to obliterate a legitimate interest or cause undue hardship, *maṣlaḥah* and *maṣlaḥah mursalah* provide remedies: In the latter case, the rule may be set aside; in the former, the needed provision may be applied as bonafide law.[80]

To the Shāfi'īs, of course, "broader interests," "legitimate interests," "harm," and the like were mere weasel words, malleable, self-serving concepts that could mean ultimately whatever one wanted them to. The Mālikīs , meanwhile, fell back on the argument that 1) some of these broader interests had been articulated in the body of the law and were discoverable were the sources but read inductively;[81] 2) there can be no conflict

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[80]An example of this may be seen in Mālik's position allowing that an intentional murderer be flogged one hundred lashes and jailed for a year, even after the victim's family had pardoned him under the provisions of *qiṣāṣ*. Although there was no direct scriptural basis for this, Mālik's motivation was apparently his wish to reconcile the interest of allowing the family to perform a religious act (pardoning the murderer) with the broader interest of protecting society by not allowing murderers to go completely undiscouraged. Al-Shāfi'ī and Aḥmad ibn Ḥanbal, on the other hand, held that the Sultan could not impose such sanctions, since there were no explicit injunctions (*tawqīf*) from the Lawgiver to support this. See Ibn Rushd, *Bidāyat* , 2:303. An analogue to the Mālikī approach in the American Constitutional system might be the allowance of "benign discrimination" on the basis of race, which lies at the basis of affirmative action. This of course violates the "color blind" principle of race neutrality contained in the 14th Amendment. But this is for a "countervailing consideration," namely, to relieve the effects of majority rule on "discrete and insular minorities". See J.E. Novack, *Handbook on Constitutional Law*, (St. Paul, Minn.: West Publishing Co., 1978), p.583.

[81]In the *Sharḥ tanqīḥ al-fuṣūl*, p. 450, al-Qarāfī criticizes an unspecified Shāfi'ī, arguing that the true understanding of al-Shāfi'ī's dictum, "Whenever a hadith proves sound, it is my doctrine," was that this held true only as long as there were no countervailing considerations that might justify or even dictate setting the hadith aside. He goes on to state that one of the impediments to the Shāfi'īs appreciation of and reliance upon countervailing considerations is their inability to read the sources inductively, i.e., to go from the specific to the universal, to go from rules to principals, and to rely on probable inference instead of only strict deductive syllogisms. "And knowing what qualifies as a countervailing consideration is the task of those who are able to infer inductively (*istiqrā'*) from the Sharī'ah, so that their statement, 'There are no countervailing considerations against this hadith,' is assured firm ground. As for the inductive inferences of one who is not an absolute *mujtahid*, they are of no value whatever. Thus, this Shāfi'ī who repeats al-Shāfi'ī's dictum should first acquire the ability to perform inductive inference before brandishing this dictum about. But he is not qualified to do this; and he is thus wrong in his unqualified assertion."

between what is beneficial to man and what God imposes as law, even if these benefits are not explicitly identified in the law.

Regarding articulated broader interests, al-Qarāfī suggests that were one to consider, for example, that in no revelation to any prophet has God ever sanctioned theft and were one to add to this the severity of the penalty for theft in the law revealed to Muḥammad, it would become clear that protection of property is a broader interest that cannot be obliterated, neither due to the lack of explicit rules to cover certain kinds of theft,[82] nor due to myopic application of individual rules, however explicit they might be. (S.392)[83]

In the case of unarticulated broader interests (*mā lam yashhadi 'sh-shar'u bi "tibārih wa la bi ilghā'ih*), al-Qarāfī insists:

> God has sent the 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 inductively (*'amalan bi 'l-istiqrā'*). Thus, whenever we find a thing that is beneficial, we assume it to be a benefit which the law seeks to promote. (S.446)

It was on the basis of these concepts of *maṣlaḥah* and *maṣlaḥah mursalah* that what constituted a countervailing consideration (*mu'āriḍ*) was determined. It was in the light of these countervailing considerations that al-Qarāfī defended the position of his school and insisted that, under the right circumstances, certain scriptural injunctions could be set aside. (T.76,128-9) The following example demonstrates how this principle was applied.

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[82]For example, unprecedented types of theft, such as theft of ideas in the form of copyright and patent violations.

[83]One might recall the unfortunate case tried by Ibn bint al-A'azz of the mansion simultaneously sold and declared *waqf* . The plaintiffs in this case were forced to forfeit their money, despite the fact that it was known that the owner of the mansion had intentionally defrauded them. See above, p.57-8.

It is reported that at the battle of Ḥunayn, the Prophet announced, "Whoever kills an enemy may despoil him." (T.105) Five of the 'canonical' collections, including those of Muslim and al-Bukhārī, contain this hadith, and Mālik also related it in his *al-Muwaṭṭa'* . (T. 105, nt.1) Al-Shāfi'ī accepted it at face value and argued that any time a Muslim soldier killed an enemy, he could automatically despoil him. Mālik, on the other hand, set this hadith aside and held that such was not an automatic right but that one could do so only by direct permission from the Imām. According to al-Qarāfī, Mālik was justified in setting this hadith aside 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 to begin with was not pure. Thus he enters the Hell-fire, and life and religion are lost. This is a grave pitfall, (the avoidance of which) justifies setting this hadith aside. (T.107)

To be sure, this brand of reasoning made al-'Izz see red. In his *Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām*, he poured truculent scorn on the heads of its proponents, whom he saw as placing the subjective judgments of their Imāms above scripture.

> ... 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'tabarah*). And it is not the right of anyone to resort to equity (*laysa li aḥadin an yastaḥsin*), nor to rely upon unarticulated broader interests (*maṣlaḥah mursalah*) ....[84]

> And it is an amazing thing indeed 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; and despite this, he follows him 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. Nay, he may even try to extricate himself from the apparent meanings of the Qur'ān and the

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[84] 'Izz al-Dīn 'Abd al-'Azīz ibn 'Abd al-Salām, *Qawā'id al-aḥkām fī maṣāliḥ al-anām*, 2 vols. ed. Ṭāhā 'Abd al-Ra'ūf Sa'd (Beirut?:Dār al-Jīl), 2:158

> Sunnah, using far-fetched and baseless interpretations, all in defense of his Imām. We have seen these people at the sessions (*majālis*), 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. But he should be more amazed at his *taqlīd* of his Imām, which he has become so used to that he thinks that the truth is limited to the latter's doctrine. Debating with these people is a waste of time and leads to nothing but mutual snubbing and schism, in return for no gain. And I have seen no one leave the position of his Imām in favor of the truth when it appears to him on the tongue of another. Nay, he continues to cling to the view of his Imām, despite his knowledge of it being weak and far-fetched. The best thing to do is not to debate with these people, who, when unable to justify their Imām's position say, "Perhaps my Imām found a proof that I have not found and which I have not been guided to," while the poor thing is unaware that anyone can say this and that the clear proof of his counterpart is preferable. God be glorified! How many are those whose sight *taqlīd* has blinded to the point that they maintain such a view! [85]

In the *Sharḥ Tanqīh al-Fuṣūl* , al-Qarāfī had argued convincingly that the Shāfi'īs were not altogether consistent in their condemnation of subjective judgments.[86] He pointed out that analogical reasoning (*qiyās*), so favorably spoken of by al-'Izz, involved a substantial subjective element. For example, in many cases the ratio essendi (*'illah*) was only tacitly articulated in the sources, or, at times, not articulated at all. This meant that it was often deduced merely on the basis of what a jurist *believed* to be the intent behind a rule -- necessarily a subjective judgment. (S.394, 446, 448). Similarly, all of the schools allow commercial transactions such as *bay' al-salam*, *qirāḍ*, and *musāqāt*, simply because there is a pressing need for them, despite the fact that they all entail an unlawful element of speculative risk (*gharar*) and uncertainty (*jahālah*). (S.392-3)[87] Indeed, despite their

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[85] *Ibid* , 2:159

[86] See, for example, *Sharḥ tanqīḥ al-fuṣūl*, p.446-7, where he states that the Shāfi'īs, Imām al-Ḥaramayn al-Juwaynī and al-Ghazzālī, openly proclaimed rulings that even the Mālikīs would not support, based on *maṣlaḥah mursalah* , "despite the fact that these two are severely critical of us [Mālikīs] for our reliance on *maṣlaḥah mursalah* ."

[87] *Bay' al-salam* is where a person forwards money to a farmer to assist the latter in planting his crop to receive a portion of that crop when it is harvested. See Aḥmad b. Muḥammad al-Ṣāwī, *Bulghat al-sālik li aqrab al-masālik ilā madhab al-imām mālik* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī and Sons, 1372/1952), 2:93. *Qirāḍ* is basically profit sharing. See *ibid*, 2:245. *Musāqāt* is where a person agrees to water the crops of

condemnation of *maṣlaḥah* (and *sadd al-dharā'i'*, "cutting off the means" [88]) and their claims that these were exclusively Mālikī idiosyncrasies, close examination showed that all of the schools of law relied on these very principles.

> For they practice analogy (*qiyās*), drawing distinctions between apparently similar cases, according to what appears appropriate (*munāsib*) to them, without looking for any textual basis (for these distinctions). And this is *maṣlaḥah mursalah* exactly. (S. 446)
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> And among the things that confirm the propriety of *maṣlaḥah mursalah* is the fact that the Companions did many things sheerly for the sake of broader interests, not on the basis of any textual proof. For example, compiling the entire Qur'ān in written form, while there was no command to do so and no precedent; and Abū Bakr's appointing 'Umar as Caliph, while there was no command to do so and no precedent; and 'Umar's settling the matter of succession by setting up an electoral council (*shūrā*)..... (S.446) [89]

Subjective judgments, then, according to al-Qarāfī, exist in the law. The issue is thus not as simple as condemning all subjective judgments as inadmissible. The issue, rather, is one of deciding which of these are valid and which are not. [90] But this raises once again the perennial problem of who is to decide. Who is to decide, for example, that a Mālikī judge's ruling denying a soldier the right to despoil his fallen enemy is based on an invalid subjective judgment? In the context of al-Qarāfī's 7th/13th century Egypt, the

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another in return 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 not being sold at a fair return.

[88] *Sadd al-dharā'i'* is the principle that denies one the right to use legal means to obtain illegal ends. See Ihsan Bagby, *Maṣlaḥah*, p.213ff. On the basis of this principle, Mālik disallowed a number of transactions, particularly dodges used to take interest on loans. One such example is his position on *bay' al-ājāl* . *Bay' al-ājāl* may be summarized as follows: "A" sells "B" a commodity (usually something of negligible value) for for a needed sum of money, say, $100.00. "B" pays this amount on the spot. "B" then re-sells the commodity back to "A" for $115.00, payable in one month. The net result is that "A" receives $100.00 now, and pays $115.00 in one month. Mālik forbade these transactions as an illegal means to take interest on loans. Al-Shāfi'ī, on the other hand, allowed this unconditionally, on the view that it constituted two independent legal contracts of sale, the intention behind which could not be second-guessed. See al-Ṣāwī, *Bulghat*, 2:40ff.

[89] Al-Qarāfī makes a similar argument in the case of *sadd al-dharā'i'* . He ends his discussion by stating: "The truth of the matter, then, is that we (Mālikis) rely on *sadd al-dharā'i'* more than others, not that *sadd al-dharā'i'* is exclusive to us. " See *Sharḥ*, p.446.

[90] Interestingly enough, al-'Izz himself lists a number of cases in which the dictates of straightforward analogy may be forsaken in light of broader interests. See *Qawā'id*, 2:162ff.

answer would have to be, once again, the Shāfi'ī Chief Justice. There would be only two possible solutions to this problem: 1) to multiply the number of Chief Justices, thereby mitigating the problem of *madhhab*-disparity between deputies and principles; or 2) adhere faithfully to the principle of two-tiered orthodoxy. The first solution would require intervention by the government, an ominous liability which any enlightened jurist could only dread. Enter, then, al-Qarāfī's defense of two-tiered orthodoxy.

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The judicial arrangement of Ayyūbid and early Mamlūk Egypt, according to which the principal of all other judges on the circuit was a Shāfi'ī Chief Justice, exposed judges from the remaining guilds of law to the danger and humility of having their rulings overturned. This liability appears to have laid dormant until the ascension of the Shāfi'ī, Tāj al-Dīn Ibn bint al-A'azz, to the chief judgeship, beginning in 654/1256. Under Ibn bint al-A'azz, only those rulings that were in close enough conformity with his Shāfi'ī view were confirmed and enforced as law.

This partisan and exclusivist policy had, or stood to have, a disproportionately bad effect on the Mālikīs of Cairo because:1) of the major schools in Egypt at the time, the Mālikīs were still the Shāfi'īs' chief rivals for preeminence; 2) the Mālikīs were, nevertheless, without firm political backing; and 3) there were major differences -- perhaps more pronounced than those between any other two schools -- between the Mālikī and Shāfi'ī approaches to law and jurisprudence.

As headmaster of the Mālikīs of Cairo, it fell upon al-Qarāfī to rise and defend the corporate status of the Mālikī guild of law. His *Tamyīz* and his defense of two-tiered orthodoxy are testimonies to this brilliant effort. I shall turn now to a more detailed treatment of al-Qarāfī's defense of two-tiered orthodoxy.

Chapter Three

In Defense of Two-Tiered Orthodoxy

General Remarks

There are two contexts in which al-Qarāfī's defense of two-tiered orthodoxy must be understood. The first is the immediate context of 7th/13th century Egypt and the problem of Chief Justice Ibn bint al-A'azz overturning substantively valid rulings. The second is the broader context of the running history of Islamic law, particularly through its evolution from the regime of *ijtihād* to the regime of *taqlīd* . It is only by reading the *Tamyīz* against this broader background that one comes to understand why al-Qarāfī sees the problem in terms of a failure to distinguish legal responsa (*fatāwā*) from judicial decisions (*aḥkām*), and why and how this obscurity comes about.[1]

It may help, in attempting to understand the main point of al-Qarāfī's campaign, to consider via comparison the views of an important American legal thinker, Jerome Frank (d.1957). In his revolutionary work, *Law and the Modern Mind* (which became the basis for American Legal Realism), Frank defended the practice of judges relying on their enlightened discretion in adjudicating cases. His argument was that this is what the judicial function had always been about, even if many in the legal community were unwilling to admit it. According to Frank,

> 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.[2]

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[1] See below, "From *Ijtihād* to *Taqlīd* : The Pre-Qarāfian Backdrop," p.115ff.
[2] Jerome Frank, *Law and the Modern Mind*, p.123.

The upshot of all of this for Frank was that to challenge the ruling of a judge was to challenge not the law itself but, rather, the judge's interpretation of the law, which, according to him, was always more a matter of discretion than anything else.[3] By contrast, for al-Qarāfī, judicial decisions were based not on the individual discretion of the presiding judge but on the view of his *madhhab*, to which he was bound. On this understanding, to challenge the decision of a judge was thus to challenge not his personal discretion but rather the law itself, as articulated in his school. And since the interpretation of each school of law was, ceteris paribus, orthodox, all such challenges were, according to al-Qarāfī, illegal.

I. Two-Tiered Orthodoxy: Theory

There are two categories of rules in Islamic law: 1) universally agreed upon (*mujma' 'alayh*); and disputed (*mukhtalaf fih*). Universally agreed upon rules are those whose validity is established via the unanimous consensus of the Community's doctors of the law. Disputed rules, on the other hand, are those whose validity is acknowledged by some doctors, yet contested by others; for example, the Mālikīs, Shāfi'īs and Ḥanbalīs hold the presence of a male guardian to be a prerequisite to a valid marriage; the Ḥanafīs, meanwhile, contend that such is not a prerequisite. According to the provisions of two-tiered orthodoxy, the rules from both of these categories -- universally agreed upon and disputed -- are equally orthodox; i.e., equally authoritative and equally protected. The only difference is that universally agreed upon rules are binding upon the entire Community,

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[3]In criticizing Salmond and others who denied both the fact and the 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 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*, p.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*, p.137-8.

whereas disputed rules are orthodox only for those members of the Community who subscribe to them.

At bottom, the validity of two-tiered orthodoxy rests upon a number of consensuses.[4] On the one hand, where scripture provided no univocal evidence (*dalīl qaṭ'ī*) on a question, each doctor had an individual obligation to perform *ijtihād*, to exert his utmost effort to understand the intent of scripture. Where this collective effort ended in no disagreement, there was consensus, and the agreed upon conclusion was binding upon the entire Community. On the other hand, where the efforts of the *mujtahid*s resulted in disagreement, the view of each *mujtahid* had also to be recognized as orthodox, both for him and for those who followed him. For, according to al-Qarāfī, there was also consensus to the effect that each *mujtahid* , *as well as those who followed him*, was bound by what he believed to be correct.

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[4]As will become clear, the validity of al-Qarāfī's entire campaign rests on the validity of these claims of consensus. It should be noted, however, that even if these claims prove erroneous, this would not mean that al-Qarāfī deliberately misrepresented the Community. For there are no synods or councils to determine consensus in Islam and no records verifying it. Consensus is rather the absence of any *known* dissent. This is reflected, for example in the very precise formulation of Imām Aḥmad b. Ḥanbal, who once stated, "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." See Muḥammad Abū Zahrah, *Tārīkh al-madhāhib al-islāmīyah* (Cairo:Dār al-Fikr al-'Arabī, n.d.), p.531; *idem*, *Ibn Ḥanbal* (Cairo:Dār al-Fikr al-'Arabī, n.d.), p.276. It seems, however, to have been the common practice that whenever a scholar researched a matter and found no disagreement, he would claim consensus. This led to a problem of false and contradictory claims, a problem not lost on medieval jurists themselves. Ibn Taimīya, for example, once wrote: "We have already cited some cases in positive law concerning which consensus has been claimed, according to the reports of the great jurisconsults who were themselves well-versed in the science of non-consensus (*khilāf*). [And these claims were made] despite the fact that these reports were self-contradictory and the cases spoken about still the subject of controversies unknown to these great men. And there may have been others who even made claims of consensus that contradicted the claims of these men, such as may be found among the Great Ancestors (*al-salaf*), such as the statment of al-Shāfi'ī, 'I know of no one who accepted the testimony of a slave,' and then before him the statement of Anas b. Mālik, 'I know of no one who did not accept the testimony of a slave.' And similar is Ibn Ḥazm's claim of a consensus invalidating analogy, while the majority of legal theoreticians cite a consensus affirming its validity," See Ibn Taimīya, *al-Nubūwwāt* (Cairo: Salafīyah Press and Library, 1966), p.108. As these comments make clear, Consensus contains a substantial and potentially dangerous subjective element. It is perhaps for this reason that some modern scholars, particularly the *Salafīyah*, have come to accept only the consensus of the Companions or the more universal consensus (including laymen) on such basic matters as the obligation to pray. See Muḥammad Sulaymān al-Ashqar, *al-Wāḍiḥ fī uṣūl al-fiqh li al-mubtadi'īn* (al-Kuwayt:al-Dār al-Salafīyah, 1403/1983). p.112-14.

> The Community is in unanimous agreement (*ijmā'*) that whenever a *mujtahid* performs *ijtihād* and concludes a ruling, God's ruling, both in the case of the *mujtahid* and those who follow him, is the ruling concluded by the *mujtahid* . (T.219)

In other words, while a single question might elicit multiple and even contradictory responses, each response was authoritative for the respective *mujtahid* who advocated it. This applied, according to al-Qarāfī, as long as this response did not violate 1) univocal texts of scripture; 2) consensus; 3) a fortiori analogy (*qiyās jalī*); and 4) established legal precepts (*qawā'id*), without some valid countervailing justification (*mu'āriḍ*).[5] As long as a view did not violate this four-part criterion, it was a constituent of the disputed (*mukhtalaf fihi*) tier of orthodoxy and had to be acknowledged as such by the entire Community. The Community had thus to acknowledge, for example, that marrying a woman who does not have a male guardian could be licit to one group of Muslims while at the same time illicit to another, "just as God made eating the meat of dead animals (*maytah*) permissible to one compelled by necessity but forbidden to one who has an alternative." (T.221) Moreover, despite their many differences, all of the schools of law were described by al-Qarāfī as "a way to God." (T.142)

Having said this much, it is important to note that the *mujtahid*s of whom al-Qarāfī spoke were none other than the eponyms of the four orthodox schools: Mālik, al-Shāfi'ī, Abū Ḥanīfa, and Aḥmad b. Ḥanbal. It is important to understand this in order to understand the fact that, according to al-Qarāfī, a view in his time acquired orthodox status not because its advocate was a *mujtahid* but because its advocate was a member of one of the orthodox *madhhab*s, i.e., a follower of one of the *mujtahid*s par excellence. According to al-Qarāfī, it is not *ijtihād* -- there being no *mujtahid*s in his day -- but the *madhhab* , the guild of law, that is the efficient cause determining orthodoxy. This position is supported

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[5]See above, p.77-8.

by yet another consensus cited earlier by Abū al-Husayn al-Baṣrī (d.426 a.h.) which al-Qarāfī appropriates to the new order. According to al-Qarāfī, not only does consensus sanction the views of each of the schools of law, it also proscribes all doctrines that are extraneous to the views of these four schools.

The consensus cited by al-Baṣrī 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 besides these two are invalid.[6]

On the basis of this consensus, al-Qarāfī maintained 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] gives such a ruling based on the assumption (for example) that the brother is related by sonship while the grandfather is related by paternity, and sonship takes precedence over paternity, we overturn this ruling. And if he is a mufti, we do not follow him. (T.130)

According to al-Qarāfī's interpretation of this rule, even if one claiming to be a *mujtahid* advocated awarding an entire estate to the brother of a deceased, this opinion "would be a violation of consensus; for this third opinion contradicts the validity of that upon which the Community has agreed [i.e., the correctness of only two views]. It is thus itself invalid, because it is impossible for the truth to have escaped them." (S.326)[7]

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[6]*Al-Mu'tamad*, 2:505.

[7]This opinion holding that an entire estate could go to a brother of the deceased to the exclusion of a grandfather is cited in the *Tamyīz* as an example of violating consensus as a constituent of al-Qarāfī's four-part criterion. See *Tamyīz* , p.130.

The disputed (*mukhtalaf fihi*) tier of orthodox law thus consists of all validly deduced views endorsed by any one of the four Sunni guilds on a disputed question of law. The orthodox status of these views is confirmed by consensus. This renders *recognition* of their validity binding upon the entire Community.

Having said this much, it is important to note that the concept of two-tiered orthodoxy goes farther than merely authorizing individuals to act in accordance with the views of their school; two-tiered orthodoxy confers orthodoxy upon these views both as *fatwās and* as judicial decisions (*aḥkām* /s.*ḥukm*). In other words, not only does it authorize individuals to comply voluntarily with the doctrine of their school, it also authorizes judges to impose these doctrines in the form of binding decisions. It is this aspect of orthodoxy, i.e., the orthodoxy of the views of the guilds *as judicial decisions* that al-Qarāfī is seeking to defend in the *Tamyīz* .

II. The Problem from al-Qarāfī's Perspective

In its essential features, the concept of two-tiered orthodoxy was not new. Already as early as the 2nd/8th to 3rd/9th centuries it had been conceded that while a *mujtahid* might be incorrect from a metaphysical point of view, he was ever correct from the standpoint of the religious law, and bound, therefore, by the results of his *ijtihād* . Al-Shāfi'ī (d.202/819), for example, states in his *al-Risālah* that while in reality only one of those searching for the direction of prayer was correct, both were correct "in *ijtihād*." [8] The 3rd/9th century Mālikī jurist, Ibn al-Qaṣṣār al-Baghdādī (d.297/909), who rejected the doctrine, *kullu mujtahidin muṣīb*, [9] insisted all the same that while only one of the

[8]Muḥammad ibn Idrīs al-Shāfi'ī, *al-Risālah*, ed. Muḥammad Sayyid Kilānī (Cairo: Muṣṭafā al-Bābī al-Ḥalabī and Sons, 1388/1969), p.216.

[9]Literally, "every *mujtahid* is correct." There were two versions of this doctrine. According to one, every *mujtahid* was correct in the sense that he accepted the obligation to perform *ijtihād* whenever he was faced with a question for which there were no univocal scriptural directives (*dalīl qaṭ'ī*). According to another version, however, every *mujtahid* was understood to be correct in the substantive content of his

competing *mujtahids* was correct, none of them incurred sin in following their respective conclusions.[10] Al-Ghazzālī (d.505/1111), a staunch proponent of the doctrine, *kullu mujtahidin muṣīb*, stated with no reservations that consuming small amounts of *nabīdh*-wine could be permissible to Zayd (the view of the Ḥanafīs) but forbidden to 'Amr, depending on the results of their respective *ijtihād* .[11] Al-Māwardī (d.450/ 1058) traces this *kullu mujtahidin muṣīb* doctrine back as early as "Abū Yūsuf [113/731-182/798] and a party among the scholars of Iraq."[12] Later, however, with the transfer from the regime of *ijtihād* to the regime of *taqlīd*, individual autonomy was reappropriated to the *madhhab* as a whole, and the doctrine, *kullu mujtahidin muṣīb*, became effectively '*kullu madhhabin muṣīb* '. At any rate, the existence of this and similar doctrines in the early period points up the fact that it was not al-Qarāfī's aim in the *Tamyīz* to *establish* the order of two-tiered orthodoxy; rather, his mission was simply to *defend* what in theory already existed.

Now, in theory also, all substantively valid rulings in cases involving disputed questions of law were immune. This was according to consensus.

> The consensus of all of the Imāms, without exception, is 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 the judge. And it is forbidden for anyone to overturn it. (T.28)

This consensus notwithstanding, the reason that a principal, such as Ibn bint al-A'azz, might overturn a valid ruling lies in his failure, according to al-Qarāfī, to distinguish judicial rulings from legal opinions. This failure is due in turn to "the extreme subtlety" of the dividing line separating the two. This is clearly indicated in a key statement made in al-

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conclusions, whatever they may be. This was the version of *kullu mujtahidin muṣīb* advocated by al-Ghazzālī. See *al-Mustaṣfā*, 2:377-8.

[10]Abū al-Ḥasan 'Alī b. 'Umar, better known as Ibn al-Qaṣṣār, *Muqaddimah fī uṣūl al-fiqh*, fol.16 recto.

[11]*Al-Mustaṣfā*, 2:378. *Nabīdh*-wine is apparently any wine made from other than grapes, the latter being referred to as *khamr*. See Ibn Rushd, *Bidāyat* , 1:345.

[12]See Abū al-Ḥasan al-Māwardī, *Adab al-qāḍī*, 1: 526-7.

Qarāfī's *al-Furūq* , where he argues that those who understand the difference between the *fatwā* and the *ḥukm* know that valid decisions terminate the legal dispute both among the litigants and among the *fuqahā'*, forcing the latter to defer to the view of the judge. "But," al-Qarāfī then laments,

> owing to the fact that the distinction between the two 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 this basic rule, and they have not required that the decisions of judges in cases involving disputed questions of law be enforced. (F.2:106)

My understanding of the genesis of this problem may be summarized as follows. By the 7th/13th century, the legal tradition had evolved to the point of an 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 for the legal (as opposed to factual) content of their rulings judges were bound to the views upheld in the respective guilds of law. When a judge chose as his ruling a valid *fatwā* from among those endorsed in his school, his act of giving judgement transformed this *fatwā* into a binding, unassailable *ḥukm* . Failure to recognize the difference between this view's former status as a *fatwā* and its new status as a *ḥukm* led to the illegal practice of challenging and overturning judicial rulings, these rulings now being treated as if they were still *fatwā*s. The problem, then, became one of recognizing that "*x* " is a legal opinion and may be treated as such, while "*X* " is judicial decision and may not be treated as "*x* ," *despite the fact that "x" and "X" are substantively identical* .

A. The Threat to Two-Tiered Orthodoxy

Confusing the judicial decision with the legal opinion threatens the order of two-tiered orthodoxy. To understand why this is so, it is necessary to understand the basic constitution of both the *fatwā* and the *ḥukm* .

According to the provisions of two-tiered orthodoxy, the view of each guild is valid *both as a fatwā and as a ḥukm* , as long as it does not violate al-Qarāfī's four-part criterion.[13] However, to challenge a view issued as a *fatwā* does not detract from its status as a valid *fatwā*; but to challenge a view in its capacity as a ruling denies it the essential characteristics of a *ḥukm* . This is the point of al-Qarāfī's opening statement in the introduction to the *Tamyīz* , where he writes:

> To proceed: Indeed, there has run over the course of time between myself and some of the notables (from among the jurisconsults) discussions concerning the matter of the difference between the *fatwā*, in the face of which the *fatwā* of the dissenter remains valid and standing (*tabqā ma'ahu futyā 'l-mukhālif*), and the *ḥukm* , which may not be violated by a dissenter (*la yanquḍuhu 'l-mukhālif*)....
> (T.18)

In other words, in responding to a question, a Shāfi'ī and a Mālikī may each give contradictory responsa, while at the same time acknowledging the validity of the other's view as a *fatwā* . For since *fatwās* are by constitution non-binding, neither view cancels the other's status as a valid *fatwā* . Indeed, a petitioner's (*mustaftī*) choice of "A" does not deny him the option of subsequently changing his mind and choosing "B." However, judicial rulings, on the other hand, are by definition *binding* and *unassailable* . Thus if a Shāfi'ī issues a challenge to a Mālikī judge's ruling, he thereby denies it its fundamental constitution as a *ḥukm* . It is thus necessary, in order to safeguard the inviolable status of judicial decisions, to clarify the distinction between the *fatwā* and the *ḥukm* . And it is

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[13]Univocal scriptures, consensus, a priori analogy, and established legal precepts, in the absence of a valid countervailing consideration. See above, p.77-8.

here that al-Qarāfī's *Kitāb al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām* becomes a campaign in defense of two-tiered orthodoxy.

B. An Illustrative Summary

The following hypothetical, in light of the information preceding it, will shed some light on the mechanics of the problem of the *Tamyīz*, as perceived by al-Qarāfī.

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*). However, the Mālikīs, in agreement with their eponym, add an impediment to the wife's right to exercise this option: If at the time she agrees to marry him she is aware that her husband he is indigent and may not always be able to support her and she, despite this knowledge, agrees to marry him, she may not petition for an annulment on grounds of his inability to support her.[14]

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 (his) insolvency, because the harmful effects of his inability to support her are of a recurrent nature ....[15]

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

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[14]See *Tamyīz*, p.146-7; Ibn Qudāmah, *al-Mughnī*, 7:577.

[15] See Shams al-Dīn Muḥammad ibn Aḥmad al-Sharbīnī (d.977/1570), *al-Iqnā' fī ḥall alfāẓ abī shujā'* , 2 vols. (Cairo: Muṣṭafa al-Bābī al-Ḥalabī and Sons, 1359/1940), 2:146-7. The *Iqnā'* is a commentary on the famous Shāfi'ī manual, *Ghāyat al-ikhtiṣār*, of Aḥmad b. al-Ḥusayn ibn Aḥmad al-Isfahānī, better known as Abū Shujā' (533/1138-593/1197). See al-Zirikli, *al-A'lām*, 1:116-7.

a loan in this amount with the husband as the debtor. In other words, repayment of the loan becomes a legal obligation upon the husband, not the wife.[16]

There is disagreement in the Ḥanbalī school. Ibn Qudāmah indicates that the narrations on the authority of Aḥmad ibn Ḥanbal support the position of Mālik. Ibn Qudāmah himself, however, comes out in favor of the position of al-Shāfi'ī, endorsing the view that since the right to financial support recurs daily, it cannot -- unlike dowry, which is a onetime right -- be forfeited permanently.[17]

* * *

Two men -- a husband and a father-in-law -- both tattered and soiled, enter the Ṣāliḥīyah *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."

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16 See 'Abd al-Ghanī b. Ṭālib b. Ḥamādah ibn Ibrāhīm al-Ghunaymī, *al-Lubāb fī 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-Qadūrī al-Baghdādī (362/973-428/1037). See al-Zirikli, *al-A'lām*, 1:212.

17 *Al-Mughnī*, 7:577. Ibn Qudāmah's reasoning is an interesting display of *qiyās*.

The husband happily departs. "But we are migrating north, and this man cannot support my daughter! From where is she to survive?" exclaims the father-in-law. "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 now 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 *fatwā*s 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 his indigence at the time of their marriage, I shall flatly deny her petition and uphold their marital bond."

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 Shāfi'ī mufti 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.

Al-Qarāfī's point in the *Tamyīz* is that the action of the Shāfi'ī mufti at the Ṣāliḥīyah (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 judge was not a *fatwā* but a *ḥukm*. It was thus illegal for the Shāfi'ī to oppose 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 challenging and overturning 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 guild. 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 giving judgment on the theretofore *fatwā* of his school, the Shāfi'ī continued to treat this ruling as if it were still a *fatwā*.[18] And in doing so he violated the provisions of two-tiered orthodoxy.

III. The Solution

Ideally, the solution to the problem of violating two-tiered orthodoxy would be to clarify the distinction between the *fatwā* and the *ḥukm* in such a way that is both theoretically sound and, at the same time, so plainly conceded by the culprits that they would be ever on their guard against violating it. This al-Qarāfī attempts to achieve by enlisting the service of a basic dichotomy maintained in medieval Muslim thought: he

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18In explaining the effect of the judge's act of giving judgment, al-Qarāfī writes in his *al-Furūq*, 2:106: "This, then, is 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 the *Kitāb al-Iḥkām fī al-Farq Bayna al-Fatāwā wa al-Aḥkām*. For that work is devoted entirely to a discussion of this difference alone. But it is laid out over forty questions, including various (other related) issues, so that the intended meaning emerges with the utmost clarity and exactness."

identifies the *fatwā* as a *khabar* (report, simple assertion) and the *ḥukm* as an *inshā'* (i.e., an origination).

A. The *Khabar/Inshā'* Dichotomy

The significance of this dichotomy for maintaining the distinction between the *fatwā* and the *ḥukm* emerges in al-Qarāfī's response to Qu. no. 6, where he identifies fundamental differences between the *khabar* and the *inshā'*.

> 1. The *khabar* is subject to being believed (*taṣdīq*) or disbelieved (*takdhīb*), while the *inshā'* is subject to neither of these.
>
> 2. The *khabar* is not a cause that brings its referent into actual existence, nor does its existence necessitate the existence of its referent. The *inshā'*, 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. (T.48-9)[19]

An assertion (*khabar*), e.g., "Zayd stood up," is not a cause producing the actual standing of Zayd in the real world. At most it produces in the mind of a listener the *belief* that Zayd stood up; and on the basis of this belief, this listener will confirm this statement as truth. On the other hand, due to prior knowledge or subsequent investigation, this statement may not produce belief in this listener's mind, and he may therefore repudiate it as false. This contingency, which is inherent to all simple assertions (*akhbār*), stands in sharp contrast to the self sufficiency of those statements that function as originations (*inshā'*). 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 and

[19]A third difference is that the *khabar* is contingent upon the time frame of its referent (past, present, or future) whereas the *inshā'* is not. See *Tamyīz*, p.48.

formerly licit actions are rendered thereby illicit.[20] As such, it would be superfluous for one to confirm or repudiate these statements. For, again, the truth content of such statements is confirmed by the words themselves.

Al-Qarāfī points out that there is an important difference between confirmation (*taṣdīq*) and repudiation (*takdhīb*), on the one hand, and truth (*ṣidq*) and falsehood (*kadhib*) on the other. The truth or falsity of a statement inheres in the statement itself; confirmation and repudiation are ontologically extraneous and come to the statements from without. (F.1:18) Thus, while from a factual standpoint a *khabar* may be true, because it is merely a *khabar*, it may be repudiated as false. Conversely, a *khabar* 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 *khabar* remains subject to the independent judgments of its recipient.[21] This contrasts sharply verbal formulae used for *inshā'* . For the latter pronouncements confirm themselves, and, as such, are not subject to the independent judgments of their recipients.

The upshot of all of this for the *fatwā* and the *ḥukm* is the following: 1) the *fatwā*, as a *khabar*, is subject to the independent judgments (belief or disbelief) of its recipient, whereas the *ḥukm*, as an *inshā'* , is not; 2) the binding force of a *fatwā* is thus contingent upon the assent given it by a petitioner, whereas the binding force of a *ḥukm* inheres in the decision itself; 3) while the recipient of a *fatwā*, then, 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.

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[20]On *inshā'* as a legal institution, see below, p.105-6.

[21]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 it as true.

B. The *Hukm* as an *Inshā'*

In Qu. no. 1 of the *Tamyīz*, al-Qarāfī defines the *ḥukm* as

> ... the origination (*inshā'*) of a disencumberance (*iṭlāq*) 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*). (T. 20)

He then gives examples which clarify the manner in which he understands judicial rulings to be acts of origination:

> ... if (a judge) rules that land conquered by force (*'anwatan*) is free land (*ṭilq*), not *waqf* for the benefit of the conquerers -- as Mālik and 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. (T.20-1)

> 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. (F.2:103)[22]

In other words, 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 that theretofore did not exist, that al-Qarāfī 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). (T. 28) emphasis mine

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[22]This second example is from his *al-Furūq*. Mālik held that such marriages were invalid and that the previously pronounced divorce was binding. (T.65-6). 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).*" (T.73.) The subsequent marriage was thus, according to al-Shāfi'ī, valid and binding. On judicial *fatwās*, see "Obiter Dictum," below, p.193-5.

It is important to note, however, that what the judge actually originates is not the *content* of his ruling. His act of giving judgment originates only a *status*, viz., binding and unassailable, which he confers upon the theretofore *fatwā* of his guild. Al-Qarāfī's case against his interlocutors is that the ability to confer this status upon *fatwā*s in this manner is exactly what judgeship is all about, and that it is just this authority (*wilāyah*) that separates the judge from the mufti. To challenge, let alone overturn, a ruling is to violate this very authority, which, as long as it is used to transform an orthodox *fatwā*, is properly exercised. This is the real point of al-Qarāfī's claim to the effect that deputies are actually equal to their principals. (T.167) For although 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 a *fatwā* that is orthodox, it remains just as illegal to challenge his ruling as it would be to challenge the ruling of a chief justice.[23]

1. Why *Inshā'* ?

Judicial rulings are not unassailable *because* they are originations (*inshā'āt*); this was only al-Qarāfī'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'* .[24] This raises the question: What advantages was al-Qarāfī seeking from this particular theoretical approach?

The reason al-Qarāfī chose to define judicial rulings as acts of *inshā'* was that *inshā'* was the legal instrument par excellence in Islamic law, and its binding and irreversible effect was deeply embedded in the collective conscience of his times. By

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[23]See above, p.65 and nt. 34. On "Orthodox Law," see below, p.145f.
[24]See Abū Bakr Aḥmad b. 'Umar b. Māhir al-Shaybānī, better known as al-Khaṣṣāf, *Adab al-qāḍī*, ed. Farhat Ziadeh (Cairo: American University in Cairo Press, 1978), p.338ff.

aligning the *ḥukm* with *inshā'*, al-Qarāfī thus hoped to gain for it the same sacrosanctity accorded all other acts of *inshā'* .

In his *al-Furūq*, al-Qarāfī defines *inshā'* as:

> ... any statement the existence of which engenders the existence of its referent, actually or concomitantly. (F.1:21)

These "statements" are actually specified verbal formulae used to initiate certain legal actions provided for under the Law: e.g., eleemosynary gifts, contracts, legal testimony.[25] These "formulae of origination" (*siyagh al-inshā'*) include preterit verbs, imperfect verbs, and active participles. Each of these morphological forms is used exclusively 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" (*shahadtu*) would not be valid. (T.53) Active participles, as in, "You are divorced" (*anti ṭāliq*) and "You are free" (*anta ḥurr*), are used to originate divorce and manumission, respectively; 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 effect of all acts of *inshā'* (as verbal formulae) was uncontested and deeply ingrained in the legal thinking of al-Qarāfī's times is reflected in a widespread problem taken up by al-Qarāfī in Qu. no. 39 of the *Tamyīz* .

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[25]According to the Shāfi'īs and the Mālikis, any action implemented through the use of a verbal proclamation and or consent was an *inshā'* . The Ḥanafīs are cited as disagreeing with this position, holding instead that these utterances were mere assertions, i.e., *akhbār* . The Ḥanafīs agreed, however, that these *akhbār* were of a special type that had to be interpreted non-literally in order to preserve their efficacy as legal formulae, as well as their truth content. Otherwise, "You are divorced," for example, would neither be true nor effective in bringing about divorce. In other words, the Ḥanafīs differed only in that they were unwilling to *call* these actions originations; they agreed, on the other hand, that custom had changed the literal meaning of these words, and that in their non-literal forms they carried binding legal force. It may be that the early Ḥanafī contacts with Mu'tazilism is behind this preference for a *ḥaqīqah/majāz* dichotomy over the *khabar/inshā'* distinction. See *Tamyīz*, p.58-9.

The problem in Qu. no. 39 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 the words used 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 these expressions with what may be called 'formula-of-origination status'. This is clearly stated by al-Qarāfī 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'i '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 (*khabar*) into an origination (*wa innamā ṣārat tufīdu 'ṭ-ṭalāqa bi sababi 'n-naqli 'l-'urfiyi 'ani 'l-ikhbāri ila 'l-inshā'*). This is how all such (legally binding) formulae work. (F.1:23)

On this understanding, it is conceivable that with a change in custom what was once a formula of origination could cease to be so, and vice versa. This is the root of the problem confronting al-Qarāfī in Qu. no. 39 of the *Tamyīz* .

Al-Qarāfī cites a number of areas in which changes in custom had divested formulae of origination of their legal effect: e.g., sale, *murābaḥah*, commercial contracts, divorce. As such, it was illegal, he insisted, to hold laymen to the legal effects of certain outdated and archaic 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-Qarāfī, to inform a layman that his saying to his wife, "You are devoid of obligation (*anti*

khaliyah)," or "I have given you to your family (*wahabtuki li ahliki*)," actioned divorce; for it was no longer the custom of the people to use these phrases for this purpose, and many people no longer even knew what they really meant. (T.237-8)[26]

Al-Qarafi'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 effect. On this understanding, many jurists continued to give *fatwas* based on outdated formulae, holding people to words of which the latter had no understanding . And, despite his eloquent campaign against this practice, al-Qarafi was ultimately forced to concede defeat.

> But 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 Imams. 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 guilds, which is unfitting for those who fear God Almighty. (T.241)

This problem and the fact that it thwarted al-Qarafi's efforts to overcome it reflects the deeply ingrained sacrosanctity of anything associated with *insha'* . More to the point, however, is the fact that by redefining[27] the *hukm* as an *insha'*, al-Qarafi's aim was to reinforce its inviolableness by equating it with an instrument whose legal status and effects

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[26]These phrases had been cited by Malik in *al-Mudawwanah* as formulae for initiating triple (irrevocable) divorce. See *Tamyiz*, p. 237ff. Al-Qarafi contested, on the other hand, "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 khaliyah*,' or '*wahabtuki li ahliki* .' No one hears anyone use these phrases (today), neither to severe the marital bond, nor to designate the desired number of divorces." *Tamyiz*, p.238.

[27]The traditional definition of the *hukm*, cited by al-Qarafi at T.18, had been that it was "(the imposition of) a binding obligation (*ilzam*)." Al-Qarafi expresses his dissatisfaction with this view and offers instead his alternative, according to which the *hukm* becomes an *insha'* of a binding imposition (*insha'u ... ilzamin*). Ibn Farhun and, after him, al-Tarabulusi, intimate that this had been an innovation by al-Qarafi. See *Tabsirat*, 1:11; *Mu'in*, p.8. However, the notion of the *hukm* being an *insha'* appears in the work of Ibn Abi al-Dam, who died in 642/1244. See *Adab al-qada'*, p.125.

were readily conceded, and whose violation was unthinkable. It is significant that it was the Shāfi'īs, and not the Ḥanafīs, who went along with al-Qarāfī in identifying legal actions, such as sale and divorce, as acts of *inshā'* .[28] This shows that al-Qarāfī's main target was the Shāfi'īs and that his theory was most likely to have achieved its greatest success with them.

C. Apropos the Shāfi'ī Doctrine on Principal/Deputy Disparity

Having established the *khabar / inshā'* dichotomy, al-Qarāfī was left now to contend with the Shāfi'ī 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". (F.2:104)[29] The problem here was that while one might honor two-tiered orthodoxy in the sense of live and let live, when it came to *interaction* between members of disparate guilds it was one's own view that would determine the legality of the shared act. Al-Qarāfī had two responses to this problem: the first was based on the idea of taking the perspective of those with whom one interacted; 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'īs, 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.[30] This position turns on the idea that interacting with others cannot be justified by the fact that the shared

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[28]*Tamyīz*, p.58-9. See also nt. 25, above.
[29]See above, p.70.
[30]See above, p.68.

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-Qarāfī 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 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 guild. On this understanding, principals are justified, and indeed bound, to enforce the rulings of their deputies, as long as these are sound according to the latters' school, even if they go against the view of the principal and his guild.

Among the questions raised in the *Tamyīz* around the issue of interaction is whether or not it is permissible for a Shāfi'ī to 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 Qur'ān], or fails to rub (*tadlīk*) when performing ritual washing." (T.227) To be sure, these questions were not new.[31] And perhaps al-Qarāfī's position can best be appreciated by way of comparison with the responses of two Shāfi'īs, Abū Ḥāmid al-Ghazzālī and al-'Izz ibn 'Abd al-Salām.

Al-Ghazzālī's response to the question of whether a Shāfi'ī could be led in prayer by a Ḥanafī was in the negative. The reason for this was that the Shāfi'ī did not believe the Ḥanafī's to be a valid prayer, i.e., were the Shāfi'ī himself to pray in this manner, his prayer would not be valid. Al-Ghazzālī notes that in and of itself the Ḥanafī's prayer

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[31]See, for example, al-Ṣāwī, *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-Fātiḥah*] 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. (Ibn Ḥanbal held that the excretion of blood invalidated one's ablution.) To this Ibn Ḥanbal 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, *Ḥujjat allāh al-bāligha*h, 1:159.

would be valid for the Ḥanafī, because it is the result of his Imām's *ijtihād*. But for a Shāfi'ī, who believes not Abū Ḥanīfa but al-Shāfi'ī to be correct, to be led in prayer by a Ḥanafī would result in an invalid prayer.[32]

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'ī 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. (T.228/ F.2:100). Therefore, al-'Izz held, it was permissible for a Shāfi'ī to be led by a Mālikī and vice versa, although this was for him clearly an exception to the rule.[33]

For his part, al-Qarāfī differs with both al-'Izz and al-Ghazzālī. He differs with al-Ghazzālī in that for al-Qarāfī a Shāfi'ī should judge the validity of a prayer led by a Ḥanafī according to Abū Ḥanīfa's criterion for a valid prayer, 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-Qarāfī points out that were a Shāfi'ī to be led by another Shāfi'ī who did not recite the entire opening chapter of the Qur'ān (*al-Fātiḥah*) or the *basmalah*, for example, 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

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[32]*Al-Mustaṣfā*, 2:370-1.

[33]At one point, for example, al-Izz is asked if it is permissible for a Shāfi'ī to do business with a Mālikī who seizes some commodity or makes a contract by means believed by the Shāfi'ī to be illegal, affirming in both cases that these actions are permissible according to the *madhhab* of Mālik. Al-'Izz responds: "A Shafi'ī should not do this; this 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 disliked (*yashtaddu karāhatuh*), owing to its weak justification." See *Fatāwā*, p.38-9.

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 the gist and uniqueness of al-Qarāfī's proposal -- is that small amounts of ritually impure substances pollute (*yunajjis*) 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 doctrine (*madhhab*). It is therefore illegal 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" 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 this Mālikī must be considered sound.[34]

As for the view of al-'Izz, al-Qarāfī 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. (T.228) Al-Qarāfī emphasizes, however, that the two cases are actually different; for facing the direction of prayer is a universally agreed upon (*mujma' 'alayhi*) question; rubbing (*tadlīk*), 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. (T.229-30/F.2:101) This cannot be said, however, in the case of one who omits portions of *al-Fātiḥah* , or fails to rub when performing ablution.

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[34]See *al-Furūq*, 2:100-2, esp. 102.

2. *Taqdīm al-Khāṣṣ ʻalā al-ʻĀmm*

Al-Qarāfī's proposal to take the perspective of the other was a new idea for which he claimed credit as the innovator. (F.2:100-1) Another solution to the Shāfiʻī filibuster tactic was based on the long-established principle in *Uṣūl al-Fiqh* which stipulated that whenever there was conflict between a general category and a specific one, precedence was to be given to the specific. This appears to be the argument most favored by al-Qarāfī.

The principle, "giving precedence to the specific over the general," (*taqdīm al-khāṣṣ ʻalā al-ʻāmm*) 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 it in its general sense (*ʻāmm*) 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 denotate, i.e., they may be used to refer to only a subset of all possible referents. This denotatum is referred to as the specific, *khāṣṣ* . Understood in its specific sense, a prohibition on touching an *ayn* might include only gold coins. According to al-Qarāfī, there was consensus among legal theoreticians (*uṣūliyun*) that whenever there was conflict between two injunctions, one general (e.g., Kill all unbelievers), the other specific (Do not kill Jews and Christians), precedence was to go to the specific, and the general meaning was to be set aside.[35] The reason for this was that to give precedence to the general would obliterate the specific, but to give precedence to the specific would not completely obliterate the general, since some portion of the latter would remain. In other words, to kill all unbelievers would obliterate

[35]See *Tamyīz*, p.67, 77, 85, 122, and passim. The notion that words denotate and that it is often necessary to set their general meaning aside is found in Aḥmad b. Ḥanbal's polemics against the Muʻtazilites. At one point, for example, Jahm b. Ṣafwān argues that the Qurʼān must be created because God says in the Qurān that He is the Creator of *all* things (*khāliqu kulli shayʼ*). Ibn Ḥanbal responds that "all" here, and in many places in the Qurʼān, is a denotatum. Among his proofs he cites 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 which she was not given. See Aḥmad b. Ḥanbal, *al-Radd ʻalā al-zanādiqah wa al-jahmīyah*, (Cairo: Salafīyah Press,1399/1979) p.33-4.

the command to spare Jews and Christians; but to spare Jews and Christians would not completely obliterate the command to kill all unbelievers, since unbelievers other than Jews and Christians could still be killed. Moreover, in the face of such apparent contradictions it is assumed that the intended meaning of "all unbelievers" excluded Jews and Christians to begin with. (S.203-4) Thus, particularizing general statements (*takhṣīṣ al-'umūm*) is actually a means of removing ambiguities from the latter and apprehending their originally intended meanings.[36]

Al-Qarāfī 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 representative, 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 given precedence over the general, as has been established according to the science of legal methodology (*Uṣūl al-Fiqh*). (T.122)

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[36]Particularizing general statements appears to be a method favored by the Mālikīs, who see general statements as conjectural and specific statements as certain. This contrasts, for example, the view of the Ḥanafīs, who consider both types certain and resort, therefore, in the face of apparent contradictions, to the method of abrogation (*naskh*). See 'Umar F. 'Abd Allah, *'Amal*, p.149-54. Al-Qarāfī wrote an entire monograph in which he surveyed diachronically the various views on the problem of particularizing general statements. For a summary of these views, see Shihāb al-Dīn al-Qarāfī, *al-'Iqd al-manẓūm fī al-khuṣūṣ wa al-'umūm*, Arabic Mss. no. 16724 (Dār al-Kutub al-Miṣrīyah), fol. 242. Western scholarship has paid little attention to this issue, and this had led to a number of lamentable interpretations, particularly of the Qur'ān.

The view of each guild 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 guild, he renders this view specific, identifying it as the view specifically intended by God to cover the case under review. As the specific, this view takes precedence over all of the remaining views, according to the agreed upon principle in *Uṣūl al-Fiqh, 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." (T.70) [37]

The ruling of the judge is also specific in another sense, namely, in that it applies only to the case under review; it has no probative weight outside this specific case. Precedent, or *stare decisis*, as it exists in American Common law, never took root in Islam.[38] Thus, judicial rulings do not affect the views of the guilds 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:[39] It ends the dispute only as regards the adjudicated case; generically speaking, the legal question continues among the *madhhab*s as a disputed question of law. On the other hand, *fatwā*s -- and the view expressed by another judge, including the Chief Justice, in the face of a valid decision is only a *fatwā* [40] -- that go against judicial rulings are of no effect whatever, and litigants may not take these as a means of extricating themselves from judicial decisions. (T126-7)

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[37]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 *Tamyīz* , p.65-6. See also al-Qarāfī's lengthy response to Qu. no. 26 at *Tamyīz*, p.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.

[38]See also Schacht, *Intro*, p.26.

[39]See 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."

[40]See "Obiter Dictum," below, p.193-5.

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. By virtue of this principle, al-Qarāfī notes that rulings in cases involving disputed questions are actually more inviolate than those in cases where the legal question is one of consensus, since in the latter case there is only one impediment to challenges (i.e., consensus), whereas in the former there are two (consensus and giving the specific precedence over the general). Marvelling at this unexpected result, al-Qarāfī exclaims, "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." (T.66-7) This amazement, however, was only feigned; for it was al-Qarāfī's very intention in writing the *Tamyīz* to reinforce the authoritativeness of disputed views.

IV. From *Ijtihād* to *Taqlīd* : The Pre-Qarāfian Backdrop

Earlier it was mentioned that al-Qarāfī attributed the propensity to confuse the *ḥukm* with the *fatwā* to the "extreme subtlety" of the dividing line separating the two.[41] In so describing the cause of this problem, al-Qarāfī intimated an important feature of the Islamic legal system as it had come to exist in his day, namely, that there was a 'genetic' relationship between the *fatwā* and the *ḥukm*, whereby the latter descended *necessarily* from the former. This was a result of the transformation from the regime of *ijtihād* to the regime of *taqlīd*, by virtue of which judges no longer enjoyed jurisdiction of law but had instead to rely on the *fatwā*s upheld in their respective guilds. The problem of confusing the *fatwā* with the *ḥukm* was thus not wholly an isolated one but rather a widespread tendency that resulted from the very structure of the system itself.

41 See above, p.94-5.

I first entered my study of the *Tamyīz* under the influence of a number of ideas gathered from primary but mainly 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 has been called by some.[42] Emile Tyan, for example, in the most extensive work on judicature to date had written,

> ... l'inexistence d'un organe de législation, devait avoir sa répercussion sur le statut juridique du kādi et contribuer dans une très large mesure à faire de lui, non pas simplement un organe d'application de la loi, mais aussi un organe de création du droit. [43]
>
> C'est un principe qui a toujours été proclamé, dans l'Islam sunnite, qui la source première de toute loi se trouve dans le livre saint, le Coran, et dans la Sunna du Prophète et l'accord de la communauté (Iğmā). Par conséquent, on ne reconnaître à personne, pas même au calife, un pouvoir de législation. Il devait résulter nécessairement de là une extension exorbitante du pouvoir *d'interpretation*, surtout aux premiers siecles, camouflant un vaste et profond travail d'adaptation et création, auquel les magistrats chargés d'attributions judiciaires devaient participer dans une très large mesure.[44]

Then there was the locus-classicus of Western scholarship, asserting a "separation between theory and practice" in Islamic law. 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,

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[42]I should add that I had my own preconceived notions of what judges in Islam did based on what judges in the American system do. I was also influenced by the views of the German sociologist, Max Weber, who coined and described Islamic law with the unflattering phrase, "Cadi-justice." Following Weber's lead, this phrase came to be used by some American legal scholars as a catch-all for all systems where judges interpret (often abusively) the law. See, for example, Edgar Bodenheimer, *Jurisprudence: the Philosophy of the Law* (Cambridge, Mass.: Harvard University Press, 1962), p.116-20, where he discusses the diatribes of the American 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 1985-6, p.97-112, esp. 105-6, where Weber is quoted, and Lawrence Rosen, *The Anthropology of Justice* (Cambridge: Cambridge University Press, 1989), p. 58ff., esp. p.59, where Weber's *kadijustiz* is cited.

[43]Tyan, *Histoire*, 1:107.

[44]*Ibid*, 1:12-13.

> between the Shari'ah law as expounded by the classical jurists and the positive law administered by the courts....[45]

On these views, I pursued my study of the *Tamyīz* on the assumption that Muslim judges interpreted scripture, deduced the rules therefrom, and applied these, thus deduced, to the cases before them. Though guided by the interpretations upheld in the guilds of law, the content of a judge's ruling was ultimately his own product and might differ substantially from the rules on the books. This notion of the judicial function was confirmed by what I found in medieval Muslim manuals on judicature from the period prior to al-Qarāfī, manuals which stipulated that one had to be a *mujtahid*, i.e., one 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 independently, unconstrained by the views upheld in the respective schools of law; the stipulation that they be *mujtahid*s was to ensure the validity and correctness of these 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.

However, on this understanding, I was not able to make sense of al-Qarāfī's manner of proceeding in the *Tamyīz*. For if both judges and muftis interpret the law, the distinction between the *fatwā* and the *ḥukm* must be essentially that the interpretation of the judge is binding while that of the mufti is not. Under such an arrangement, it is conceivable that a problem of overturning valid rulings might result from a failure to acknowledge the authority of judicial interpretations; but it is not conceivable that this result from a failure to differentiate between the interpretation of the mufti (the *fatwā*) and the interpretation of the judge (the *ḥukm*), particularly where Zayd is clearly distinguishable as

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[45]Coulson, *History*, p. 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*, p.2, and passim.

judge and 'Amr as mufti. By analogy to the American Constitutional system (where judges do interpret law) it would make sense to attribute such a problem to a failure to recognize the authority of Supreme Court rulings; but this failure would not blur the distinction between these rulings and the legal counsel given by a lawyer; nor would it justify describing this difference as "so subtle that I have found no one able to pinpoint and explicate it with precision." (F.2:106)

Meanwhile, further examination of works on judicature written closer to the period of al-Qarāfī and after indicated that a fundamental change had befallen the judicial function. Interpreted in this new light, the *Tamyīz* came to indicate that the role of a judge was simply to determine the *existence* of facts, which had been identified as legal causes (*asbāb/s. sabab*) and which activated specified legal rules (*aḥkām/s. ḥukm*). This was done on the basis of the judge's interpretation of the courtroom evidence (*ḥujjah*) presented in the case. The identity of these legal causes and rules, however, had been predetermined by the jurisconsults of the guilds. In other words, on questions of law, judges did not interpret, they merely chose. The interpretation chosen was at its origins of course a *fatwā* . And it was here, namely, in the failure to recognize the effect of the judge's choice on this theretofore *fatwā* that al-Qarāfī found the seeds of the main problem of the *Tamyīz*.

A. The Judicial Function: From *Ijtihād* to *Taqlīd*

1. *Ijtihād* Required of all Judges

The clearest indication that a change befell the judicial function emerges when one compares descriptions of that function before the 7th/13th century with those that appear after the 7th/13th century. In the two *al-Aḥkām al-Sulṭānīyah* works of the 5th/11th century Shāfi'ī, al-Māwardī (d.450/1058), and the Ḥanbalī, Abū Ya'lā (d.458/1065), both of whom served as judges in Baghdād, one of the necessary qualifications of a candidate for judgeship is that he be a *mujtahid* . This means, 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 (*uṣūluhā*) 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 (verses), the univocal and the allegorical, the universal and the 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 they were connected with a particular event or not; 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* in the religion. 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.[46]

In his version of the *al-Aḥkām al-Sulṭāniyah*, Abū Ya'lā cites the same qualifications and explains them in almost the exact same terms.[47] Elsewhere, in his *Adab al-Qāḍi*, a work devoted exclusively to judicature, al-Māwardī confirms these requirements

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[46]Al-Māwardī, *al-Aḥkām al-sulṭāniyah*, p.63. Al-Māwardī adds that, "If he relies on *taqlīd* and issues a correct or incorrect ruling, his *taqlīd* is null and void and his ruling rejected, even if it is substantively correct." For an earlier version of these qualifications, see Abū Bakr Aḥmad b. 'Umar b. Māhir al-Shaybānī, better known as al-Khaṣṣāf, *Kitāb adab al-qāḍi*, ed. Farhat Ziadeh (Cairo: American University Press, 1978), p.29.

[47]Muḥammad b. al-Ḥusayn b. Muḥammad b. Khalaf b. Aḥmad b. al-Farrā', better known as Abū Ya'lā, *al-Aḥkām al-sulṭāniyah*, ed. Muḥammad Ḥāmid al-Faqī (Beirut: Dār al-Kutub al-'Ilmiyah, 1404/1983), p.62-3.

more emphatically. In fact, he devotes an entire section specifically to the invalidation of *taqlīd* :"*al-taqlīd wa fasāduh* ."[48]

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'ī or Abū Ḥanīfa.[49] If a judge's interpretation of scripture 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 *ijtihād* .[50] Al-Māwardī cites an objection by "some of the jurisconsults," to which "some of our [Shāfi'ī] 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.[51] He also cites a view attributed to Abū Ḥanīfa, according to which judges have the choice of either ruling on the basis of their own scriptural interpretations, or ruling according to the interpretation of one more versed in the law, either from among their contemporaries, or bygone members of their school.[52]

Al-Māwardī rejects these views and insists that under no circumstances is it permissible for a judge to perform of *taqlīd* of another, even if this other is more knowledgeable than he.[53] As proof, he adduces a hadith of the Prophet in which the latter sent the Companion, Mu'ādh b. Jabal, to Yemen to serve as judge, asking him, "On the basis of what shall you rule?" "The Book of God," replied Mu'ādh. "And if you do not

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[48]Al-Māwardī, *Adab*, 1:269-73.
[49]*Ibid*, 1:644.
[50]*Ibid*, 1:644-5. This underscores the fact that in the pre-Qarāfian period, to be a follower of an Imām meant to be a follower of his method (*uṣūl*), the application of which might lead one to conclusions that differed from those of the Imām; *madhhab* was during this period more synonymous with *ṭarīqah* , i.e., way, or method. By al-Qarāfī's time, however, to be a follower of an Imām meant to be a follower of his *conclusions* reached on the basis of *his* application of his method. In a word, *madhhab* by this time had come to mean positive legal doctrine. See below, p.139ff.
[51]*Ibid*, 1:645..
[52]*Ibid*, 1:645-6.
[53]*Ibid*, 1:647.

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 responded, "Praise be to God, Who has guided the messenger of the messenger of God to that which pleases the messenger of God."[54]

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.[55] Additional arguments adduced by al-Māwardī 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.[56]
>
> And it is not permissible for those who share the ability to exercise independent judgment to perform *taqlīd* of each other -- even if one is more knowledgeable than the other-- by analogy to the case of exercising independent judgment in order to find the direction of prayer.[57]
>
> And because for any *mujtahid* for whom it is not permissible to perform *taqlīd* of an equally knowledgeable counterpart, it is not permissible to perform *taqlīd* of one more knowledgeable, just as is maintained in the case of the mufti.[58]
>
> And because the *taqlīd* that is impermissible for the mufti is impermissible for the judge, equal in effect to (the impermissibility of) performing *taqlīd* of another in the face of univocal scripture.[59]

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[54]*Ibid.*
[55]*Ibid.*
[56]*Ibid.* 1:647-8.
[57]*Ibid.* 1:648.
[58]*Ibid.*
[59]*Ibid.* See also *ibid.* 1:269-73.

Al-Māwardī accepts the view that judges should seek the counsel of knowledgeable jurists on difficult questions of law.[60] But this counsel, he maintains, is only advisory, and in the end a judge must always rule according to his own lights.

> He is not commanded to seek counsel in order for him to perform *taqlīd* thereof. Rather, he is commanded to do so for two reasons only : 1) in order to gain access to probative evidence not in his possession; 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 this reason that he is commanded to seek counsel.[61]

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Al-Māwardī's distaste for allowing *muqallid*s to serve as judge is also echoed in the *al-Mustaṣfā* of al-Ghazzālī (d.505/1111). However, having lived a generation later, al-Ghazzālī could not deny that non-*mujtahid*s might and did ascend the bench. His attitude, however, was that this was only "out of the necessity of the times."[62] Normatively speaking, a judge had to be a *mujtahid* .[63]

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 *mujtahid*s. The Ḥanafī opened with the following pointed question.

> Where are the mujtahids? This question closes the gate of judgeship (*bābu 'l-qadā'*). [64]

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[60]*Ibid*, 1:260-1.
[61]*Ibid*, 1:268.
[62]*Al-Mustaṣfā*, 2:384.
[63]*Ibid*, 2:343-4.
[64]Cited in Wael Hallaq, *Gate*, p.21. Hallaq's translation.

Ibn 'Aqīl fires back with the following response.

> [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 (ḥukm) 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.[65]

Careful examination of this exchange reveals that in the mind of both Ibn 'Aqīl and his opponent *ijtihād* remained an absolute requirement for all judges. 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 yakūna min ahli 'l-ijtihād*).[66] 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.[67] 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* .[68] Moreover, Ibn Qudāmah insists,

> It is not stipulated that he (a judge) have mastered those questions of positive law laid down by the *mujtahid*s in their manuals. For these questions were resolved by (these) jurists *after* they had reached the rank of *ijtihād*. It cannot,

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[65]*Ibid*, p. 21-2. Hallaq's translation.
[66]*Al-Mughnī*, 9:40.
[67]*Ibid*, 9:41.
[68]*Ibid*.

> therefore, be incumbent upon this judge (to know these questions) while he is just coming into this rank.[69]

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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 then apply these rules to the cases before them. The legal aspects of a judge's ruling were thus his own product, the result of his unfettered exercise of *ijtihād* . However, as we move closer to the period of al-Qarāfī, an important change appears to take place.

2. *Ijtihād* No Longer Required

In his *Adab al-Qaḍā'*, 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.[70]

This is followed by a detailed explanation of this criterion, after the fashion of al-Māwardī and other representatives of the tradition. Then he says:

> 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,

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[69]*Ibid.* Ibn Qudāmah, following al-Ghazzālī, also held that a candidate for judgeship did not have to a *mujtahid* in all areas of law. His view was that *ijtihād*, as a potential, was not indivisible but could be divided into separate parts. One might thus be a *mujtahid* in contracts but not in criminal offenses. Likewise, one might be a *mujtahid* in contracts of sale but not in those of usus or marriage. See also, al-Ghazzālī, *al-Mustaṣfā*, 2:384.

[70]*Adab al-qaḍā'*, p.36.

> 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 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 this Imām.[71]

Ibn Abī al-Dam then offers his explanation -- couched mainly in eschatological terms -- for the disappearance of *mujtahids*. He then returns to the subject of the qualified judge in his day.

> We return now to the subject at hand. Our [Shāfi'ī] 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 (*az-zamanu 'l-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 behalf); familiar with the methods of investigation (*ṭuruqu 'n-naẓar*), and of weighing probative evidence (*tarjīḥu 'l-adillah*), possessing mastery of analogy; quick-witted, astute, capable of handling probative sources, of setting them up, arranging them, and adducing them for

71*Ibid*, p. 37 .

> controversial (*mukhtalaf fihi*) 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 *fatwā*s accepted.[72]

In his *Tabṣīrat al-Ḥukkām*, Ibn Farḥūn cites the views of a number of scholars who lived after al-Māwardī but before al-Qarāfī who confirm the position of Ibn Abī al-Dam that *mujtahid*s no longer existed and that *ijtihād* was no longer a requirement for judges: Al-Māzarī (d.536/1141), the great Sicilian jurist of the Mālikī school, asserted that in his time," There does not exist exist in all the wide expanses a master-jurisconsult (*muftin nazzar*) who has reached the rank of *ijtihād.*" [73] "But", al-Māzarī cautions, "To prohibit *muqallid*s 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 Law."[74] These *muqallid*s, according to a certain Abū Bakr al-Ṭarṭūshī (d.566/1170), were not competent to interpret scripture directly. Instead, he insisted, in no uncertain terms, "Their Qur'ān is simply the *madhhab* of their Imām" (*innamā muṣḥafuhum madhhabu imāmihim*).[75]

a. Al-Qarāfī and *Muqallid* Judges

The above citations reflect what appears to have been a change that had been developing since the 6th/12th century. By the time of al-Qarāfī and his *Tamyīz* the transformation from *ijtihād* to *taqlīd* was all but complete. This is reflected in a number of statements in the *Tamyīz* itself.

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[72]*Ibid*, p.41.
[73]*Tabṣīrat*, 1:27.
[74]*Ibid.*
[75]*Ibid*, 1:29.

First, in responding to a question about the qualifications for judgeship, al-Qarāfī completely ignores the stringent requirements cited by al-Māwardī and Abū Ya'lā in their respective *al-Aḥkām al-Sulṭānīyah* works. 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 (*ayyu shay'in yufīdu 'l-insāna ahlīyata an yunshi'a ḥukman fi mawāṭini 'l-khilāfi fa yajibu tanfīdhuhu wa la yajūzu naqḍuh*)? 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? (T.156)
>
> Response: There is no disagreement among the scholars that such is not the right of everyone. Rather, such is the 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 (*al-wilāyah al-khāṣṣah*). (T.156)

Second, al-Qarāfī asserts that all muftis -- and therefore candidates for judgeship in his day -- were *muqallids*. In his response to Qu. no. 3, 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. (T.29) 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,

> he is a *muqallid, as is the case in our time*, then he is simply a representative of his Imam on behalf of whose conclusions he communicates to those seeking legal counsel. (T.29) (emphasis mine)

Similarly, al-Qarāfī adds, if this *muqallid* is a judge, he may

> give judgements based on the view most widely subscribed to (*al-mashhūr*) in his guild, 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*. (T.79)

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.[76]

Finally, al-Qarāfī states openly that the legal content of a judge's ruling must find precedence in the views of one of the recognized Imāms.

> 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.... (T.31)[77]

b. After al-Qarāfī

There is evidence from the 8th/14th century to the effect that by that time the regime of *taqlīd* had become institutionalized.

In his collection of responsa, Taqī al-Dīn al-Subkī (d.756/ 1255) indicates that the legal content of a judge's ruling had to be the *fatwā* upheld in his guild. This occurs in al-Subkī's response to a question concerning the propriety of a certain rhyming cliche, "The

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[76]Cf., for example, al-Māwardī, above, p.120. See, however, below, p.208-11, where al-Qarāfī's indecision concerning the rule on applying the most sound (*al-rājiḥ*) as opposed to the most widely subscribed to (*al-mashhūr*) is discussed.

[77]Al-Qarāfī's statements on the absence of *mujtahids* is apparently more descriptive than prescriptive, although he is obviously an advocate of the regime of *taqlīd*. His responses to Qu. no.22 (T.79) and Qu. no. 24 (T.84-5) admit the *possibility* of the existence of *mujtahids*, as do . his statements his *Sharḥ Tanqīḥ al-Fuṣūl*, p. 450. Also, it should be noted that there are no references in any of al-Qarāfī's works to a "closing of the door of *ijtihād* " (*insidād bāb al-ijtihād, ghalq bāb al-ijtihād* , etc.).

judge dictates, while the mufti hallucinates" (*al-qāḍī yufti wa al-muftī yahdhī*),[78] 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 takes a chance on falling into disbelief. For the mufti is God's representative after the Prophet; far, then, be his pronouncements from mere "hallucinations"![79] As for judicial decisions, al-Subkī goes on to indicate that in his time they were still perceived as the genetic offspring of the *fatwā*s of the respective guilds.

> The mufti makes clear the ruling of God, and he is the inheritor of prophethood (*nubūwwah*)[80] This applies when he gives a response in accordance with the truth. God, the Exalted, has said: "Say, God gives you counsel (*allāhu yuftīkum*). 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*.[81] (emphasis mine)

In his *Tabṣirat al-Ḥukkām*, Ibn Farḥūn (d.799/1396) indicates that judges in his day were *muqallid*s and as such were bound to the views of the respective guilds. Citing the view of the Mālikī, Ibn 'Abd al-Salām (d.749/1348), Ibn Farḥūn agrees that

> One should not, in these times of ours, appoint *muqallid*s who are not capable of distinguishing and choosing the

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[78]Abū al-Ḥasan Taqī al-Dīn 'Alī b. 'Abd al-Kāfī al-Subkī, *Fatāwā al-subkī*, 2 vols. (Cairo: Maktabat al-Qudsī, 1365/1937), 2:543.

[79]*Ibid.*

[80]By prophethood al-Subkī is referring not to the receipt of revelation (*waḥy*) from God, but to the prophetic office of conveyor (*muballigh*) of God's will to creation. This idea is apparently taken over from al-Qarāfī (see *Tamyīz* , p.96 ff.) 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 Ismāīl (Cairo: 1402/1982).

[81]*Ibid* . One notices here that the *mujtahid follows his Imām*, and that *ijtihād* is applied not to scripture but to the *fatwā* of one of the Imāms, which under the old order was itself the *result* of *ijtihād* .

> strongest of the various views [upheld in the guild]. For such an ability still exists, albeit rare. As for the rank of *ijtihād*, it has disappeared from the West (*al-maghrib*). [82]

Ibn Farḥūn indicates further that *mujtahid*s, 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."[83] He goes on to lament that the scholars of the past had laid down instructions for judges who were *mujtahid*s but that the function of *muqallid*-judges had been ignored and that he would have to devote words to that topic in a later section of his book.[84] In the later section to which he refers, Ibn Farḥūn treats the various definitions of "most widely subscribed to" (*al-mashhūr*) and "weightiest," or "best substantiated" (*al-rājiḥ*). This was part of an effort to instruct *muqallid*-judges on how to identify these two types of opinions, since, in the absence of *ijtihād*, judges were bound to these two categories of views.[85] One notices in his discussion of these terms that there is a seemingly new conflict between the jurist as individual and as member of the guild. [86] One notices also that the word *ijtihād* quietly takes on a second meaning: Under the old order it meant to apply the methods of interpretation and application developed under the discipline of *Uṣūl al-Fiqh* to scripture directly. Here, under the regime of *taqlīd*, it comes to refer to the application of these methods to the responsa of the *mujtahid*-Imāms.

c. The *Adab al-Qāḍī* Genre

The transfer from the regime of *ijtihād* to that of *taqlīd* is also reflected in a parallel development in the *Adab al-Qāḍī* genre of legal writings. A comparison between the

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[82] *Tabṣirat*, 1:26.
[83] *Ibid* , 1: 25.
[84] The above-mentioned Abū Bakr al-Ṭarṭūshī had dealt with judicature in a work of his entitled "*Ta'līqat al-Khilāf* ." But, Ibn Farḥūn laments, "Sheikh 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)
[85] See below, p.208-11, "The Judge's Choice in *Mukhtalaf Fihi* Cases: *Rājiḥ* or *Mashhūr* ?"
[86] See below, p.173-4.

formal structure of these works on judicature written prior to the 7th/13th century with those written from the 7th/13th century on reveal a fundamental change in their intended design. To take one example, al-Māwardī's (d.450/1058) *Adab al-Qāḍī* is for all intents and purposes a work on *Uṣūl al-Fiqh*, with all the appurtenances thereof, including chapters on the Qur'ān, the Sunnah, consensus, analogy, linguistic conventions, and so forth. This work is designed to teach judges how to interpret scripture, deduce rules, and apply these to cases. However, beginning with Ibn Abī al-Dam's (d.642/1244) *Adab al-Qaḍā'*, and continuing through Ibn al-Kinānī's (d.767/1325) *al-'Iqd al-Munaẓẓam li al-Ḥukkām*, [87] Ibn Farḥūn's (d.799/1396) *Tabṣirat al-Ḥukkām*, al-Ṭarābulusī's (d.844/1440) *Mu'īn al-Ḥukkām*, and Ibn Shiḥnah's (d.882/1477) *Lisān al-Ḥukkām fī Ma'rifat al-Aḥkām*,[88] works on judicature assume the form of statute manuals, books designed to provide judges with the rules already deduced on the basis of one of the recognized schools. This, again, was a confirmation of the new order, according to which the judicial function was recognized as being not one of interpreting scripture directly and deducing rules therefrom but rather one of choosing and applying rules already deduced by the jurisconsults of the guilds of law.[89]

3. A Tentative Hypothesis

Any attempt to uncover fully the forces that produced these developments would require much more study than space allows here of this clearly crucial period. However, a number of facts produce in my mind an outline, albeit sketchy, of a possible explanation. To begin with, one means of arriving at the cause of an occurrence is to look to its effect. In effect, the transfer to the regime of *taqlīd* removed jurisdiction of law from judicial

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[87]Ibn Salmān al-Kinānī, *Kitāb al-'iqd al-munaẓẓam li al-ḥukkām fīmā yajrī bayna aidīhim min al-'uqūd wa al-aḥkām*, 2 vols. (Beirut: Dār al-Kutub al-'Ilmiyah, n.d.). On the margin of an edition of Ibn Farḥūn's *Tabṣirat*.

[88]Abū al-Walīd Ibrāhīm ibn Abī al-Yaman Muḥammad ibn Abī al-Faḍl, better known as Ibn al-Shiḥnah, *Lisān al-ḥukkām fī ma'rifat al-aḥkām* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī and sons, 1393/1973), appended to al-Ṭarābulusī's *Mu'īn*, beginning on p. 216.

[89]Another parallel development is the displacement of legal principles (*uṣūl*) by legal precepts (*qawā'id*). See below, p.166.

competence; no longer were judges authorized to adjudicate cases on the basis of their own interpretations of scripture. It is conceivable that this was the ultimate goal, i.e., to prevent judges, and through them the central power, from interpreting God's law, the better to avoid tampering and legal opportunism.

That there was a deep mistrust of being taken into the service of the government via the office of judge is apparent from the inception of the office itself. As early as the 2nd/8th century, Abū Ḥanīfa (d.150/767), to take just one example, was repeatedly beaten and died in a prison cell to which he was taken following his refusal to accept the post.[90] So consistent and vehement were such refusals that in a study of this topic N. J. Coulson was moved to write;

> ... from the very number of these stories [of refusals] and the seriousness with which they are recorded it is certain that there did exist during this early period a fairly widespread and deep-rooted dislike, if not dread, of the office of qadi. [91]

Judgeship, at its origins, had been a political appointment presided over by the Caliph and later the Sultan. For those rulers whose preoccupation with political expediency left them none too tolerant of the principled constraints of law, it provided a means of co-opting the latter into their service. Given that the interpretations of judges in the early period were inviolate (*kullu mujtahidin muṣīb*), the most effective means of countering the excesses of the more pliant among them would be to disallow judges altogether from interpreting the law, holding them instead to the views upheld by the guilds. The problem with this solution, however, would be how, in the absence of political power, to enforce it.

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[90]*Shadharāt*, 1:228.
[91]Coulson, *Doctrine*, p.17.

A distinction should be made at this point between power and authority. The government had the authority to appoint judges and the power to back the rulings handed down by its appointees. But it did not have the authority to invest these rulings with orthodoxy; it could not determine what was legally correct and what was not. This authority rested in the hands of the jurisconsults, the heirs of the Prophetic office; and it extended to the judge only by virtue of his being recognized *by the fuqahā'* as a qualified interpreter of the law, a *mujtahid* . To withdraw this recognition and divest him of this status would in effect divest his rulings of authority. Herein lay the solution to the dilema.

That this is what was at stake is indicated clearly in the statements of Ibn 'Aqīl's Ḥanafī interlocutor, as well as those of Ibn Abī al-Dam. The remark of Ibn 'Aqīl's opponent, it will be recalled was, "Where are the *mujtahid*s? This question closes the gate of judgeship."[92] Ibn Abī al-Dam, on the other hand, went to great lengths to defend the authority of the rulings of non-*mujtahid*s.[93] This was a clear indication that under ordinary circumstances such rulings had no authority. Earlier, al-Māwardī (d.450/1058) had stated unequivocally that even if a ruling was substantively correct, if the judge relied on *taqlīd* , his ruling was null and void and had to be rejected. [94] But perhaps most significant of all was Ibn Abī al-Dam's eschatological explanation for the "disappearance" of *mujtahid*s.[95] For this explanation disguises the action of the jurisconsults, as it disguises also the fact that it was aimed primarily not at judges per se but at the central power. However, rather than risk confrontation with the government, this maneuver by the jurisconsults forced the latter to accept as an ordained fait accompli a new job description for a position that had been created originally by the government itself.

92See above, p.122. Note also that Ibn 'Aqīl's response reflects the notion that the authority of a judge's ruling was contingent upon his being a *mujtahid* or being backed by one.

93See above, p.125-6.

94*Al-Aḥkām al-sulṭāniyah*, p. 63.

95In his "Was the Gate of Ijtihad Closed," p. 20, W. Hallaq discusses the appearance of the phrase *"insadda bābu 'l-ijtihād "* and the fact that it conveys no idea as to *who* actually closed the gate.

The regime of *taqlīd* was the jurisconsults' answer to the government's ongoing attempt to co-opt the law. By withdrawing recognition from would-be *mujtahid*-judges, they forced the latter to rely upon the views of the recognized Imāms, the *mujtahids* par excellence.[96] In this way judges ceased to be an effective tool in the hands of the government.

At the same time, this move proved to be a helplessly blunt instrument. While it was aimed primarily at the central power, it placed crippling constraints upon the jurisconsults themselves, forcing even the most able among them to do in the dark what had been all along their very raison d'etre. Moreover, withdrawing recognition from would-be *mujtahids* had to be done with tongue in cheek; for no one could conceal the fact that there were jurists who had mastered the discipline of *Uṣūl al-Fiqh,* such mastery of which would qualify anyone as a *mujtahid* .[97] If, it had to be asked, a jurist was capable of applying the methods of *Uṣūl al-Fiqh* to the legal doctrines of the eponyms, what was to stop him from applying these to scripture itself? This question brought disquiet to many and remained a source of lasting tension for some time to come.[98] Indeed, at bottom, it was this very question that brought al-Qarāfī into conflict with his esteemed teacher, al-'Izz ibn 'Abd al-Salām.

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[96]On "*taqlīd* ," see below, p.136-7. That judges are bound to the views of their school has been asserted before by Schacht, *Intro*, p. 196, and Juynboll, *Ḳāḍi*, p. 201. However, Juynboll appears to compress the entire run of Islamic legal history into a single static picture. He does not take account, for example, of the explicit pre-6th/12th century position to the effect that judges had to rule according to their own *ijtihād* , even if this meant going against their eponym and their school. Schacht, on the other hand, points out that judges in the early period ruled according to their own interpretations, asserting that the early judge "took over the seat and the wand of the [pre-Islamic] ḥakam." *Intro*, p. 24. In his Systematic Section, he states, "Judgment must be given according to the doctrine of the school of law to which the ḳāḍi belongs." *Ibid* , p.196. However, Schacht does not indicate when, how, or under what circumstances this change took place. In his preface he states that he based his Systematic Section on Bergstrasser's *Grundzuge des islamischen Rechts*. Bergstrsser's work was essentially a translation of parts of the *Multaqā al-Abḥur* of Ibrāhīm al-Ḥalabī, who died in 956/1549, i.e., centuries after the Islamic judge took over the pre-Islamic *ḥakam* 's wand.

[97]Recall, for example, the criteria of al-Māwardī, Abū Ya'lā, and Ibn Qudāmah. See above, p.118-24.

[98]For more this problem and various responses to it , see below, p.173-4.

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The transfer from the regime of *ijtihād* to the regime of *taqlīd* removed jurisdiction of law from judicial competence. This brought about a genetic relationship between the *fatwā* and the *ḥukm*, as judges were now bound to the views upheld in their respective *madhhab*- guilds. It was this genetic relationship that led to the confusion between the *fatwā* and the *ḥukm*, leading to violations of two-tiered orthodoxy, as disputed rulings came to be treated as if they were disputed legal opinions. Al-Qarāfī's effort in the *Tamyīz* is thus to clarify the distinction between the *fatwā* and the *ḥukm* in order to safeguard the provisions of two-tiered orthodoxy, according to which the views of each *madhhab*-guild are both orthodox and protected, both as legal responsa and as judicial decisions. This he achieves through enlisting to his service the *khabar / inshā'* dichotomy maintained in medieval Muslim thought. In addition, he introduces the doctrines of "taking the perspective of the other" and "giving the specific precedence over the general" as fail-safe reinforcements.

Part Two

Chapter Four

The *Fatwā* : The View of a *Madhhab*

General Remarks

In part one of this study, I attempted to show that the *Tamyīz* was written in response to a specific problem in 7th/13th century Egypt. This problem had evolved, however, out of the broader context of what I believe to have been a transformation from a regime of *ijtihād* to a regime of *taqlīd*, by virtue of which the *madhhab* took on a corporate nature, and judges were denied jurisdiction of law. Al-Qarāfī's perception of this problem, along with his proposed solutions, have now been treated in full.[1] My aim in the following two chapters shall thus be toward a more detailed description of 1) the view of a school of law and the mechanism through which it is established, and, 2) the judicial process and the function of judges in the time of al-Qarāfī. The first of these topics shall be treated in the present chapter. The second shall be taken up in chapter five, following which I shall return, in my concluding remarks, to the fate of al-Qarāfī's campaign in defense of two-tiered orthodoxy.

I. On the Vocation of the Mufti in al-Qarāfī's Time

There are two classes of jurisconsults in Islam. The first includes those who interpret scripture directly. These are the *mujtahids*, the most important of whom are the eponyms of the four orthodox schools. According to al-Qarāfī, this class of jurisconsult no longer existed in his day,[2] and the function of legal practitioners was thus limited to that undertaken by those of the second category, the *muqallids*. *Muqallid*-jurisconsults do not

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[1]See, however, my concluding remarks, below, p.223-5, where I discuss the ultimate failure of al-Qarāfī's campaign, and the fact that the problem of Ibn bint al-A'azz was resolved ultimately via state intervention.
[2]See above, p.127-8.

interpret scripture directly but rely instead upon the interpretations of the *mujtahid* -Imāms. This practice of following the Imāms in their interpretations is known as *taqlīd* .

A. *Taqlīd*

The term, "*taqlīd*," is the verbal noun of the transitive verb, "*qallada*," literally, "to place something around another's neck."[3] The Prophet is reported to have used the verb in this sense, saying, "Do not place cords around their [i.e., the horses] necks" (*la tuqalliduhā bi 'l-awtār*).[4] According to Ibn Badrān, one explanation of this order was that the Arabs used to believe that such tying cords around the necks of horses would protect them from ill affliction. The Prophet thus forbade them from doing so in order to disabuse them of this false belief.[5]

As a technical term, *taqlīd* is used by the *fuqahā'* with the basic meaning of "accepting the view of another without (scriptural) proof of its validity."[6] It has been suggested that this usage was derived from the above-cited practice of the pre-Islamic Arabs in which they tied cords around the necks of animals for protection from ill omens.[7] On this understanding, *taqlīd* in its technical sense would seem to carry the notion of accepting the view of another on the belief that such will exonerate one before God.

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[3]See, for example, 'Abd al-Qādir b. Badrān, *Nuzhat al-khaṭṭār al-'aṭṭār*, 2 vols. (Cairo: Dār al-Fikr al-'Arabī, no date), 2:449. The *Nuzhah* is a commentary on Ibn Qudāmah's *Rawḍat al-Nāẓir wa Junnat al-Munāẓir* on *uṣūl al-fiqh* .

[4]*Ibid* .

[5]*Ibid.*

[6]*Ibid*, 2:450. On this definition Ibn Badrān points out that there can be no *taqlīd* of the Prophet, since his statements are themselves proof.

[7]*Ibid.*

B. On the Justification for *Taqlīd*

According to al-Qarāfī, *taqlīd* was not wholly the acceptance of another's view without *any* proof of its validity. One might not know the specific proof, but consensus had guaranteed that the conclusions of the *mujtahid*-Imāms were all valid and sanctioned by God. In his *Sharḥ Tanqīḥ al-Fuṣūl* al-Qarāfī states:

> Every legal ruling (*ḥukm*) 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 -- and these are (obviously) supported by consensus; and 2) those concerning which there is disagreement. But here there is consensus to the effect that whenever (the propriety of) a ruling reigns predominate in a *mujtahid* 's mind, that ruling is the ruling of God, both for that *mujtahid* and whoever follows him via *taqlīd* .... (S. 18)

To illustrate his point, al-Qarāfī adduces a syllogism in which the middle term is Mālik's position on the necessity of rubbing (*tadlīk*) when performing ablution.

> The necessity of rubbing during ritual washing appeared, without doubt, we must assume, as the correct view to Mālik. Everything that appeared to Mālik to be correct is, without doubt, God's ruling, according to consensus. Thus, the necessity of rubbing is, without doubt, God's ruling. (S. 19)

This notion, again, lay at the basis of two-tiered orthodoxy and the corporate status subsequently acquired by the guilds of law. For, according to al-Qarāfī, *taqlīd* was valid precisely because it was the acceptance of the views of the eponyms *on the understanding that they were correct, ipso facto* . It was, again, this line of thinking taken to its extreme that raised the ire of al-'Izz ibn 'Abd al-Salām, Ibn Qudāmah, and other representatives of

the old school who insisted that all views were subject to scrutiny via the never-ending process of *ijtihād*.[8]

II. *Taqlīd* and al-Qarāfī's Doctrine of Pure Law

It is common practice to translate *taqlīd* as "blind following," or "servile imitation."[9] These adjectives tend to divest the institution of any sophisticated aspects it might possess, as it also imputes to Muslim jurists the acceptance of straight-forward non-thinking. For his part, al-Qarāfī has a very particular and restrictive understanding of *taqlīd*, on the basis of which it may described as "following," but it is certainly not a blind activity, and still less is it exclusive of independent reasoning.

A. "*Madhhab* ": Pure Law

The key to understanding al-Qarāfī's restrictive concept of *taqlīd* lies in his restrictive understanding of "*madhhab*," not in the sense of the guild or association, but in the sense of legal doctrine. For, according to al-Qarāfī, *taqlīd* is valid only where its object is a constituent of a *mujtahid* 's *madhhab* . *Madhhab*, it turns out, is pure law, i.e., law in the strictest sense of the term, exclusive of all para-and non-legal elements.

In Qu. no. 37 of the *Tamyīz*, al-Qarāfī is asked to define those aspects of the doctrines of the Imāms in which it is legitimate to follow them via *taqlīd* : "What is the meaning of 'Mālik's *madhhab'* and the *'madhhab* ' of other scholars [i.e., eponyms] in which they may be followed via *taqlīd* ?" (T.194) The questioner goes on to indicate that he is aware of a number of doctrines of Mālik in which it is not permissible to follow him via *taqlīd* . This is not because these doctrines are substantively wrong, but rather because they are not the proper object of *taqlīd* ; for example, views on *uṣūl al-fiqh* or *uṣūl al-dīn*

[8]See, for example, above, p.120, and p.75-6 for the views of al-'Izz and Ibn Qudāmah.
[9]See, for example, G. Makdisi, *Rise*, p.199.

may not be made the object of *taqlīd* . (T.194) In other words, al-Qarāfī's interlocutor is aware that the area in which *taqlīd* may be legitimately practiced has fixed limits, as he seems also to know that, properly speaking, *taqlīd* is confined to questions of law, strictly speaking. His problem, however, is that he is not quite able to give an exact definition of law, and to clarify the distinction between law and non-law (i.e., between *madhhab* and non-*madhhab*).[10]

In his response, al-Qarāfī confirms the suspicion of his interlocutor and goes on to give his definition of law proper (i.e., *madhhab*). According to this definition, the *madhhab* of an Imām is limited to five things: 1) the legal rules which make up the branches of positive law and which have been deduced on the basis of *ijtihād (al-aḥkām al-shar 'īyah al-furū'īyah al-ijtihādīyah*) ; 2) the legal causes (*asbāb* /s.*sabab*) which activate

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[10]The full question put by al-Qarāfī's interlocutor reads:"What is the meaning of 'Mālik's *madhhab* ' and the '*madhhab* ' of other scholars [i.e., eponyms] in which they may be followed via *taqlīd* ? If you say, 'That which they say which is true and correct', this is made problematic by statements of theirs such as 'one is half of 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 is invalidated by the cases of *uṣūl al-dīn* and *uṣūl al-fiqh* . For while these are matters of 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 mina 'd-dīni bi 'ḍ-ḍarūrah*), such as [the obligation to perform] the five prayers, and to fast the month 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. 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.*sharṭ*) in which you follow the scholars by way of *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 which is prescriptive (*khiṭāb taklīf*), while legal causes and prerequisites belong to that portion which is descriptive (*khiṭāb waḍ'*)".

And it is because of questions such as these that we find hardly any of the lesser jurisconsults able to respond definitively when asked to define the *madhhab* of their Imām whom they follow via *taqlīd* . And this applies equally to the followers of all the *madhhabs*. See *Tamyīz*, p.194-5.

these rules; 3) the legal prerequisites (*shurūṭ* /s. *sharṭ*) to the application of these rules; 4) the legal impediments (*mawāni'* /s.*māni'*) to the application of these rules; and 5) the various forms of courtroom evidence (*ḥijāj* /s. *ḥujjah*) by which the occurrence of these rules, causes, prerequisites, and impediments is established. (T.195)

1. The Constituents of Pure Law: Definitions

The first four constituents of "*madhhab* " are known in the parlance of *Uṣūl al-Fiqh* as *al-aḥkām al-shar'īyah* /s.*al-ḥukm al-shar'ī*, i.e., legal rulings, or statuses. The *ḥukm shar'ī* is further divided into two categories: 1) prescriptive rulings (*al-aḥkām al-taklīfīyah*) and 2) descriptive rulings (*al-aḥkām al-waḍ'īyah*). The *ḥukm* identified by al-Qarāfī as the first constituent of *madhhab* is the *ḥukm taklīfī* . The remaining three are *aḥkām waḍ'īyah* .

a. *Ḥukm Shar'ī*

The *ḥukm shar'ī* establishes in religious terms the status of specific human actions towards specific things. It speaks not to the essence of things in themselves but only to the propriety of specific human actions towards them.[11] For example, a *ḥukm shar'ī* would not state that pork is forbidden; it would state rather that *eating* pork is forbidden; looking at pork or smelling it would not be included in this prohibition. Each *ḥukm shar'ī* thus involves a prescribed or proscribed act, plus a status. In the *Sharḥ Tanqīḥ al-Fuṣūl*, al-Qarāfī defines the *ḥukm shar'ī* as

> God's sempiternal speech addressed to persons of maturity and sound mind (*mukallaf*) in which He commands them or grants them an option concerning the performance of some act. (S.67)

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[11]This point is made forcefully by al-Ghazzālī in his *al-Mustaṣfā*, 2:377: "(Some) jurisconsults have erred simply because they understood legal statuses (*aḥkām*), such as permissible and forbidden, to be descriptions of the essence of things (*a'yān*) in themselves, just as a group thought that good and evil (*al-ḥusn wa al-qubḥ*) described the essence of things."

1. *Hukm Taklīfī*

The *ḥukm taklīfī* comprises those *aḥkām shar'īyah* that involve direct commands of the the sort, "Do!" or "Do not do!," or options of the form, "You may do," or "You may choose not to do." It consist of five categories: 1) obligatory (*wājib*); 2) forbidden (*ḥarām*); 3) recommended (*mandūb*); 4) disapproved (*makrūh*); and 5) neutral (*mubāḥ*). (S.68) When failure to perform an act incurs punishment from God, the act is recognized as obligatory, and there is an obligation (*wujūb*) to perform it. When failure to eschew an act incurs punishment, the act is recognized as forbidden. When God, or by extension, His prophet, issues a command, "Do!," but failure to comply does not incur punishment, performance of this act is recognized as recommended. When there is a countermand whose non-abstention is not punished, eschewing the act is recognized as disapproved. Whenever neither the performance nor non-performance of an act incur punishment, the act is recognized as neutral.(S.67-71) Performance of obligatory and recommended acts are rewarded by God, as is abstention from forbidden and disapproved acts. Neutral acts incur no reward, just as they incur no punishment.

The *ḥukm taklīfī* is religio-legal (*shar'ī*): it defines the status of actions strictly in religious terms, concerning itself only with how one who performs them is to be received by God in the Hereafter. It is 'positive' (*far'ī*) 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, nor those that are known, a priori, to be part of the religion.

2. *Ḥukm Wad'ī*

The *ḥukm wad'ī* , including the *sabab, sharṭ,* and *mānī'* , 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, my ruling is not "Y""; or, "If "Z" obtains, even if "X" obtains, my ruling is not "Y"". According to al-Qarāfī, the *ḥukm waḍ'ī* is referred to as *waḍ'ī* (i.e., positive), because, "it is something which God has posited in His law, in contradistinction to those things which He has commanded His servants to perform .... (S.79) It is defined as

> That which necessitates that a legal ruling (*ḥukm taklīfī*) be applied, or that it not be applied. That which necessitates that it be applied is the legal cause (*sabab*) [by its presence]; that which necessitates that it not be applied is the legal prerequisite (*sharṭ*) -- by its absence -- and the legal impediment (*māni'*) -- by its presence. (S.70)

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,* or quota. In addition, the property claimed stolen cannot have been left out in the open without safe-keeping measurements (*ḥirz*) nor willfully delivered into the possession of the alleged thief.[12] Now, legally speaking, an act of theft constitutes a legal cause (*sabab*), activating the ruling, "amputation of the hand is obligatory." Exceeding the quota, 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. These things constitute, therefore, legal impediments, *mawāni' /s.māni'* to the application of this ruling. Clearly, of the three *aḥkām waḍ'iyah,* the legal cause is primary; the other two come into play only after the initial occurrence of a legal cause is assumed.

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[12]See Ibn Rushd, *Bidāyat*, 2:334.

b. *Ḥijāj /s. Ḥujjah*

The final constituent of al-Qarāfī's "*madhhab* " is the various forms of courtroom evidence (*ḥijāj /s ḥujjah*) relied upon by judges. In order to establish the existence of a legal cause, prerequisite, or impediment, judges must rely upon recognized forms of admissible courtroom evidence. Such forms include, forensic evidence or proof (*bayyinah*), sworn oaths (*yamīn*), confession (*iqrār*), and the like.[13] 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. 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.

B. "*Madhhabu Mālik*" vs. "*Madhhabu 'l-Ummah*"

Each constituent of al-Qarāfī's "*madhhab* " may be the object of consensus or disagreement. There is consensus, for example, that damaging another's property is a legal cause (*sabab*) obliging reimbursement (T.196); 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'ī held that it was not. (T.196-7) Similarly, there is consensus that maintaining an amount of wealth in excess of the minimum quota (*niṣāb*) for one year (*ḥawl*) is a prerequisite (*sharṭ*) to the obligation to pay obligatory alms (*zakāt*). (T.197) But there is disagreement on whether the presence of a male guardian

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[13]For a more detailed list of recognized forms of evidence, see below, p.204.

(*walī*) to represent the bride is a prerequisite for a valid marriage. Abū Ḥanīfa, for example, held that it was not.[14]

Consensus on a constituent of *"madhhab"* represents the *madhhab* of the *Ummah*, and is referred to as the *mujma' 'alayh*. (T.199) The *madhhab* of an eponym is simply his position on any constituent of *"madhhab"* which is not universally agreed upon, even if he is joined in his opinion by other *mujtahid*-Imāms. Thus, for example, a single instance of nursing as a legal cause forbidding marriage is the *madhhab* of Mālik; a single instance not forbidding marriage is the *madhhab* of al-Shāfi'ī. However, the presence of a male guardian as a prerequisite to a valid marriage is the *madhhab* of Mālik, al-Shāfi'ī, and Aḥmad b. Ḥanbal. It is Abū Ḥanīfa's *madhhab* that the presence of a guardian is not required.

C. Orthodox Law

Al-Qarāfī's restrictive definition of *"madhhab "* provides working definitions of both law, 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 applies to 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 jurisconsults in performing *taqlīd*. For jurisconsults are limited strictly to questions of law. Judges too are affected by this

[14]See Ibn Rushd, *Bidāyat*, 2:7.

restrictive concept of law in that they may impose as binding rulings only those views already recognized as orthodox law.

III. Proper versus Improper *Taqlīd*

Further on in his response to Qu. no. 37, al-Qarāfī takes up the issue of improper *taqlīd*. Here the problem is not one of *muqallid*s 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* and what is factual. The result is that they often follow the eponyms on views that are actually matters of fact.

According to al-Qarāfī, as God's translator-interpreters, *mujtahid*s have only jurisdiction of law. This is because scripture itself addresses only questions of law. This is brought out clearly in al-Qarāfī's *al-Furūq*, 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 (*adillatu mashrū'iyyat al-aḥkām* . . .). (F.1:128) These are contrasted to the sources for determining the *occurrence* of these things, what he refers to as the "*adillatu wuqū'i 'l-aḥkām, ayy, wuqū'i asbābihā wa ḥuṣūli shurūṭihā wa 'ntifā' i mawāni'hā* ." (F.1:128) On this distinction, al-Qarāfī states at one point:

> 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. (F.1:11) (emphasis added)

To illustrate the difference between the sources of law and the sources of fact, al-Qarāfī 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 estab-

lished by the verse, "And establish prayer at the sun's decline (from its meridian)." [Q.17:83] But the sources by which one may determine the sun's actual passing its zenith are numerous; al-Qarāfī cites some fourteen different ways, means, and instruments, including the use of an astrolabe, shade-measuring instruments, and the breath-rate of certain animals. He notes that while the sources of law are finite, numbering around twenty, the sources of fact are infinite (*ghayru munḥaṣirah*) and may increase in number with man's increase in technological knowledge.[15] He notes further that while God has stipulated the sources to be relied upon for the determination of every rule, He has not done so for the determination of every fact, even those facts that have legal implications, such as the sun's passing its zenith. (F. 1:128)

This distinction between law and fact, or between the *status* of things and their actual *occurrence*, has important implications for *taqlīd* . For according to al-Qarāfī, not only are *muqallid*s 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 *occurrence* of this thing. This becomes extremely significant when one considers that much of what is handed down by the eponyms contains an admixture of scriptural interpretations and assessments of facts to which these interpretations were applied. This raises the danger on the part of *muqallid*s of confusing law with fact and of accepting as authoritative everything that has been handed down. It is indeed this very practice that is condemned by al-Qarāfī as an improper exercise of *taqlīd* .

> Know that when we perform *taqlīd* of the scholars concerning legal causes, we do so only as regards the status

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[15]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 'l-hisāb al-falakī; 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).

> 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 perform *taqlīd* of him 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 *mujtahid*s. (T.201)

Al-Qarāfī 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." (T.206) As an example of such instances of improper *taqlīd*, 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 endowed 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, nor made the object of claims of preemption (*shuf'ah*). (T.207) It was also Mālik's view that Egypt had been conquered by force. (T.207) Now, based on these opinions, some Mālikī jurists and judges in al-Qarāfī's time ruled that it was forbidden to sell, rent, or claim preemption rights over the agricultural lands and public utilities in Egypt. (T.211) Al-Qarāfī took issue with this position and argued that it was inadmissible on the following grounds:

> Their *taqlīd* of him (Mālik) in that the ruling on selling, renting, and claiming rights of preemption over such lands is

> "forbidden" (*taḥrīm*) is a proper *taqlīd* ; for such is a *taqlīd* concerning a legal category (*ḥukm*).[16]
>
> And their *taqlīd* of him in that a territory which has been conquered by force receives this ruling is a proper *taqlīd* ; for such is a *taqlīd* concerning a legal cause's status as a legal cause (*sababīyatu sababin*).
>
> But their *taqlīd* of him in that forced despoilment and conquest occurred in Egypt or Mecca is an improper *taqlīd* ; for this is a *taqlīd* concerning the occurrence of a legal cause. (As such), no rulings are to be based on this *taqlīd* , neither in general nor with regard to any specific case. (T.208)

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, a learned opinion which is not legal in the strict sense but which has legal implications. As dictum, it is not a constituent of "*madhhab* " and thus neither probative nor protected as orthodox law. It is therefore not permissible to perform *taqlīd* of Mālik in this regard, and statements of law made on the basis thereof are invalid.[17]

IV. *Taqlīd* and Independent Reasoning

Al-Qarāfī's restrictive concepts of "*madhhab*" and *taqlīd* and his insistence on separating legal from para-legal elements circumscribes significantly the area in which *taqlīd* may be legitimately practiced. One important consequence of this is that independent

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[16]In other words, assuming the fact of forced despoilment, selling, renting, and preemption receive the ruling "forbidden," as opposed to "neutral," or "disapproved."

[17]It is interesting that the *taqlīd* condemned in some of the writings of the modern reformist, Muḥammad 'Abduh, fits exactly this description of improper *taqlīd*. In his *Al-Islām dīn al-'ilm wa al-madanīyah* (Cairo: Sīna li al-Nashr, 1986), p.145, 'Abduh cites the shameful case of a student who had petitioned admission to al-Azhar 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 *riwāq* was informed that according to the books of geography the student's country was covered. 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 donator of this *waqf* designated the people of this area as its beneficiaries!"

reasoning is not wholly obliterated by *taqlīd* but is rather allowed its proper place alongside it.[18] A few examples in this regard will demonstrate my point.

In the *Bulghat al-Sālik*, an 18th century Mālikī manual still used at al-Azhar mosque-college, it is stated that the corpses of dead insects that do not have "running 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.[19] Now, on al-Qarāfī's doctrine, to accept that dead animals from which blood does not flow are ritually pure would be a proper exercise of *taqlīd*. 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 *taqlīd* and independent reasoning. By way of *taqlīd*, he would deem dead insects that do not have "running souls" ritually pure. By way of independent reasoning, he would determine whether or not fleas fit this description.

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[18]In what is still an influential view, J. Schacht equated *taqlīd* with the absence of independent reasoning, describing it further as the "unquestioning acceptance of the *doctrines* of the established schools and authorities." *Intro* , p.71. (emphasis added) "Doctrine" was apparently Schacht's translation of *madhhab* . This understanding, however, according to al-Qarāfī, is overinclusive; for there may be many 'doctrines' espoused by the Imāms that are not a part of their *madhhabs*. And, as such, these extra-legal "doctrines," may not be properly made the object of *taqlīd* . Moreover, since *"madhhab"* does not encompass para-legal matters, whose resolution is essential to the *application* of the law, independent reasoning is not fully obliterated by *taqlīd* but is, rather, bound to exist alongside it. Against the view of Schacht, W. Hallaq argued that there was never a closing of the door of *ijtihād*, nor, therefore, a regime of *taqlīd* . He points out that a number of later jurists disagreed with the "doctrines" of their eponyms, and argued further that analogy (*qiyās*), which he sees as the backbone of *ijtihād*, was practiced throughout. See W. Hallaq, *Gate* . On my reading of the *Tamyīz*, my response to Hallaq would be that the existence of these things does not prove that *ijtihād* never ceased to exist. First, a *muqallid* may differ with his Imam on a "doctrine" that is para-legal or non-legal and still remain a *muqallid*, as did al-Qarāfī. Second, one may practice *qiyās*, as does al-Qarāfī, and still remain a *muqallid*. My fundamental difference with Hallaq is that while he considers 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 are applied to scripture directly. See above, p.130.

[19]Al-Ṣāwī, *Bulghat*, 1:17. For the list including fleas, see *ibid*, 1:19.

Also in the *Bulghat al-Sālik*, 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.[20] If during this period the property shows a defect, the buyer has the right to revoke the sale. This thirty-six day allowance, however, was apparently the result 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'īs and Ḥanafīs who grant only three days on all products, the warranty period differs depending on the nature of the product: ten days are allowed for slaves, five for clothing, and so on.[21] Now, that an act of sale grants a buyer a warranty period 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, *taqlīd* would bind a *muqallid* to acknowledge a warranty period under the provisions of *khiyār al-naqīṣah* . However, the duration of this period would be based on his individual discretion, which would allow him to grant what he believed to be a fair and sufficient amount of time.

A final example demonstrating *muqallids*' reliance upon independent reasoning involves those opinions handed down from the *mujtahids* in which they relied on custom. Custom, it seems, by its very nature, blurs the distinction between legal and para-legal issues, and heightens, therefore, the possibility of falling into improper practices of *taqlīd* . This is brought out clearly in al-Qarāfī's exchange in Qu. no. 39 of the *Tamyīz* , which opens with the following pointed question.

> What is the correct view concerning those rulings found in the *madhhab* of al-Shāfi'ī, Mālik, and the rest, which have

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[20] *Ibid*, 2:47.

[21] *Ibid*, 2:50. See also *ibid*, 2:47 for the position of the Shāfi'īs and Ḥanafīs.

> been deduced on the basis of habits and customs that prevailed 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 jurisconsults 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 *fatwās*, therefore, according to what we find in the books handed down on the authority of the *mujtahids*."? (T. 231)

Al-Qarāfī's response is emphatic: A ruling remains valid only as long as the custom upon which it was based remains in tact 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. (T.231)

Al-Qarāfī cites several areas of law in which this principle should be observed with particular care: sale, intestate 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. 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 'alaiya ḥarām*), or "You are devoid (of 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 of non-intention. On the basis of this entry, Mālikī jurists in al-Qarāfī's time held that whenever a man uttered such phrases, he set in motion the same legal effects. Al-Qarāfī 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-Qarāfī, to impute legal force to these words.

> 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. (T.238)

For al-Qarāfī, 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 the eponyms on this point. But God has not prescribed any particular formula for actioning this right. Rather, these are derived from the custom of the people, from pre-Islamic times down to the present.[22] In determining if a particular statement is a pronouncement of divorce, therefore, 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 predominate among them as formulae for divorce. Moreover, in making such a determination, a jurist must be careful not to confuse what is predominate in the minds of the *fuqahā'* with what is predominate among the people. For a statement may have univocal meaning to a jurist owing to his specialized training and regular disputation in the law. (T.243) This, however, does not gain for it recognition as a formula for divorce. Rather, a statement acquires this status only when *the people* of a particular location make it *their* custom to use it as a legal formula, and only when *they* come to understand one

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[22]See above, p.106.

thing only whenever they hear it, not according to the usage of the jurisconsults, but according to their own. (T.243)[23]

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To summarize: *Taqlīd*, according to al-Qarāfī, is permitted only on questions of law strictly speaking. Law consists of five components: legal categories (*aḥkām*), legal causes (*asbāb*) legal prerequisites (*shurūṭ*) legal impediments (*mawāni'*) and the various forms of courtroom evidence (*ḥijāj*). Only when it pertains to a thing's *status* as a constituent of law is *taqlīd* valid; *taqlīd* is not permitted where the question is one concerning the *occurrence* of a thing. Between the rules on the books and the outside world lies a certain dissonance, which 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 *mujtahid*s on such factual questions are not authoritative; nor is it proper for a *muqallid* to follow his Imām in this regard. It is true that, as jurisconsults, both *mujtahid*s and *muqallid*s must speak to these issues, in order for the law to be applied. The important thing, however, is that neither speaks *authoritatively* in this regard. Rather, where this dissonance affects a matter of religious observance (*'ibādāt*), its resolution is left to the individual conscience.[24] Where the matter is one of a conflict of rights between individuals, judges are called upon to determine the facts.[25]

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[23]Another example in this regard might include the following. According to the Mālikī school, foodstuffs that are also used for medicinal purposes may be exchanged in unequal amounts without this violating the ban on *ribā al-faḍl*, interest of increase. See Muḥammad ibn Aḥmad al-Dardīr, *al-Sharḥ al-ṣaghīr* (on the margin of *Bulghat al-Sālik*), 2:24. However, what is customarily used for medicinal purposes varies from place to place, depending on the custom of the people. Thus, for example, it would be wrong to state on the authority of the custom of Egypt that it is illegal for Americans to trade in unequal amounts of tea. For tea is used among Americans as a medicament for the common cold, even if it is not used for this purpose in Egypt.

[24]In other words, a layman may accept as law a jurisconsult's statement, "Hardship is a valid excuse to break one's fast," or "Small amounts of ritually impure substances impurify entire bodies of water," but he may not accept *as law* his statements, "You have a hardship," or "This particular body of water is impure". These matters are left to the individual, as matters of observation and conscience. See also below, "On the Scope of the Judicial Process," p.179ff.

[25]See, however, "Discretionary Actions," below, p.189-93, where it will be seen that judges resolve via binding decisions only questions of legal facts, not para-legal facts.

V. Levels of *Taqlīd*

According to al-Qarāfī's *al-Furūq*, there are two types of *taqlīd* : 1) verbatim transmission (*naql*) and 2) extrapolation (*takhrīj*). There are essentially two levels of verbatim transmission, *naql* and *naql al-mashhūr*. This brings the total number of levels of *taqlīd* to three. (F.2:107-10)

The type of *taqlīd* 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 exhausted in the standard manuals of the guild. 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 guild containing general, cut-and-dried, unqualified statements of law. These statements are often further elaborated, e.g., made specific (*mukhaṣṣaṣ*) or qualified (*muqayyad*), in larger commentaries or monographs devoted to specific topics. Al-Qarāfī stipulates 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 it; nay it exactly." (F.2:107) If it is believed that there may 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 demonstrates 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*). [26]

Now, a novice who has mastered this abridgment could respond to a question involving disagreement over dowry where the marriage had not already 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 guild, and it has been proved that this applies only where it is the custom of a people that the wife always receives her dowry before the marriage is consummated, as was the case in Medīnah during the time of Mālik. If this is not the case, the burden of proof would fall upon the husband, since in the absence of indications to the contrary, it must be assumed that the dowry had not been paid. (T.233-4)

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[26]Muḥammad b. al-Ḥārith al-Kushanī, *Uṣul al-futyā fī al-fiqh 'alā madhab al-imām mālik*, ed. Muḥammad al-Majdūb (Dār al-'Arabīyah li al-Kitāb, 1985), p.286.

It is obviously not always clear that the information in a manual is deficient and in need of further clarification. As is clear from the present example, unpredictable changes in custom may without warning render an entry obsolete. It is perhaps here that the mentor-system alluded to in al-Qarāfī's advice to jurisconsults takes on its greatest significance.[27]

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 in which general statements are specified or qualified, from monographs, private sessions, or detailed commentaries. Still, he has not 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 does he know the rank accorded the various sources and principles, 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 on them in passing from fellows and teachers at the 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* on complex treated questions and transmits, verbatim, to his petitioner the view most widely subscribed to (*al-mashhūr*)[28] in the guild. (F.2:107)

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[27]See above, p.50-1, where I discuss the manifestations of rank within the guilds of law and al-Qarāfī's statement, "These latter expressions should be used only if it is proper for the second mufti to authorize the first mufti to give *fatwās* (*yujīzuhu*) or that he *act as overseer of the latter's work*, and the relationship between the two is as that between teacher and student ...." (emphasis added)

[28]On the *mashhūr*, see below, p.167ff.

The difference between the novice and the intermediate jurisconsult is that the novice treats basic questions on which there is little if any disagreement in the guild 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, such as 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. *Takhrīj* is primarily a process of analogical, deductive and inductive reasoning. It is via this process that the master followers of the Imāms are able to resolve unprecedented questions.

The basic idea behind *takhrīj* is that the method of an Imām is extractable from the aggregate of opinions expressed by him on individual questions of positive law.[29] Once this method has been mastered, one can predict his position on unprecedented questions and indicate this on his behalf. At the heart of *takhrīj* lies the all important task of determining if the untreated question is analogous to a treated one. This entails a tripartite

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[29]For an early example of this see, Abū al-Ḥasan 'Alī b. 'Umar, better known as Ibn al-Qaṣṣār, *Muqaddimah fī uṣūl al-fiqh*, where the author systematically deduces Mālik's method based on the latter's position on a number of individual questions. For example, the fact that on many questions Mālik argued on the basis of *mursal* hadiths (i.e.,those where a Successor or Companion did not indicate who stood between him and the Prophet), such as preemption of partners (*shuf'at al-sharīk*) and the admissibility of the testimony of one witness joined by the plaintiff's sworn oath, indicated that *mursal* hadiths were absolutely probative according to Mālik's method of legal interpretation. See fol. 10, verso.

operation: First, of all the attributes (*awṣāf /s. waṣf*) inhering in the treated question, it must be determined which are efficient and to be considered, therefore, ratio essendi (*'ilal /s.'illah*). Second, the same must be done for the untreated question. Finally, the untreated question is subsumed under the appropriate legal category and accepted or rejected as a relevant constituent of law, according to the "*madhhab*" of the Imām.

1. Identifying Efficient Properties

In the *Sharḥ Tanqīḥ al-Fuṣūl*, al-Qarāfī identifies eight methods for identifying efficient causes (*'ilal/ s.'illah*) . He cites five methods for proving properties inefficient. Space allows here for only a superficial treatment of each.

The eight sources and methods for identifying efficient properties are :1) explicit statements (*naṣṣ*); 2) verbal allusion (*īmā'*); 3) appropriateness (*munāsabah*); 4) resemblance (*shabah*); 5) coextensiveness/ coexclusiveness (*dawarān*); 6) selective elimination (*al-sabr wa al-taqsīm*); 7) induction (*ṭard*); and 8) extraction (*tanqīḥ al-manāt*).

Explicit Statements (*naṣṣ*): The *mujtahid* states explicitly, "X is the ratio essendi." The *muqallid* thus knows that this is the efficient quality. (S. 390)

Verbal Allusion (*īmā'*): A statement such as, "Murderers receive no inheritance from their victims," alludes to murder as the ratio denying an individual inheritance otherwise due. (S.390-1)

Appropriateness (*munāsabah*): Here the ratio is identified as that which serves some public benefit (*maṣlaḥah*) or removes a harmful effect (*mafsadah*). For example, benefit to the poor is identified as the ratio for the obligation to pay alms (*zakāt*); its harmful effect on society is identified as the ratio for the prohibition on consuming intoxicants. These benefits and harmful effects are ranked according to the extent to which they benefit or harm society: absolutely necessary (*ḍarūrī*), necessary (*ḥajji*), and desirable (*tatimmi*). (S.391-4)

Resemblance (*shabah*): Here a property is not of itself appropriate (*munāsib*) as a ratio but closely resembles or entails a property that is. For example, a murdered slave's property of being a murdered slave engenders of itself no specific ruling. However, he resembles property, and he resembles free human beings. Mālik and al-Shāfi'ī emphasize his resemblance to property and conclude that his murderer is liable for his dollar-value, even if this exceeds the amount of blood-money paid for a free person. Abu Ḥanīfa, on the

other hand, emphasized his resemblance to free men and held that the blood-money paid could not exceed that paid for free men. (S.394-6)

Coextensiveness/Coexclusiveness (***dawarān***): Here the ratio is identified as that quality which is present wherever a particular ruling is present and absent where the ruling is absent. For example, grape juice is forbidden if it ferments and thus intoxicates, but permissible if it does not. Fermentation and intoxication are thus identified as the ratio. (S.396-7)

Selective Elimination (***al-sabr wa al-taqsīm***): This is also called *takhrīj al-manāt* (extracting efficient properties). The *mujtahid*-Imām does not identify the properties deemed to inhere in the treated case, nor does he identify the ratio. The *muqallid* thus catalogues the various qualities inhering in the treated case (*sabr*) and then decides, by process of elimination, which are efficient (*taqsīm*). The example given is that of the Prophet's prohibition on trading wheat in unequal amounts or with lapses of time between deliveries. The Prophet did not identify any qualities, such as wheat's being a fungible, sold by weight, quantity, etc. The *mujtahids*' identification of these qualities and their subsequent selecting one as the ratio is an exercise in *al-sabr wa al-taqsīm*, which involves the selective elimination of other inherent qualities. (S.397-8)

Induction (***ṭard***): Here it is simply noticed that wherever a property exists, a particular ruling exists, although the property cannot be isolated and judged on its own, because it does not clearly represent a benefit or harm to society. (S.398) An example of such might include the prohibition on eating pork.

Extraction (***tanqīh al-manāt***): This has two forms:1) where the ratio is extracted from a number of identified properties via process of elimination; for example, it is reported that a Bedouin once came to the Prophet, beating his (own) chest, pulling out his hair, exclaiming, "I have perished, I have perished; I had relations with my wife during the fast of Ramaḍān." (S.398) The man's beating his chest and his pulling out his hair are eliminated, and coitus is identified as the ratio; 2) where the difference between treated and untreated entities are deemed inefficient and thus ignored. For example, the gender difference between male and female slaves is ignored, and the verse, "To them [female slaves] applies half the punishment applied to free women," (Q.4:25) is applied to male slaves as well. (S.398-9/ S.388)

2. Proving Properties Inefficient

The five means of proving properties inefficient are : 1) inconsistency (*naqḍ*); 2) inefficiency (*'adamu 't-ta'thīr*, also called *'aks*); 3) incongruence (*qalb*); 4) concession of inefficiency (*al-qawlu bi al-mūjab*); and 5) dissimilarity (*farq*).

Inconsistency (***naqḍ***): A quality suspected of being efficient is proved inefficient by showing that while it exists in one case that receives ruling X, it also exists in another case that does not receive this ruling. For example, by itself, confusing the agnatic relationship of children is proved inefficient as a full ratio by the fact that were a man to cast away his children at an age when they were too young to know their lineage, he would not receive the ruling governing adultery, although it has been said that confusing agnatic relationships

is an efficient property in cases of adultery and fornication. Most jurists consider *naqḍ* an exercise in determining not if a property is efficient, but under what circumstances it is efficient. Others have said that it is an exercise in uncovering impediments (*mawānī'*) to a property's efficiency. (S.399-400)

Inefficiency (*'adamu 't-ta'thīr*): Here a property is found to exist along with ruling X; the property disappears (in another case), yet the ruling, X, remains. The property is thus concluded to be inefficient. For example, red wine, which is forbidden, has the property of redness and of being an intoxicant. In white wine, the property of redness disappears, but the prohibition remains, showing that color is inefficient. (S.401)

Incongruence (*qalb*): Here the property suspected of being efficient is proved inefficient by its existence in two cases yielding mutually contradictory rulings. This method is used primarily as a means of defending one's own definitions and disproving those of an opponent. For example, if an opponent argues that fasting is required when performing *i'tikāf* (seclusion), because *i'tikāf* entails spending long periods of time in a holy place, one might respond that 'Arafāt is a holy place where one spends long periods of time (e.g., during pilgrimage), yet fasting is not required there. This disproves spending long periods at holy places as an efficient property necessitating fasting. (S.401-2)

Concession of Claimed Efficiency (*al-qawlu bi 'l-mūjab*): Here the thesis of an opponent is conceded, but it is argued that it does not necessitate the claimed ruling. For example, one might concede that horses are like camels in that they are ridden. But this does not prove that one must pay alms (*zakāt*) on horses. Rather, only if they are used for commerce must alms be paid on them. *Al-qawlu bi 'l-mūjab* is actually a variation of *naqḍ* (inconsistency). It is particularly relevant in treating cases that admit of compound efficient qualities (*'ilal murakkabah*). (S.402-3)

Dissimilarity (*farq*): Here the difference between two entities is brought out, and it is shown that due to this difference a property that is efficient in the first case is not in the second. For example, the difference between sale and eleemosynary gifts is that sale involves remuneration whereas gift-giving does not. Thus uncertainty (*gharar*) about quantity or quality is relevant in sale but not in gift-giving, since in the latter case the recipient stands to lose nothing. (S.403)

D. *Takhrīj* : The *Ijtihād* of the *Muqallid*-Jurisconsult

Through the above methods, the *muqallid*-master jurisconsult extracts from the views of his Imām those properties believed to have been relied upon as ratio essendi. With this information he is now able to subsume untreated questions under treated ones. This may take the form of straight-forward deduction; e.g., according to Mālik, X, which has the property Y, receives ruling A; R, a new issue, has property Y; R thus receives the ruling A. Or in cases where the treated and untreated cases are not perfectly symmetrical, a more sophisticated form of analogy may be required; e.g., according to Mālik, X, which

has the properties PQRS, receives the ruling Y; N, a new issue, has the properties OPQR; S in the treated issue and O in the untreated issue are deemed inefficient; N thus receives the ruling Y.[30]

The methods employed by the *muqallid*-master jurisconsult are identical to those employed by the *mujtahid*-Imāms in deducing ratio essendi from the sources, and subsuming untreated questions under treated ones. According to al-Qarāfī, *complete mastery of uṣūl al-fiqh is an absolute necessity for anyone aspiring to perform takhrīj*. (T.261/F.2:109) In this there is no difference between the *mujtahid* and his *muqallid* - follower.

> This is an area in which the *mujtahid*s and the *muqallid*s are equal, inasmuch as neither may perform *takhrīj* (unless he has mastered this discipline). Nay, any *muqallid* who has reached the level where he is able to temper the universal and general statements of his Imām with the appropriate qualifications, yet he lacks the requisite knowledge for performing *takhrīj*, may issue only those legal opinions that embody narrations handed down in the *madhhab*, without venturing into *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 a *mujtahid* - Imām. The same goes for the *muqallid* [i.e., he may not extrapolate unless he has mastered *uṣūl al-fiqh*]. (F.2:109)

Indeed, in uncovering the reasons and ratio essendi relied upon by his Imām, the *muqallid*-jurist is completely on his own; his is a thoroughly subjective operation for which he relies exclusively on his own lights. This is the meaning of al-Qarāfī's endorsement of his interlocutor's statement to the effect that *there is no taqlīd in uṣūl al-fiqh*. (T.196)[31] Essentially, in performing *takhrīj* the *muqallid* performs *ijtihād*; i.e., he exerts the same

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[30]For an excellent introduction to deductive and analogical reasoning, see Wael Hallaq, "The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law," *Cleveland State Law Review*, vol. 34 no.1, 1985-6, p.79-96.

[31]See above, p.140, nt. 10.

intellectual effort and employs 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* is the "translator-interpreter for God," (T.29) the *muqallid* is "the tongue of his Imām, and the interpreter of that which [wa]s in the latter's mind." (T.29) "He is the representative of his Imām on behalf of whose conclusions he communicates to those seeking legal counsel." (T.29) Summed in the words of al-Qarāfī,

> One who looks into the *madhhab* of his Imām (*an-nāẓiru fī madhhabi imāmih*) and seeks to extrapolate on the basis of the latter's method (*uṣūl*) stands in relation to his Imam as his Imam stands in relation to the Law-giver, in following His explicit statements and extrapolating on the basis of (his understanding) of His intended purposes (*maqāṣidih*). (F.2:107)

E. Legal Precepts (*qawā'id*): The Mainstay of the *Muqallid's Takhrīj*

While in the main, *takhrīj* was a subjective and individualistic operation, there was one additional observandum impinging on the activity of the *muqallid*-jurist: In extrapolating on the basis of the *madhhab* of his Imam he had to be certain that he did not violate any legal precepts (*qawā'id*).

> 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* and the rules of consensus. And to the extent that he is deficient in this ability, it is prohibited for him to perform *takhrīj* . Nay, under such circumstances he should respond only to questions already treated .... (T.260) [32]

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[32]In his *al-Furūq*, al-Qarāfī warns more explicitly that it is not enough to master the discipline of *uṣūl al-fiqh*, "for *uṣūl al-fiqh* does not encompass legal precepts (*qawā'id*). On the contrary, there are many, many, precepts of the *sharī'ah* relied upon by the Imāms and the masters that are nowhere to be found in the books of *uṣūl al-fiqh*. And it was for this reason that I was moved to compose the present work, i.e., to catalogue these precepts to the best of my ability." See *al-Furūq*, 2:110.

Legal precepts (*qawā'id*) are essentially broad-based rules or tests deduced from the aggregate of opinions of the early Imāms. In contradistinction to legal principles (*uṣūl*), which apply equally to all areas of the law, legal precepts apply only to the area from which they are drawn: A precept drawn from the opinions on inheritance, for example, will apply only to questions on inheritance; a precept from commercial transactions will apply only to commercial transactions; and so forth and so on.[33] The basic function of legal precepts is to enable jurists to screen unprecedented questions without having to memorize scores of individual rules, and without having to refer back to scripture in every case for specific probative texts (F1:2-3): where a question may be subsumed under an existing precept, there remains neither cause nor justification to investigate it any further. At the same time, where the need does arise to consult scripture on an unprecedented matter, legal precepts ensure that the resulting interpretations do not violate the *madhhab* of the respective Imām.

An example of a legal precept would be the rule in the Mālikī school prohibiting all transactions where money paid is liable to oscillate between payment and loan (*at-taraddudu bayna 'th-thamanīyati wa 's-salafīyah*). 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, on this description, to purchase it, the contract will remain valid only as long as the seller does not stipulate payment before delivery. The reason for this is that the buyer may later decide against buying, in which case the money now in the vendor's hand will oscillate between being payment for the crop (*thaman*) and a loan to the seller (*salaf*). [34]

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[33] In his *al-Furūq*, 1:4, al-Qarāfī indicates that there are at least five hundred forty-eight (548) precepts. His *al-Furūq*, which ends with distinction no. 274, apparently treats all of these by way of comparison.

[34] 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

On this precept, *at-taraddadu bayna 'th-thamanīyati wa 's-salafīyah*, any transaction that threatened to lead to oscillation between payment and loan would be deemed illegal, automatically, regardless of its particulars, and even if scripture and the *madhhab* were both devoid of specific rules in this regard.

Legal precepts operate much in the same way 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 ...."[35] However, when a case is brought before a lawyer or a court, there is no return to these words to determine their meaning anew for the particular case at hand. 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," the third part of this test, is determined on the basis of a three-part sub-test which looks at: 1) the character and the purpose of the religious institution to be benefitted; 2) the nature of the aid; 3) the resulting relationship between the government and the religious officials. [36]

These "tests" are almost identical in function to the legal precepts (*qawā'id*) relied on in Islamic law. The application of these tests by lower court judges and lawyers is in effect an exercise in *taqlīd* : The legal community seeks to interpret not the meaning of the Constitution but the meaning of these tests, which are the product not of Congressional legislation but rather of the Supreme Court's deliberation. Indeed, a fresh and independent

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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 thus understood to have been a loan, what is its maturity date?

[35]See Gerald Gunther,*Constitutional Law: Cases and Materials* 10th.ed. (New York:The Foundation Press, 1980), appendix B, p.B9

[36]See J.E. Novack et al., *Handbook on Constitutional Law* (St. Paul, Minn.:West Publishing Co., 1978), p.851.

reading of the Constitution might lead to different or even contradictory results. The relationship, then, between the Supreme Court and the legal community is not wholly unanalogous to that between the *mujtahid*-Imāms and their *muqallid*-followers.[37] However, whereas *taqlīd* in the American system consists of following *living mujtahid*s who are aware of and affected by the exigencies of their times, *taqlīd* in Islam is limited to following dead scholars, whose doctrines become fixed at the time of their death. It is perhaps this difference, and not that one system admits *taqlīd* while the other does not, that provides for the difference in the two systems' ability to chart their course into the future.

For Islamic law, however, the ban on violating legal precepts was essential to the regime of *taqlīd* ; for only through observance of these precepts could non-violation of the *madhhab*s be ensured. In effect, this new observandum forced legal principles (*uṣūl*) to the periphery, with legal precepts (*qawa'id*) nearly displacing the latter as the mainstay of the jurisconsult.[38] It is noteworthy that this displacement seems to make its appearance at the turn of the 7th/ 13th century. This is the impression one gets from Ḥājjī Khalīfah's *Kashf al-Ẓunūn*, where under the heading, "*al-qawā'id,*" one reads:

> "*Al-Qawā'id fī al-Furū' al-Shāfi'īyah* ," of the Shāfi'ī, Mu'īn al-Dīn Abū Ḥāmid Muḥammad ibn Ibrāhīm al-Jajirmi, who died in 613 a.h.: People became heavily involved with this work during his time (*akthara 'n-nāsu "alā 'l-ishtighāli bihā fī 'aṣrih*). (Similar works were written by) the Shaykh and Imām, Khalīl b. Kaykaldi al-'Alā'i and Shihāb al-Dīn

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[37] I have focused in this study on the concrete historical factors that may have contributed to the transfer from the regime of *ijtihād* to that of *taqlīd*. It seems to me, however, that, concrete historical factors aside, all legal traditions develop in the direction of *taqlīd*. For, if a legal tradition is to take itself seriously, its interpretations must be grounded in ideals that are in some sense transcendent of immediate interests, which means that they are most likely to draw upon 'universal' ideals whose pedigree extends into the past. Likewise, every tradition must set horizontal limits beyond which no interpretation is accepted. And for a jurist to remain within these perimeters means itself that the primary sources of the law are mediated through some artificial channel. Finally, mention should be made of the constraints brought about by institutionalizing legal education; for afterall, the goal of all education is, at least in part, to preserve some already established ideals and doctrines.

[38] An indication of this appears in the diachronic work of Shāh Walī Allāh, *Ḥujjat Allāh al-Bālighah* , 1:156-7, where the author inveighs against the apparently widespread practice of giving precedence to legal precepts over hadith.

> Abū al-'Abbās Aḥmad ibn Idrīs al-Qarāfī, the Shāfi'ī [sic], who died in 684 a.h., (the title of the latter work being) *anwār al-burūq* . Shaykh Sharaf al-Dīn 'Alī b. 'Uthmān al-Ghaznī, who died in 799 a.h., also wrote a work on legal precepts in which he cited precepts and the various exceptions to them. He also included the "puzzles" (*alghāz*) of al-Isnawī and added to them.[39]

Ḥājjī Khalīfah cites no works on *al-qawā'id* prior that of al-Jajīrmī, who died, again, in the year 613 a.h.

VI. The View of a *Madhhab* : *Rājiḥ* vs. *Mashhūr*

The cumulative stock of a school consists of two categories of rules: 1) those the deduction of which is attributed to the eponym of the school; and 2) those extrapolated on the basis of the latter's *madhhab* . Because of disparity in narrations on the authority of the Imāms, and due to differences resulting from individual jurists' independent *takhrīj* , there is diversity within each of these categories. Among this diversity, however, are some opinions that gain greater acceptance among the members of a school than others. These preferred views come under two designations: *rājiḥ* and *mashhūr* .

Literally, the term *rājiḥ* means "preponderant" or "weightiest". *Mashhūr*, on the other hand, means, "famous," "widely subscribed to". Between the two terms there is overlap, and jurists often use them interchangeably, presumably on the assumption that the weightiest view is bound to receive the widest recognition and become, therefore, "famous". This assumption, however, is not necessarily true, and at bottom there remains an important difference between *rājiḥ* and *mashhūr* .

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[39]Ḥājjī Khalīfah, *Kashf al-ẓunūn 'an asāmī al-kutub wa al-funūn*, 2 vols. (Baghdād: Muthannā Press, no date), 2:135

Generally speaking, for a jurist to conclude a view to be *rājiḥ* is for him to make a subjective judgment founded on his individual scrutiny. This conclusion implies that to his mind this view is qualitatively superior and better substantiated. Al-Qarāfī underscores the highly subjective character of the *rājiḥ* when he points out that what may be *rājiḥ* to one jurist may not be so to another. (S.331) *Mashhūr*, on the other hand, implies not so much the subjective judgment of an individual jurist but rather a group acceptance of a view, with far less attention paid to the reasons for this acceptance. Whereas *tarjīḥ*, the act of identifying the *rājiḥ*, is the preserve of only the most qualified jurisconsults, identifying the *mashhūr* becomes the duty of jurists on the intermediate level and below, those who have not yet reached the level where they are competent to assess the merit of a view. This is clearly reflected in the position cited by Ibn Farhūn, 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-rājiḥ*) of the views of the followers of his guild, 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 that is most widely subscribed to (*al-mashhūr*) (in his guild).[40]

Again, this underscores the fact that while the *rājiḥ* 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 *rājiḥ*, in contradistinction, is the view of the individual and may exist for him even alongside the *mashhūr*. Similarly, if a proponent of a *rājiḥ* view is able to convert enough jurists to his way of thinking, this view may acquire *mashhūr* status and displace the incumbent view.

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[40]See *Tabṣirat*, 1:66. Notice that Ibn Farhūn conceives of *ijtihād* as the effort exerted to understand not scripture but the *madhhab* of an Imām.

A. Criteria : *Rajiḥ*

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 (of the Imāms) are anterior and which posterior." [41]

Such qualified jurists employ a variety of criteria, apparently with varying degrees of consistency, in determining which of the views related on the authority of an Imām is *rājiḥ* . There appears to be general agreement that whenever a view is known to have been the Imām's final word on a matter, it is the *rājiḥ* .[42] This suggests that "*rājiḥ* ," when it comes to questions already treated by the Imām, 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*). [43] Apparently, some of jurists understood the existence of numerous narrations to reflect a certain diffidence on the part of the Imām or the fact that the question had not been exhausted. They would therefore consider the matter unresolved and resort to *takhrīj* (extrapolation), 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. [44] In com-

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[41] *Ibid*, 1:68.
[42] *Ibid*, 1:67.
[43] *Ibid*, 1:66 , 71.
[44] *Ibid*, 1: 66-7.

menting on this practice, Ibn Farhūn 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 the property of the wife, the view that divorced women are awarded these things would not be *rājiḥ* in places where these things customarily belonged to husbands.[45] Ibn Farhun adds that many Shāfi'īs were also mindful of this observandum.[46]

Where the question is one of deciding which of the views extrapolated as solutions to unprecedented questions is *rājiḥ* , Ibn Farhūn 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, for example, a view supported both by precedence and congruence with the method of an Imām might be preferred over a view that is congruent with his method but unsupported by practice.

The disagreement over whether the *rājiḥ* is that which accords best with scripture or that which accords best with the method of the Imām is predicated, it seems, on the ongoing conflict over whether views better substantiated by scripture automatically dislodge those of the Imāms. Al-Qarāfī, it will be recalled, was hostile towards the notion that the views of the Imāms should be automatically displaced. [47] This position, as suggested earlier, was based on the fear that to concede the opposite view would ultimately lead to the erosion of the corporate status of the *madhhab*s and to violations of two-tiered orthodoxy, as principals might take the liberty of second-guessing their deputies on the

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[45]*Ibid*, 1: 69.
[46]*Ibid*, 1: 69-70.
[47]See above, p.77-8.

argument that there own views were better substantiated by scripture. Later, in chapter five, I hope to show that al-Qarāfī was aware that this particular means of safeguarding the corporate status of the *madhhab*s was a blunt instrument purchased at a very high price. It is telling, however, that this insight notwithstanding, this was a price he was nonetheless willing to pay.[48]

B. Criteria : *Mashhūr*

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

According to Ibn Farhūn, whenever there was conflict among the views of Mālik, the *mashhūr* was the view related by Ibn al-Qāsim. [49] 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, and which later, which had been retracted, and which had been his final say. [50]

Ibn Farhūn 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.[51] 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

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[48]See below, p.208-11.
[49]*Tabṣirat*, 1:71.
[50]*Ibid*, 1: 68.
[51]*Ibid*, 1: 66.

cumulative manuals and court records, such as, "That which has been traditionally applied" (*alladhī jarā bihi 'l-'amal*), "That which had been traditionally applied in the courts" (*alladhī jarā bihi 'l-qaḍā'*), 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* .[52] For some, these phrases indicated not that a view was *mashhūr* but that it was *rājiḥ* , and the question came up as to whether judges could abandon *mashhūr* views in favor of views supported by this type of precedent.[53]

Some scholars objected to giving any probative weight at all to statements such as, "That which has been traditionally applied," and the like. For these statements, they protested, indicated only that a view had been accepted and applied; they did not indicate *who* had accepted them nor *who* had applied them. [54]

Sometimes the *mashhūr* differed according to region. The Iraqis, 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* . [55]

Regarding views on unprecedented questions extrapolated on the basis of the *madhhab*s 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 held that it was "that for which there is the greatest number of proponents" (*mā kathura qā'iluh*). [56] Historically speaking, the latter is almost certainly

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[52]*Ibid*, 1: 67.
[53]*Ibid*, 1: 66. On the rule holding judges to the *mashhūr* and al-Qarāfī's diffidence on it, see below, p.208-11.
[54]*Tabṣīrat*, 1: 67.
[55]*Ibid*, 1: 71.
[56]*Ibid*.

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-Ḥājib to the effect that the *mashhūr* is resorted to by default, i.e., when one is not capable of assessing its merit.[57] This shows that originally the *mashhūr* was not "that for which there is the strongest evidence."

Some scholars, for example the Mālikī, Ibn Rāshid (d. circa., 731/ 1330),[58] 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." [59] 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 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.[60]

The insistence of those scholars who argue that the *mashhūr* is the view best substantiated by scripture reflects, I believe, an attempt to circumvent one of the more

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[57]See above, p.168.
[58]On Ibn Rāshid and his association with al-Qarāfī, see above, p.65, esp. nt. 36.
[59]*Tabṣirat*, 1: 71.
[60]*Ibid.*

stultifying effects of the regime of *taqlīd*. Under this new order, the emphasis apparently shifted from the individual jurisconsult to the association of jurisconsults as a whole. The "view of a *madhhab*" being the *mashhūr*, it was this view to which all guild members would have to pay respect. This meant that where a scholar's independent research led him to a new conclusion, he had somehow to find a way either to dislodge the incumbent *mashhūr* or to circumvent it. However, displacing an incumbent view would take time, and even if successfully done would only affect things in the future, not the present, out of which had come the circumstances that produced the new view. This explains, perhaps, the attempt on the part of a number of scholars to get around the *mashhūr* by using one of two devices. In the first of these the attempt is simply to redefine the *mashhūr* as that which is in closest conformity with scripture. On this definition one becomes justified in calling his preferred view "*mashhūr*," since, in his judgment, it is the view best substantiated by scripture. The second device for circumventing the *mashhūr* was simply to outwit the majority by going one better than it. Typical of this approach was the practice of Ibn al-Ḥājib, who, alongside the *mashhūr* would cite another view, which he preferred, and dub this second view "the more famous," "*al-ashhar*"! [61] Al-Subkī follows a similar approach, when, after comparing his view with previous opinions, he refers to it as "the more apparent," "*al-aẓhar*"![62]

These practices are actually exercises in *tarjīḥ* (identifying the *rājiḥ*). Yet scholars do this only surreptitiously, choosing not to make obvious the distinction between the *mashhūr* and their own preferred views. This shows that they recognized that the view most likely to receive the widest acceptance and application was not the *rājiḥ*, its qualitative superiority notwithstanding, but the *mashhūr*.

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[61] *Ibid*, 1: 72.
[62] *Mu'īd al-ni'am*, p.52.

This, again, underscores what was perhaps one of the most important side effects of the regime of *taqlīd*, namely, that authority passed from the individual jurist to the association of jurisconsults as a whole. As a consequence, even where there was disagreement on an issue, not all existing views were of equal weight; some were, and ideally one was, preferred over the rest. This meant that even where there was no consensus proper on a question, the existence of a "going opinion" produced a similar effect, namely the fordization of views. And it is here, to my mind, and not in the technical application of *taqlīd* as a method, that the negative effects of the regime of *taqlīd* are most sorely felt. For this new order not only deepened the already conservative bent of the legal tradition as a whole -- and one might remind oneself that all legal traditions are backward looking -- it also sacrificed quality to quantity, as it forced the individual to pay homage to the group and in effect put an end to the free flow and availability of ideas.[63]

C. Diversity and Change

As previously shown, what is *rājiḥ* or *mashhūr* in one place or time may not be or remain so in another; conversely, what is not *rājiḥ* or *mashhūr* may become so. This underscores the fact that legal change and diversity exist even under a regime of *taqlīd*. A number of examples culled from the sources confirm this fact.

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[63]Compare in this context the statements of al-Māwardī and Ibn Qudāmah to the effect that the jurisconsult's primary responsibility was to God, not the *madhhab* to which he belonged. See above, p.118-22, esp. nt.46, and p.123f. Compare also the view of Prof. G. Makdisi:"In this process [of issuing legal opinions] two freedoms were involved: the freedom of the professor to profess his own personal opinions independently of all forces, both within and without the guild in which he was a member; no power could compel him to give a predetermined opinion." *Scholasticism and Humanism in Classical Islam*, p.177. See also, *idem*, *Rise*, p.201, where it is said of the judge's *ḥukm*, that it "put an end also to the free play of ideas leading to the strongest opinion accepted by the consensus of the community." It may be that the role attributed here to the judge's decision belongs more properly to the self-imposed constraints of the regime of *taqlīd*.

In his *Mu'īd al-Ni'am*, Tāj al-Dīn al-Subkī relates a controversy over the practice of some well-to-do suitors who would have their dowry commitments to their spouses-to-be written out on silk parchments. The use of silk being forbidden to men, the question came up as to whether this practice was permissible. Al-Subkī notes that this issue had been debated previously in the Shāfi'ī *madhhab*: the headmaster, al-Nawawī (d.676/1277), for example, had forbidden the practice. Later, however, al-Subkī reports that he saw his father, the famed Chief Justice, Taqī al-Dīn, write out such contracts on silk parchments. The father had originally refrained from this practice, which suggests that the view of al-Nawawī had originally been 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. [64]

In the *Tamyīz* al-Qarāfī asserts that the Mālikī position is that if a woman is knowledgable of her husband's indigence at the time of marriage, she may not subsequently file for annulment on grounds of non-support. (T.147) This is confirmed in Ibn Qudāmah's *al-Mughnī*, which catalogues the views of all the schools. [65] However, throughout the *al-Mudawwanah*, 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.[66] In the *Bidāyat al-Mujtahid*, Ibn Rushd (d.595/1198) echoes the opinion cited in *al-Mudawwanah* and gives the Mālikī view as agreeing with that of the Shāfi'īs.[67] In a much later work, the *Bulghat*

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[64]*Mu'īd al-ni'am*, p. 52.
[65]*Al-Mughnī*, 7:577.
[66]See Saḥnūn (Ibn Sa'd al-Tanūkhī), *al-Mudawwanah al-kubrā*, 4 vols. (Beirut: Dār al-Fikr, 1407/1986), 2: 192-4.
[67]On the Shāfi'ī view, see above, p.97.

al-Sālik , which is diachronic and cites views from several centuries back, the view cited by al-Qarāfī and Ibn Qudāmah turns up missing once again. [68]

A final example from the Ḥanafī school. According to the *al-Ikhtiyār li Ta'līl al-Mukhtār* of 'Abd Allāh b. Maḥmūd b. Mawdūd 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.[69] In the *al-Lubāb fī Sharḥ al-Kitāb* of 'Abd al-Ghanī al-Ghunaymī (13th/19th century), the same arrangement is condemned as illegal.[70] 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 of their *madhhab* as a whole. This is explicitly confirmed, for example, in the *al-Ikhtiyār* of al-Mawṣalī. In his introduction he writes:

> 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 fuqahā'* ." [71]

These changes, then, represent changes in the view of the *madhhab* as a whole, not simply the individual authors themselves. Given, however, that new arrivals must now dislodge views supported not merely by individual scholars but by the association of jurisconsults as a whole, the process of change is likely to be slower than what it had been

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[68] *Bulghat*, 1:521 ff. esp.1: 524: "*in athbata 'usrahu tuluwwima lahu 'alā 'l-mu'tamadi thuma ṭulliqa 'alayh.*"

[69] See 'Abd Allāh b. Maḥmūd b. Mawdūd al-Mawṣalī, *al-Ikhtiyār li ta'līl al-mukhtār*, 5 vols. ed. Maḥmūd Abū Daqiqah (Cairo: Dār al-Fikr al-'Arabī, no date), 3:7.

[70] 'Abd al-Ghanī al-Ghunaymī, *al-Lubāb fī sharḥ al-kitāb*, 4 vols. ed. Muḥammad Amīn al-Nawawī (Beirut: Dār al-Ḥadīth, no date), 2: 165.

[71] Al-Mawṣalī, *ibid*, 1:6. Emphasis mine.

under the previous order. Similarly, since the "going opinion" forces other views to the periphery, limiting thereby the number of alternatives at a petitioner's (*mustafti*) disposal, the process of adapting to changing social and economic circumstances is also likely to be slower than what it had been in the past. Indeed, under this new order, it seems that while there may have been many views recognized as orthodox, there was, alas, only one view recognized as orthoprax.

Chapter Five

The Judicial Process

I. On the Scope of the Judicial Process

"The sacred law of Islam," wrote the late Joseph Schacht,

> is the very 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.[1]

This statement, though undeniable in its basic assertion, is the product 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 recognized that law can be viewed from another perspective, namely that of the legal process.[2] Here the issue becomes not one of identifying which areas of human behavior are made the subject of legal contemplation, but rather which areas are regulated by legal rules that are backed by sanctions via a legal process. The question, then, in the case of Islamic law would be What proportion of its all-encompassing rules is backed by force and imposed upon the Community via the assistance of the courts?

A. Law and the Legal Process

The legal process, to borrow the description of Alan Watson, is the institutionalized process which has the essential function of resolving actual or potential disputes by means of a decision. This decision, if need be, is backed by force. The disputes that may be brought before the court are identified by the legal rules, which define the rights, privileges

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[1]*Intro*, p. 1. Emphasis mine.

[2]This is the approach of Alan Watson, for example, in his provocative work, *The Nature of Law* .

and obligations to which citizens may lay claim. In this capacity, legal rules thus provide the means of calling the legal process into operation.[3]

It is a common feature of Western secular systems that their respective legal processes do not invade every aspect of life. There are indeed, "sensitive areas" in which the principle 'Law stays out' is vigorously invoked. What is recognized as a sensitive area will of course differ from system to system, as will the means (i.e., popular morality, religion, etc.) of regulating this sphere of concerns.[4] For the most part, however, it appears that in the West the legal process is directly proportional to the scope of a system's body of rules: Every rule represents a means of calling the legal process into operation.[5] Similarly, the principle 'Law stays out' protects sensitive areas not by merely placing them outside the reach of the legal process but also by insisting that these are areas in which legal contemplation simply has no place.

The situation in Islamic law, however, is different. According to al-Qarāfī:

> The rules of Islamic law are divided into two categories: 1) a category which may be treated by both the ruling (*ḥukm*) of a judge and the ruling [*fatwā*] (of a jurisconsult), this category thus being subject to the two types of ruling; and 2) a category that may be treated only by the *fatwā* of a jurisconsult. (F.4:52)

In other words, in contradistinction to Western legal systems, Islamic law circumscribes its "sensitive areas" not by circumscribing the area covered by legal rules but

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[3]Alan Watson, *Nature*, p. 20-2.

[4]See *ibid*, p.96-8. Watson points out that these differences emerge most clearly when one looks at a foreign system. The *Allgemeines Landrecht fur die Preussischen Staaten* of 1794, for example, included the following: s.61: A healthy mother is under the obligation of suckling her child herself. s.62: How long she must keep the child at breast is determined by the father's decision. s. 63. He must, however, submit himself to the ruling of experts if the health of the mother or child would suffer from his decision. See *ibid*, p. 97. Clearly, this is an area in which most Americans would insist that law stay out.

[5]In fact, this appears the be the very *raison d'etre* of a rule's existence.

by circumscribing the legal process, even in areas for which rules exist. On this understanding, while "Islamic law," in the sense of legal rules, may be described as all-embracing, "Islamic law," in the sense of its legal process, is limited to specified areas of concern.

B. The *Ḥukm* and the Legal Process in Islam

One may discern that the effective instrument of the legal process is the decision; the decision terminates the dispute; the decision carries the threat of force. It follows, then, that any limits placed on the decision are, willy-nilly, limits on the legal process itself.

According to al-Qarāfī's definition of the binding decision (*ḥukm*), the legal process in Islam is restricted in two ways: First, the subject matter justiciable by a court is limited, roughly speaking, to criminal and civil matters, the *mu'āmalāt* . Matters of religious observance (*'ibādāt*) lie outside the scope of judicial authority. Second, within the area of the *mu'āmalāt*, only rules from the obligatory (*wājib*), neutral (*mubāḥ*), or forbidden (*ḥarām*) categories may be imposed as binding decisions. Judges may not impose rules from the recommended (*mandūb*) or disapproved (*makrūh*) categories.

1. The *Ḥukm* Restricted to the *Mu'āmalāt*

In elaborating on his definition of the *ḥukm* in response to Qu. no. 1, al-Qarāfī explains that judicial rulings are restricted to disputes involving conflict over "worldly interests" (*maṣāliḥ al-dunyā*).[6] 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. The

[6]For al-Qarāfī's definition of the *ḥukm*, see above, p.103.

> decision of a judge, thus, has absolutely no place at all in (resolving) such disputes. (T.23-4)

This notion is further elaborated in his *al-Furūq*.

> Know that all of the *'ibādāt*, without exception, are absolutely immune to the decisions of judges. Rather, these *'ibādāt* may be treated only by (non-binding) legal opinions (*fatwās*). Thus, all the pronouncements we find concerning the *'ibādāt* are no more than legal opinions. It is thus not the right of a judge to rule that the prayer of a certain individual is invalid; nor may he rule that a certain volume of water is less than two *qullah*s in volume, making 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* . And identical to the *'ibādāt* are their legal causes. Thus if a lone witness cites the crescent marking the beginning of the month of Ramaḍān and a Shāfi'ī 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; for such would constitute not a binding decision but merely a legal opinion. (F.4:48-9)[7]

a. "Religious Observances and the Like"

By "*al-'ibādāt wa naḥwuhā* " (religious observances and the like), al-Qarāfī has in mind a range of matters significantly broader than the straightforward "acts of worship and ritual," or "the pillars of Islam." This is reflected, for example, in his response to Qu. no. 29 of the *Tamyīz* .

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[7]Al-Qarāfī goes on to add that this applies equally to the decree (*ḥukm*) of the Sultan or Caliph. "Thus it becomes clear that if the Imam says, 'Do not hold the Friday congregational prayer without my permission,' this would not be a binding decree, even if the question of whether the Imām's permission is needed to hold the Friday prayer is a disputed one (*mukhtalaf fih*). 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 non-compliance. 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 decree. And some of the jurisconsults have said that this does constitute a decree (*ḥukm*). But this is incorrect." See *al-Furūq*, 4:49. See also, *Tamyīz*, p.182-3, where al-Qarāfī insists that the authorities' announcements of the obligation to wage war (*jihād*) are only legal opinions that may be accepted or rejected, not binding decisions that must be adhered to.

This issue in Qu. no. 29 is the following: If a case is controversial (*mukhtalaf fih*) because the form of evidence (*ḥujjah*) adduced is controversial, does the judge's decision terminate, along with the litigants' dispute, the dispute over the admissibility of the evidence involved? (T.75) Al-Qarāfī'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. (T.75-6) 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).
> (T.76)

b. Between *'Ibādāt* and *Mu'āmalāt*

The above raises a question: If Islam recognizes no distinction between the religious and the secular, then every human action must at some point constitute a religious act. What, then, on this understanding, can be al-Qarāfī's justification for his distinction between "religious observances and the like" and the "interests of this world"? The key to this question lies, I believe, in a fair appreciation of al-Qarāfī's understanding of the role of intention (*niyah*) in Islamic law.

1. Intention

Intention, or *nīyah*, according to al-Qarāfī, is not the mere volition that accompanies the performance of an act; nor is it the resolution in one's mind to perform this act. These descriptions correspond to *irādah* and *'azm*, respectively.[8] 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 this act itself for its own sake."[9] In other words, the object of an intention must not be the action itself, but rather some goal that lies beyond the action, which the action may be taken as a means to attain.

To illustrate: One may seek through a single act of prayer a number of purposes: One may pray, for example, 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 the aforementioned objectives as the intended aim. This is the role of intention, i.e., to isolate (*yumayyiz*) the specific objective for which a willful act is performed. According to al-Qarāfī, it is only when there enters the will a desire to exploit an act for some specific purpose that an intention exists; and without this vision towards what lies beyond an act, there is no intention.[10]

2. Intention and Islamic Law

According to al-Qarāfī, God legislates commands and prohibitions for the purpose of realizing certain benefits (*maṣālih /s. maṣlaḥah*). Of these, some can be realized through the mere occurrence of the commanded act. Others are realized only if the performance of the act is accompanied by the proper intention. "Religious observances and the like" (*al-*

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[8]See Shihāb al-Dīn al-Qarāfī, *al-Umnīyah fī idrāk al-nīyah* (Beirut: Dār al-Kutub al-'Ilmīyah, 1404/1984), p.7-9.
[9]*Ibid*, p. 9.
[10]*Ibid.*

'ibādāt wa naḥwuhā) correspond roughly to the latter category, while the *mu'āmalāt* correspond to the former. This is the understanding with which one emerges from al-Qarāfī'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 would 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. 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 result in such (a benefit to the recipient).
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> 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 through 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.[11]

On this distinction between the *'ibādāt* and the *mu'āmalāt*, the legal process may be invoked to enforce any rule which has been legislated primarily for the benefit of man in the present life. Judges 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

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[11] *Ibid*, p.27-8. "To illustrate," al-Qarāfī adds, "if a person arranges a banquet for another person and a third party benefits from this hospitality without the host's having intended such, we conclude with certainty that the one honored by this banquet was he for whom it was intended, not the person who benefitted by mere happenstance." Similarly, if one prays or fasts not for the pleasure of God, it is not God but the party for whose pleasure these acts were performed that benefits. On the other hand, it is not al-Qarāfī's contention that acts other than the *'ibādāt* are not religious acts; on the contrary, these too should be performed with the intention of worshipping God. His point, however, is that the rules of the first category are designed first and foremost for the benefit of man, and as such, whenever they are complied with man benefits, even if God does not. Or, viewed from another perspective, whenever one complies with a rule of the first category (*mu'āmalāt*), he benefits another here and now, even if he does not benefit himself in the Hereafter by performing this act with the intention of worshipping God.

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, even if it is not "A's" intention that this be the result. As a result of the judge's ruling, the benefit sought from the rule on paying debts is realized, independent of the intention of the doer. And it is for this reason that judges 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.[12] And it is for this reason that they are placed outside the reach of the legal process.[13]

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[12]The issue of apostasy raises a problem for this thesis in light of the fact that it was universally agreed upon, at least up until modern times, that apostates could be tried and, if convicted, executed. See Ibn Rushd, *Bidāyat*, 2:343. For a modern rejection of the 'classical' view, see Abdul Ḥamid Abu Suleimān, *The Islamic Theory of International Relations: Its Relevance Past and Present* (Ph.D diss., The University of Pennsylvania, 1973), p.162-4. Al-Qarāfī seems to see no contradiction between his theory on the limits of the legal process and the classical position on apostasy, and one gets the impression from his *al-Furūq*, 4:181, that this is because he sees apostasy not as a religious offense but as a criminal one whose harmful effects on society justify punishing its culprits. This is suggested by the fact that, according to him, if the apostate repents and returns to the faith, the punishment is set aside, which suggests, again, that, in his opinion, it is not the act of apostasy but rather its harmful effects on society that is punished. For an interesting modern discussion on "victimless crime" see Lord Patrick Devlin, "Morals and the Criminal Law," *The Philosophy of Law*, ed. R.M. Dworkin (Oxford University Press, 1977). Among some of Devlin's more thought-provoking statements are the following: "There is only one explanation for what has hitherto been accepted as the basis of the criminal law and that is that there are certain standards of behavior or moral principals which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole. *Ibid*, p.71. "I think it is clear that the criminal law as we know it is based upon moral principle. In a number of cases its function is simply to enforce a moral principle and nothing else." *Ibid*; and: "But I think that the strict logician is right when he says that the law can no longer rely on doctrines in which citizens are entitled to disbelieve."*Ibid*, p. 72.

[13]This understanding of the limits of the legal process is reflected also in the writings of Ibn Taimīya (d.728/1328). At one point, for example, he charges that the state's inquiry into his theological writings was illegal: "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 merely by the ruling of a judge. Rather, judicial rulings take effect only in connection with "specific matters" (*umūr*

2. The *Ḥukm* Restricted to Rulings from Specific Legal Categories

The second restriction on the judicial decision pertains to the category of rulings that may be applied by judges. As mentioned earlier, legal rulings (*aḥkām taklīfīyah*) are of five categories: obligatory, recommended, neutral, disapproved, and forbidden.[14] According to al-Qarāfī, no legal ruling from the recommended or disapproved categories may be imposed as binding judgments.

In Qu. no. 16 of the *Tamyīz* , al-Qarāfī is asked:

> If the decision of a judge 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? (T.55)

In his response, al-Qarāfī indicates that judges are bound to rules from the obligatory, neutral, and forbidden categories only.

> As for the categories "recommended" and "disapproved", these may be drawn upon by judges 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, not

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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-raḥmānu '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 and the other incorrect." See Aḥmad Ibn Taimīya, *Majmū' al-fatāwā*. 37 vols. , ed. 'Abd al-Raḥmān b. Muḥammad Qāsim al-'Aṣimī al-Najdī al-Ḥanbalī (Beirut: Dār al-'Arabīyah, 1398/1977) 3:238-9. Cf. , however, the view of Tyan, who on the authority of al-Maqrīzī, writes "...sous la dynastie des Mamluks, 'rien de ce qui etait de nature religieuse n'echappait a la competencce kadi al-kudat'." *Histoire*, 1:116.

[14]See above, p.142.

> binding decisions that may quell the dispute. And the reason for this is that statements about what is recommended and disapproved cannot terminate disputes. Yet, the reason God commissioned judges to impose decisions in the first place was for the very purpose of terminating disputes. . . . But "recommended" and "reprehensible" admit the permissibility of doing a thing, as well as the permissibility of not doing it. Thus these two categories are not capable of terminating disputes. (T.55-6)[15]

This principle, simple and straightforward though it may be, has potentially far-reaching implications. The following example will demonstrate this point.

According to the law of profit-sharing (*qirāḍ, muḍārabah*), an owner of a commodity hires an agent to sell it at retail in return for a known percentage of the profit gained.[16] According to Mālik, however, it is reprehensible for the agent to purchase from the supplier any portion of the commodity being sold.[17] The reason for this was apparently the belief that the agent will offer to do this only if he believes that such will bring him a greater profit; and this is likely to come as a result of 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 arrangement but then offers instead simply to purchase the oranges for eighty dollars. The supplier agrees to this but later learns that the oranges were sold for one hundred and fifty dollars. He files suit against the agent to have the original sale of eighty dollars 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

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[15]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 to Shāfi'is, however, payment of a severance gift is obligatory. Thus, a Shāfi'ī judge could oblige a man to forward a sum to his wife upon divorce. See Ibn Rushd, *Bidāyat*, 2:73.

[16]Ibn Rushd, *Bidāyat*, 2:178.

[17]*Ibid*, 2:182.

strike down the initial sale of eighty dollars, nor force the agent to reimburse the owner for the difference. For this sale was not forbidden but only reprehensible.[18] Were this case tried by another judge, however, according to whose school the law of profit-sharing forbids such practices, the sale of $80.00 could be reversed and or the agent forced to reimburse the supplier for the difference.

II. Supplementary Judicial Actions

There appear to be three distinct types of judicial action, each with its distinct legal effect. The primary action is the judicial decision, the *ḥukm*, which distinguishes itself by the fact that it alone among judicial actions is both binding and unassailable.[19] The remaining two 'supplementary actions' are 1) the discretionary action (*taṣarruf*); and 2) the judicial legal opinion (*fatwā*), or what I have chosen to refer to as "obiter dictum." The discretionary action may be said to be binding in that it may confer legal rights upon individuals and exact sanctions from them. However, it is not unassailable in that it may be legally challenged and overturned. The judicial *fatwā*, on the other hand, is neither binding nor unassailable.

A. Discretionary Actions: *Taṣarrufāt*

In his response to Qu. no. 36, al-Qarāfī lists some twenty different types of judicial action which he describes as 'discretionary'. His examples illustrating these notwithstanding, no formal definition of "discretionary action" (*taṣarruf*) is given. At bottom, however, it appears that a judicial action is discretionary when it involves the

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[18]Under another arrangement, such as where judges were authorized to interpret scripture directly or to impose rulings from all five categories, a judge would be able to reverse the original sale. One might notice also that this rule holding judges to specific categories of legal rules would be difficult, if not impossible, to maintain under a regime of *ijtihād*. For since judges would be constantly reinterpreting scripture, there would be no permanence to the view that a thing is forbidden, reprehensible, etc., and a judge could thus never be told that he was wrongly imposing a rule from the reprehensible or recommended categories.

[19]See above, p.102.

resolution of a question that is not legal in the strict sense and therefore not a constituent of *madhhab* .[20]

An example of a discretionary action would be a judge's marrying off (*tazwīj*) an orphan girl who has no guardian. This action would be considered binding, inasmuch as it would confer conjugal rights upon the husband, as well as the right of both spouses to inherit the other's estate. But it would not be unassailable, in that the girl, or anyone else, could legally challenge the judge's choice of a spouse, and a subsequent judge could legally overturn it. (T.178) The reason this action may be challenged is that it does not address a question of law strictly speaking, and in resolving this case the judge cannot, therefore, recline upon either tier of orthodox law. This is intimated in a number of examples in Qu. no. 36 wherein al-Qarāfī asserts that "this is not a disputed question (of law)" (*wa hādhā laisa mukhtalafan fih*).[21] In the present case, this statement clearly would not mean that the question of who is a suitable mate for the girl is not subject to disagreement; the point, rather, is that this disagreement is not strictly legal. As such, the judge cannot resolve this matter on the basis of his *madhhab* . His action is therefore discretionary and cannot be protected as orthodox law.

Another example of a discretionary action would be a judge's setting a non-prescribed punishment (*ta'zīr*). Al-Qarāfī notes that here consensus supports the levying of non-prescribed punishments for certain acts and that there is thus no disagreement that these acts constitute legal causes which activate a punishment. The *extent*, however, of the required punishment is subject to disagreement. And this disagreement, according to al-

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[20]On *madhhab* as law strictly speaking, see above, p.139.

[21]See *Tamyīz*, p. 190-1, and passim. See also the informative article of E. Tyan, "L'Autorité de la Chose Jugée en Droit Musulman," *Studia Islamica* 17, 1962, p.84-7. In this article, Tyan discusses the various meanings accorded phrases such as "*mas'alat khilāf* " and "*al-mujtahadāt*," and the implications this has for the assailable or unassailable status of judicial actions. It seems, however, that this informative article appeared before its time.

Qarāfī, is not strictly legal but is left, rather, to the judge's discretion. (T.188-9) As such, if the Chief Justice, for example, concludes that the punishment set by one of his deputies is not commensurate with the offense, he may adjust this action so that a fair and equitable punishment is set. (T.188)

Discretionary actions may often be mixed with judicial decisions, and the question becomes one of discerning which aspects of a judge's action are unassailable and which are not. For example, if a judge sells the slave of a bankrupt debtor and awards the proceeds to the latter's creditor, this action would involve both a judicial decision and a discretionary action. The action of selling the slave would be a judicial ruling which resolves the dispute among the jurisconsults (i.e., the *madhhabs*) over whether the debtor is free to manumit his slave or whether the creditors have a right to the latter's dollar-value. (T.150-1) This action is thus unassailable, and neither the owner nor the slave could subsequently claim the slave's freedom. But the question of the amount received in return for the slave is not a legal one; it is not, as al-Qarāfī would say, "*mukhtalaf fih* ". This action is, rather, discretionary and if challenged may be adjusted according to the discretion of a subsequent judge.

But perhaps the most significant of those judicial actions identified by al-Qarāfī as "discretionary" are 1) those where a judge determines an individual to be in possession of some qualifying attribute (*ithbāt al-ṣifāt*), such as "uprightness" (*'adālah*) in the case of a would-be witness, or "competence" in a child-custody case. (T.178); and 2) where a judge assumes certain procedural requirements to be fully in order, e.g., that a certain form of proof (*bayyinah*) or a confession (*iqrār*) or a sworn oath (*yamīn*) has been properly tendered. (T.179) In the case of both of these categories of action, al-Qarāfī insists that 1) neither constitute binding, unassailable, rulings (*aḥkām/s.ḥukm*), and 2) a subsequent judge may ignore them and issue rulings that in effect overturn them. Thus, in a case

where a judge refuses the testimony of a witness on grounds that the latter is morally culpable (*majrūḥ*), a subsequent judge may deem this witness upright, accept his testimony, and reverse the ruling of the first judge, provided that proof of this witness' uprightness is presented. (T.178-9) Or where a deputy judge assumes that all of the procedural requirements in a case have been satisfied, a principal may, upon reviewing this case, find procedural irregularities and overturn the deputy's ruling which was made on the basis of these irregular proceedings. (T.179-80)[22]

The going opinion in Western scholarship is that there is no appeal in Islamic law.[23] This flat notion imputes to the rulings of Muslim judges a false sense of despotic finality, while at the same time ignoring certain differences between Islamic law and Western law which render the question of appeal in each system fundamentally different. In American law, for example, appeal is allowed almost exclusively on questions of law, not fact.[24] On this understanding, it is true that Islamic law does not recognize the right to appeal. But this is because in Islamic law the legal interpretation applied to the case is not that of the judge but rather that of his *madhhab*, which is backed by consensus.[25] On the other hand, where it is suspected that a judge has committed an error of fact, or a

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[22]That the second judge may reverse the ruling of the first *in the case at hand* and not simply assume this witness or testimony to be valid in subsequent cases is made clear at *Tamyīz*, p.180, where al-Qarāfī states, "For these forms of courtroom evidence establish the existence of legal causes which activate their corresponding legal rules. But it does not follow from the mere fact that a judge deems their presence that this constitutes a binding ruling. On the contrary, a subsequent judge may review this case and invalidate these findings; or he may not invalidate them. Nay, if he comes upon some irregularity, he is to rectify it. And the initial findings (of the first judge) will in no way be an impediment to rectifying the irregularities in this evidence (*fa inna hādhihi ḥijājun tūjibu thubūta asbābin mūjibatin li 'stiḥqāqi muṣabbabātihā wa la yalzimu min kawni 'l-ḥākimi athbatahā an takūna ḥukman bal li ghayrihi an yanẓura fī dhālika fa yubṭilu aw la yubṭilu bal idhā 'ṭṭala'a fīhā 'alā khalalin ta'aqqabahu wa la yakūnu dhālika 'l-ithbātu 's-sābiqu māni'an min ta'aqqubi 'l-khalali fī tilka 'l-ḥijāj*)."

[23]See above, p.66-7, nt.39 (p.67).

[24]See Henry J. Abraham, *The Judicial Process*, p. 117: "[I]t should be understood that no trial or appellate judge will readily tamper with a jury's verdict, no matter what his private opinion may be." See also, *ibid*, p.160, para. 2 for a list of reasons for which appeal may be granted.

[25]Under the old order, appeal would be denied on questions of law on the understanding that the judge, as a *mujtahid*, is correct:*kullu mujtahidin muṣīb*.

procedural irregularity, or a misuse of his discretionary powers, Islamic law does provide possible avenues to rectification.[26]

B. Obiter Dictum

The third category of judicial action is the *fatwā* given by a judge, which I have chosen to translate as "obiter dictum."[27] Essentially, whenever a judge speaks on a matter that falls outside the scope of the legal process, or that pertains to recommended (*mandūb*) or disapproved (*makrūh*) actions, his pronouncement has neither binding effect, nor it is illegal to challenge it This non-binding, 'non-unassailable' effect is what al-Qarāfī is emphasizing when he refers to these pronouncements as *fatwās*.

In describing this third category of judicial action, al-Qarāfī uses the term "*fatwā*" negatively; i.e., a judicial pronouncement becomes a *fatwā* by default, i.e., not by virtue of its satisfying the substantive requirements of a valid *fatwā*, but by virtue of its not qualifying as a judicial decision (*ḥukm*). In this usage of the term "*fatwā*," al-Qarāfī thus shifts the emphasis from the substantive qualities of a valid legal opinion and the qualifications required of those who issue them to jurisdictional considerations and the non-

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[26]In his *Tabṣīrat*, Ibn Farḥūn introduces this subject under the heading, "Chapter Concerning a Losing Litigant's Petition to Have a Ruling Reversed" (*faṣlun fī qiyāmi 'l-mahkūmi 'alayhi bi ṭalabi faskhi 'l-ḥukm*). He then gives eleven (11) possible scenarios under which a retrial might be considered. The following are examples: "Fourth: If a losing litigant presents some proof formerly unknown to him, there are three views: Said Ibn al-Qāsim in *al-Mudawwanah*, 'His evidence is to be heard, and if it dictates that the ruling be annulled, it is to be annulled;' Said Saḥnūn: 'This evidence is not to be heard;' Said Ibn al-Mawwaz: 'If he presents it to the judge who issued the first ruling, the ruling is to be reversed; but if he presents it to another judge, it is not.'" "Fifth: If [the losing litigant] accuses the presiding judge of dereliction in investigation (the status of) witnesses and he presents proof that the witnesses who testified against him should have been disqualified, on grounds of moral culpability, even before the first ruling was handed down, then regarding the reversal of this ruling there are two views attributed to Mālik [i.e., one for and one against]. And Ibn al-Qāsim held that the ruling was to be overturned. And Ashhab and Saḥnūn held that it was not .... " *Tabṣīrat*, 1:90-1. Interestingly, al-Qarāfī states that if the witnesses themselves come forth and voluntarily recant their testimony, the ruling is to stand, as their recanting proves their culpability, and, this culpability now known, their testimony cannot be made the basis for a reversal. See *Tamyīz*, p.176.

[27]See *Webster's Third International Dictionary* (1981), p. 1555. I am indebted to Prof. Farhat Ziadeh for guiding me to this term.

binding status of all statements made in certain areas of the law. This reflects, I believe, al-Qarāfī's concern with divesting statements on certain issues of the binding authority that they might otherwise enjoy by virtue of the high rank of the issuing authority, e.g., judge, caliph, or *wazīr*.

This point might be more clearly demonstrated by way of comparison between al-Qarāfī and an earlier jurist, the Ḥanbalite, 'Abd al-Raḥmān b. al-Jawzī (d.597/1200). In response to a growing problem of unqualified would-be muftis setting themselves up to give legal opinions, Ibn al-Jawzī wrote a tract entitled *Ta'ẓīm al-Futyā* (On the Gravity of Issuing Legal Opinions) in which he attempted to dissuade some of his more sophomoric students from issuing statements that might pass as authoritative *fatwās* and be taken, therefore, as endowments of legal rights.[28] For Ibn al-Jawzī, a true *fatwā* was an opinion given only by an authorized jurisconsult; and a petitioner was to act on an opinion only if its issuer was thus qualified. Al-Qarāfī, on the other hand, wants not so much to emphasize these necessary qualifications but rather the non-binding nature of any and all statements made in certain areas of the law, regardless -- and this is the real point -- of the authority or qualifications of the issuing party. This is clearly the intent behind statements of his such as the following.

> Among the discretionary actions of judges [and caliphs] are their *fatwā*s given concerning rulings on such things as religious observances and the like, e.g., the licit or illicit status of certain arrangements of sexual usus (*taḥrīmu 'l-abḍā'i wa 'l-intifā'i bihā*), the ritual purity of certain bodies of water, or the ritual impurity of certain objects, or the obligation to wage *jihād*, or other such obligations. None of their statements regarding these matters constitute binding decisions (*ḥukm*). On the contrary, anyone who does not believe these statements to be correct may give a *fatwā* in opposition to this *fatwā* of the judge or the Caliph. (T.182)

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[28]Jamāl al-Dīn Abū al-Faraj 'Abd al-Raḥmān 'Alī b. al-Jawzī, *Ta'ẓīm al-futyā* (Chester Beatty Library, Arabic Mss. no.3829).

For his part, Ibn al-Jawzī would in all probability deny that such statements made by judges, caliphs, and other officials were at all *fatwās*, unless these officials were qualified as muftis to speak on the law. In contradistinction, al-Qarāfī states openly that the right to issue legal opinions is basic to the very office of Caliph itself. (T.32) This was not, however, to say that all caliphs and judges were qualified jurisconsults. Al-Qarāfī's point was rather that their right to give *fatwās* must be acknowledged in order to allow that their statements on certain topics be taken as no more than *fatwās*, i.e., obiter dicta in effect.[29]

It might be noticed that the real difference between al-Qarāfī and Ibn al-Jawzī is that the former accepts two different uses of the term "*fatwā* ": when speaking of authorized muftis, a *fatwā* is an authoritative legal opinion; when speaking of judges, caliphs and other officials, *fatwā* is used in the sense of obiter dictum. This distinction between the *fatwā* of the latter and the *Fatwā* (capital intended) of the former is necessary in order to ensure, on the one hand, that not all pronouncements by officials are taken to be binding,[30] while maintaining, at the same time, that such statements, even as *fatwās*, are not probative in making and breaking consensus (*ijmā'*).

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[29]My research leads me to contradict the view of Schacht, Coulson, and others, who see in the central power a relentless effort to limit the competence of judges in defiance of the *fuqahā'* , who are ever bent on keeping judicial competence as broad as possible. Al-Qarāfī's position suggests that it was the other way around; the *fuqahā'* wanted to limit judicial power, the better to offset the encroachments of the government. This latter view seems the more plausible, since it is only natural for the government to want to expand the power of those in its service, against the wishes of the guilds of law, who are ever apprehensive about government domination.

[30]Al-Qarāfī's statement at *al-Furūq*, 2:103: "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*," suggests that his 'negative' usage of "*fatwā* " was also designed to divest statements by Chief Justices against the rulings of their deputies (after the fact) of any binding force which they might ordinarily enjoy.

III. On the Need for Judicial Actions

As a general rule, the rights and obligations contained in the Law are direct and automatic. Whenever a legal cause (*sabab*) obtains, there remains no need for a judge, caliph, or anyone else to sanction the effected privilege nor to confirm the resulting prohibition. Man is endowed with *sui juris* : he has both the right and the obligation to conduct his affairs autonomously, according to the Law.[31]

This, however, is only a general rule. There are circumstances under which confirmation or some other sanctionative action by a representative of officialdom will be required in order for a legal cause to activate its corresponding legal rule.[32] These circumstances are enumerated in al-Qarāfī's response to Qu. no. 32.

> What is the general rule (*ḍābit*) 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)? (T.146)

Al-Qarāfī indicates that the need for a judge's action is engendered by any one 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. (T.146)

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[31]For al-Qarāfī's definitive statement on this point, see *Tamyīz*, p. 96, para. 1 ff.

[32]According to al-Qarāfī, the following officials are authorized to issue binding rulings within their specified areas of jurisdiction: Caliph; wazīr (of *tafwīḍ*); military governors; *maẓālim* court magistrates; the *muḥtasib*; court magistrates (e.g., justices of the peace); arbitrators; alms collectors; crop appraisers. See *Tamyīz*, p. 156-73.

> 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 and fighting, and to the corruption of souls and property. (T.148)
>
> 3) Where there exists strong disagreement (*khilāf*) (among the jurisconsults), accompanied by a conflict between the rights of God (*ḥuqūq Allāh*) and the rights of man. (T.148)

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. sharṭ*) or legal impediments (*mawāni'/s. māni'*); and 2) those whose legal causes are not fixed but of a desultory or amorphous nature.

An example of the first type is 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-Qarāfī, 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 what may be considered "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 Mālik, if the husband's indigence is 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.[33]

A second example adduced under the first category involves the non-prescribed disciplinary sanctions known as *ta'zīrat/s.ta'zīr*. These, according to al-Qarāfī, require investigation in order to determine the extent of the offense, as well as the status of the

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[33]On the issue of divorce on grounds of insolvency, see above, p.97-8. This stipulation by Mālik is a legal impediment to applying the rule on divorce on grounds of insolvency.

perpetrator and the victim. For example, if a person is caught breaking and entering another's property, it must be determined that he was no 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 possessor. (T.100) Or if a person publicly defames 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 (*shatm*, to be distinguished from *qadhf*). For there are no legal sanctions, for example, against a father verbally abusing a son.[34]

Under the second category, al-Qarāfī cites the imposition of the prescribed punishments, *al-ḥudūd*. 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-Qarāfī notes that, unlike the case of the non-prescribed punishments, the legal causes that engender *ḥudūd* punishments are both known and of a fixed constitution. There is thus no question of determining their proportions, and no need for a judge to investigate them. 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*). (T.148)

Under the third category, al-Qarāfī 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*,

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[34]See al-Māwardī, *al-Aḥkām al-sulṭāniyah*, p. 226.

drawing near to God; 3) God has a right to the debtor's act of *qurbah*, represented in the latter's freeing his slave. Moreover, there is sharp disagreement among the schools of law as to whose right is to take precedence.(T.150-1) This original act of manumission thus requires the action of a judge, who will either confirm or override it, deciding whose right is to take precedence over whose.

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According to al-Qarāfī, these three considerations are the only justifications for judicial 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 whatever for a judge, caliph , or anyone else. In al-Qarāfī'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 a judge rules or not. (T.151)[35]

IV. Some Questions Relating to Venue: Between Judges and Litigants

Once it has been determined that a case is to go to court, how is the *madhhab* of the presiding judge determined, particularly in cases where the litigants belong to two different schools? If the judge is a Shāfi'ī and one of the litigants a Mālikī, can this litigant refuse to accept the ruling of the judge?

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[35]Al-Qarāfī notes that there is often disagreement over whether or not certain rules require judicial action. A few examples: If a person ends up the slave of a well-to-do relative, 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. See *Tamyīz*, p. 153. If a seller and a buyer disagree over the terms of a contract which has already been consummated and each takes a sworn oath (*taḥālafā*) [out of court] affirming his position, does the nullification of this contract then require the ruling of a judge? Scholars differed over this question . See *Tamyīz*, p. 154.

Unfortunately, I have found no direct treatment of either of these questions in any of al-Qarāfī's works. This does not mean, however, that his works are not instructive in their regard.

Regarding the first question, according to the *Sharḥ al-Majallah*, if two people have a dispute and one wants to take it before a Shāfi'ī 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'a 'alayh* .[36] 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 primary innocence (*al-barā'ah al-aṣlīyah*). 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 that he does not recognize according to his own school. A case in point would be to allow a Shāfi'ī wife to take her claim of non-marriage to her Ḥanafī husband before a Shāfi'ī judge, who holds the presence of a guardian to be a prerequisite to a valid marriage, in contradistinction to the Ḥanafīs. In addition, to allow the plaintiff his choice of judge would lighten his burden of proof, which, according to the principle of primary innocence, falls squarely upon him, since claims of criminal wrong-doing go against the assumed norm.

In his *al-Furūq* , al-Qarāfī relies upon this same principle, *al-barā'ah al-aṣlīyah* (a cognate of presumption of former status, *istiṣḥāb al-ḥāl*) to identify who in a case is the plaintiff and who the defendant. The plaintiff in a case is not simply the one who makes the charge; the plaintiff is rather 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

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[36]Salīm Rustum Bāz al-Lubnānī, *Sharḥ al-majallah* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1406/1986), p.1171.

orphan who charges that he had not received his inheritance from his step-father would be the defendant, while the step-father would be the plaintiff, and the burden of proof would fall upon the latter. For according to the Qur'ān, the assumed norm is that the money has not been paid. (F.4:74-6) From this discussion in his *al-Furūq*, it appears that it is fairness and the desire to protect people from false claims that demands that the burden of proof be placed on the plaintiff, and that "plaintiff" be defined as he whose claim goes against the assumed norm. On this view, it would seem that, in a similar manner, al-Qarāfī's wish to protect people from false and unfair claims (such as that of the Shāfi'ī wife cited above) would demand that the choice of judge go to the defendant, as stated in the *Sharḥ al-Majallah* . In this al-Qarāfī would differ, for example, from Ibn Rushd, who states that under such circumstances the plaintiff and defendant are to draw lots.[37]

On the question of litigants refusing to accept rulings due to differences in *madhhab*, mention has been made of al-Qarāfī's doctrine concerning the relationship between judicial rulings and opposing views: judicial rulings are specific; dissenting views are general; the specific takes precedence over the general.[38] On this principle, litigants have no choice whatever before the ruling of a judge, regardless of differences in *madhhab* between the former and the latter. This view is confirmed by a contemporary of al-Qarāfī, Ibn Abī al-Dam, who died in 642/1244, not long before the *Tamyīz* was written.

> If a Ḥanafī ferments some wine and a Shāfi'ī destroys it and they come before a Ḥanafī judge and the plaintiff provides proof that the Shāfi'ī destroyed the wine after it had fermented and the judge rules that the latter is liable for its dollar-value, the Shāfi'ī 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

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[37] *Bidāyat*, 2: 345.

[38] See above, p.112-15.

> 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.[39]

This rule, binding litigants to the rulings of presiding judges, applies absolutely in cases where a judge rules 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 Ḥanafī 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 presents false evidence to the effect that a woman is his wife and a judge rules that they are married, the man could cohabitate with the woman, even if he knew her not to be his wife in reality.[40] The Ḥanafīs base their opinion 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.[41] The Mālikīs, by contrast, and some Shāfi'īs, disagree with this position. They hold that the ruling of a judge does not render a thing known to be impermissible permissible, nor vice versa. Thus if a Ḥanafī grants a Mālikī the right of preemption on grounds of neighborliness (*shuf'at al-jār*), the latter may not accept it. (T.111) Likewise, if a person knows the judge to be mistaken, he may not partake of a right granted on this mistaken pretext. (T.111)

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[39]See Ibn Abī al-Dam, *Adab*, p. 118; see also his discussion on p.166-20. See also al-Ṭarābulusī, *Mu'īn*, p.27. The point of the second paragraph is that if the 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 Ḥanafī'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'ī school, wine is not a valuable commodity). Ibn Abī al-Dam's point is that this will not avail this Shāfi'ī, since legal liability is determined on the basis of the judge's school, not the defendant's.

[40]See Ibn Rushd, *Bidāyat*, 2: 345-6.

[41]*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, afterwhich the marriage may be annuled. See *Bidāyat*, 2:86. Ibn Farḥūn states that this Ḥanafī view applied to cases of marriage only and that even some Mālikīs agreed with them as regards marriage. 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.

V. At Court: On the Three Stages of the Judicial Process

Once it has been determined that a case is to come to court and the judge who is to preside has been chosen, the judicial process proper begins. In his response to Qu. no. 30, al-Qarāfī outlines three distinct stages of this process: 1) plenary establishment of fact (*al-ithbāt*); 2) judgment (*al-ḥukm*); and 3) implementation (*al-tanfīdh*). Whenever a case is brought to court, it must 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 entitling one of the litigants to some right or relieving him of some obligation. The function of the judge is first to establish, as a matter of fact, whether or not the alleged event took place, and then to determine to which, if any, legal rights this occurrence entitles the plaintiff. 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.

A. *Al-Ithbāt*

According to al-Qarāfī, *al-ithbāt* is the process of "establishing the factual occurrence of a legal cause before a judge by way of valid courtroom evidence . . . ." (T.134) Emphasizing the fact that, in establishing the facts, a judge must rely strictly upon the legally valid evidence presented in the case, al-Qarāfī 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*). (T.82)

In his *al-Furūq* al-Qarāfī enumerates the various forms of legally valid evidence recognized by the guilds of law. Ten such forms are cited: 1) proof established by oral testimony (*al-bayyinah*); 2) acknowledgment (*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'ī] in cases involving particularly female matters; 9) testimony of minors; 10) mutual contradictory oaths taken by the plaintiff and the defendant (*al-taḥāluf*), according to Mālik, after which settlement is reached by having the two parties draw lots (*yaqtasimān*). (F.1:129) [42]

These are the means through which litigants may attempt to establish (literally, *ithbāt*) their claims.[43] 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 give judgment.

> If legally valid proof (*ḥujjah*) 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

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[42]Al-Qarāfī makes no mention of circumstantial evidence (e.g., *qarā'in al-aḥwāl*). However, in both the *Tabṣirat al-Ḥukkām*, (2:117-55) and the *Mu'īn al-Ḥukkām* (p.166-79), Ibn Farḥūn and al-Ṭarābulusī discuss circumstantial evidence at length and cite al-Qarāfī as a major source. It seems, from these citations, that al-Qarāfī discussed this matter in his opus on Mālikī law, *al-Dhakhīrah*, which I was unfortunately not able to consult in time for this study. Judging from Ibn Qayyim al-Jawziyah's *I'lām al-Muwaqqi'īn* and his *al-Ṭuruq al-Ḥukmīyah*, circumstantial evidence appears to have become a major issue in the 8th/14th century, and major innovations in the law of evidence were debated during this period.

[43]In his *al-Furūq*, 4: 44, al-Qarāfī cites the controversy over the legality of judges ruling according to what has come to their knowledge outside of court. The Ḥanbalīs and Mālikīs, according to al-Qarāfī, disallow this altogether. The Ḥanafīs disallowed it in all criminal cases, with the exception of those involving calumny (*qadhf*). The well-known position of the Shāfi'īs, however, was that a judge could rule in every case according to what he knew before becoming judge or what he learned outside of court during his judgeship.

the removal of injustice is a duty that may not be postponed. (T.135)

B. *Al-Ḥukm* or *al-Tanfīdh* ?

Following plenary establishment of fact, the case enters either the *al-ḥukm* 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*), the judge will simply implement the view dictated by consensus.

1. *Al-Tanfīdh* [44]: 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, by consensus.[45] 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.

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[44] "*Al-Tanfīdh*," as employed by al-Qarāfī, has actually two meanings. Here it is used in the sense of implementing the rule backed by consensus. For the second meaning, see below, p.214.

[45] 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'ī 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: 322-3. Similarly, it is agreed that divorce is a legal cause for a man to pay a severance gift (*muta'*) to his departing wife; however, al-Shāfi'ī held this to be obligatory, while Mālik held that it was only recommended. *Ibid* , 2:73-4. Or, while it is agreed among the Shāfi'īs, Mālikīs and Ḥanbalīs that a man's inability to support his wife is a legal cause granting the wife the right to annulment, most Mālikīs and some Ḥanbalīs recognize the wife's knowledge of the husband's poverty at the time of marriage as a legal impediment (*māni'*) to this right to annulment. See above, p.97-8.

According to al-Qarāfī, whenever the question under review is one of consensus, the judge bypasses the *al-ḥukm* stage and promptly implements the ruling backed by consensus.

> 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 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, the judge and the mufti are absolutely equal.[46] 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. (T.137)

In such cases, judges make no choice; their function is rather 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 this rule.

2. *Al-Ḥukm* : The Judicial Function in *Mukhtalaf Fih* Cases

The situation with cases involving disputed questions is different. Here we are brought back to the main problem of the *Tamyīz* .

The existence of *khilāf* (disagreement) 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

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[46]An allusion to the fact that both are verbatim translator-interpreters and mere conveyers (*mukhbir*) of a single, univocal, rule, whereas in disputed cases judges choose among a number of possible rulings.

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-ḥukm* stage in cases involving dispute questions, that the fundamental difference between the judicial function under the regime of *ijtihād* and that of *taqlīd* comes to the fore. Under the regime of *ijtihād*, in addition to resolving the factual question of the occurrence of "X," judges decided also the legal question of whether or not "X" was a legal cause and which legal rules it activated. Under the regime of *taqlīd*, however, judges were no longer recognized as competent to decide on questions of law, and their function was thus 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 of their *madhhab* .

This, however, requires some clarification. To say that judges under the regime of *taqlid* were limited to questions of fact is not to say that they decided only on the question of "X's" occurrence and nothing else. To be sure, it was equally within their competence to determine "X's" status as a legal cause, as well as the legal rights it activated. The difference, however, under the regime of *taqlīd*, was that the question of "X's" occurrence was resolved on the basis of courtroom evidence *which the judge himself interpreted*, whereas the question of "X's" status as a legal cause was resolved on the basis of scriptural evidence *which was now the exclusive preserve of the mufti.* This division of competences is reflected in a number of al-Qarāfī's statements, such as the following.

> . . . the judge follows legal courtroom evidence (*ḥujjah*), while the mufti follows scriptural evidence (*adillah/ s. dalil*). The mufti, meanwhile, does not rely upon legal evidence (*ḥujjah*); rather, he relies strictly upon scriptural evidence (*adillah*). And scriptural evidence includes the Quran, the Sunnah and the like; while legal evidence includes proof

established by oral testimony (*bayyinah*), acknowledgment (*iqrār*), and the like. (T.30-1)[47]

Stated differently, 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 (or, one should say, the *madhhab* of an eponym), and because muftis have now the exclusive right to interpret such evidence, only the pronouncements of muftis on the question of "X's" status as a legal cause are authoritative. It is in this sense that one may speak of a separation between jurisdiction of law and jurisdiction of fact, the latter going to judges, the former to muftis. As a result of this division, the primary function of judges under the regime of *taqlīd* came to resemble that performed by the jury in American law. In new capacity, while the factual content of a judge's ruling was his own product, the legal content was ever borrowed from the *fatwā* upheld in his school.

A. The Judge's Choice in *Mukhtalaf Fīhi* Cases: *Rājiḥ* or *Mashhūr* ?

As mentioned earlier, there may be a number of views on a single question that fall within the confines of what a school will acknowledge as acceptable. Among these, however, are some that come to acquire more weight than others, both on the level of the individual, as well as that of the group. Not surprisingly, the question comes up as to whether judges are bound to apply the view most preferred by them as individuals, i.e., the *rājiḥ* , or that most preferred by the *madhhab* as a group, i.e., the *mashhūr* .[48]

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[47]See also *al-Furūq*, 1: 129: "Scriptural evidence (*adillah*) is relied upon by the *mujtahids*; legal evidence (*ḥijāj /s. ḥujjah*) is relied upon by judges; legal causes, such as the sun's passing its zenith and sighting the crescent marking the beginning of the month, are relied upon by all those who are legally responsible (*al-mukallafūn*)."

[48]On *rājiḥ* and *mashhūr* , see above, p.167ff.

Al-Qarāfī's response is that only if a judge is a *mujtahid* is it incumbent upon him to apply the *rājiḥ* . If, on the other hand, he is a *muqallid* ["as is the case in our day" (T.29)], "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." (T.79)

To be sure, for the al-Qarāfī, the rule was that judges were bound to apply the *mashhūr* . In the early segments of the *Tamyīz*, he states unequivocally that judges may choose from among "one of the competing views" (*aḥadu 'l-mustawayn*) (T.30) (*aḥadu qawlayn*) (T.65) and that they are not bound to perform *tarjīḥ* (determination of the best substantiated view). (T.30) He reminds his reader in this regard that judges rely upon courtroom evidence only, implying that measuring the substantive quality of views is not the vocation of the judge, qua judge. (T.30-1) But in summing up his response to Qu. no. 22, al-Qarāfī equivocates, stating that it is conceivable that a judge rule according to the *rājiḥ*, as it is conceivable that he apply a view that is not *rājiḥ*, implying that whether he applies one or the other is a matter of choice. (T.80)[49]

Why this vacillation? To my mind the following seems plausible as an explanation. Under the regime of *taqlīd*, the rule had been that judges were bound to the *mashhūr* of their *madhhab* . For to allow them the privilege of performing *tarjīḥ* would incur the same liabilities wrought by allowing them to perform *ijtihād* . For a judge could always find amid the mass of opinions in his school a view that suited his or, alas, his patron's needs, a

[49]This contradiction caught the attention of Ibn Farḥūn (*Tabṣirat*, 1:75) and Shaykh 'Illīsh in his *Fatḥ al-'Alī al-Mālik* . The latter attempted to resolve it, however, by arguing that *tarjīḥ* was required where two views were found to be of unequal weight, whereas in the case of equivalent views, *tarjīḥ* was not required. This explanation, however, is defective; for determining the two views to be of equal or unequal weight to begin with would itself be an exercise in *tarjīḥ* . *Tarjīḥ*, then, would be a requirement in all cases. See *Tamyīz*, p. 80-2, nt. 1.

view whose correctness he could claim reigned preponderant in his mind. However, this insistence on applying the *mashhūr* proved to have a stultifying effect on the law, as it denied judges the opportunity to do the one thing which they had free reign to do under the regime of *ijtihād* , namely, to individualize cases. Bound to a solitary rule, judges were now rendered much less able to accommodate extenuating circumstances and to check ulterior motives. This meant, in a number of cases, that they were forced to countenance even known miscarriages of justice. One might recall in this regard the case tried by Ibn bint al-A'azz in which a mansion was simultaneously sold and declared *waqf*.[50] In order to circumvent this negative effect, it was necessary to find a way of allowing judges greater leeway in choosing their rulings. This demanded a less rigid application of the rule on applying the *mashhūr*, and at least a tacit approval of judicial *tarjīḥ* 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 family made its choice on the fate of the murderer, i.e., execution, blood-money, or clemency. [51] He cites, however, a difference of opinion on this question, some scholars holding that every family member, including females, who had a right to inheritance also had the right to grant a murderer clemency.[52] 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 the *Bulghat al-Sālik* (18th C.), the position cited for the Mālikī school 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.[53]

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[50]See above, p.57-8. The purchasers were forced to forfeit their money, despite the fact that it was known that the seller had willfully defrauded them in favor of his heirs.
[51]*Bidāyat*, 2: 301-2.
[52]*Ibid*, 2: 302.
[53]Al-Ṣāwī, *Bulghat*, 2: 391.

In other words, this had apparently become the *mashhūr* of the Mālikī *madhhab* , and the view of Mālik had been abandoned as the weaker, i.e., *marjūḥ* 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?[54] Obviously, the answer depends on the degree to which judges are to be held to the *mashhūr*. And it was perhaps this type of consideration that left al-Qarāfī unwilling to commit himself fully to the rule on applying the *mashhūr*. And it becomes clear in this context that al-Qarāfī was painfully aware of one of the more serious drawbacks of the regime of *taqlīd* : On the other hand, to state unequivocally that judges had the right to apply the *rājiḥ* in every case would have constituted a return to the old order. On the other hand, to bind them absolutely to applying the *mashhūr* in every case would inevitably undermine the law's commitment to justice. It is perhaps this conflict of interest that explains al-Qarāfī's equivocation on this point.

B. Independent Reasoning

While the basic rule under the regime of *taqlīd* was that judges were bound to the *mashhūr* , it remained possible, even on the basis of this single *fatwā* , for a judge to reach different rulings in different cases, depending on the nature of the rule. An example from a rule upheld in the Ḥanbalī school will demonstrate this point.

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[54] According to the Ḥanafī, al-Ṭarābulusī, judges may not apply views that have been abandoned in the *madhhab*. For this, according to him, would be a *khilāf* , i.e., a violation of the going opinion, not an *ikhtilāf*, i.e., a difference of opinion within the boundaries of many acceptable views. See *Mu'īn*, p. 34.

According to the Hanbalīs, if a stipulation in a contract violates the specific purpose of the contract, the contract remains valid while the stipulation is voided. If, however, the stipulation violates a more general principle of the Sharī'ah, the entire contract is invalidated.[55] Now, in a loan contract where the lender stipulates that the borrower not spend the money, the question will arise as to whether this stipulation contradicts the basic purpose of the loan, or a more general principle of the Law, viz., that a loan is a transfer of property whereby the lender loses his right to make such stipulations. In trying such a case, a judge may find that this stipulation violates the Sharī'ah, whereby he invalidates the entire loan. Or he may conclude that it contradicts only the purpose of this particular loan, whereupon he upholds the loan and voids the stipulation. Or, assuming that the borrower's aim was merely to procure "front-money," this same judge may find that such a stipulation violates neither the general Sharī'ah concept of loans (i.e., to provide a borrower with needed funds without bringing gain to the lender), nor the specific purpose of this loan (which may be determined by the parties themselves). He may therefore uphold both the loan and the stipulation.

As in the case of the mufti, this exercise of independent reasoning relates more to questions of fact than law.[56] In the present case, for example, the question is whether or not a particular stipulation is a violation in a particular case, not whether stipulations in general affect the status of contracts in general. It was probably to this type of independent reasoning that al-Subkī referred when he spoke of an *ijtihād* performed by judges.[57]

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[55]See Nabil A. Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law* (Cambridge University Press, 1986), p.45.
[56]See above, p.149-54.
[57]See above, p.129.

C. Unprecedented Cases

Thus far the main focus has been on al-Qarāfī'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, however, al-Qarāfī 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'* . (T.78)

Al-Qarāfī's response is that it is not a precondition that a case be precedential in order for the judge's decision to enjoy full immunity. Rather, judicial rulings remain unassailable even in unprecedented cases. Here, however, al-Qarāfī 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. (T.78)

> . . . if the question represented in a case has never been treated before (*maskūt 'anhā*) and the judge hands down a ruling that is plausible (*ḥakama '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. (T.78)

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 of law only through the *madhhab*s of their respective Imams.[58] This stands in sharp contrast with the situation of the past, whereby judges were bound only to the universal sources and principles of the law (*uṣūl*), viz., the Qur'ān, the Sunnah, Consensus, and analogy, and a ruling was valid

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[58]See above, *qawā'id*, p.163-7.

as long as it did not violate any of these.[59] Here, however, when al-Qarāfī speaks of "plausible[ness]" (T.78) 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.[60]

VI. *Al-Tanfīdh*

"Al-Tanfīdh" has two applications: 1) it refers to a judge's *application* of the rule dictated by consensus in cases involving *mujma' 'alayhi* questions; 2) it applies to the *enforcement* of the judge's decision in both *mujma' 'alayh* and *mukhtalaf fihi* cases, following the act of choosing a ruling in the latter, and following establishment of fact in the former. Al-Qarāfī makes clear 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-siyāsah al-'āmmah*) 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, a judge -- qua judge -- merely originates rulings, while the power to enforce these goes beyond his being a judge. He may be authorized to enforce rulings, and he may not.[61]

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[59]This is reflected, for example, in the criterion of al-Shāfi'ī: "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 hādhā* -- al-Shāfi'ī'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-Khassāf, *Adab*, p. 338 ff; al-Māwardī, *ibid*, 1:261; al-Ghazzālī, *al-Mustaṣfā*, 2:382-3; Ibn Qudāmah, *al-Mughnī*, 9: 56.

[60]See also above, p.163-7.

[61]Cited in Ibn Farḥūn, *Tabṣirat*, 1:18.

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According to the doctrine of al-Qarāfī, the legal process in Islam may be invoked only to resolve disputes of a civil or criminal nature, i.e., to impose rules that regulate *mu'āmalāt* ; matters of religious observance and the like (*al-'ibādāt wa naḥwuhā*) fall outside the perimeters of the legal process. Within their realm of jurisdiction, judges may be called upon to adjudicate disputes only if there is a legal justification for doing so; e.g., where the rule in question is nebulous or accompanied by substantial legal prerequisites or impediments; where allowing the public to settle a dispute is likely to lead to civil strife and unmitigated chaos; where there is sharp disagreement among the schools of law and or a conflict of interest between the rights of God and the rights of man.

In settling some disputes, judges might not levy binding decisions (*aḥkām/ s. ḥukm*); they may resort instead to supplementary actions such as discretionary actions (*taṣarrufāt*) and pronouncements of obiter dictum (*fatāwā/ s.fatwā*). Where a decision is levied, however, it must be an orthodox rule drawn from the obligatory, forbidden, or neutral categories only. These decisions are binding and unassailable. Discretionary actions, on the other hand, may carry binding force, in the sense that, ceteris paribus, they may settle disputes. But they are not unassailable and may be legally challenged and overturned. This, under a number of circumstances, may open the way to 'appeal'. Obiter dicta, on the other hand, are not only challengeable, but they also carry no legal force whatever.

When a case comes to court, it must pass through at least two of three stages in order to reach settlement: If it involves a universally agreed upon question of law, it goes from the first stage (plenary establishment of fact (*al-ithbāt*)) to the third stage (imple-

mentation (*al-tanfīdh*)). Here the judge makes no choice of a ruling but simply applies the rule dictated by consensus, after establishing the facts: If, on the other hand, the case involves a disputed question, it must pass through a third stage between establishment of fact and implementation. It is at this intermediate stage, i.e., judgment (*al-ḥukm*), that the judge chooses a view from among those upheld in his school. This choice constitutes an origination (*inshā'*), which transfers that view from a *fatwā* to a *ḥukm* and renders this decision both binding and unassailable. According to al-Qarāfī, judges were normatively to apply the view identified as the most widely subscribed to (*mashhūr*) in their school. However, for practical reasons, al-Qarāfī himself showed some flexibility on this point, allowing judges in certain cases to apply the view believed by them to be most appropriate to the case (i.e., *al-rājiḥ*).

When trying unprecedented cases, judges extrapolate (i.e., practice *takhrīj*) on the basis of their respective *madhhab*s (unlike the verbatim and selective verbatim transmission (*naql* and *naql al-mashhūr*) performed when adjudicating precedential cases). The results of this extrapolation is also a binding and unassailable ruling. But this is so only as long as the resulting view does not violate any of the legal precepts (*qawā'id*) recognized in the judge's school.

If two litigants differ over their choice of judge, the choice of the defendant is to be honored. If a judge rules against a litigant from another school, his ruling remains binding and unassailable, and the litigant may not use *madhhab*-disparity as a means of extricating himself. Where a judge grants a litigant a right, however, and this right is not recognized by the latter's school, there is disagreement as to whether the latter may accept. A similar disagreement arises where a litigant knows that a judge's grant was made on the basis of false or insufficient evidence.

Conclusion

Islamic law, it has been said, "represents an extreme case of 'jurists' law'; it was created and developed by private specialists."[1] Indeed, Islamic law was not the product of the state but developed, rather, in cautious opposition to it. The amalgamation of schools of law in the 3rd/9th century marked, as has been suggested by Prof. Makdisi, a fundamental turning point in Islamic religious history. Indeed, this new order marked the beginning of yet another chapter in the never-ending antagonism between the now formally organized doctors of the law and the state.

The impetus behind the initial amalgamation of the schools of law was not merely the threat of the rationalist Mu'tazilites; it was rather Mu'tazilite rationalism backed by the state.[2] At stake in the Great Inquisition (*miḥnah*)[3] was not simply the doctrine of the createdness of the Qur'ān; rather, the Inquisition threatened to impose speculative rationalism as the basis of Muslim orthodoxy; and this it threatened to do by displacing the consensus of Community's doctors with the brute force of political fiat. With the demise of the Inquisition and the consolidation of the *madhhab*s, the state would abandon its attempt to impose theological doctrines on the community; from this point on the attempt would be to co-opt the religion through its system of law. For law was now the legitimizing agency in Islam. Now a government advance; now a counter-maneuver by the *fuqahā'*; the state would continue in its quest to co-opt the law, the jurisconsults trying all the while to stay a step ahead.

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[1]Schacht, *Intro*, p.5, p.209.

[2]Al-Ash'arī's (d.325 a.h.) *Maqālāt al-Islāmiyīn*, for example, shows that the period prior to the Inquisition was rife with rationalist movements of varying hues. What seems to set the Mu'tazilites apart, however, is the fact that they gained state support. See Abū al-Ḥasan 'Alī ibn Ismā'īl, *Maqālāt al-islāmiyīn wa ikhtilāf al-muṣallīn*, 2 vols., ed. Muḥammad Muḥyi al-Dīn 'Abd al-Ḥamīd (Cairo:Maktabat al-Nahḍah al-Miṣriyah, 1389/1969.

[3]See above, p.7 ff.

Both parties to this struggle had advantages and disadvantages: The central power had the authority and power to apply the law; but it could not determine what the law would be. The *fuqahā'*, meanwhile, had the authority to determine the content of the law; but they had not the power to apply it. Between these two groups stood a third party who straddled the boundary between them. This was the judge, who in the early period, as a *mujtahid*, had both the authority to determine the content of the law, and, as an extension of officialdom, the authority and, sometimes, even the power to apply it. Needless to say, in the on-going struggle between the central power and the *fuqahā'*, the balance of power rested clearly in the office of judge.

The office of judge provided the central power with the means to co-opt the law. At the same time, the authority of judges to interpret law derived not from their being appointed by the central power but only from the fact that they were recognized *by the fuqahā'* as *mujtahid*s. This fact was not lost on the *fuqahā* ', and, beginning in the 6th/12th century, withdrawal of this recognition began to be seen as the means of neutralizing judges as tools in the hands of the government. This led ultimately to endorsement of the regime of *taqlīd*, which appears to have become institutionalized in the 7th/13th century.

The transfer from the regime of *ijtihād* to the regime of *taqlīd* brought four major changes in its train. First, withdrawal of jurisdiction of law from judges brought about a genetic relationship between the *fatwā*s of the schools of law and the decisions delivered by judges at court; judges were effectively denied the right to interpret scripture directly, and forced instead to rely upon the views endorsed by the *madhhab*s. Second, "*madhhab*," which had theretofore stood for the legal principles and methods relied upon by a *mujtahid*, came now to constitute a specific body of positive legal rules. Third, the *ijtihād* of the

individual jurisconsult was displaced by the corporate status of the *madhhab*, the association of jurisconsults as a whole. No longer were views rendered orthodox simply because they issued forth from an authorized jurisconsult; only if a view was endorsed by an orthodox *madhhab* did it enjoy this status. Within a *madhhab* there could exist a multiplicity of 'orthodox' views, i.e., those recognized as acceptable from a doctrinal standpoint. These, however, would be overridden by the going opinion of the group (*al-mashhūr*), which would be enshrined as the view of orthopraxy and declared acceptable practice. Finally, *Uṣūl al-Fiqh*, theretofore the mainstay of the jurisconsult, was forced to the periphery by an increasing reliance on legal precepts (*qawā'id*), which had been deduced from the opinions of the *mujtahid*-Imāms. As a consequence, in treating unprecedented questions, *muqallids* maintained access to the sources of law only through the lenses of their *mujtahid*-Imāms and the leading authorities of their school.

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The regime of *taqlīd* was not, however, a necessary product of the religious tenets of Islam; nor did it result from a graduai dissipation of Muslim intellectual energy; nor was there a group decision that "all essential questions had been thoroughly discussed and finally settled."[4] It was rather the result of a conscious religio-political stratagem employed by the *fuqahā'* in response to a concrete *historical* problem. Its goals were both specific and limited. It was not --as it is often made out to be -- an exercise in passive resignation. It was rather a movement of spirited pragmatism. Indeed, it should be enough to vindicate this period as one of intense intellectual vigor that it produced the likes of the great Shihāb al-Dīn al-Qarāfī.

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[4]Schacht, *Intro*, p.70.

There being in Islam, however, no ecclesiastical hierarchy, there was no formal body capable of establishing *taqlīd* as the official *modus operandi*. There was thus dissention in the ranks over what was perceived to be a negation of the jurisconsult's very *raison d'être*, namely, to reach an understanding of God's revelation by exerting his utmost individual effort in *ijtihād*. It appears that the majority of scholars of 7th/13th century Egypt, and certainly after, supported the regime of *taqlīd*. And to this majority belonged the great Mālikī chief, Shihāb al-Dīn al-Qarāfī. There remained, however a significant minority who opposed this innovation and insisted even in the face of it that *ijtihād* was the jurisconsult's eternal obligation. Among this minority of the 7th/13th century were scholars such as the redoubtable Shāfi'ī, al-'Izz ibn 'Abd al-Salām, and the Ḥanbalite, Ibn Qudāmah al-Maqdisī.

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It is in the context of this new order, however, that Shihāb al-Dīn al-Qarāfī's *Tamyīz* appears. According to the judicial set-up of 6th-7th/ 12th/13th century Ayyūbid Egypt, the principal of all judges on the circuit was a Shāfi'ī Chief Justice, who could reserve to himself the right to review for confirmation the rulings of all of his deputies. This exposed judges from the remaining schools of law to the danger and humility of having their rulings, which were based on the going opinion (*mashhūr*) of their school, overturned. This liability appears not to have reached maturity until the ascension of the Chief Justice, Tāj al-Dīn Ibn bint al-A'azz, beginning in 654/ 1256. Under Ibn bint al-A'azz, only those rulings that were in close enough conformity with his Shāfi'ī view were confirmed and enforced as law. Ibn bint al-A'azz was a student and protege of the celebrated Shāfi'ī, al-'Izz b. 'Abd al-Salām, whose attachment to the old order of *ijtihād* left him none too tolerant with what he perceived to be weak and poorly substantiated views, even if these were supported by entire associations of jurisconsults (i.e., *madh-habs*). His insistence on *ijtihād* was undoubtedly a factor that encouraged the Chief Justice

in his predilection for second-guessing deputy judges, despite the fact that the rulings of the latter were based on the going opinion of their school.

The partisan policies of Ibn bint al-A'azz struck particularly hard at the Mālikīs of Egypt because: 1) the Mālikīs were still the Shāfi'īs' main rivals for preeminence; 2) the Mālikīs were, nevertheless, without strong political backing; 3) the Positivism-'Natural Law' conflict was and remains more pronounced between the Mālikīs and the Shāfi'īs than that between any two other schools of Islamic law.

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Al-Qarāfī attributed the illegal practice of striking down substantively valid rulings to a failure on the part of the Chief Justice to distinguish judicial rulings (*aḥkām/s. ḥukm*) from legal opinions (*fatāwā /s. fatwā*). According to al-Qarāfī's perception, it was only such a failure that would induce the Chief Justice to overturn rulings that were substantively valid according to the school of the issuing judge; for to challenge these rulings was essentially to treat them as if they were *fatwās*. However, the reason that the Chief Justice would confuse legal opinions with judicial decisions in this way was that the regime of *taqlīd* had brought about a genetic relationship between the *ḥukm* and the *fatwā*, whereby the legal content of a judge's decision was necessarily the going opinion of his school.

Al-Qarāfī's response to the practice of the Ibn bint al-A'azz was that it violated consensus. For the Community was in unanimous agreement that orthodoxy consisted of two-tiers: 1) universally agreed upon views (*mujma' 'alaih*); and 2) views that are disputed among the schools of law (*mukhtalaf fih*). Moreover, the rules from both tiers -- and especially the disputed tier --of orthodoxy were protected, both as legal opinions and as judicial decisions. Therefore, when a judge chose as his ruling a legal opinion upheld in

his school, his ruling was orthodox and thus immune to all challenges. Where the Chief Justice erred was where he assumed that in the same way that a Shāfi'ī mufti could challenge a *fatwā* by a Mālikī mufti, the Chief Justice could challenge a *ḥukm* by a Mālikī judge -- especially, since under the regime of *taqlīd*, the *content* of the Mālikī judge's *ḥukm* was identical to the *fatwā* of a Mālikī mufti.

For al-Qarāfī, the difference between a *fatwā* and a *ḥukm* was essentially 1) to challenge a *fatwā* does not affect its status as a valid *fatwā*, since *fatwās* are by constitution neither binding nor unassailable, and the initial *fatwā* remains thus standing and valid alongside its challenger's view; 2) judge's are endowed with an authority (*wilāyah*) to <u>apply</u> the law, whereas muftis are not; thus to challenge a view in its capacity as a judicial ruling is to challenge this very authority, whereas to challenge it in its capacity as *fatwā* is not. Only by clarifying these differences are challengers likely to desist from treating judicial rulings as if they were legal opinions. And it is here that the *Kitāb al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām* becomes a campaign in defense of two-tiered orthodoxy.

On the level of theory, al-Qarāfī attempts to highlight the difference between legal opinions and judicial decisions by arguing that the former are mere assertions (*akhbār/s. khabar*), whereas the latter are originations (*inshā'āt/s. inshā'*). His argument was basically that, via the authority vested in him as judge, a judge's act of giving judgment transforms the *fatwā* of his school into a binding, unassailable, *ḥukm* , just as a man's pronouncement of divorce transforms his spouse, immediately and irreversibly, into an illicit companion.[5] As long as the chosen *fatwā* was orthodox, i.e., it did not violate 1)

[5]All divorces in Islam are irreversible, and the term "revocable divorce" (a common translation for *al-ṭalāq al-raj'ī*) should not be taken to imply otherwise. When a man reclaims his wife after having divorced her, he does not reverse the original divorce; he simply enters upon a new and separate right granted under the law of divorce.

univocal scriptural texts (*nass*), 2) consensus (*ijmā'*), 3) clear analogy (*qiyās jalī*), and 4) established legal precepts (*qawā'id*) -- all in the absence of some valid countervailing consideration (*mu'āriḍ*) -- the judge's ruling was valid and protected as orthodox law.

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However, al-Qarāfī's theory contained a fundamental weakness: Save consensus, determining a view to be in violation of his four-part criterion is necessarily a subjective judgment. The problem of, "Who is to determine that a view is in violation?" thus remains. If this task is left to the Chief Justice, he may invalidate any view that is not backed by consensus. This, however, would defeat the entire purpose of al-Qarāfī's campaign. If, on the other hand, it is left to someone other than the Chief Justice, then al-Qarāfī's attack on the latter is unfair, since he condemns him for doing what is allowed to everyone else. But alas, al-Qarāfī himself is found taking the liberty of invalidating views upheld by other *madhhab*s on his understanding that they violate the above criterion.

In his response to Qu. no. 29 of the *Tamyīz* , al-Qarāfī gives examples of violations of his four-part criterion. Among the examples given are grants of preemption on grounds of neighborliness (*shuf'at al-jār*) (T.131-2), and the famous *"Surayjiyah* question" (If a man says to a woman, if I divorce you, you are thrice divorced before my divorce takes effect," does this constitute divorce?). (T.130-1) Now, the first position, i.e., allowing grants of preemption on grounds of neighborliness, is known to have been the *mashhūr* of the Ḥanafī *madhhab* .[6] Regarding the second question, the editor of the *Tamyīz* points to scholars of no less standing than that of the celebrated Ibn Taimīya, who opposed al-Qarāfī's Mālikī view to the effect that divorce occurred. (T.130-1, nt. 1) If it is argued that the view of Ibn Taimīya or that of the Ḥanafīs violates al-Qarāfī's four-part criterion, the question becomes once more, "Who is to decide?". If it is legitimate for al-Qarāfī to

[6]See, for example, F. Ziadeh, "Shuf'ah," *Cleveland State Law Review* 34 no.1 (1985-6), p.35-46.

condemn the Ḥanafī view in this way, what is to stop Ibn bint al-A'azz from following his lead in the case of certain Mālikī views?

Al-Qarāfī was himself aware of this problematic aspect of his theory. In the *Tamyīz* he stated openly that of all the constituents of his criterion, only consensus was universally recognized (T.128), which implied that consensus was the only sure protector of any view. Given this admission, the weakness in al-Qarāfī's theory cannot be attributed to a mere oversight on his part. At the same time, it seems clear that this weakness would be easily overcome were his theory applied to a system in which there were four Chief Justices, as opposed to one. For a Ḥanafī Chief Justice is certainly not going to strike down grants of preemption on grounds of neighborliness; nor is any other Chief Justice likely to overturn rulings based on the *mashhūr* of his school. Thus, while under the incumbent system al-Qarāfī's theory is not likely to solve the problem of Ibn bint al-A'azz, it obviates the fact that under a new system -- and only under a new system -- where there is a Chief Justice representing each *madhhab* , the problem of a Chief Justice's subjective judgments ceases to be a problem. Enter al-Malik al-Ẓāhir.

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In Dhū al-Ḥijjah of 660/1261, the Mamlūk Sultan, al-Malik al-Ẓāhir Baybars al-Bunduqdārī, ordered the Chief Justice, Tāj al-Dīn Ibn bint al-A'azz, to appoint deputy judges from each of the remaining schools. As the Sultan's direct appointees, these deputies enjoyed both the right to appoint deputy judges, as well as the right to confirm and enforce the latters' rulings, i.e., *tasjīl*. The appointment of these deputies by the Sultan was apparently a trial run to see if this would solve the problem. Apparently it did, and in 663/1264, Baybars decided to institutionalize this change. By virtue of this new arrangement, the views of the Ḥanafī, Mālikī, and Ḥanbalī *madhhab*s, along with those of the Shāfi'ī, received equal protection under the aegis of its own *qāḍī al-quḍāt*.

This move by Baybars put an end to the problem of Ibn bint al-A'azz; and in doing so it ended also the debate that must have grown up around this problem. This hypothesis finds support in the fact that al-Qarāfī's audience apparently produced neither a single commentary on the *Tamyīz* nor any rebuttals to it. It seems that the general perception came to be that such activities would now constitute only so much waste of time. For the main point of al-Qarāfī's campaign, namely, the sanctity of the *both* tiers of orthodoxy, had now been translated into a veritable *fait accompli*.

It is difficult, on this outcome, to say for sure whether or not al-Qarāfī perceived himself as a victor. If protecting the views of the Mālikī *madhhab* was his apex concern, one might say that, while he lost the ideological battle in defense of two-tiered orthodoxy, he won the war in defense of the Mālikī guild. But if al-Qarāfī's main purpose in writing the *Tamyīz* was to resolve the problem of Ibn bint al-A'azz *without government intervention*, then one might see things from a slightly different perspective; i.e., while he won the battle in defense of the Mālikī guild, he lost the war, which if won would have preserved not only two-tiered orthodoxy but also the autonomy of the *fuqahā'* as a whole. As it turned out, while the views of all the guilds came to enjoy equal protection, the ultimate outcome of al-Qarāfī's struggle conceded -- and ominously so -- that this protection was not in the hands of the *fuqahā'* but rather in the hands of the government.

It is nonetheless tempting, given that the Mālikīs were during this period one of the politically weaker schools in Egypt, to think that al-Qarāfī was satisfied with these results. Given, however, the farsightedness of his thought as a whole and the ongoing antagonism between the *fuqahā'* and the central power, my reading of *Tamyīz* leaves me with serious doubts.

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