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Islamic law and legal system studies of Saudi Arabia

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ISLAMIC LAW AND LEGAL SYSTEM

STUDIES OF SAUDI ARABIA

A thesis presented

by

Frank Edward Vogel

to

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ABSTRACT

Islamic Law and Legal System
Studies of Saudi Arabia

Frank E. Vogel

This thesis examines the legal system of Saudi Arabia not only for its own sake but also as a case-study for advancing our understanding of past and present Islamic legal systems. Indeed, the overriding objective of the research is to gain a more fundamental understanding of Islamic law and legal systems in comparison with secular Western counterparts.

Saudi Arabia, never colonized, is an apt subject. It, almost alone among Muslim countries, has a constitutional and legal system resting on traditional Islamic legal principles. The Qur'ān and Sunna are the declared constitution; the Islamic fiqh is the common law; no comprehensive "man-made" codes exist; religious-legal scholars [*'ulamā'*] are among the most powerful legislators and legal officials.

After a methodological Introduction, Chapter One introduces basic conceptions of Islamic law, while developing a framework of comparison used throughout the book.

Chapter Two begins the examination of the Saudi legal system by considering the processes of *iftā'* [authoritative legal opinion] and *qaḍā'* [adjudication] in both theory and practice. Close attention is given the questions of freedom of ijtihād (i.e., freedom to elaborate Islamic law), the scope of appeals, and the conduct of trials.

Chapter Three moves from the plane of the *qāḍī* and the court to that of the ruler and the state. It begins with a

survey of Islamic legal and constitutional history, raising hypotheses suggested by the thesis's emerging comparative framework. It then takes up two case-studies. The first is a series of recent developments in Saudi criminal law toward harsher penalties for certain crimes, involving a changed interpretation of the *ḥadd*, or Qur'ānic, crime of *ḥirāba* and a shift of jurisdiction from the King to the courts. The second is the vigorous, long-standing controversy whether Saudi Arabia should codify its laws [*taqnīn*]. The second case-study serves as a summary and conclusion, since it brings together and applies the findings of earlier Chapters.

ISLAMIC LAW AND LEGAL SYSTEM STUDIES OF SAUDI ARABIA

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P R E F A C E

This study draws on nearly five years of research in the Kingdom of Saudi Arabia and took over ten years to complete.

These ten years are a record of debts, owed to hundreds of people -- strangers, acquaintances, friends, colleagues, teachers, deans, lately students -- in the United States and in Saudi Arabia. Of all of them I can mention so few. Of course, I do mention many of them in the pages to come, dubiously rewarded by being quoted.

A few great benefactors I can and must acknowledge. Greatest of all, my beloved family, who so willingly went with me to the Middle East and spent there so large a portion of their lives. This dissertation has also been, too often, a part of their lives. It now belongs to them.

Then there are those who made possible my research in Saudi Arabia. Two institutions supported my work: the American Research Center in Egypt, for a preparatory year in Cairo, and the Fulbright-Hays Doctoral Dissertation program. But more than these, His Excellency Shaykh Ahmed Zaki Yamani made the work possible. He sponsored my visa, and, when the fellowships ended, supported two additional years of research. He also introduced me to the Minister of Justice, His Eminence

Shaykh Ibrāhīm b. Muḥammad Āl al-Shaykh. In turn the latter advanced my work by introducing me to several venerable judges, or qāḍīs -- great men of religion and law who inspired, merely by doing their daily work, the pages to follow. I also relied heavily on many officials of the Saudi government. Of particular note is Dr. Motleb A. al-Nafissah, President of the Bureau of Experts of the Council of Ministers, whose ideas, wisdom and experience are drawn on frequently and fundamentally below. In the academic world, Imām Muḥammad b. Sa'ūd Islamic University, through its Rector Dr. 'Abd Allāh al-Turkī and its General Secretary Dr. Muḥammad al-Sālim, offered me the opportunity to approach professors and scholars, all hospitable. Of the latter, I thank particularly Prof. 'Abd al-'Āl 'Aṭwa of the Higher Judicial Institute, who met with me weekly for months. Dr. al-Tawail of the Institute for Public Administration allowed me use of the Institute's excellent library. Finally, back at Harvard, while these many years passed, my mentors, Professors Arthur von Mehren, Muhsin Mahdi and Wolfhart Heinrichs, remained perfectly patient and indulgent, as well as marvelously didactic.

The many errors in the work are all mine. Indeed, it proves a very poor vessel for such gifts.

INTRODUCTION

Islamic law, and legal systems built from it, unfold from a fundamental legal ideal utterly foreign to those of Western laws and legal systems. This is the ideal of divine sovereignty. Western systems may have glancingly approached this ideal from time to time, but never, because of basic decisions about the nature of mankind and of the cosmos, have they confronted it fully or borne its burdens. Modern secular societies think by self-anointed progress to have forever left it behind. Now they are challenged by it once again, in the form of Islamic laws and legal systems -- systems that are to them not only anachronistic but utterly foreign.

This book has two major objectives. The first is to confront, and explore at depth, the contrasts between the secularism of modern legal systems and the divine sovereignty of Islamic legal systems. The second is to investigate the Islamic legal system of Saudi Arabia. This introduction explains these two objectives, and why and how they coincide in a single book.

Every day our newspapers mention the law of Islam. Of the world's one billion Muslims, many demand a return to

Islam; the call rises in country after country. Whatever else this call may mean, it is a call to uphold the sovereignty of God. We find movements organized, elections won, regimes justified, even civil wars fought, over the issue of the application of Islamic law. As a worldwide ideology Islam becomes continually more prominent now Marxism-Leninism has collapsed.

Given such momentous events, we must expect, at the least, that over the next few decades Islamic law will become much more prevalent, both in domestic legal systems and as wielded internationally by Islamic blocs of nations. Muslim states' legal systems will reinstate Islamic legal norms, perhaps to the extent of becoming a new family of legal systems, like that of the civil- and common-law countries. In international affairs the influence of Islamic theories of international law and relations, human rights and economic order will increase. Facing these events and prospects, the West must now take stock of its knowledge of Islamic law and its ideal, and acknowledge a woeful ignorance. Of this ignorance no better proof is needed than the fact that so many in the West react so uniformly with prejudice, even repulsion, to some of the highest aspirations of a billion Muslims.

Islamic law is no mere code of laws. It is at the heart of Islamic religion and civilization, and has been a primary vehicle for the cultural achievements of fourteen centuries of Islam. Its cultural mass, the breadth and depth of its

content -- legal, religious, intellectual, philosophical, political and social -- is immense; its gravitational force operates on all phenomena called Islamic. Non-Muslims' weakness in understanding the law, therefore, affects not only comprehension of matters today recognized as "law," but of all aspects of Islamic life. In every Western scholarly discipline dealing with historical or contemporary Islam we find a frustrated demand for a richer understanding of Islamic law.

Assessing this poverty of knowledge of Islamic law in the West, we find that much of it stems from a weakness on a fundamental point -- identifying essential contrasts between Western legal ideals and those within Islam. If we turn to the works of Western scholars, we find, to our great surprise, that this very point is neglected.[1] The authoritative books usually deal with these contrasts summarily, reciting hoary maxims such as "Islam knows no separation of state and church," "the distinction between secular and spiritual for the Muslim has no meaning," or "the law precedes the state and

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[1]In respect to the importance of the topic, Western learning on Islamic law is just at its beginning. Perhaps for reasons of past cultural antipathy, only a very few, at most two dozen, scholars in the West in the last century have concentrated in the field and contributed major work. The field also received the sidelong interest of other orientalists and scholars of various disciplines, rarely law-trained, and then the practical attentions of lawyers and law scholars, originally those involved in colonial administration. Although many of these scholars have to their credit monumental work, the outcome remains an accumulation of glancing approaches, failing to afford a coherent picture.

is immutable at all times and under all conditions."[2] Invoking these formulas, the authors go on to break the subject into smaller pieces, these usually chosen to coincide with the various Western scholarly disciplines. We prefer to ignore what these maxims so emphatically announce: that in dealing with Islamic law we enter a fundamentally different legal universe.

This failure of understanding, and the dilemma it poses, are hardly only, or even primarily, the concern of Western society. Muslims and Muslim societies face their own dilemma, exactly parallel to it, but with much higher stakes. Their dilemma arises from the fact that in most Muslim countries Western-inspired laws and legal systems have been in place for a century and more. Islamic legal development no longer is a fully indigenous process, but is inextricably entangled with Western legal notions. This being so, one would expect that contemporary Islamic legal scholarship would be deeply engaged in a dialectic with Western law. Unfortunately, however, this is not the case: Muslim scholarship has not broken a habit engendered under colonial rule of proceeding on dual tracks, one religiously Islamic, the other secularly Western. This is but one aspect of these countries' far-reaching dualisms -- in

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[2]See, e.g., Ann K.S. Lambton, *State and Government in Medieval Islam -- An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford: Oxford University Press, 1981), pp. xv, 1. Joseph Schacht in his *An Introduction to Islamic Law* (London: Oxford University Press, 1964), scarcely touches on these problems. See pp. 2-3, 84. 112, 200-201.

hearts, intellects, scholarship and education, and in their legal and political orders. The persistence of this dualism in law in particular, despite several great Muslim scholars' efforts to bridge it, is one of the most profoundly troubling phenomena of modern Muslim life, and must be accounted a chief contributor to political and religious extremism.

Indeed, taking up a much longer perspective, and considering the course of world intellectual history, it is perfectly astonishing how persistent, for both Islam and the West, has been the divide of ignorance and misunderstanding as to law, especially since the basic terms of the opposition were set centuries ago. Only a few flimsy, narrow bridges reach across this divide, yet the volume and urgency of communication increases daily.

One book is no solution for difficulties of this magnitude. When what is needed is a broad, open bridge spanning the chasm, my own effort is only to survey, in the chasm's deep reaches, a few points where pylons might be placed.

This daunting undertaking, then, is the first, and primary, objective of this book. The second objective -- to study the Islamic legal system of Saudi Arabia -- is best explained by discussing a few of the methodological decisions I have made toward fulfilling the first purpose. Clearly, the methodological problems confronting a task of comparative culture of this complexity are huge, and I have had to give

them much thought. In this introduction I shall, in the interest of getting on to business, merely signal some of these problems and my decisions about them, enough so that the method can be discerned in its use.

My first methodological decision was to study Islamic law in the sphere of its application, in its contemporary, living practice. In summary, the reasoning behind this choice is the following. If our objective is to explore the opposition of the two legal systems, secular Western and traditional Islamic, then we confront the problem of the relative incommensurability of their ideal representations -- amply demonstrated by the long history of misunderstanding between the two systems. Therefore, it seems unlikely that we shall be able to subdue that incommensurability merely by rehearsing these representations. One stands at risk of wholly misrepresenting the opposite system: of one's comparisons being but echoes in an empty room. Modern Western legal theory doubts whether rules, even its own, can be understood in abstraction from application. It demands to know its law as applied, and insists on inquiring from life the meaning of words on pages. If Westerners do this with their own law, then how in understanding Islamic law can they trust written rules to convey reliably to them even their meanings, when they are so largely unaware of the greater universe in which the rules are written, understood and applied? Lacking such knowledge, they inevitably fill the vacuum with assumptions

about application drawn from Western systems, and misread Islamic "black-letter" rules. For example, judging Islamic legal rules by their expression in religious and moral terms, orientalists have all too frequently declared the rules too idealized to be enforced. It would seem that, if Islamic law is studied in isolation from application, we can add little to our legal understanding of Islamic law, though we may learn about it as theology or an intellectual ideal system.

If study of pure theory seems unpropitious, what of observation of practice? This is promising: if in both systems there is something that could be commonly defined as a legal system,[3] then there is scope to compare the two systems in their performance of common, standard functions -- for example, courts in both are enterprises to resolve disputes. If we identify and define fairly a zone of overlap in function, and then make careful observations of legal behavior within that zone, should we not be able to make enlightening comparisons?

Unfortunately, making such comparisons of behavior sounds easier than it actually is. The fundamental problem is that no legal phenomenon can be defined solely physically, without an ideal component, and we have seen how these two systems widely diverge in ideal legal representations. This divergence is in fact so severe that, in senses to be

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[3]How this is done in the present study will be explained p. 128 below.

clarified in subsequent chapters, the two systems do not draw the line between practice and theory, or indeed even between physical and mental worlds, in the same way. This divergence drives us, if we still seek commonality of legal behavior, toward the most concrete data, such as physical movements or literal statements, or statistics on legal outcomes. Unfortunately, after being thus reduced these forms of behavior become mute and undifferentiating, bereft of meaning as legal, though perhaps grist for the mill of one of the Western social sciences.

If this is all true, must we then conclude that no outsider can ever understand a foreign system legally, since between legal systems neither observed practice nor theory coincide? Of course not: the solution is some form of simultaneous observation of theory and practice.

I propose that we model the comparison of legal behavior between the two systems in the following way. Let us imagine a single subtle sphere in which subsists at once, without fundamental differentiation, both ideal and actual legal behavior. More usefully defined, this would be a sphere which encompasses, without fundamental differentiation, both outer and inner legal behavior, meaning both behavior that happens to be physical (and therefore directly observable), and behavior that happens to be mental (and therefore only indirectly observable). Then, within this sphere, each legal system, or rather the sum total of legal behavior in that

legal system, describes a unique, independent legal reality, or legal world. Each such legal reality possesses an architecture, or geometry,[4] meaning that it possesses a discernible unique structure or order integrating (more or less successfully) its constituent legal behavior. Such an architecture extrudes relatively little into physically observable events, and subsists chiefly in mental matter, or occupies chiefly mental planes. Alternatively put, it is chiefly a phenomenon inner to the acting individuals. Nonetheless, it issues in physical or outward legal acts, and thus has a physical outcropping or outward profile that is in meaningful relation with structures further in.[5]

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[4]All these spatial terms are a metaphor, and will be useful only if not taken too literally: we will rarely "place" any point in this architecture. The idea is only to supplement our legal descriptive tools with a visual sense.

[5]Note that this methodological discussion portrays my effort as purely descriptive, as naively innocent of claims as to value, causation, or, indeed, absolute reality. As to evaluation, see note 10 below. As to causation, I give here some explanation.

This book will venture from time to time modest causative hypotheses, describing lines of causation operating in two directions, from outward to inward, and the reverse.

As to the former, it is at the level of its physical outcropping that the legal system directly confronts and is constrained by physical and biological reality. At that level also, the system confronts any anthropologically general laws, or elements, applying to many, most, or all "legal systems," however defined. Among the latter are certain functional commonalities between Islamic and modern Western legal systems, many of which are outward, positive, and even mechanical, in nature. In all such cases, powerful outward-arising causes impact the system, and constrain it, first in its outward manifestations and then in its inward forms. Their effects are worked on the latter because of the posited integrity of the system's reality architecture.

As for the opposite direction of causation, inward to

How, then, does an outsider enter such a foreign legal reality? The task is one of great difficulty. In the nature of things, the outsider can enter only through the directly observable aspects of the system; the access must be gained through the physical acts and statements of insiders. Departing from these, and alternating between them and actors' statements giving their ideal representations of such events, one must gradually become aware of the system's reality architecture or geometry. Not all entry points are equal -- the most fruitful are points known for provoking conflict and contradiction between the systems to be compared.[6]

A critically important point is that in observing

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outward, many examples appear in this book. Most of these arise from the nature of Islamic law as a scripturalist religious law, as when legal outcomes are thought to be dictated by revealed text. Other cases occur also, however, and suggest that certain forms of legal behavior that are inward to one or another degree occur in both Islamic and other legal systems, and operate on them in predictable ways.

As is already apparent, this book is agnostic as to any claim that one or the other of these two directions of causation is single, or even primary. Note, however, that a great many of the legal phenomena studied here, in radical distinction to the majority of modern Western legal phenomena, have behind them the conviction of a single cause, which can be apprehended ultimately only inwardly, this being God's will.

[6]This partly justifies a comparativist's occasional emphasis on exotica or foreignness, disparaged as "curio-collecting." The opposite of it is global universalization through reductive positivism. These extremes expose the fundamental antinomy of "Other" and "Same" in comparative method. The comparativist's path is always between the Scylla and Charybdis of these two methodological pitfalls (cf. "Orientalism" and "Reverse-Orientalism"). The study at hand travels a course that veers toward "Other" and corrects later toward "Same." But much of the latter, the correcting, course cannot be completed here, and is only sketched.

insiders' actions, we must strive to know these not as mere social actions,[7] but rather as experiences,[8] meaning actions

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[7]Here I am thinking of "social action" in Weber's sense, which he defined as follows:

> Action is social in so far as, by virtue of the subjective meaning attached to it by the acting individual (or individuals), it takes account of the behaviour of others and is thereby oriented in its course. . . .
>
> . . .
>
> . . . Subjective attitudes constitute social action only so far as they are oriented to the behaviour of others. For example, religious behavior is not social if it is simply a matter of contemplation or of solitary prayer.

Max Weber, On Charisma and Institution-Building, ed. S.N. Eisenstadt (Chicago: University of Chicago Press, 1968), 3-4.

[8]A critical point here encapsulated in shifting to the term "experience" instead of "action" is a departure from the social sciences' resolute restriction of scientific observation to the material world. In my view neither scientific method nor the proper mission of social sciences (or law) requires denying, or putting in a separate category, the reality of individual experience that does not inhabit, or is not "oriented to," the externally observable world. Such an idea hopelessly flattens individual experience, and thereby falsifies also social behavior. The consequences are particularly clear, and dire, in the study of any religious phenomenon. As a vivid example, see in the last note Weber's use of the term "subjective," and his treatment of prayer.

Another example, also showing how this sort of methodological limitation screens the advance of substantive theories about religion and society, is the following from Durkheim:

> Indeed, what characterizes religious beliefs and practices alike is that they are obligatory. Now everything that is obligatory has a social origin. An obligation implies a command and consequently an authority which commands. . . . We comply with orders spontaneously only if they come from someone more exalted than ourselves. If, however, we refuse to move outside the realm of experience, there is no moral authority superior to the individual, except that of the group to which he belongs. From empirical knowledge, the only thinking being which is greater than man is society. . . . Thus, society dictates to the believer the dogmas he must uphold and the rites he

as experienced by the actor within the actor's different legal reality. This is precisely what holds us back from this comparative exercise, and makes it so difficult: we must suspend our own reality frame, and cede to the observed acts, on faith as it were, the quality of being real experiences, of being experiences in a reality to which we are not ourselves committed. This borrowed experiential state is temporary, followed by an effort to hold its outcomes against our own reality frame, searching for correspondence in shapes, lines and structures in space.

Obviously, such a highly interpretive exercise is not objective, in the usual scientific sense. It does, however, possess traits of verification and prediction. An inner legal reality as it takes shape from observation can be tested by extrapolating from it predictions of directly observable events in theretofore unobserved areas of that legal system, and then investigating the actual events for consistency with the predictions. But verifications in physical pheneomena would not in and of themselves be conclusive; they could be only if the reality sought were contained in those phenomena, which by definition it is not. The true vindication is rather of a piece with the original observation, and equally interpretive and subjective. Interpretation is verified when,

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must observe; if this is so, it is an indication that the rites and dogmas are its own handiwork.
W.S.F. Pickering, ed., Durkheim on Religion (Boston: Routledge & Kegan Paul, 1975), p. 92.

drawing on the observer's past experiences in the system, onfolding pheonomena have become to the observer humanly understandable, i.e., they appear as the predictable, normal, human response of participants in the system to events, however unlikely that same response would be from the observer's own reality frame.[9] Predictability, reproducibility and verifiability must be judged by this common, human sense.[10]

Since the architectures we seek by definition delineate reality as experienced by those occupying them, the method by which we shall penetrate to the essential orientations, shapes, structures, of these legal worlds, often employs inquiry into these worlds' internal epistemologies. In other words, the method will often inquire, of the occupants of that legal world, the ultimate or fundamental grounds on which they

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[9]I believe this idea comes from Louis Massignon. Cf. Edward Said, *Orientalism* (New York: Pantheon, 1978), 266-274.

[10]What about objectivity in another sense, in the sense of avoiding evalution, of separating "fact" and "value"? The foregoing makes clear this is illusory. But in another sense, that of suspending judgment, avoiding the imposition of one's own cultural commitments, one must strive for "objectivity" if one is to achieve this human understanding. There is no need to justify this; nothing less is demanded by the respect owed other human beings, possessors of a culture on which they insist just as we do on ours. What needs emphasis is that this respect must be taken excruciatingly far, as not just scholarly discipline but act of faith. Yet, when ultimately one eases this rigor and the attained understanding bears fruit in comparison, then evaluation, whether implicit or explicit, precipitates naturally. It is then justified by the fact that (to the extent that the comparer achieves understanding) evaluation reflects, weighs, equally on both terms of the comparison; it approaches self-evaluation. Anything less than this, again, denies common humanity.

rest in ascribing to it reality and truth. The use of this tool is particularly natural in Islamic law, since the legal sources and doctrine are epistemologically extraordinarily self-conscious.

This methodological program obviously demands research in an actual Islamic legal system. There still remains before us a fork in the road. We must choose between an Islamic legal system of the past or of the present. There are many evident reasons why past systems should be given priority. One is that earlier legal systems possess, in Islamic terms, ideological primacy in defining the ideals of Islamic law, the greater as their era is earlier; the pure standard is the time of the Prophet Muḥammad and his Companions. Present-day Islamic systems, at the other extreme, have been influenced by Western notions to a degree that they are liable to the charge of having no authenticity at all. Another advantage of study of past systems is that, by schooling us in the historical vagaries of implementation of the Islamic law ideal, it prevents us from taking today's circumstance as eternal verity.

Although such historical study is vital, it does have several disadvantages. One is the constant problem of sources for actual legal practice; despite recent advances, it will still be years before these will permit adequate study.[11]

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[11]Against the erroneous assumption that Islamic law was largely irrelevant to legal practice outside ritual and the family (the point is discussed often below), progress is now

Two other problems are substantive. One is that since the issues we raise are ones provoked by contrasts between Western and Islamic systems, we are not likely to find pre-modern Muslims commenting upon them. Most of the knowledge that would serve to answer many of our questions, was, first, not in issue, and, second, held commonly by all. Second, the rules that govern the application of the law, in distinction to the substantive legal rules actually applied, were only partly considered to be separate topics of Islamic legal

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being made, though chiefly in the interest of cultural history and not law. It has long been guessed that the story of the Islamic law's adaption will be best learned from the voluminous and diffuse compilations of *fatāwā*, or responsa, that were the guides to current local practice. Exceedingly little has yet been done in the exhausting work of compiling these *fatāwā*, and relating them to formal doctrine and what is otherwise known of local conditions. For an indication of the rich results that will follow, see Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988). An encouraging development lately is the use by social historians of extant court and other administrative records of the late medieval empires. See, for material particularly relevant to law study, Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V.L. Menage (Oxford: Oxford University Press, 1973); a number of articles by Ronald C. Jennings, particularly "Kadi, Court, and Legal Procedure in 17th C. Ottoman Kayseri," *Studia Islamica* 48 (1978): 136-162;
and "Limitations of the Judicial Powers of the Kadi in 17th C. Ottoman Kayseri," *Studia Islamica* 50 (1979): 151-184; Haim Gerber, "Sharia, Kanun and Custom in the Ottoman Law: The Court Records of 17th-Century Bursa," *International Journal of Turkish Studies*, 2 (1981): 131-147; idem, "Social and Economic Position of Women in an Ottoman City, Bursa, 1600 -1700," International Journal of Middle East Studies, 12 (1980): 231-244; Galal H. El-Nahal, *The Judicial Administration of Ottoman Egypt in the Seventeenth Century* (Minneapolis: Bibliotheca Islamica, 1979). But court documents have the defect for our purposes, however, of being usually extremely terse in discussion of legal doctrine.

literature; many of these rules are scattered throughout discussions of substantive law. Formed and guided by these rules, the day-to-day application of the law was considered not so much a subject for theoretical writing as an art handed down.

Our other alternative is the observation of a present-day Islamic legal system, if one exists. For the methodological program just described, the advantages of this course are as obvious as they are difficult to explain theoretically. Where the comparisons involved are of such difficulty, and pose such profound contrasts between cultures, nothing can equal direct experience. Dry texts, written in other ages for other purposes, do not display the uncanny, wordless contrasts posed relentlessly by living phenomena. Living persons responding -- if only with puzzlement -- to one's questions can guide one unerringly across uncharted terrain. But with this alternative there are also great difficulties and problems of method. One, already noted, is that any contemporary society has been infused with foreign, chiefly Western, legal culture, complicating the legal picture. To counter this problem, obviously one would study the most traditional available Islamic legal system, and avoid any already possessing a "modern" self-conception. If such a system had remained close enough to its traditional roots, then supervening influences would still be distinct. In such a situation, the influx of foreign elements into the traditional system could even aid

study, since their entry may provoke reactions in the system that expose both its own character and that of the intruder.

For these reasons, I resolved upon study of a living Islamic legal system. The legal system best meeting the criteria just outlined, and perhaps the only living legal system that does so, is Saudi Arabia. In Saudi Arabia[12] Islamic law is constitutionally the law of the land, the general jurisdiction is held by traditionally trained judges who apply exclusively the Islamic law, and traditional Islamic legal learning is still good professional training for practice. Over nearly two hundred and fifty years, the successive Saudi states of Arabia have played some of the most dramatic and meaningful roles in the history of the Middle East. But among the many exploits of this state, one of the most notable -- and this also when viewed from the long perspective of Islamic history -- is its creation of an enduring, coherent and effective Islamic legal system. Chief among the justifications for the present regime, and the cause to which it most commonly ascribes its historical successes and hopeful future, is its zeal in upholding the legal code of God.

In Saudi Arabia Western law and legal conception have not invaded the essential core of the legal system. Saudi Arabia

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[12]Other Arabian Gulf countries are the closest competitors, though none besides Saudi Arabia combines all these characteristics. See William M. Ballantyne, "The Constitutions of the Gulf States: A Comparative Study," *Arab Law Quarterly* 1 (1986): 158-176.

never experienced the Western colonization that in virtually every other Muslim country drastically transformed the legal system. The country has, indeed, had an extensive exchange with the West, but this began only in this century, and became hectic and invasive only from the seventies onward. In the process, the country has undergone an immense material transformation, followed closely by a far-reaching cultural impact, on law as well. Saudi Arabia has created legal institutions that appear modern and Western. These include the numerous "decree-laws" or "regulations,"[13] including laws on such matters as labor relations, commercial papers, traffic rules, social security, and government tenders. It has created also specialized judicial bodies to decide disputes arising under these regulations, such as the Labor Board and the Commercial Papers Committee. But these new legal institutions remain in form clearly mere superadditions to a preexisting legal system, and the latter, as we shall see, has never fully acknowledged them. Only now, after the first rush of development has subsided, are the Saudis facing the difficult tasks of reconciling these additions with their traditional system. The process of reconciliation stirs up controversies that serve to put the contrasts between the two systems into relief.

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[13]The Arabic term for such regulatory laws is "*niẓām.*" This division of the laws of the Kingdom is discussed in Chapter Three. Note that the book does not treat this sector of the Saudi legal system in detail, since other books do. See n. 14 below.

It can now be seen how the two objectives of this book converge. On the one hand, despite its centrality to Saudi history and society, the traditional Islamic legal system in Saudi Arabia is very little known, due to its inaccessibility to outsiders.[14] Thus, knowledge of the Saudi legal system is best advanced by concentrating upon this traditional system. On the other hand, knowledge of the contrasts between Islamic and Western legal systems is best advanced by immersion in a living Islamic legal world, and, in our time, Saudi Arabia offers the best opportunities for this research. In the very

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[14]There are very few studies of the Saudi Islamic legal system. The most perceptive study is Muṭlab 'Abd Allāh Nafīsa, "Law and Social Change in Muslim Countries: The Concept of Islamic Law Held by the Hanbali School and the Saudi Arabian Legal System" (Cambridge, Ma.: Ph.D. diss., Harvard Law School, 1975); but it does not discuss the legal system at length. Other works are the opposite: they catalog the country's laws and institutions with little interpretation. Muḥammad Sa'd al-Rasheed, "Criminal Procedure in Saudi Arabian Judicial Institutions" (Ph.D. diss., University of Durham, 1973) (an impressive attempt to explain the Saudi legal system using Western legal categories; cites copious otherwise secret sources); Sa'ūd b. Sa'd Āl Durayb, *al-Tanẓīm al-qaḍā'ī fī al-mamlaka al-'arabiyya al-sa'ūdiyya* (Riyadh: Maṭābi' Hanīfa, 1403 H., 1983 C.) (by a member of the Ministry of Justice); Ḥasan b. 'Abd Allāh Āl al-Shaykh, *al-Tanẓīm al-qaḍā'ī fī al-mamlaka al-'arabiyya al-sa'ūdiyya* (Jedda: Tihāma, 1404 H., 1983 C.); Soliman A. Solaim, "Constitutional and Judicial Organization in Saudi Arabia" (Ph.D. diss., The Johns Hopkins University, 1970); Hamad Sadun al-Hamad, "The Legislative Process and the Development of Saudi Arabia" (Ph.D. diss., University of Southern California, 1973); Alison Lerrick and Q. Javed Mian, *Saudi Business and Labor Law: Its Interpretation and Application*, 2d ed. (London: Graham & Trotman, 1987) (directed chiefly at non-Saudi lawyers and the *niẓām* decree-law with which they mostly deal; very weak on most Islamic aspects of system). A short but perceptive study is by George Sfeir, "The Saudi Approach to Law Reform," 36 *American Journal of Comparative Law* 36 (1988): 729-759. A number of articles by practitioners exist.

fact that Saudi Arabia shares our time and suffers from dilemmas in confronting modern law, it offers opportunities to learn of Islamic law that we could not equal even were we transported magically into the past.

Here the objection will at once arise that this approach seems bound to credit Saudi Arabia's legal system as the ideal of Islamic law application. The objection is important, in part for different reasons, to both Muslims and non-Muslims. As to the former, no Muslim wishes the sublime ideal that is the concern of this book to be ensnared in any single implementation, or even worse, in my faulty understanding of that implementation. As to the non-Muslims, irritation may be felt in my conjoining ready talk in universals, of "Islamic" this and that, with the close examination of facts so discrete and particular. I shall give the same answer to both versions of the objection -- and in uniting the answers is, indeed, a certain thesis.

First, no Saudi citizen I have met has claimed perfection or sanctity for Saudi Arabia's implementation of Islamic law. Many Muslims, Saudi and otherwise, have asserted the extreme opposite, and are concerned that I not present my findings with any other implication. Most urge me rather to study the historical record of Medina under the Prophet and the early Caliphs, to learn the ideal of Islamic law application. I conceded above the virtue of this suggestion, but submit that, though such study would enrich this work, it would be a

different project, pursued by a different method.

There is a difference between the Islamic ideal and any realization of it. Even in the time of the Prophet there were hypocrites and backsliders. When Muslims act in relation to Islamic ideals, their acts are relevant, however imperfect, and however deprecated by their coreligionists. Modern Muslims, in evaluating, whether to praise or to blame, their own acts, surprisingly often abandon the methods and categories of Islam, particularly in dialogue with the West. For example, instances where Islamic law is either applied or not applied are often accounted for as "power politics"; acts complying with Islamic rules are blamed if consistent with secular motives; a success is praised by showing favorable comparisons with Western "man-made" laws; sincere differences of opinion, though within religiously permissible scope, provoke accusations of bad faith. Muslims when analyzing their own realities seem to neglect not only Islamic thought's universal and perceptive categories of description, but also the power of methods and patterns of Islamic thought to hold ideals ever above realities, yet still in meaningful relation to them; to identify failures and causes while engendering the will to overcome them; to accommodate human weakness and worldly motivations for the sake of greater goods; and to seek out unity on essentials despite vigorous disagreement. Islamic law possesses a method of understanding implementations of an ideal not as the inevitably flawed

particulars of some abstract form, but rather as genuine this-worldly realizations of it, each genuine despite being unique, concrete and transient. All these categories and methods can be meaningfully applied to non-Muslim societies; should they not all the more be used to understand a country where with sincerity many Muslims seek to apply God's law? The Islamic law, as God's own law, must be ever transcendental and never known in full, while men's arts, acts and artifacts in law alone can be known, and observed.

In any case, although Saudi Arabia no doubt does not perfectly apply Islamic law, and indeed according to the views of some (and as a non-Muslim I make no judgment), it does not apply true Islamic law at all, it is indisputable that it does apply at least a traditional Islamic law in many spheres; and it does this, as we shall appreciate in Chapter Three, with certain notable successes relative to Islamic antecedents. Even the most forward-looking Muslim cannot disown utterly the past to which Saudi Arabia is heir.

That the Islamic law applied in Saudi Arabia is largely traditional in its content, though it chagrins some modern-minded Muslims, is to a scholar of the Islamic law invaluable. The Saudi practice suffers a minimum of discontinuity with a past stretching back across fourteen centuries of development. Saudi Arabia still knows old resonances, and they can be heard here even by the outsider. The majority of the Saudi people highly value their religion, and intend to preserve its force

in their legal and social life. Most are traditional in culture, and find their indigenous law natural. In any Muslim country, one may discuss religion and law with religious scholars and religious leaders of the people, but in Saudi Arabia these religious figures are at the same time judges or powerful officials, daily applying a law that they believe is God's. Anywhere one can meet with religious people and discuss their religion, but in Saudi Arabia these are also the people on whom a law is applied that they accept as God's.

All this notwithstanding, Saudi Arabia is still but one example, and limited by its particularity. Unanimously Muslim, and overwhelmingly Sunnī,[15] it is religiously homogeneous. Moreover, in the public domain at least,[16] it strenuously adheres to one trend of Sunnī thought and practice, that deriving from the teachings of Muḥammad b. 'Abd al-Wahhāb (d. 1206 H., 1791 C.), and before him Ibn Taymiyya[17] (d. 728 H., 1328 C.); the teachings of both these scholars will figure prominently in what follows. The political and religious movement founded by Ibn 'Abd al-Wahhāb, which has

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[15]A very small proportion are Shī'īs, living chiefly in the Eastern Province.

[16]Saudi Arabia has hardly yet conquered regionalism. In several regions, especially the vital Ḥijāz, the Wahhābī religiosity brought by the Saudi regime can seem only a public state of affairs, while religiosities of the old days, even Ṣufism, survive in private.

[17]Taqī al-Dīn Aḥmad b. 'Abd al-Ḥalīm Ibn Taymiyya.

dominated the history of the Arabian peninsula for almost a quarter of a millenium, is well known, and treated in many books.[18] Saudi Arabia today, though now fallen heir to fabled wealth, is still deeply marked with the values of this movement. The religious ideas of Wahhābism[19] are certainly centrist, but at the same time so strenuous as to never claim more than a minority following. The Wahhābīs strove to regain the pure practice of the *salaf*, the pious forebears, and shake

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[18]See, e.g., R. Bayly Winder, *Saudi Arabia in the Nineteenth Century* (New York: St. Martin's Press, 1967); Christine Moss Helms, The Cohesion of Saudi Arabia (London: Croom, Helm, 1981); George Snavely Rentz, "Muhammad ibn 'Abd al-Wahhab (1703/04-1792) and the Beginnings of Unitarian Empire in Arabia" (Phd. diss., University of California, Berkeley, 1948); 'Abd Allāh Ṣālih al-'Uthaymīn, "Muḥammad Ibn-'Abd-al-Wahhāb: The Man and His Works" (Ph.D. diss., University of Edinburgh, 1972). These works leave much study still to do in the movement's religious and legal positions and how these relate to the political history. Rich original sources are available. See the bibliography in Henri Laoust, *Essai sur les doctrines sociales et politiques de Taki-d-Din Ahmad b. Taimiya* (Cairo: Imprimerie de l'Institut Francais d'Archéologie Orientale, Cairo, 1939), 643-650.

[19]I shall use the term "Wahhābī movement," though the term *Wahhābiyya* has often been rejected and disapproved by the movement itself, on the ground that the term was invented by the movement's opponents to deride it, and that it suggests, wrongly, that the movement is a new, heterodox and extreme sect. al-'Uthaymīn, "Ibn-'Abd-al-Wahhāb," 212-3. Such abusive usage has not died out, being found even now among opponents of Saudi religious influence. The term has, however, become common in scholarly usage, and is the only practical alternative. (We cannot use the names that the movement itself employed, since these mostly assert universal Islamic truth: for example, Muslims, Muwaḥḥidūn, Da'wat al-Tawḥīd, al-Da'wa al-Muḥammadiyya; ibid., 213; cf. al-Da'wa al-Najdiyya.) Rejection of, and sensitivity to, the term Wahhābiyya among Saudis has diminished as the movement has found better understanding and a more comfortable place in the world. It has even been used by Wahhābī authors. Ibid., 214.

off the cultural accretions of intervening centuries; they sought to do so by means of a rigorous, legalist adherence to the revealed scriptures, the material texts of the revelation through Prophet Muhammad. They were not content with pious wishes, and with mere memories of a past; they sought with might and main to make their Islam a living reality. All these characteristics, and many more with them, distinguish observations in Saudi Arabia from those that might be made elsewhere.

Yet, heuristically, most characteristics of Saudi Arabian legal culture serve our purposes. Many variables of religion which could immensely complicate work are controlled. Saudi Arabia's relative religious homogeneity is a great aid. And much is simplified by the dogmatic stringency of Wahhābism. For one thing, customary law, which elsewhere in the Muslim world often overrules Islamic law, is scarcely to be found. Secondly, legal positions are conscious and dogmatic, and the enforced norm is that one's practice conform to one's theoretical positions, even though this be by an accommodation or exception in the theory. Finally, the Wahhābīs accentuate everything legal in Islamic piety, and banish the theosophical and mystical, which would muddy our conceptual waters.

For all these reasons, Saudi Arabia is an apt beginning, but hardly the end, for study of "the Islamic legal system."

This introduces the dual objectives of this book, the study's method, and how it is that both objectives are pursued

at once and by a single method. Five other points about this method remain to be discussed.

First, since the subject matter of this book is of interest to scholars in many fields, the book assumes no prior knowledge of Islamic law and its basic concepts, and thus includes all necessary introductions. Indeed, the first chapter is almost entirely devoted to this task. The need for these introductions is unfortunate,[20] since they will seem at times to take us far from our Saudi Arabian context; but they are made to serve also another purpose, which is to introduce the book's theoretical comparative apparatus. Perhaps similar introductions are called for as to modern Saudi Arabia, its history and its present political system. But here, on the ground that there are easily available and topical treatments in English,[21] I have kept introductions to these topics

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[20]No other expedient, such as requiring reference to some basic handbook, is feasible. First, there is no adequate handbook in English. Second, on many needed subjects, if literature exists, it is usually not only scattered or inaccessible, but also poorly calibrated for use. The study of the law's actual application has been, in particular, sorely neglected. Third, since the field is hardly settled on most of the issues covered, however basic, even a specialist reader will wish to know where I stand. Fourth, treatments of these issues include original material, much of it inspired by my experiences in Saudi Arabia; they therefore are an essential part of presenting the lessons of those experiences.

[21]Helms, *Cohesion;* Summer Huyette, *The Political Adaptation of Saudi Arabia* (Boulder, CO: Westview, 1985); Robert Lacey, *The Kingdom* (New York: Harcourt Brace Jovanovich, 1981); Tim Niblock, ed., *State, Society and Economy in Saudi Arabia* (London: Croom, Helm, 1982); Willard A. Beling, ed., *King Faisal and the Modernization of Saudi Arabia* (London: Croom, Helm, 1980). For a full bibliography see Huyette, *Adaptation*, pp. 181-189.

extremely brief.

The four remaining points are all caveats, warning of limitations in the study. The first of these concerns the selection of material. My criterion of selection has been, first, to narrow observation of Saudi legal life to the realm of "legal system" -- the narrow world of legal literature, statutes, courts, legislatures, legal professionals and administrators; second, within the legal system, I focus solely on the more traditionally Islamic sectors; third, within those sectors, I identify points that most perplex our Western understanding, taking these as case studies; and fourth, I draw through these points cross-sections of the legal system, and extrapolate from these in turn a composite picture of the system as a whole.

Clearly, with this program, the book falls far short of the treatment many would like to see. Thus, practitioners and many comparativists may wish instead for a treatise describing Saudi laws and their applications. Instead, the book concerns itself only with fundamental, and Islamic, aspects of the system. Second, comparativists will wish for more explicit comparisons with one or several Western legal systems, not as to doctrine so much as to legal reasoning, methods and institutions. This is certainly an appropriate point, but, apart from a few asides and the easy comparisons that readers will make for themselves, such comparison involves much more effort and space than one might think. As already suggested,

the comparisons sought here seem to fall to extraordinarily fundamental levels. They demand studies of Western systems of considerable doctrinal, philosophical and historical reach, that moreover respond to the new lines of comparison discovered here. This task must be postponed. Third, social scientists will decry the failure to root Saudi legal behavior in its social and political context, the study treating only matters explicitly both Islamic and legal. I equally regret this shortcoming, and fully endorse the suggested larger project.[22] As I hope my treatment demonstrates, I am hardly wedded to conceptions of legal formalism or of the autonomy of the legal system, or to functionalist or doctrinalist comparative legal methodologies. The Saudi traditional Islamic legal reality architecture just described has been totally unknown to us. Further, on examination, we find that it is a conceptual system that holds water, is integrated, to an extent that justifies pouring into it our extended attention. It deserves not our ignorance, but our considerable respect. Regardless of our ultimate objectives, we need first to understand it on its own terms.

The second caveat is that, in its focus on contemporary Saudi Arabia, the study cannot provide adequate treatments either as to Islamic history and doctrine. My research was driven by the urgency of recording, and of giving a first-

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[22]Moreover, here no other literature fills the gap. A reason for this, and for my own neglect, is the many obstacles such research would face in Saudi Arabia.

order interpretation to, key facts about Saudi practice and legal thought while opportunity presented. But, of course, a vital part of our purpose is to reflect upon Islamic legal doctrine and history far beyond Saudi Arabia. Accordingly, I do venture many observations on such matters, but with the understanding that these are hypotheses growing out of this particular case-study, and not at all fully demonstrated claims. In sum, I approach the immensity of Islamic history, doctrine, law and legal practice from the standpoint of the contemporary Saudi legal system, as an ocean from the shore.

A corollary of this, requiring emphasis, is that reference to Islamic thought and practice will be confined within the mainstream Sunnī school.

The third caveat concerns the terminology to be used in this book. The noted relative incommensurability of ideal representations entails that the conceptions and terms of one system simply will not capture the reality of the other system. The legal language of each culture is firmly loyal to its enterprise, and resists -- in surprisingly subtle ways -- being turned to any other purpose. Obvious examples of the problem are the terms "religion" and "law"; the chauvinism of terms like "rule" and "case" is more surprising. No less difficulty is found on the other, Islamic and Arabic, side. But the lexical problem is just a token of a vastly more fundamental difficulty, that the distinctions among things, the divisions of experience -- the very capital on which words

draw -- differ between the two legal cultures. The basic dualisms in one system cut, in great trajectories, across the basic dualisms of the other. As a result only rarely will words born of one set of dualisms fit comfortably with realities as determined by the other. Taking things even further, words are apprehended in different cultures in wholly different ways, or contexts: a view held as subjective, ideal, or emotional in one culture may be held in the another as objective, real, or rational. As a medium of expression to cope with these difficulties, straightforward academic legal prose may seem a woeful choice.

What solutions are there for these difficulties? Largely, we make do with English, in quantity. But we must also use a number of Arabic terms. It is always a dilemma in studies of comparative culture whether to label concepts from the foreign culture with rough English equivalents or with their original terms in the original language. We have chosen, as to a few central concepts, the latter course as the most efficient. The reasons for this are many: these concepts are large and complex, great vehicles of culture, with cherished names of their own; their distinction from seemingly parallel Western ideas is vital; and giving them foreign names avoids prejudicing understanding, and incites a natural urge to understand.

Our practice, then, as to these Arabic terms will be to introduce each one in context of discussion, ***boldened and***

italicized, with a rough definition, enough to make the term usable. Thereafter the word will be used un-italicized (it still will not be mistaken for English). A glossary is provided giving for each a brief definition, and also the page number of first use. Note that many other Arabic words also appear, but these, *italicized*, not boldened, are included only for those who know Arabic, and are not needed to follow the argument.

But even this is not enough of a concession to foreignness. We also need to follow, though rarely, a third course, that of neologism. If these legal cultures, and languages, are different to the extent just claimed, then the need will be understood to adopt occasionally new theoretical devices, constructed both from English and Arabic. These innovations will seem like Robinson Crusoe's house, rude necessities built with odd bits from two worlds.

The fourth and final caveat is an extension of the third. Unfortunately, it must be said that not only the terminology, but at times even the overall tone of our descriptions, will be odd -- and this to readers from <u>both</u> legal cultures. One reason for this is that the descriptions are only rough representations in language, and unduly fallible even as such. But another reason -- one infinitely more sad -- is that, even if the descriptions are relatively successful, they will inevitably in the eyes of each system be off-center, miss the point, fail to tell the true story. But can one who wishes to

cross a bridge remain on either side?

C H A P T E R

O N E

I S L A M I C L A W

It is often said, "The law of Saudi Arabia is the Qur'ān." Islamically, this statement means that the Saudi Arabian legal system upholds divine sovereignty. Therefore, this study could be said to have as its sole purpose to penetrate the meaning of this statement.

All things Islamic trace their ultimate source and justification to the Qur'ān, accepted as God's direct speech to mankind through the Prophet Muḥammad. But in Islamic legal philosophy, at a stage one step less ultimate, other sources of Islamic values and norms are equally in play, whose use is justified on the authority of the Qur'ān. Classically, there are three sources of Islamic law in addition to the Qur'ān. The sources of the law are called "roots" [***uṣūl***], and the particular rules deriving from them are called "branches" [*furūʿ*]. All justification in Islamic law must proceed by proofs from the roots. The science of the method of derivation of branches from roots, or, if you prefer, Islamic legal philosophy, is called the science of ***uṣūl al-fiqh***, or

the "roots of the law."

These roots and this method of derivation monopolize Islamic legal justification, and therefore form the foundation on which rests the conceptual edifice of the Islamic legal system. By contemplating the essential features of this foundation, the outsider gains a basic orientation to the subject. To achieve this end is the purpose of this Chapter.

In this Chapter we encounter, though in a form still schematic and obscure, the most fundamental of the contrasts that will be our concern throughout. The statement that Saudi law is summed up in the divine scripture of the Qur'ān may have already aroused in the reader specters of extreme fundamentalism or arbitrary rule; surely, nothing could be more foreign to modern Western ideas of law as deriving ultimately from values of democracy and the commonweal. Although we shall modify and rechannel these rough and instant reactions as we proceed, yet the felt keenness of contrast is appropriate, and we should not forget it. Does it not then become urgent to know whether the patterns of legal behavior arising under these divergent ideals also, and as markedly, diverge?

Recall the methodological metaphor invoked in the Introduction, of legal realities defined by unique architectures, reaching deep into the inner worlds of individuals. Prime lines and vertices in the Islamic legal architecture are to be charted in this Chapter, though only doctrinally. The remainder of the book will explore along

these axes in the actual Saudi practice, filling them out with both observed detail and more explicit theoretical structures. When the detailed charts are brought together, the composite should suggest the world they describe. If the resulting representation does portray a world -- without its sense of reality being wholly lost in translation -- then the effort will have been successful.

This Chapter is divided into three parts. The first part introduces, by quoting extensively from the Qur'ān, two basic ideas simultaneously: first, the fundamental concept of "law" in Islam, and second, the Qur'ān as a source of law. We need a beginning acquaintance with the Qur'ān for many reasons. One appears from the quotation at the head of the Chapter. Another is the need to emphasize, to non-Muslims, how fundamental the influence of the Qur'ān on legal matters is -- indeed, the influence is so pervasive as to be often missed.[1]

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[1]My use of the Qur'ān here needs explanation. Adducing it as I do, in another language, uprooted from its traditional ground of minute interpretation and historical context, is very artificial. Certainly I do not offer here an authoritative commentary on the Qur'ān. While the meanings for which I cite the Qur'ān (as translated) have support in the text and in Muslim interpretation, by offering them I do not express or relate a preference for one interpretation over another. Nor do I assert from any available outsider's perspective, whether lexical or historical-critical, that the Qur'ān authentically means, or meant, what I quote it to support. These and others are possible "strong theses" about the verses quoted; I elide the problems they raise, for the reason at least that they deflect us unduly from our purpose.

From my treatment does emerge, however, a "weak" thesis about the Qur'ān. Assume that I were using these verses, or rather their translations, on the minimal claim that they usefully captured, conveyed, Islamic-legal ways of thought and

The second part of this Chapter introduces in essentials the Islamic method of legal justification, the uṣūl al-fiqh, and the law that is derived by this method. This discussion proceeds in four stages: first, introduction to the three roots of the law besides the Qur'ān; second, description of the method of derivation from these roots; third, a resume of the history of the operation of the method and of the development of Islamic law; and fourth, several observations on the universal, all-comprehensive scope of the law derived by this method, including the problem of defining the term "Islamic legal system" in a way suitable for comparisons with Western legal systems.

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feeling that I had already observed or experienced. This would be to use the Qur'ān almost as one would quote poetry, not in order to invoke the authority of the poet, but rather to portray to the reader, to evoke, a certain way of thought and feeling. (From a scientific viewpoint, my manner of using the Qur'ān can claim very little more than this.) I am continually surprised at how well the Qur'ān performs measured in this way, and with what profundity of emphasis, suggestion, and ambiguity it responds to the sought meanings. The weak thesis, then, is to point to this fact, and to assert that it deserves greater attention than is usually given in the various strong-thesis interpretations. The explanation for it is that the Qur'ān has pervasively, and with extraordinary subtlety, shaped Islamic realities.

PART I

THE *QUR'ĀN* AND THE NATURE OF ISLAMIC LAW

A. THE EPISTEMOLOGY OF THE QUR'ĀN

> Read in the name of thy Sustainer, who has created --
> created man[2] out of a germ-cell!
> Read -- for thy Sustainer is the Most Bountiful One
> who has taught (man) the use of the pen --
> taught man what he did not know! [96:1-5][3]

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[2]"*Insān*" is used, which means "human being."

[3]My primary source for translation of the Qur'ān has been Muḥammad Asad, *The Message of the Qur'ān* (Gibraltar: Dar al-Andalus, 1984). This translation, by the late esteemed European Muslim thinker, together with the commentary undertaken as an indispensable part of it and exposed in footnotes, was undertaken explicitly as an effort at cross-cultural explanation, at making the Qur'ān accessible to Western readers. Asad's monumental intellectual effort, in general, and most of his interpretations and renderings, in particular, turn out to aid us in our own venture.

Asad's translation often reflects the bold independence of thought of its author. He often adopts minority or even isolated opinions in Qur'ān interpretation, and incorporates these views into his renderings, scrupulously noting this in his footnotes. In some instances his translations do not serve our purposes, as in cases where we must rely specifically on traditional interpretations. I then depart freely from Asad's translation, noting the fact of alterations

These are held to be the first verses of the Qur'ān to be revealed to the Prophet Muhammad. In the ***Qur'ān***, meaning "recitation" or "reading," that calls itself the *kitāb*, meaning "book" or "writ," God "[teaches] man what he did not know."[4]

The Qur'ān presents itself as revealed by God, in God's Arabic speech, to Muḥammad, God's "Messenger," through another messenger, the archangel Gabriel, the "Faithful Spirit."[5] The direct words of God to men were thus faithfully conveyed.

The Qur'ān is for us the necessary point of departure. We examine it using the technique of internal epistemological inquiry mentioned in the Introduction,[6] i.e., inquiry into the epistemological status of the Qur'ān among those who accept it. Let us consider first some indications, admittedly general and impressionistic, of cultural phenomena that surround the Qur'ān.

A visitor to Muslim countries is early struck by the

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solely by an asterisk in the reference. I also omit from time to time -- without notice -- Asad's often lengthy parenthetical explanatory phrases, needed because of the ellipticity of the Qur'ān. My own interpolations (or minor amendments to the translation) are marked by brackets.

Hereafter I shall give Qur'ānic references only as chapter (or *sūra*) and verse (or *āya*), e.g., [96:1]. I distinguish verses by indenting.

[4]Literally, these verses refer to all knowledge conveyed by writing. But see, e.g., [2:151]: "an apostle . . . to impart unto you revelation and wisdom, and to teach you that which you knew not . . . "

[5]See [26:193].

[6]See page 14 above.

degree to which, even in the modern age, an unthinking faith in the Qur'ān seems in the very grain of society. To a great majority -- if one can accept the anecdotal impressions from which such conclusions are reached -- the Book still claims axiomatic acceptance as the literal words of God. One encounters this acceptance routinely in every class of society, among both the educated, worldly and Westernized and the traditional or illiterate, among the casually as well as strictly observant.

The Qur'ān is warp and woof of Muslim culture and daily life. The believer encounters the Book intimately, continually: it is recited five times a day at prayer, at great length on many occasions; it is always in the air, from radio or tape recorder; school children must memorize some part of it, some learn it entire. Ordinary people, at least those who speak Arabic, have direct access to the Qur'ān, since its original language has, as the first objective of Muslim education, been kept close to everyday consciousness. It claims reverence, at least from those who know Arabic, for its inimitable beauty and power of expression. Its chanting, in melodies of preternatural beauty, is a religious art widely esteemed and cultivated.

In sum, to a great many Muslims individually and in society, the Qur'ān represents an omnipresent reality, an instinctual call, an unquestionable divine intervention.

These cultural phenomena lend moment to our next step, an

epistemological inquiry into the doctrines surrounding the Qur'ān. Interestingly, we find these doctrines expressly preoccupied with the proofs by which the Qur'ān's truth is established. By a purely mechanical analysis, our inquiry resolves into four parts: (i) whether God's speech is true; (ii) whether words included by Muḥammad in the Qur'ān are truly God's; (iii) whether the Qur'ān as received historically is authentically the text received from Muḥammad; and (iv) whether man apprehends truly the intent of the words of the Qur'ān. We find that each link in this epistemological chain receives the attention of the Qur'ān itself, and after it, of Islamic religious thought.

The first link, whether God speaks truth, would seem, in a religious context, self-evident. But in another sense, that of men's innermost convictions of the reality and truth of religion, the issue is the most vital of all, and is profoundly open. The Qur'ān repeatedly deals with it. For example:

> Say: ". . . And who is it that governs all that exists?" And they will (surely) answer: "(It is) God." Say, then: "Will you not, then, become (fully) conscious of Him --
>
> seeing that He is God, your Sustainer, the Ultimate Truth? For, after the truth (has been forsaken), what is there (left) but error? How, then, can you lose sight of the truth?" [10:31-32]

As for the second link, whether the Qur'ānic words are divine, we find that the Qur'ān marshals arguments, of several types, against doubters and outsiders of its time and since. First, and most fundamentally, the Qur'ān claims that it is

self-authenticating: all of pure purpose, sound knowledge and reason will recognize in it *a priori* the mark of God's truth.

> And (only) those who are devoid of knowledge say, "Why does God not speak unto us, nor is a (miraculous) sign shown to us?" Even thus, like unto what they say, spoke those who lived before their time: their hearts are all alike. Indeed, We have made all the signs manifest unto people who are endowed with inner certainty. [2:118]
>
> Nay, but this (divine writ) consists of messages clear to the hearts of all who are gifted with knowledge -- and none could knowingly reject Our messages unless it be such as would do wrong. [29:49]
>
> For, when they [hear] what has been bestowed from on high upon this Apostle, thou canst see their eyes overflow with tears, because they recognize something of its truth; (and) they say: "O our Sustainer! We do believe; make us one, then, with all who bear witness to the truth." [5:83]
>
> These are messages of the Qur'ān -- a divine writ clear in itself and clearly showing the truth:
> a guidance and a glad tiding to the believers
> who are constant in prayer and spend in charity: for it is they, they who in their innermost are certain of the life to come! [27:1-3]

Second, the Qur'ān offers an argument from external evidence, pointing to the miracles of the Qur'ān: its production at the hands of Muḥammad, and man's powerlessness to create its like.

> [F]or, (O Muhammad,) thou hast never been able to recite any divine writ ere this one, nor didst thou ever transcribe one with thine own hand -- or else, they who try to disprove the truth (of thy revelation) might indeed have had cause to doubt (it).
> . . .
> And yet they say, "Why have no miraculous signs ever been bestowed upon him from on high by his Sustainer?" Say: "Miracles are in the power of God alone; and as for me -- I am but a plain warner."
> Why -- is it not enough for them that We have bestowed this divine writ on thee from on high, to be conveyed (by thee) to them? For, verily, in it is (manifested Our) grace, and a reminder to people who will

believe. [29:48, 50-51]

> [A]nd so they assert, "(Muhammad himself) has invented this (Qur'ān)!" Say (unto them): "Produce, then, ten *sūrahs* [chapters] of similar merit, invented (by yourselves), and (to this end) call to your aid whomever you can, other than God, if what you say is true!
>
> And if they are not able to help you, then know that (this Qur'ān) has been bestowed from on high out of God's wisdom alone, and that there is no deity save Him. Will you, then, surrender yourselves unto Him?" [11:13-14]

Muslims assert that historically the Qur'ān's claim to inimitability [*i'jāz*] has never been refuted, and that from this fact one must draw the conclusion stated by the Qur'ān itself.[7] Muslims find these arguments from the Qur'ān corroborated by the established historical record of the events of the revelation, of Muḥammad's character as an honest and pious man unlikely to forge enormities on God, and, finally, of stunning success in his lifework.

Note that these arguments to vindicate the Qur'ān's divine authority are directed at the individual reason, offering arguments and evidence both *a priori* and external; in both cases, the arguments are understood to appeal objectively, and to be irresistible to any one of sound mind and heart. Note that, in appealing to mankind as individuals, these arguments make no appeal to church authority or the force of community (except in the appeal to historical evidence); also, in invoking reason they do not rely on any touchstone of elevated devotional or mystical states, or on

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[7]On the doctrine of inimitability [*i'jāz*], see G.E. von Grunebaum, "I'djāz," *Encyclopedia of Islam*, 2d ed.

the devout irrationality of blind faith. These arguments seek, then, to establish the authenticity of the Qur'ān not according to any other criterion, or at any other level of truth, than that of everyday apprehensions of reality.

Taking up the third link in the epistemology of the Qur'ān, the issue of the authenticity of the transmitted text as that learned originally from Muḥammad, we find the same sort of proof offered. Muslims from very early on were most anxious to assure this authenticity, and devised the religious sciences necessary to demonstrate it. These sciences do establish that the present text is authentic, within a relatively narrow range of uncertainty and variation.[8] This success is seen as predicted in the Qur'ān verse:

> Behold, it is We Ourselves who have bestowed from on high, step by step, this reminder: and, behold, it is We who shall truly guard it. [15:9][9]

The last link in the chain is the issue of interpretation, or how man may know the true meaning or intent

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[8]A.T. Welch, "Ḳur'ān," *Encyclopedia of Islam* (2d ed.), pt. 3. "According to the orthodox view, the Ḳur'ān was perfectly preserved in oral form from the beginning and was written down during Muḥammad's lifetime or shortly thereafter when it was 'collected' and arranged for the first time by his Companions. The complete consonantal text is believed to have been established during the reign of the third caliph, 'Uthmān (644-56), and the final vocalised text in the early 4th/10th century. Most Western scholars have accepted the main points of this traditional view." Ibid. This article also demonstrates, however, the immense complexity and the many uncertainties of the history of the Qur'ānic text at the level of detail, even according to the Islamic authorities. See also R. Paret, "Ḳirā'a," ibid.

[9]See also [85:22] (the "well-guarded tablet," *lawḥ maḥfūẓ*).

of the Qur'ānic text. This is the chief concern of the science of uṣūl al-fiqh, to be discussed presently.

The critical point to draw from this analysis is that, as thus established in Muslim thought, the Qur'ān affords mankind an epistemological straight line to absolute truths. Its truths, though transcendental, approach one as directly as any mundane verdict of one's mind and senses. Yet, because transcendentally true, their truth value is set apart: in Arabic words God teaches man precisely "what he does not know." Humans may validate epistemologically the vehicle, the outer form, of the message, and even interpret it; but the content, the inner truth, is absolute, and evades their measure. Two very distinct epistemological quantities are thus conjoined, and the tension between them always accompanies the Qur'ān.[10]

B. THE NATURE OF THE LAW OF THE QUR'ĀN

Understanding that the Qur'ān is accepted in this extraordinary way, let us return to the statement that in Saudi Arabia the Qur'ān is the law. We want to ask, what sort of law can this be? Surely we now have misgivings about using the English word "law" in this question, sensing how it slurs

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[10]Inevitably, given these characteristics of the Qur'ān, a great deal of Muslim religious effort was channelled into religious sciences of textual interpretation and historical proof. In this way Islamic piety was early spurred to intellectual, scientific and literary efforts.

over vast cultural and chronological differences; besides, "law" imports its own highly variegated connotations. But we must persist: these slurrings and ambiguities are precisely the objects of our study; let us allow them to build, urging their own resolution.

The Qur'ān seems itself oddly preoccupied with many of the questions we want to ask, and offers its own answers.

> Judgment [*al-ḥukm*[11]] rests with God alone, and He has ordained that you should worship nought but Him. . . . [12:40]
>
> But for people who have inner certainty, who could be a better law-giver than God [*aḥsanu min allāhi ḥukman*]? [5:50]
>
> Does man, then, think that he is to be left to himself, to go about at will? [75:36][12]

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[11]This term, much and variously used in Islamic law, has many meanings. The root from which it derives seems to have the original meaning "to restrain or prevent another," usually from harm or corruption. Thus, related to it are words with meanings such as "restraint" from wrong behavior, hence, wisdom, science and knowledge [*ḥikma*]; and "arbitrator" [*ḥakam*] appointed by litigants to decide their dispute (a common judicial model preexisting Islam). See Joseph Schacht, *An Introduction to Islamic Law* (London: Oxford University Press, 1964), 10. Among the valid -- and far more legally common -- meanings of *ḥukm* are judgment, rule, ruling, and, to a lesser extent, jurisdiction, dominion. In Islamic law the word is used for many types of legal determinations or evaluations, including a qāḍī's judgment or a scholar's theoretical ruling. Jurists often use the term "*ḥākim*," meaning one who makes a judgment [*ḥukm*], especially where a generic term, encompassing various types of decision-makers (besides *qāḍīs*) is needed. But *ḥākim* can also mean "ruler." Abū al-Faḍl Jamāl al-Dīn Muḥammad b. Makram Ibn Manẓūr (d. 711 H., 1312 C.), *Lisān al-ʿarab*, 15 vols., 2d printing (Beirut: Dār Ṣādir, n.d.), 12:140-45; Edward William Lane, *An Arabic-English Lexicon* (London: Williams & Norgate, 1893), 2:616-18.

[12]See [23:115]: "Did you, then, think that We created you in mere idle play [*ʿabathan*] . . . ?"

> And (so it is that) whenever they are summoned unto God and His Apostle in order that (the divine writ) might judge between them, lo! some of them turn away.
>
> . . . .
>
> Is there disease in their hearts? Or have they begun to doubt (that this is a divine writ)? Or do they fear that God and His Apostle might deal unjustly with them? Nay, it is (but) they, they who are doing wrong (to themselves)! [24:48,50][13]

The Qur'ān states, in one of its last verses to be revealed,

> Today have I perfected your religious law [*dīn*] for you, and have bestowed upon you the full measure of My blessings, and willed that self-surrender [*al-islām*] unto Me shall be your religion [*dīn*]. [5:3][14]

Suggested even from these few verses, and overwhelmingly corroborated by Muslim life and faith, is the idea that the Qur'ān intends to institute an explicit set of norms for, or a paradigm of, human behavior. God through revelation appears to assert a sovereignty over human life. We need to spend some time to explore the dimensions of this conception in the Qur'ān.

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[13]As is usually the case, this verse was revealed in response to a worldly event or problem. Abū al-Ḥasan 'Alī b. Aḥmad al-Wāḥidī al-Nīsābūrī (d. 468 H., 1074 C.), *Asbāb al-nuzūl* (Beirut: Dār al-Kutub al-'Ilmiyya, 1400 H., 1980 C.), 221, 108, relates that, in a dispute between a Jew and a "hypocrite," the Jew wished the Prophet to judge the case, but the hypocrite wanted Ka'b Ibn al-Ashraf instead, saying, "Muḥammad will deal unjustly with us."

[14]The root meaning of "*dīn*" seems to be "obedience"; thence submission, servitude; thence, religion (in both practical and doctrinal aspects) and also religious or moral law. Lane, *Lexicon*, 3:942; see also Asad, *Message*, 57, n. 249, 981, n. 3.

1. Law as a Fundamental Religious Conception

Indeed, in the Qur'ān we find suggested a primal conception of law, one singularly poorly conveyed by the modern term "law." This conception, striking deep into man's religious nature, has no single Western counterpart; unitary, it overlaps, in part, with a number of Western ideas and ideals, only some of which relate to law. We may trace here, in the fundamental context of the Qur'ān, how its reach extends across the boundaries defined for law in the modern West.

As a tool for grasping this fundamental conception, let us envision, as an imagined primal[15] human stance toward experience, what we shall call "the dilemma of will." This is that mankind observes all nature -- including in some respects one's own body and one's outer life -- as subject to a vast, overwhelming power or order beyond one's powers to manipulate or control. Yet, through some rift in nature, one finds in oneself, in individual consciousness, a preserve of freedom and choice where this external power or order does not seem to run. The entire world seems in perfect and instantaneous "subjection" or "obedience" to some "commands" or "laws," yet

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[15]This stance may well be neither a primitive, universal or even common human experience, and should not be thought of as present in the Qur'ān. No doubt it overlaps with the angst deep in the dilemma of free-will vs. determinism. I present it as a thought experiment useful in probing the Qur'ānic vision of law.

the individual will asserts its own order, and acts to implement it. A chasm yawns between oneself and the world, between what one wills and what comes to pass, between the order one struggles to create and that to which all else submits, between one's acts and an overwhelming reality. Not only this, but one is burdened also with awareness of the rift, and this forces one to ponder why one has this power of will, and how one should direct it. One wonders if there is a power or order to which, like nature, one ought to submit -- or, like nature, submits involuntarily -- but, due to some failure in one's knowledge, one's consciousness does not encompass it. One finds in others like oneself similar assertive wills, and indeed one eagerly contends with those wills in relations of command and obedience. Moreover, in relationships with others one encounters society and in it another compelling form of power and order.

The Qur'ān offers an answer to the dilemma of will, that the power or order that informs and compels all -- whether nature, man or society -- is the will of God its creator.

> Do they seek, perchance, a faith other than in God, although it is unto Him that whatever is in the heavens and on earth surrenders itself, willingly or unwillingly, since unto Him all must return? [3:83]

> For, unto Him belongs every being that is in the heavens and on earth; all things devoutly obey His will. [30:26]

This will continually creates and fixes truth and reality.

> Say: "Who is it that provides you with sustenance out of heaven and earth, or who is it that has full power over (your) hearing and sight? And who is it that brings

> forth the living out of that which is dead, and brings forth the dead out of that which is alive? And who is it that governs all that exists [*man yudabbir al-amr*]?" And they will surely answer: "(It is) God." Say, then: "Will you not, then, become (fully) conscious of Him -- seeing that He is God, your Sustainer, the Ultimate Truth? For, after the truth (has been forsaken), what is there (left) but error? How, then, can you lose sight of the truth?" [10:31-32]

God's commands encompass all that we nowadays understand as objective laws of nature; but as presented in the Qur'ān, these laws are intensely personal, voluntary, present and immediate.

Thus it is God's commands that rule the outer creation, governing both man and nature. The Qur'ān also proclaims, however, that these very commands resonate deep within man's conscience, and awaken there the religious obligation to acknowledge God. The Qur'ān declares that within man is an innate human faculty to recognize truth, called a natural, inborn disposition [*fiṭra*].

> And so, set thy face steadfastly towards the faith, turning away [*ḥanīfan*] from all that is false in accordance with the natural disposition which God has instilled into man . . . . [30:30]

The Qur'ān relates that mankind entered primordially into a covenant to recognize God.[16]

> And when thy Sustainer brought forth their offspring from the loins of the children of Adam, He called upon them to bear witness about themselves: "Am I not your Sustainer?" -- to which they answered: "Yea, indeed, we do bear witness thereto!" [Of this We remind you,] lest you say on the Day of Resurrection, "Verily, we were unaware of this." [7:172-3*]

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[16]See [7:172-3], [91:7-10], [2:26-8].

> And why should you not believe in God, seeing that the Apostle calls you to believe in your Sustainer, and [seeing that] He has taken a pledge from you? . . . [57:8]

Seemingly in order to awaken the memory of this covenant, the Qur'ān invokes the overwhelming power and order of the cosmos:

> O mankind! Worship your Sustainer, who has created you and those who lived before you, so that you might remain conscious of Him
>
> who has made the earth a resting-place for you and the sky a canopy, and has sent down water from the sky and thereby brought forth fruits for your sustenance: do not, then, claim that there is any power that could rival God, when you know.
>
> . . .
>
> [N]one does He cause thereby to go astray save the iniquitous,
>
> who break their bond with God after their covenant with Him . . . .*
>
> How can you refuse to acknowledge God, seeing that you were lifeless and He gave you life . . . .
>
> He it is who has created for you all that is on earth, and has applied His design to the heavens and fashioned them into seven heavens . . . . [2:21-22, 26-29][17]

But one's innate Godward faculties hardly absolve one of the dilemma of will; indeed, they sharpen it. Mankind is described as "created weak,"[18] and as often willfully denying and disobeying.[19] Humanity has other human powers and capabilities, the very ones that create the dilemma of will: self-ruled powers of reasoning and volition. These traits the

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[17]This innate faculty is capable to recognize the divine truth of the revelation. See verses cited above p. 43.

[18][4:28].

[19]See, e.g., [91:7-9] (self "imbued with moral failings as well as with consciousness of God").

Qur'ān exalts: mankind is created capable "to think and to argue";[20] it is created as God's "vicegerent in the earth," even though it will do in it "corruption"; Adam was taught "the names of all things," and the angels were commanded to prostrate themselves before him.[21] Thus, man, innerly resonant with God's command, but liable to wanton self-will, bears an exquisite burden. It appears to be in just this sense that the Qur'ān mentions a "trust" that was refused by the heavens, the earth and the mountains, but that man was foolish enough to accept.[22]

To aid mankind in this fearful plight, God sends messages, and warnings, through a sequence of messengers of whom Muḥammad is only the last.[23] Through revelation mankind

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[20][16:4].

[21][2:30*-34].

[22][33:72]. Asad, *Message*, 637, n. 87, interprets the trust as that of "reason and volition." This view is supported in the commentary on this verse by Naṣir al-Dīn Abū Sa'īd 'Abd Allāh b. 'Umar b. Muḥammad al-Bayḍāwī (d. 685 H., 1286 C.), *Tafsīr al-qur'ān* (Istanbul: al-Maṭba'a al-'Uthmāniyya, 1305 H., 1887 C.), 563 ("reason and obligation [*al-'aql wa-al-taklīf*]"). More common interpretations of "trust" include the duty of obedience generally or the duty to fulfill the various provisions of the law. See, e.g., 'Imād al-Dīn Abū al-Fidā' Ismā'īl Ibn Kathīr (d. 774 H., 1373 C.), *Tafsīr al-Qur'ān al-'Aẓīm*, 4 vols. (Cairo: 'Īsā al-Bābī al-Ḥalabī, n.d.), 3:522-24; Abū al-Qāsim Maḥmūd b. 'Umar al-Żamakhsharī (d. 538 H., 1144 C.), *al-Kashshāf*, 4 vols. (Beirut: Dār al-Ma'rifa, n.d.) 3:276.

[23]The doctrine was early established (see Marshall G.S. Hodgson, *The Venture of Islam* (Chicago: University of Chicago Press, 1974), vol. 1, *The Classical Age of Islam*, 197-98; F. Buhl, "Muḥammad," *Encyclopedia of Islam*, 2d ed., 368) that after Muḥammad there would be no prophets, and therefore the authority of Muḥammad's revelation is unchanging eternally.

is given the boon of an explicit way of life, a plain road, following which one can achieve one's good here and beyond. Again, the Qur'ān declares that God has "perfected your religious law [*dīn*] for you" [5:3]. This revealed paradigm, by which man's conscious life is shown its place in the cosmic order, is the divine "law." The Arabic term for this law is the ***sharī'a***, literally, "a path to water." The name has its origins in the Qur'ān:

> And, finally, [O Muhammad,] We have set thee on a way of [God's] Command [*sharī'atin min al-amr*[24]]: so follow thou this [way], and follow not the whims [*ahwā'*] of those who do not know. [45:18*][25]

The revelation gives man indispensable "guidance," teaches "what he did not know," and gives specific commands -- such as the prescribed ritual prayer -- that he could never intuit.

> Thus, then, have We bestowed from on high this (divine writ) as an ordinance [*ḥukm*] in the Arabic tongue. And, indeed, if thou shouldst defer to men's likes and dislikes after all the knowledge that has come unto thee, thou wouldst have none to protect thee from God . . . . [13:37]
>
> Verily, for all believers prayer is a sacred duty linked to particular times [of day]. [4:103]

Since the Qur'ān is a "clear book," in "clear Arabic," making

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The Qur'ān's reference to Muḥammad as the "seal of the Prophets" [33:40] is interpreted to mean the last of them.

[24]The phrase "*min al-amr*" was classically usually understood as "of what pertains to religion." Asad, *Message*, 767, n. 15. See, e.g., Bayḍāwī, *Tafsīr*, 661 (*amr al-dīn*).

[25]Also, "Unto every one of you have We appointed a law [*shir'a*] and way of life . . . " [5:48].

all "clear,"[26] one now knows God's commands. Absolved of all doubts and uncertainties, one's dilemma is now perfectly sharp: the fatal choice between submission [*islām*], and rebellion (*kufr*, denial of the truth, infidelity). If one does not willingly uphold God's order, it is not for lack of knowledge, but because one willfully, perversely, denies clear signs. If one's acts are inspired by futile self-will, one rebels, foolishly, vainly, against God's order; if one's acts conform to God's commands, then one fulfills God's order as vicegerent. In either case, God's commands are ineluctable, vindicated in the unseen.

No knowledge is more vital or urgent, therefore, than knowledge of the sharī'a, God's revealed law, which guides mankind in all actions and thoughts. By knowledge of it, one attains, deep within one's individual conscience, unity of the "is" and the "ought." By such knowledge, and not faith alone, mankind enters into utter reality, and into harmony with nature and fate.[27]

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[26][27:1], [13:37], [16: 89].

[27]For a discussion of the very narrow extent to which Islamic theology considered reason, independent of revelation, as a source of ethical knowledge, see Ignaz Goldziher, *Introduction to Islamic Theology and Law*, trans. Andras and Ruth Hamori (Princeton: Princeton University Press, 1981), 91-93, 104-111. Ḥanbalī thought denies that reason may be trusted for knowledge of ethical values. *Ibid.*

2. The Law as the Norm for All Human Life

Given its primal origins and its cosmic reach, it is not surprising that this law is understood as encompassing all aspects of human life.

For example, the law applies as much to life in this world as in the next, and knowledge of it leads to welfare in both worlds. The Qur'ān constantly describes those who follow God's guidance as the fortunate, the prosperous, with apparent reference to both worlds:

> Good fortune awaits, in this world, all who persevere in doing good; but their ultimate state will be far better still . . . . [16:30]
>
> And as for anyone -- be it man or woman -- who does righteous deeds, and is a believer withal -- him shall We most certainly cause to live a good life; and most certainly shall We grant unto such as these their reward in accordance with the best that they ever did. [16:97]
>
> God has promised those of you who have attained to faith and do righteous deeds that, of a certainty, He will cause them to accede to power on earth . . . . [24:55]

Indeed, the Qur'ān seems to weigh the goods of both worlds in a single balance:

> They will ask thee about intoxicants and games of chance. Say: "In both there is great evil as well as some benefit for man; but the evil which they cause is greater than the benefit which they bring." [2:219]
>
> [The Prophet] will enjoin upon them the doing of what is right and forbid them the doing of what is wrong, and make lawful to them the good [or pleasant] things of life [*al-ṭayyibāt*] and forbid them the bad [or foul] things [*al-khabā'ith*] . . . . [7:157]

Yet, if men but knew the truth, the goods of this world are

hardly of any consequence alongside the goods of the next, and they delude men and lead them into evil.

> Hence, do not barter away your bond with God for a trifling gain! Verily, that which is with God is by far the best for you, if you but knew it:
> all that is with you is bound to come to an end, whereas that which is with God is everlasting. . . . [16:95-96]

Yet again, the Qur'ān's rejects, with its concern for worldly welfare, any tendency to renunciation of worldly life, and condemns especially any attempt to impose such renunciation as a religious obligation:

> "Seek instead, by means of what God has granted thee, the life to come, without forgetting, withal, thine own share in this world . . . ." [28:77]
>
> And so, partake of all the lawful, good things which God has provided for you as sustenance . . . .
> . . .
> Hence, do not utter falsehoods by letting your tongues determine, "This is lawful and that is forbidden," thus attributing your own lying inventions to God: for, behold, they who attribute their own lying inventions to God will never attain to a happy state! [16:114,116][28]

A second respect, equally far-reaching, in which the law encompasses all of human life is that it governs man not only as an individual, but also as a member of collectivities -- group, family, community, society, state and nation; indeed, the law goes on to address these collectivities themselves.

This result unfolds naturally from the fact that God's law is not mere moral preachment addressed to the individual conscience and secured by rewards or punishments in the

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[28]See also [6:119].

Hereafter. Rather, it is a law to be fulfilled here and now, at large, and by the active, conscious agency of believers. The Qur'ān calls the Prophet David God's vicegerent (lit., successor, *khalīfa*) on earth, with the consequence drawn that he shall act as righteous judge and ruler:

> (And We said:) "O David! Behold, We have made thee a (prophet and, thus, Our) vicegerent on earth: judge [*fa-[u]ḥkum*], then, between men with justice [lit., the truth, *al-ḥaqq*] and do not follow vain desire, lest it lead thee astray from the path of God . . . . [38:26]

Similarly, Muḥammad must judge by the law:

> Behold, We have bestowed upon thee from on high this divine writ, setting forth the truth, so that thou mayest judge between people in accordance with what God has taught thee. . . . [4:105]

Not only prophets but all men are God's vicegerents on earth.

> And lo! Thy Sustainer said unto the angels: "Behold, I am about to establish upon earth a vicegerent . . . . [2:30*]

> For, He it is who has made you vicegerents of the earth . . . . [6:165*]

Thus, the duty of applying, enforcing, God's law falls, not only on prophets, but on all in their relations with all. Thus, the law is to be upheld in mutual relationships, by means of exhortation, even compulsion:

> And (as for) the believers, both men and women -- they are close unto [are responsible for] one another: they (all) enjoin the doing of what is right and forbid the doing of what is wrong, and are constant in prayer, and render the purifying dues, and pay heed unto God and His Apostle. . . . [9:71]

A fortiori, those who have power over others must uphold the law in their actions:

> Behold, God bids you to deliver all that you have

> been entrusted with unto those who are entitled thereto, and whenever you judge between people, to judge with justice. . . . [4:58]

From such obligations between individuals derives the conception of a moral community, defined by its law:

> And thus have We willed you to be a community of the middle way [*ummatan wasaṭ*] , so that you might bear witness to the truth before all mankind . . . . [2:143]
>
> Unto every one of you have We appointed a [different] law and way of life [*shir'atan wa-minhāj*]. And if God had so willed, He could surely have made you all one single community . . . . [5:48]

The virtue of the Muslim community lies in its possessing the divine law, and fulfilling it through mutual, communal support and enforcement.

> You are indeed the best community [*umma*] that has ever been brought forth for mankind: you enjoin the doing of what is right, and forbid the doing of what is wrong, and you believe in God. . . . [3:110][29]

The Qur'ān speaks about the Muslim *umma*, and other peoples and nations. The point is often made that a community's welfare, like that of the individual, is tied to its moral career.

> And hold fast, all together, unto the bond with God, and do not draw apart from one another. And remember the blessings which God has bestowed upon you . . . . In this way God makes clear His messages unto you, . . .
>
> and that there might grow out of you a community who invite unto all that is good, and enjoin the doing of what is right and forbid the doing of what is wrong: and it is they, they who shall attain to a happy state! [3:103-04]

As to government or the state, the Qur'ān requires individuals to obey those who apply God's law:

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[29]Hypocrites are described as doing the reverse in [9:67].

> They do not (really) believe unless they make thee (O Prophet) a judge of all on which they disagree among themselves, and then find in their hearts no bar to an acceptance of thy decision and give themselves up (to it) in utter self-surrender. [4:65][30]

> O you who have attained to faith! Pay heed unto God, and pay heed unto the Apostle and unto those from among you who have been entrusted with authority; and if you are at variance over any matter, refer it unto God and the Apostle, if you (truly) believe in God and the Last Day. . . . [4:59]

The state itself exists only to uphold God's sovereignty. No other claim to domination is legitimate. To determine right and wrong, to adjudicate, to rule, according to other than the law of God, is unbelief.

> [F]or they who do not judge [*yaḥkum*][31] in accordance with what God has bestowed from on high are, indeed, deniers of the truth [*kāfirūn*]! [5:44][32]

To turn from the law in asserting authority over one's equals is to follow mere *hawā*, or arbitrary, willful passion, caprice or whim, and thus to practice injustice, oppression and wrongdoing toward one's fellow-man (all included in the concept of ***ẓulm***, the doer thereof called *ẓālim*):

> (And We said:) "O David! Behold, We have made thee a (prophet and, thus, Our) vicegerent on earth: judge, then, between men with justice, and do not follow vain desire [*hawā*], lest it lead thee astray from the path of God . . . . [38:26]

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[30]al-Nīsābūrī, *Asbāb*, 109 lists this as involving litigation between Prophet's nephew al-Zubayr and a Jew over water-rights.

[31]See note 11 above.

[32]See al-Nīsābūrī, *Asbāb*, 130-32, for stories of context of this revelation -- all of which have to do with adjudication.

> And they who do not judge in accordance with what God has revealed -- they, they are the evildoers [*ẓālim*] ! [5:45]
>
> But nay -- they who are bent on evildoing [ẓulm] follow but their own desires [*ahwā'*, pl. of *hawā*], without having any knowledge (of the truth). . . . [30:29]

Thus, all forms of authority and submission -- whether moral or legal, whether those of individual conscience, of mutual exhortation, of community solidarity and opinion, or of secular command and sovereignty -- must derive from ultimate truth, righteousness and justice. By revealing these, by a clear, Arabic revelation, God Himself has claimed direct sovereignty over man, community and state.

For Muslims, from such verses of the Qur'ān as I have cited, there emerges the unmediated divine command, directed to themselves as individuals in a total life as "***muslim***", *i.e.*, as surrendered to God's will, and then, implicitly and explicitly, also as families, communities, societies, states and Islamic nation, to obey totally, participate in, and consciously fulfill, God's revealed will. The ideal of a life, in which the will of men, individually and collectively, becomes wholly God-conscious, God-guided, God-patterned, is clearly suggested. This ideal has driven Muslims for ages.

3. Two Aspirations Within the Law Ideal

So far we have discussed the law as so fundamental an ideal as to comprehend all aspects of human life. But does

not this ideal, as we described it, in fact aspire to much more, that the law should vouchsafe a total guidance, making known divine commands to govern every event and circumstance of human life, from now to the end of time? The Qur'ān lends support to this point of view:

> Today have I perfected [also, completed, made whole] your religious law [*dīn*] for you . . . . [5:3].
>
> Thus, then, have We bestowed from on high this (divine writ) as an ordinance [*ḥukm*] in the Arabic tongue. And, indeed, if thou shouldst defer to men's likes and dislikes after all the knowledge that has come unto thee, thou wouldst have none to protect thee from God . . . . [13:37]
>
> And on whatever you may differ, [O believers,] the verdict [*ḥukm*] thereon rests with God. . . . [42:10]
>
> They do not (really) believe unless they make thee (O Prophet) a judge of all on which they disagree among themselves . . . . [4:65]
>
> [N]o single thing have We neglected in Our decree. . . . [6:38]
>
> We have bestowed from on high upon thee, step by step, this divine writ, to make everything clear . . . . [16:89]
>
> Does man, then, think that he is to be left to himself, to go about at will? [75:36]

Let us call this aspect of the law ideal the aspiration to pan-ordering.

A second aspiration included in the law ideal we shall call the aspiration to meta-ordering. This aspiration is somewhat more difficult to grasp, and it will be viewed from a number of perspectives as we proceed. Let us introduce it by considering the unique epistemological status of the revelation. By definition, resolving the dilemma of will

depends upon mankind gaining knowledge of the cosmic will and power, and transcending the false dictates of one's petty will or that of others. Revelation alone conveys such knowledge with certainty, and lays down direct divine legislation. The duty of obedience to God's commands, therefore, entails zeal to know God's words above all else, to cleave to them in their sublime purity and certitude, and to turn from all lesser truths, merely human, relative and probable. Figuratively, while pan-ordering seeks God's law in a horizontal dimension, pursuing that law's perfection in its extending to all possible human questions and all legal/moral cases, meta-ordering cherishes the divine law in another, vertical, dimension. It sees the law's perfection rather in the divinity of its origin; it exalts not comprehensiveness but certainty, and seeks to derive knowledge from the most sublime source possible, disdaining all that falls below.[33]

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[33]Cf. a suggestively related distinction by Aron Zysow, between "materialist" and "formalist" methods in usūl al-fiqh. Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Cambridge, MA: Ph.D. diss., Harvard University, 1984), 4-5. Zysow's distinction is between methods that insist on certainty for validity of legal proofs (roughly extreme meta-ordering in my sense), and those that credit legal proofs, even when uncertain, if they meet various formalist and institutional criteria (cf. note 39 below on constitutive interpretation). Zysow uses this distinction successfully to categorize important trends within usūl al-fiqh, particularly between those who reject and those who accept qiyās. My distinction is similar in that it groups people in roughly congruent ways, but across a slightly divergent dividing line, cutting across Zysow's at about the middle of the formalist category. My distinction is intended to illuminate differences between not usūl al-fiqh theorists, but lawyers, nearly all of whom are "formalists" in Zysow's sense. Its object is to identify a global tension affecting

Qur'ānic verses support this aspect of the law ideal. First, the Qur'ān condemns all who turn from knowledge vouchsafed by God, and rely instead on mere *hawā*, meaning whim or desire, or on *ẓann*, meaning mere guess or surmise. For example, it inveighs against those who

> utter falsehoods by letting your tongues determine, "This is lawful [*ḥalāl*] and that is forbidden [*ḥarām*]," thus attributing your own lying inventions to God . . . , [16:116][34]

> bent on evildoing [ẓulm] follow but their own desires [*ahwā'*], without having any knowledge . . . , [30:29]

or

> follow nothing but conjecture [ẓann]: (and,) behold, conjecture can never be a substitute for truth. . . . [10:36][35]

Other verses, already quoted, suggest that God's laws are exalted over those of men:

> But for people who have inner certainty, who could be a better law-giver than God [*aḥsanu min allāhi ḥukman*]? [5:50]

> And (so it is that) whenever they are summoned unto God and His Apostle in order that (the divine writ) might judge between them, lo! some of them turn away . . . . [24:48]

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the entire legal system, not only in theory, but in doctrine and practice, and which moreover can be applied to, is extendable into, Western legal ideas and systems.

[34]Cf. [5:87], [2:168] [7:33], [17:36].

[35]Note how nothing we cite declares clearly for one or the other of the two aspirations, but instead seems to tread, with an exquisite ambivalence, between them. Verses cited to support one aspiration can be easily reinterpreted to support the other. In fact, some of the verses I cite for one proposition were more famous as a banner for the other proposition. See, e.g., [42:10], and Asad, *Message*, 740, n. 8.

> Judgment [*al-ḥukm*] rests with God alone, and He has ordained that you should worship nought but Him. . . . [12:40]

Similarly, the Qur'ān condemns those who follow mere tradition:

> [F]or when they are told, "Come unto that which God has bestowed from on high, and unto the Apostle" -- they answer, "Enough for us is that which we found our forefathers believing in and doing." Why, even though their forefathers knew nothing and were devoid of all guidance? [5:104]

and those who accept truth from those with power over them:

> [On Judgment Day] those who had been weak will say unto those who had gloried in their arrogance: "Nay, (what kept us from the truth was your) devising of false arguments, night and day, when you commanded us to blaspheme against God and to claim that there are powers that could rival Him!" [34:33][36]

Such verses suggest that, according to the ideal of divine sovereignty, only knowledge bestowed by God's perfect revelation, and not knowledge from any uncertain, contingent, imperfect human source -- however sanctioned by history, convention or power -- may rightly claim the awesome, sublime status of divine law.

Thus, we have now two aspirations included within the law ideal, pan-ordering and meta-ordering. While each in itself seems unrealizable, to achieve both at once would appear utterly impossible. Consider that, to Muslims, the revelation is considered closed at the death of the Prophet;[37] hence, the

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[36]See [34:31-4].

[37]In the Sunnī doctrine, no new revelation possessed of divine authority is possible following the death of the "Seal of the Prophets" Muḥammad. Shī'ī thought allows for a continuation of divine guidance in the persons of the Imāms,

revelation,[38] of which all this is demanded, is finite, and moreover conveyed only through written language. How can mere finite texts both achieve total coverage of the infinity of human actions and situations (pan-ordering) and attain for each one of these legal outcomes utterly certain transcendent sanction through revelation (meta-ordering)?[39] It would seem

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as to the succession and number of whom the various Shī'ī branches differ.

[38]Though the *sunna* or the Prophet's example is not yet introduced, I mean to include it here in the words "texts" and "revelation." The *sunna* is in practical effect an additional divine textual revelation, also finite, and also closed with the death of the Prophet.

[39]Note that the sense that the two aspirations are opposed depends on several premises, none of them yet introduced. One of these is that the texts are meant to be approached legally, textually, and not by some form of religiosity less bound by the finiteness of scripture. In particular, note how the sense of opposition between the aspirations depends upon an expectation that the texts should declare or entail, by purely verbal means, a definitive legal rule for each case, or, in other words, that the texts should themselves constitute an explicit code of laws.

What if instead we were to think of the texts as fulfilling two functions: one legislative, in laying down a finite number of rules, this by the operation of explicit verbal content; and the second constitutive, in providing clear divine sanction for certain lawmaking processes that would be capable of issuing in an infinity of laws, each possessed of a delegated divine certainty? See Muṭlab 'Abd Allāh Nafīsa, "Law and Social Change in Muslim Countries: The Concept of Islamic Law Held by the Hanbali School and the Saudi Arabian Legal System" (Cambridge, Ma.: Ph.D. diss., Harvard Law School, 1975), 43-44, 64. Conceivable lawmaking processes include legal reasoning (including that operating under authority of highly general statements), mystic inspiration, social custom, pursuit of utility, majority vote of believers, or other means of social decision; all these processes could conceivably be set in motion by a finite number of texts. For example, the revelation could consist of one sentence: "Obey your king in every respect."

The constitutive approach is inevitable to some extent -- if only that revelation of a text implies divine permission at

that one of these goals must be sacrificed to achieve the other.[40]

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a minimum to use reason to authenticate the text and apprehend its literal meaning. Islamic law goes well beyond this starting point, in that it finds in the Qur'ān itself authority to derive law from three extra-Qur'ānic roots. But, as we shall see presently, Islamic law adopts this approach only with reservations. It is reluctant to free the products of these roots wholly from moorings in textual references, preferring to construe them as merely elaborations or corroborations of laws constituted solely in the texts. (There are subsidiary sources of law, such as *maṣāliḥ mursala*, or utility, for which the contrary is admitted by many; significantly, controversy over the latter root's validity focuses precisely on the issue here raised.) And it shows a reluctance to attribute these products a certainty capable of competing with that achieved by texts.

Since we are dealing with law, and particularly with Saudi Arabia and its legalist religiosity, we shall leave aside, unless otherwise stated, possible processes of decision other than the textual, legalistic means condoned by uṣūl al-fiqh. This is the strict Sunnī sharī'a approach, and does not hold true for other vital streams of Islamic thought and feeling. For example, Shī'ism, mysticism [Sufism, *taṣawwuf*], Islamic philosophy [*falsafa*] recognize respectively continuation of divine guidance (in the Imāms), mystic inspiration, and reason, as complementary, alternative or overriding avenues to truth.

[40]Precisely this solution was proposed medievally. The clearest example is that of the Ẓāhirī ("Literalist") school, which, taking the meta-ordering aspiration to an absolute, denied use of analogy [*qiyās*] and laid claim to a total certainty by means of reducing the revelation to its thinnest, most literalist interpretation. This group argued that the revelation was perfect, complete, in its literal [*ẓāhir*], textual form. God had not intended, or condoned, that men should seek behind the apparent [*ẓāhir*] form of words any hidden [*bāṭin*] meaning, or supplement its certain knowledge with the ẓann condemned by the Qur'ān. These scholars were obliged to turn their backs on pan-ordering, and even to advance the realization of meta-ordering solely by a logical and linguistic hermeneutic. See, e.g., Abū Muḥammad 'Alī b. Aḥmad b. Sa'īd Ibn Ḥazm (d. 456 H., 1065 C.), *al-Muḥallā*, ed. with comparisons with edition by Aḥmad Muḥammad Shākir, 11 vols. (Beirut: Dār al-Āfāq al-Jadīda, n.d.), 1:50-71; Ibn Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām*, ed. Aḥmad Shākir, 8 vols. (Cairo: Zakariyā 'Alī Yūsuf, n.d.), 3:289-294; R. Strothmann, "Zāhiriyya," *Shorter Encyclopedia of Islam*, ed. H.A.R. Gibb and J.H. Kramers (Ithaca: Cornell University Press, 1953).*Encyclopedia of Islam*; Ignaz Goldziher, *The*

The jurists of Islamic law, as we shall observe in our discussion of the uṣūl al-fiqh to follow, worked indefatigably to keep alive both of these religious aspirations; constructive tension between them is felt in uṣūl al-fiqh and the law as a whole. Indeed, viewed from the fundamental perspective of the last two sections, they are seen as properly not opposites, but facets, or analytic cross-sections, of the unitary law ideal there sketched. The relation between them, and between them and the legal world they inhabit, may suggestively be visualized as two vectors, or tensions, one horizontal, one vertical, pressing outward to fill a single space.

In deference to the unity integrating the two aspirations, the law worked out a subtle compromise, which will be, in a sense, a constant topic in this book; what follows introduces it in a few words. In forming this compromise, the aspiration to meta-ordering seems to have played the dominant role: at the level of ideal justification, it seems to have set transcendental and epistemological stamp on all legal method. But it achieved this success by a vital concession, that was, in a way, forced upon it by its own stringent standards of truth. These standards required it to admit that, in actuality, the revelation determines only few actual legal outcomes to a certainty. If, then, the law was

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Ẓāhirīs: Their Doctrine and Their History, trans. Wolfgang Behn (Leiden: E.J. Brill, 1971), 85-88, passim; Zysow, *Economy*, 314-321.

to have an appropriate scope and intelligibility, method must condescend to admit that in broad areas of the law legal valuations cannot attain to certainty, cannot banish "ẓann," however much ẓann is condemned in the Qur'ān.[41] Even worse, the extent of divergence even between the most learned and pious show that highly subjective human choices cannot be evaded. If this is the case, then divine certainty is in any case rarely available; and even the aspiration to meta-ordering then would prefer, over pure whim, some sort of objective basis for choice -- even if it is apparently secular and human. Thus, meta-ordering came to make a second key concession, namely, allowing for human valuations of truth to

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[41]Scholars modulate their acknowledgement of ẓann in complex ways under the various uṣūl al-fiqh headings. The more fervent the meta-ordering, the more the inspiration is felt to posit, and to strive toward, a truth capable of being wholly, completely, known from the revelation. This inspiration militates against a view that the textual revelation cannot resolve all questions, a view that tends to slacken zeal for the interpretive task. Thus, the Ḥanbalī Ibn Taymiyya (d. 728 H., 1328 C.) states: "Division of proofs into the certain [*qaṭ'ī*] and the probable [*ẓannī*] is not a division with respect to the proofs' innate character [*bi-[i]'tibār ṣifatihā fī anfusihā*], but with respect to the conviction [*i'tiqād*] of those convinced of them. This is something that varies according to the persons who assert them as proofs. What is certain to one may not be certain to another, and vice versa." Taqī al-Dīn Abū al-'Abbās Aḥmad b. 'Abd al-Ḥalīm Ibn Taymiyya et al. [hereafter "Banū Taymiyya"], *al-Musawwada fī uṣūl al-fiqh*, Muḥammad Muḥyī al-Dīn 'Abd al-Ḥamīd, ed. (Beirut: Dār al-Kitāb al-'Arabī, n.d.), 245. [The preceding reference is by Ibn Taymiyya and his ancestors. Hereafter, unless otherwise indicated, the portion cited is by Ibn Taymiyya.] Ibn Taymiyya wants to maintain that ẓann enters in only because of human error and weakness in interpretation, and not because of any deficiency in the sharī'a. Ibid., 245-46. On ẓann, see Bernard Weiss, "Interpretation in Islamic Law: The Theory of *Ijtihad*," *American Journal of Comparative Law*, 26 (1978): 199-210.

supplement the divine revelation. But it made this concession only after firmly subjecting these additional sources to its overall enterprise: by, first, finding in the revealed law itself the justification and conditions for their use; and second, assigning to these sources, because so human, uncertain and approximate, an order of truth profoundly subordinate to truths learned reliably and directly from the divine. As a result, the aspiration to meta-ordering came to acknowledge a hierarchy of proofs, ranked by epistemological weight, descending from the texts themselves. But the whole enterprise remained fixed on the objective of meta-ordering, that of drawing as close as possible to God's transcendent command.

Once meta-ordering made these concessions -- first as to the certainty of its outcomes, and then as to pristine divinity of its sources of truth -- hopes of fulfilling the aspiration to pan-ordering revived as well. The idea was generally accepted that Islamic law does encompass the infinity of human actions -- in the sense that as to every action, <u>proofs</u> or <u>indications</u> of God's true ruling have been provided in His revelation. Of course, meta-ordering, in its stringency, exacted the admission that these proofs or indications do not lead to divine law with certainty, but only with ẓann, and that pan-ordering therefore can be achieved only with probable results and at lower orders of truth. But Islamic legal scholars, aroused by the aspiration to pan-

ordering, were little deterred by these reservations, and strove to discover, from the texts' manifold indications of truth, the best, the most probable, of all the uncertain outcomes. They eagerly set out to detect the perfect deontology, to derive an explicit moral-legal code to govern all of human life for all time. Surely God would not put this perfect guidance wholly out of man's reach: did He not say in revealing the sharī'a that man is given clear commands, a known path, so that obedience left nothing to chance?

Let us introduce here an important technical schema, a set of five classes of legal rulings, which are necessary to understand how the law could aspire to cover all aspects of human life, with continuity of the moral with the legal. The jurists did not mean, in their aspiration to pan-ordering, to lay down for each act a legally enforceable command, prohibition, or ruling of legal validity or invalidity. Rather they sought to assign to each act one of five legal values: obligatory [*wājib*], recommended [*mustaḥabb*],[42] indifferent [*mubāḥ*], reprehensible [*makrūh*], or prohibited [*ḥarām*].[43] With regard to law enforcement, the second and

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[42]Other names for this category are *mandūb* and *sunna*.

[43]In the usual explanation, as to acts in all categories except the middle one, if the actor obeys the law's classification, the actor earns reward. Thus, acts categorized as "reprehensible" or "recommended" earn him reward (in the Hereafter) if he complies with the law's counsel, but no punishment if he neglects it; the law imposes punishment only for doing "prohibited" acts or omitting "obligatory" acts.

fourth of these were interpreted as solely ethical, concerned with reward in the Hereafter,[44] and conflated with the third category. These five values were supplemented by other categories useful in expressing legal validity and enforceability, such as valid [*ṣaḥīḥ*], legally binding [*lāzim*], permissible [*jā'iz*], void or voidable [*fāsid*], and invalid or nugatory [*bāṭil*].[45]

4. The Transcendent Dimension of Uṣūl al-Fiqh

I have just said that by making several concessions the aspiration to meta-ordering was able to put its stamp on Islamic law, and direct the law toward its goal of drawing as close as possible to God's transcendent command. We must note, however, that these concessions represent not a weakening, but rather a heightening, of meta-ordering's urge toward the transcendent. It is precisely the sublimity of the Qur'ān's claims -- to state a guidance utterly perfect, certain and complete -- and the dire contrasts between these claims and the actual limitations of texts when grasped as

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[44]This follows in that they usually were represented as involving no punishment for their neglect.

[45]See, e.g., 'Abd al-Qādir b. Aḥmad b. Muṣṭafā b. 'Abd al-Raḥīm b. Muḥammad Ibn Badrān (d. 1346 H., 1927 C.), *al-Madkhal ilā madhhab al-Imām Aḥmad b. Ḥanbal* (Cairo: Idārat al-Ṭibā'a al-Munīriyya, n.d.), 61-65. See generally Schacht, *Introduction*, 120-22.

material and finite, that compelled the concessions we have mentioned. These concessions express the legal method's recognition that God's message in the Qur'ān, even though explicit and verbal, surmounts its physical embodiment; behind the revealed words, in some hidden intent, stand truths untold; of these men gain knowledge only after struggle, often falling victim to self-will, weakness, error, approximation, and disagreement.[46]

We are using the word "transcendence" often, and should now consider the shape of this conception in Islamic sources. In the Arabic of the Qur'ān the conceptions that correspond to "transcendence" are primarily not relatively near translations of the word "transcendence," such as "*ta'ālā*,"[47] but rather the terms "*ghayb*," meaning "the unseen," and "***bāṭin***," meaning

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[46]This idea that humans must struggle, and may fail, to understand the Qur'ān is hardly absent from the Qur'ān itself. Cf. the following subtle, fundamental verse:

> He it is who has bestowed upon thee from on high this divine writ, containing messages that are clear in and by themselves -- and these are the essence of the divine writ -- as well as others that are allegorical [also, equivocal, ambiguous, unclear, see Lane, *Lexicon*, 4:1500]. Now those whose hearts are given to swerving from the truth pursue that part of the divine writ which has been expressed in allegory, seeking out confusion, and seeking its final meaning; but <u>none save God knows its final meaning</u>. Hence, those who are deeply rooted in knowledge say: "We believe in it; the whole is from our Sustainer -- albeit none takes this to heart save those who are endowed with insight." [3:7] [Emphasis added.]

[47]E.g., *ta'ālā*, means "exalted, elevated, higher than," and appearing after "Allāh," as it usually does, means "He is ever higher" than anything He is compared with.

"inward," "hidden," "intrinsic."[48] The opposite of bāṭin is *ẓāhir*, meaning "external," "apparent," "extrinsic," and, significantly, "literal." Thus, the Qur'ān describes God as:

> knowing all that is in the unseen and the seen [*al-ghayb wa-al-shahāda*]. Sublimely exalted [*ta'ālā*] is God above ['*an*] anything to which men may ascribe a share in His divinity [*yushrikūn*]! [23:91-2*]
>
> And God alone comprehends the hidden reality [*ghayb*] of the heavens and the earth: for, all that exists goes back to Him. . . . [11:123]
>
> He is . . . the Outward [ẓāhir] as well as the Inward [bāṭin]: and He has full knowledge of everything.
>
> He it is who has created the heavens and the earth . . . . He knows all that enters the earth and all that comes out of it . . . . And He is with you wherever you may be; and God sees all that you do. [57:2-4]
>
> We shall [show] them Our messages in the utmost horizons and within themselves, so that it will become clear unto them that this (revelation) is indeed the truth. Is it not enough that thy Sustainer is witness unto everything? [41:53]
>
> Now, verily, it is We who have created man, and We know what his innermost self whispers within him: for We are closer to him than his neck-vein. [50:16]

Emphasis here is not on the cosmological image of transcendence as a sphere "above" and apart from this world, but rather on a present, all-pervasive and all-penetrating innerness. Clearly, the habitual opposition between transcendence and immanence needs here at least to be revised, if not suspended.

This innerness reminds us of the Qur'ān's frequent claims, mentioned in Part I above, that its truths resonate

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[48]Lane, *Lexicon*, 1:221.

with some inner faculty of the individual, and that those innately "gifted with knowledge" or "inner certainty" acknowledge the transcendent truth of the revelation. One of the opening verses of the Qur'ān describes the Qur'ān and the guidance it bestows:

> This divine writ -- no doubt in it -- is a guidance for all the God-conscious
> who believe in the unseen . . . ;
> and who believe in that which has been bestowed from on high upon thee, [O, Prophet,] . . . ; for it is they who have certainty [*yūqinūn*] of the life to come! [2:1-4*]

Islamic legal method, entranced by the aspiration to meta-ordering and its metaphor that ultimate truth is captured in concrete texts, detected in the texts, as though rising behind and through them, a steep ascent to the transcendental, or as just explained, toward the inward and unseen. This peculiar bent -- this sense that, mediated by textual revelation, man's law may reach toward truths utterly transcendent, or alternatively, toward an innermost, bāṭin, spring of reality -- is one of the dominating features of the Islamic legal ideal, indeed of the Islamic grasp of reality. Its exploration is a fundamental preoccupation of this book.

This dimension is evident in the science of uṣūl al-fiqh. Uṣūl al-fiqh is conceived as the science of methods by which God's ultimately unknowable law, transcendent, bāṭin, unseen, may be approached with the greatest epistemological security; or it is the science of gleaning from the revealed texts every shred of guidance, every indication or hint, toward God's pure

will, while quelling arbitrary human guesswork and willfulness.

The Qur'ān's connection between transcendence and the innermost perceptions of individuals suggests a methodological hypothesis useful in exploring this dimension of the law. This hypothesis I simply register for now, by a rough statement, in order to recall it for use in later Chapters. The hypothesis is that, in exploring how perceived transcendent truths about law shape actors' legal realities or architectures, our observations will be made easier if we imagine those truths as structuring, or, as it were, inhering or incarnating in, the innermost levels of individuals' realities or architectures.[49] In other words, we shall imagine transcendent truth experiences as occurring at inner levels of these architectures. Such levels are "inner" in the sense that they consist in those legal experiences that the actor perceives as both (i) ultimate epistemologically, and (ii) least influenced by outward experience, circumstance or event. (Not meant here is that they are "inner" in the sense of being perceived by the actor as merely subjective or psychological;[50] "bāṭin" itself would here have no such

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[49]This proposition does not reduce to the proposition, trivially true, that, from the point of view of observation, transcendent things exist in no reality but that of mental phenomena.

[50]Nor should we -- at this stage of investigation -- import the innuendo of unperceived subjectivity. This is a critical point on which the modern Western observer must compensate for his local outlook, all the more since he may

connotation, being in this respect parallel to "transcendence."[51]) Once structured, opened up, these inner reaches are part of one's legal worlds, and one's legal behavior is then as much influenced by realities at that level as at any other; sometimes, indeed, one acts at that level. As a simple, overarching illustration, we would certainly not be surprised to find a natural relationship between an actor's perception of transcendent truth in the legal doctrine to be applied, on the one hand, and that actor consciously disregarding considerations arising otherwise that question or counter that result, on the other hand. For example, if one has reached conviction that a particular penalty for a particular act is enjoined literally by the Qur'ān, then, in deciding whether to impose that penalty, one would not advert to considerations of utility, such as the frequency of that crime in society. Restating this point to draw together several strings of my argument, we would expect that meta-ordering's characteristic striving to root law in the transcendent, unseen, and bāṭin, beyond the human, mundane,

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want to justify it in the name of science. Indeed, in terms of the method of this study, for the outsider seeking entry, this may seem a crucial point of challenge, a point of no return. See p. 11 ff. above.

[51]"The bāṭin" can be used as the bāṭin of an individual, when it means, like the bāṭin of any other thing, his or her hidden inner state, including the secret inmost thoughts. Lane, *Lexicon*, 1:221. Legally, it is used in this sense as to whether witnesses are being truthful. But again, the reference is not to the witness's subjective feelings, but to an inner state of truthfulness as objective -- if hidden -- fact.

and ẓāhir, should translate as an observable striving by legal actors in practice to derive their justification for legal action from deep within themselves -- in particular, from their own individual,[52] inner moral/legal/religious apprehensions taken directly from divine texts -- and to couple this with a fervent disregard for laws or legal considerations arising from external or social sources of law. Thus, again, one determined not to punish anyone to any degree without the sanction of divine law would not consider a crime's harmfulness to society unless already convinced that divine texts permitted such a reference. Decisions on the latter point would be experienced as occurring at inner levels of reality architecture.

C. THE CONTENT OF THE LAW OF THE QUR'ĀN

The last section has described the profound, far-reaching

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[52]See n. 51 above. Note here the pressure placed on our methodological resolve not to attribute subjectivity and individuality to these "inner" experiences, see n. 50 above, by using the word "individual" here. But our language gives us no alternative, at least one that connects up with outward observations. The term's catering to outsiders' predilections may be felt on the Muslim side, as offending predilections: they see these truths as so obvious and known as to self-exist, inhering only incidentally in individuals' inner states through being perceived or apprehended. But, given our intent to observe as outsiders, we cannot allow religious truths wholly to slip their moorings in particular individuals. The meeting ground between believers' and outsiders' senses of the reality of religious truth is to conceive of these truths as fully incarnated, existent, but as "inner" states as we have defined the term.

ideal of law that we find in the Qur'ān. Given that ideal, we may feel surprise when, examining the Qur'ān itself, we find only a few statements explicitly laying down legal commands. The greater part of the Qur'ān is what we would want to call religious exhortation, admonition, doctrine or parable -- accounts of creation and Adam and Eve, stories of past prophets, exhortations to charity and good acts, threats of eternal punishment of evil-doers. The usual count for verses with legal applications is 500, from a total of 6,236.[53]

Despite their small number, the nature of the legislating verses, on examination, reflects all of the characteristics of the sharī'a stated in the last section. Thus, included in this small number of verses are laws covering broad reaches of life, far beyond the scope of modern secular laws. Among these are laws that seem to be "religious," such as pilgrimage, prayer, ritual purity. Other laws lay down rules of social practice. Others seem to state rules of morality, in the sense of what is praiseworthy or reprehensible, and not

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[53]al-Ghazālī, *al-Mustaṣfā min 'ilm al-uṣūl*, 2 vols. (Cairo, 1907; reprint ed., Beirut: Dār Iḥyā' al-Turāth al-'Arab, n.d.), 2:350; followed by the Ḥanbalī Muwaffaq al-Dīn Abū Muḥammad 'Abd Allāh b. Aḥmad b. Muḥammad Ibn Qudāma (d. 620 H., 1223 C.), *al-Mughnī wa-yalīhi al-sharḥ al-kabīr*, 12 vols. (1972; repr. Beirut: Dār al-Kitāb al-'Arabī, 1403 H., 1983 C.), 11:383. 'Abd al-Wahhāb Khallāf, *'Ilm uṣūl al-fiqh*, 8th printing (Cairo: Maktabat al-Da'wa al-Islāmiyya, 1981), 32-33, gives total at 228, excluding laws of worship. Goitein points out that the legal verses are usually much longer and less often repeated than those for other subjects. S.D. Goitein, *Studies in Islamic History and Institutions* (Leiden: E.J. Brill, 1968), 127.

legality, what is obligatory or prohibited, valid or invalid.[54] But others do convey what we ordinarily would call "law." Many regulate family life, including rules as to chastity, marriage, divorce, care of children, and inheritance. Others are provisions on civil law, procedure, criminal law, taxation and constitution.

For example, the Qur'ān gives rules about ritual, social habits, family, contract, evidence, and murder:

> O you who have attained to faith! When you are about to pray, wash your face, and your hands and arms up to the elbows, and pass your hands lightly over your head, and (wash) your feet up to the ankles. . . . [5:6]

> O you who have attained to faith! Do not enter houses other than your own unless you have obtained permission and greeted their inmates. This is for your own good, so that you might bear (your mutual rights) in mind.
>
> Hence, if you find no one within, do not enter it until you are given leave; and if you are told, "Turn back," then turn back. This will be most conducive to your purity; and God has full knowledge of all that you do. [24:27-28]

> Concerning (the inheritance of) your children, God enjoins (this) upon you: The male shall have the equal of two females' share; but if there are more than two females, they shall have two-thirds of what (their parents) leave behind; and if there is only one, she shall have one-half thereof. And as for the parents, each of them shall have one-sixth of what he leaves behind, in the event of his having (left) a child; but if he has left no child and his parents are his (only) heirs, then his mother shall have one-third; and if he has brothers and sisters, then his mother shall have one-sixth after any bequest he may have made, or any debt. . . . (This is) an ordinance from God. Verily, God is all-knowing, wise. [4:11]

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[54]See p. 71, about the five classifications of acts.

O you who have attained to faith! Remain conscious of God, and give up all outstanding gains from usury, if you are believers;

for if you do it not, then know that you are at war with God and His Apostle. But if you repent, then you shall be entitled to (the return of) your principal: you will do no wrong, and neither will you be wronged.

If, however, (the debtor) is in straitened circumstances, (grant him) a delay until a time of ease; and it would be for your own good -- if you but knew it -- to remit (the debt entirely) by way of charity.

And be conscious of the Day on which you shall be brought back unto God, whereupon every human being shall be repaid in full for what he has earned, and none shall be wronged. [2:278-81]

O you who have attained to faith! Whenever you give or take credit for a stated term, set it down in writing. And let a scribe write it down equitably between you; and no scribe shall refuse to write as God has taught him: thus shall he write. And let him who contracts the debt dictate; and let him be conscious of God, his Sustainer, and not weaken anything of his undertaking. . . . And call upon two of your men to act as witnesses; and if two men are not available, then a man and two women . . . . And be not loath to write down every contractual provision, be it small or great, together with the time at which it falls due; this is more equitable in the sight of God, more reliable as evidence, and more likely to prevent you from having doubts (later). . . . [2:282]

And it is not conceivable that a believer should slay another believer, unless it be by mistake. And upon him who has slain a believer by mistake there is the duty of freeing a believing soul from bondage and paying an indemnity to the victim's relations, unless they forgo it by way of charity. . . . And he who does not have the wherewithal shall fast for two consecutive months. (This is) the atonement ordained by God: and God is indeed all-knowing, wise.

But whoever deliberately slays another believer, his requital shall be hell, therein to abide; and God will condemn him, and will reject him, and will prepare for him awesome suffering. [4:92-3]

And We ordained for them in that (Torah): A life for a life, and an eye for an eye, ... and a tooth for a tooth, and a (similar) retribution for wounds; but he who shall forego it out of charity will atone thereby for some of his past sins. . . . [5:45]

> O you who have attained to faith! Just retribution is ordained for you in cases of killing . . . ,
> for, in just retribution, O you who are endowed with insight, there is life for you, so that you might remain conscious of God! [2:178-179]

Note that, even in these clearly "legislating" verses, the religious tone is constant, perhaps predominant. We tend to find, alongside language implying a legal rule or consequence (such as punishments, the validity or enforceability of actions or claims, or rules of evidence and procedure), other language evoking moral praise or blame, inspiring religious awe or dread, or drawing general moral and religious lessons.

Given the strong religious coloration, one might wonder whether the Qur'ān actually means to lay down "laws" at all, in the usual sense, as opposed to "standards of morality." Indeed, perhaps all of the verses just quoted could be interpreted as purely "moral," and, given a community sufficiently pious, enforced only through voluntary action -- no one contesting the prescribed inheritance, the creditor willingly foregoing his usury, the accidental killer voluntarily paying indemnity, the family of the murderer acquiescing readily in the latter's execution. The possibility is hypothetical only, however, because, as the historical records of the Prophet's time abundantly indicate, even the Prophet enforced these laws compulsorily. And even that pious community of his Companions had its backsliders and hypocrites.

In any case, other verses in the Qur'ān are more clearly legal, and unavoidably suggest the use of the machinery of a state, or at the least organized, collective compulsory enforcement. This is most obvious in the criminal provisions:

> Now as for the man who steals and the woman who steals, cut off the hand of either of them in requital for what they have wrought, as a deterrent ordained by God: for God is almighty, wise.
> But as for him who repents after having thus done wrong, and makes amends, behold, God will accept his repentance: verily, God is much-forgiving, a dispenser of grace. [5:38-39]

> As for the adulteress and the adulterer -- flog each of them with a hundred stripes, and let not compassion with them keep you from this law of God, if you believe in God and the Last Day; and let a group of the believers witness their chastisement. [24:2]

And there are other provisions that, though only vaguely, suggest constitutional and political rules:

> [Heavenly reward] (shall be given) to all who attain to faith and in their Sustainer place their trust;
> . . . and who, whenever they are moved to anger, readily forgive;
> and . . . whose rule is consultation [*shūrā*] among themselves . . . ;
> and who, whenever tyranny afflicts them, defend themselves. [42:36-39][55]

> Behold, God bids you to deliver all that you have been entrusted with unto those who are entitled thereto, and whenever you judge between people, to judge with justice. . . .
> O you who have attained to faith! Pay heed unto God, and pay heed unto the Apostle and unto those from among you who have been entrusted with authority . . . . [4:58-9]

With these examples we have had a fair glimpse of the law of the Qur'ān. We now carry our exploration of the ideal of law

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[55]See also [3:159].

in the Qur'ān onward through the other three roots of Islamic law.

PART II

THE METHOD AND HISTORY OF DEVELOPMENT OF THE ISLAMIC LAW

A. THE SECOND ROOT: THE SUNNA, AND THE TRANSITION TO TEXTUALISM

After the Qur'ān, there are three sources or roots of Islamic law. Next in rank, and the sole other source of revealed law, is the ***sunna*** of the Prophet, or the sayings and doings of the Prophet Muḥammad.

The word "sunna" means "beaten path." In its pre-Islamic usage the word meant whatever corresponded with the traditions and ideals of tribes, which were handed down as the fabled doings of tribal forefathers.[56] With the coming of Islam, devotion to this "sunna" inevitably came into conflict with the terms of adherence to the new faith, especially as the new religious community began to supplant tribal identities, and

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[56]Fazlur Rahman, *Islam*, 2d ed. (Chicago: University of Chicago Press, 1979), 44-45; Ignaz Goldziher, *Muslim Studies*, ed. S.M. Stern, trans. C. R. Barber and S.M. Stern, 2 vols. (Chicago: Aldine Publishing Co., 1967, 1971), 2:25-6.

as Muḥammad exercised legislative powers. The Qur'ān set a supervening standard of righteousness; it denounced the old ways as those of a "Time of Ignorance" [*jāhiliyya*]. The Qur'ān scorns those wedded blindly to tradition:

> [F]or when they are told, "Come unto that which God has bestowed from on high, and unto the Apostle" -- they answer, "Enough for us is that which we found our forefathers believing in and doing." Why, even though their forefathers knew nothing, and were devoid of all guidance? [5:104]

Yet, although it thus broke the grip of tradition, the Qur'ān worked with the stuff of the old moral and legal standards; it did not uproot, though it did strenuously prune and graft to, the old sense of righteousness.

Appropriately, therefore, early Muslims expressed their new standard of righteous conduct using their old term, "sunna," but with reference now to the exemplary behavior, not of tribal forebears, but of the Prophet and his community in Medina.

The Qur'ān includes verses suggesting a normative authority in the Prophet beyond his role in conveying the divine words of the Qur'ān. First, there are verses suggesting authority to explicate the Qur'ānic command:

> And upon thee [O Prophet] have We bestowed from on high the Remembrance [*al-dhikr*], so that thou might make clear unto mankind what has been bestowed upon them. . . . [16:44*]

> Even as We have sent unto you an apostle from among yourselves . . . to impart unto you the Book [*al-kitāb*] and the wisdom [*al-ḥikma*], and to teach you that which you knew not. [2:151*]

The Qur'ān repeatedly enjoins the believer to obey the Prophet.[57] It demands that the believers submit their legal disputes to the Prophet's decision.

> They do not really believe unless they make thee [O Prophet] a judge of all on which they disagree among themselves . . . . . [4:65]
>
> [W]henever they are summoned unto God and His Apostle, in order that (the divine writ) might judge between them, lo! some of them turn away;
>
> . . .
>
> Is there disease in their hearts? Or have they begun to doubt? Or do they fear that God and His Apostle might deal unjustly with them? . . . [24:48-50]

According to Muslim tradition, the generations after Muḥammad's death considered reported statements, actions and judgments of the Prophet as binding precedents.

But Muḥammad's own generation, the Companions, naturally were guided, in seeking to achieve piety after Muḥammad's death, not only by their explicit memories of his actions and words, but also by an implicit sense for righteous living, gained under his tutelage. They would not only <u>speak</u> about his behavior, but also, and even more importantly, they sought to <u>act</u> according to his example.[58] The generation after the

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[57]See, e.g., [4:79-80].

[58]This point derives from Rahman, *Islam*, 53-58. Consistent with this interpretation is the reported reluctance of the Companions to relate words and actions of the Prophet. Muḥammad Zubayr Ṣiddīqī, <u>Ḥadīth Literature: Its Origin, Development, Special Features and Criticism</u> (Calcutta: Calcutta University, 1961), 36-37. This reluctance is profoundly rooted in Islamic piety, and can be variously explained. In general, these Companions must have feared the moral responsibility of trifling by their own efforts, however sincere, in the divine responsibility of truth-declaring and norm-making. Compare the reluctance to write one's legal

Companions, the "Successors" who had never seen Muḥammad, would seek, by emulating the Companions' behavior (as much as or even more than by hearing and obeying their explicit teachings), to follow in the righteous ways, the "sunna," of the Prophet and Medina. But as the time of the revelation grew more distant, the authenticity of this transmitted charisma could only wane; moreover, divergences inevitably arose among far-flung Muslim cities, each of which had become the home of Companions and claimed an equal link to Muḥammad and his "sunna." For such reasons, inevitably transmission by unspoken practice had to give way to its competitor, the explicit historical account. Each such account, or story or narration, was called a ***ḥadīth*** (pl. **aḥādīth**). Correspondingly, emphasis had to shift, even among explicit, spoken precedents, from narrations of immediate teachers' sayings and doings, to historical accounts reaching back to the pristine authority -- Muḥammad's life among his Companions.

Thus, gradually the sunna came to mean less and less unspoken ideals exemplified in pious action, and more and more the body of properly authenticated verbal accounts, or aḥādīth, of the sayings and doings of the Prophet (and of his Companions, the latter for the indication they give of the

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opinions (cf. Aḥmad b. Ḥanbal) or even to make an oath. Cf. Goldziher, Muslim Studies, 2:181-88; Fuat Sezgin, *Geschichte des arabischen Schrifttums*, 9 vols. (Leiden: E.J. Brill, 1967), 1:53-84.

Prophet's teachings). This change represents a critical transformation in forms of religious thought and action, away from a way of life integrally assimilated from the living, toward teachings fixed and transmitted by written and spoken word; from the living charisma of individuals, to the construct and objectified charisma of a dogmatic system. According to uṣūl al-fiqh in its classical stage of development, although sunna retains its literal, proper meaning of a way of life to be imitated, it acquires also the technical meaning of the sum of the authenticated aḥādīth about the Prophet. Thus, from the second Hijrī[59] century forward, as the sunna became increasingly a material and textual source of truth, it became possible, and very natural, to apply to it, as to the Qur'ān, the methods of legalistic, textual interpretation. To such methods the law increasingly turned.

The classical theory, citing as proof the Qur'ānic verses above on obedience to the Prophet, held that the sunna is a divinely sanctioned source of law. Muhammad's religious authority, as established in the text of the Qur'ān and by his role in conveying the Qur'ān, is such that his sayings and actions within his role as prophet are held to be infallible. Even when he relied not on revelation in declaring norms, but

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[59]The Islamic or Hijrī calendar begins with Prophet Muḥammad's emigration to Medina, in the year 622 A.D. Christian (Common) Era dates are herein represented by "C." and Hijrī dates by "H."

rather on his own human judgment, and was thus open to error, most would say that God undertook to correct him if wrong, as the Qur'ān itself records God doing on several occasions.[60]

Classical theory held that the sunna validly sets norms in addition to those of the Qur'ān, and validly rules on the Qur'ān's interpretation, even to the point of limiting or conditioning a Qur'ānic command.[61] The sunna contains far more explicit legal matter than does the Qur'ān. Indeed, upon the sunna depend innumerable utterly essential matters of faith and practice left indefinite or unstated by the Qur'ān -- for example, the number of the prayers, their times, and how they are to be performed.

Since the sunna, so vital to the faith, involved maintaining an explicit historical record, early Muslims were confronted with great historiographic challenges. These were more onerous than those involved in authenticating and fixing the Qur'ānic text: the basic data of the sunna -- actions and statements of the Prophet over his twenty-three year career as observed by thousands of people -- were more voluminous and complex than the Qur'ānic text; and the transmission of these events, at first often by oral means, was naturally a far more haphazard and diffuse phenomenon. Beginning in the first

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[60]E.g., [80:1-10]. Prophet Muhammad's sayings and actions are said to be at best inspired by God in meaning only, while the Qur'ān was revealed both as to its meaning and its words.

[61]See Goldziher, *Muslim Studies*, 2:31.

century, pious specialists in ḥadīth confronted these challenges, and worked to fashion the needed scientific techniques. These techniques, perfected in the third and fourth, include a penchant for factuality and method that often appeals even to us moderns as scientific. The method relied on the piety and honesty of the narrators of a report. Collectors of aḥādīth recorded, in a part of each ḥadīth called the ***isnād*** (lit. "support"), the names of the successive narrators of each ḥadīth. They kept note of narrators' piety, character, memory, skills, knowledge, beliefs, partisanships, using this data to scrutinize the testimonial worth of each ḥadīth by evaluating each narrator's credibility. They also kept record of each narrator's chronology, places of travel and sojourn, and scholar-pupil connections, by which to critique the plausibility of the isnād. To corroborate each report, the specialists collected it with as many different isnāds as possible; strong collaboration was afforded when the ḥadīth came down from the Prophet through entirely separate channels, thereby diminishing the possibility of a single man or group forging or distorting the statement. The efforts of centuries were exerted in winnowing the reports and carefully classifying their degrees of certainty. Aḥādīth related by isnāds so numerous and diverse as to render it impossible that in any one generation the relators could collude to falsify

the ḥadīth are termed "***mutawātir,***" lit., "successive."[62] These aḥādīth were held to convey apodictic truth. But few aḥādīth achieved this status. Many others the ḥadīth specialists qualified as "valid" [*ṣaḥīḥ*] or "fine" [*ḥasan*] (a lesser status), by which they meant that these aḥādīth were at the least a valid basis for action, and therefore law, even if most scholars would not accept their authenticity as beyond doubt.[63]

While these sciences were developing, other groups of religious specialists emerged who were primarily concerned with legal questions. Again starting in the first century, these scholars sought to subject the rapidly developing Muslim legal practice, both public and private, to the test of Islamic piety by drawing on the Qur'ān and sunna. Legal practice in each region began to crystallize, the jurisprudence of each identified by region, such as the Medinan or Kufan. Each such locality claimed for its own legal practice the religious sanction of "sunna" (in the sense

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[62]Or "widely spread." Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950), 51-52. The Qur'ān, for example, is held to have been so transmitted.

[63]On ḥadīth and its sciences, see James Robson, "Ḥadīth," *Encyclopedia of Islam*, 2d ed.; Nabia Abbott, *Studies in Arabic Literary Papyri*, Vol. II, *Qur'ānic Commentary and Tradition* (Chicago: University of Chicago Press, 1967), 1-83; Muḥammad Zubayr Ṣiddīqī, *Ḥadīth Literature: Its Origin, Development, Special Features and Criticism* (Calcutta: Calcutta University, 1961), 88-101; G.H.A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Hadith* (Cambridge: Cambridge University Press, 1983).

of the "living" pious tradition, as discussed above) and "*ijmā'*" (consensus, as discussed below, but here purely local).

Among legal specialists differences of opinion arose as to the proper method by which to derive divine laws from scripture. The most important such divergence was that between the "people of ḥadīth" [*ahl al-ḥadīth*] and the "people of opinion" [*ahl al-ra'y*]. The first group sought to base law entirely, or at least primarily, on ḥadīth reports, with a minimum of human reasoning. The second group, the "people of opinion," were less receptive to aḥādīth, and elaborated law much more through the use of legal reasoning and sound judgment. The differences in the groups were partly reflected geographically, the Kufans being particularly strong in ra'y under the leadership of Abū Ḥanīfa (d. 150 H., 767 C.), and the Medinans, led by Mālik (d. 179 H., 795 C.), being considered strongest in knowledge of, and reliance upon, aḥādīth.

Between the two groups, the proponents of ḥadīth and of opinion, began a famous controversy, which more than anything marks the first three centuries of Islamic legal history.[64]

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[64]See Joseph Schacht, "Aṣḥāb al-Ra'y," and "Ahl al-Ḥadīth," *Encyclopedia of Islam*, 2d. ed., noting that the division between people of ḥadīth and people of opinion is somewhat arbitrary. Where I draw the line is correlated, therefore, with the point at which the meta-/pan-ordering distinction is drawn. The doctrinal success of the ḥadīth perspective made it impossible for any group to associate itself with ra'y. Ibid. But, by the internal, Islamic assessment, the Ḥanafī and the Ḥanbalī schools -- the two

In a sense, each of the two groups favored and sought to advance one of the two aspirations we have defined. The people of ḥadīth cherished the aspiration to meta-ordering, and found in the aḥādīth, and its epistemological apparatus, a God-placed ladder leading to transcendent knowledge of God's will. The Prophet's words and actions contained absolute truths; as with the Qur'ān, epistemological concern could be narrowed to questions of authenticity and linguistic interpretation, and keep aloof from all other, much less quantifiable and controllable, causes of human confusion. The people of opinion, on the contrary, showed affinity for the aspiration to pan-ordering, which inspired them to understand God's law as an explicit, universal code of laws that it was their duty to discover. Their legal reasoning enabled them to weave from fixed points of revelation a universalizing legal web; they cultivated a taste for problems at the frontiers and interstices, even hypothetical ones, confident in their abilities to construct answers from their system. They exhibited lawyerly tendencies of concern for their rules'

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schools to which we give attention in the next Chapter -- are held up as exemplars of the ra'y and ḥadīth trends respectively. See, e.g., ibid. Outside these two schools there are more extreme examples of both trends available, and, indeed, each school exhibits its own variations and opposed trends, but our treatment will ignore these complexities, and scale the distinction according to the general, characteristic contrasts existing between these two schools. As will be seen in the next Chapter, these contrasts become more useful and pronounced whenever we refer specifically, within the Ḥanbalī school, to views of Ibn Taymiyya and Ibn al-Qayyim, followed by the Wahhābīs.

general application, and of willingness to adapt to their task relatively secular law-making processes, such as custom, local consensus, and the demands of administration. To far greater degree than those of meta-ordering sensibilities, they sought to secure for these techniques and their outcomes a degree of sanction as divine.

Since the Islamic legal ideal subsumes both of these aspirations, and sees them as complementary along the lines of the compromise between the two aspirations sketched above,[65] increasingly each group had to recognize the other, and to some extent merge tasks and personnel. But, before effective overlap could occur, their respective sciences had to attain a certain level of development, which was accomplished only during the second century.

The work of al-Shāfi'ī (d. 204 H., 820 C.), the author of the first book on uṣūl al-fiqh to come down to us, shows the emerging integration between the groups, and the compromises by which it was made. Al-Shāfi'ī was concerned to quell the divergence between regional law schools, each of which claimed sanction from the "sunna" as meaning the living "pious" practice. Benefiting from the emerging corpus of scientific ḥadīth collection, al-Shāfi'ī advocated giving place, in lieu of this divisive local sunna, to the competing interpretation of "sunna," namely, the sunna as constituted by texts

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[65]See p. 68 above.

reporting the Prophet's legal acts.[66] His system of four roots of law, which won classical acceptance, approached the Qur'ān and sunna as texts open to legal analysis and derivation, and firmly ranked them as superior to any other source of truth.

This integration of the two divergent approaches to law was made at a price. The system advanced by al-Shāfi'ī furthers the tendency toward textualism as, in Weberian terms, the routinizing vehicle for the charisma of the Prophet's age. The material texts of the Qur'ān and the sunna mediate the transcendent truths to which the Prophet had had access. His system narrows the epistemological gulf looming between humans and transcendent truth down to the mere uncertainties of texts, to the comprehensible tasks of authenticating, and then linguistically and logically construing, revealed words. As appears from this aspect of the system, at least on the level of doctrine the people of ḥadīth gained the upper hand over their opponents.

Yet the two differing disciplines and approaches to law and piety -- those of opinion and of ḥadīth -- remained extant, and continue until today to demarcate opposed positions and tendencies in the law. An example is disagreement over the probative value of the "singular ḥadīth" [*khabar al-wāḥid*], i.e., a ḥadīth having only one transmitter

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[66]Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950), Part I, esp. 77-81.

at a particular stage.[67] This issue had set starkly apart the people of aḥādīth and of opinion: the former saw such aḥādīth as guidance more reliable than human reasoning, since they afforded a channel, even though only probabilistic,[68] to transcendent truths; the latter, on the other hand, asked why a few persons' testimony about a single event from long ago should overrule the accumulated legal wisdom of revered generations stretching back to the Prophet.[69] On this issue, again, the people of ḥadīth prevailed in principle, in that singular aḥādīth were uniformly accepted as a sound basis for legal rules. Yet their success was partial: after the integration not all of the classical schools of thought rank the probative value of such aḥādīth above the verdicts of systematic legal reasoning; and all schools learned means to

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[67]Another later identified category is the *khabar al-āḥād*, meaning the ḥadīth with only several transmitters at a particular level. Robson, "Ḥadīth"; see Schacht, *Origins*, 41, 50-52.

[68]Some claimed that the sharī'a required that only action, not knowledge, be entailed by these reports. Others allowed that these reports yield knowledge, but these opinions took many variations. Some, including al-Shāfi'ī (Schacht, *Origins*, 135, also 52), held that singular traditions yield knowledge only in the ẓāhir, not the bāṭin, while the Qur'ān and the unanimously recognized sunna yield truth in both. Others held the reports to yield certain knowledge when accompanied by various corroborations. Ibn Taymiyya seems eager to find that the reports yield "knowledge," while at the same time nuancing his position in various ways, such as by admitting that error still enters due to human weakness in interpretation. See Banū Taymiyya, *Musawwada*, 238-48.

[69]Rahman, *Islam*, 58-63.

avoid such aḥādīth when necessary to protect other goals and values of their systems.[70]

In this way, in classical uṣūl al-fiqh the work of the people of ḥadīth was integrated and harmonized with the work of the people of opinion. Jurists, and society at large, began to hold certain of the collections of aḥādīth (usually numbered at six) as virtually canonical.[71] Two, by al-Bukhārī (d. 256 H., 870 C.) and Muslim (d. 261 H., 873 C.), were particularly honored, their aḥādīth being considered almost beyond question.[72] Jurists thereafter readily accepted aḥādīth found in these collections, at least when consistent with their own views.

To suggest how ḥadīth reports are used in law, consider the following important aḥādīth on winedrinking. The Qur'ān prohibits wine using the term "*khamr*," which means, in its most literal sense, grape-wine:

> *[K]hamr* [is] but a loathsome evil of Satan's doing: shun it, then . . . . [5:90]

The aḥādīth must be turned to to learn the Qur'ānic meaning of *khamr*. The aḥādīth, however, conflict:

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[70]Zysow, Economy, 61-68; Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 71-73; M.A. Abdur Rahim, *Principles of Muhammadan Jurisprudence* (London: Luzac & Co., 1911), 71-77.

[71]See Goldziher, *Muslim Studies*, 2:234-244.

[72]See ibid. On al-Bukhārī's and Muslim's methods, see Ṣiddīqī, *Ḥadīth Literature*, 88-101.

From Ibn 'Umar[73], [who said] that the Prophet (S) said, "Every intoxicant is *khamr*, and every intoxicant is prohibited (*ḥarām*)."[74]

From Abū Hurayra that the Prophet (S) said, "*Khamr* is from the two trees: date and grapevine."[75]

From Anas b. Mālik, who said, "I was the wineserver to the people in the home of Abū Ṭalḥa [in Medina] on the day when the prohibition of *khamr* was revealed. Their drink was only *faḍīkh* [a drink made from dates]. [When a crier announced the prohibition], Abū Ṭalḥa told me, "Go and pour it out, and I poured it out."[76]

From Ibn 'Umar, who said "*Khamr* was prohibited, and in Medina there was none of it."[77]

From Abū Mūsā . . . who [asked,] 'O Messenger of God, in [Yemen] there are two drinks made from wheat and barley . . . . What shall we drink?' He [the Prophet] said, 'Drink, but do not get drunk.'"[78]

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[73]The chains of transmission are here omitted except for the first narrator, the Companion.

[74]Muslim (Ashriba 77), al-Nasā'ī 8:297 (Ashriba), Ibn Māja (Ashriba 3390). For each ḥadīth cited in this book, references are made to the standard six collections of ḥadīth, giving only the author's name. Full information on the references appear at the beginning of the Bibliography. The attempt is made to give as many citations as possible to the same text (or close variants) from these standard six collections, when such citations exist. If none do, then only will other sources of the ḥadīth be cited. The citations refer to the number of the ḥadīth in the cited edition, unless a volume and page instead appear.

[75]Muslim (Ashriba 14); Abū Dāwūd (Ashriba 3678); al-Nasā'ī 8:294 (Ashriba); Ibn Māja (Ashriba 3378).

[76]Muslim (Ashriba 3); al-Nasā'ī 8:287 (Ashriba).

[77]al-Bukhārī 3:321 (Ashriba).

[78]Abū Ja'far Aḥmad b. Muḥammad b. Salāma al-Azdī al-Ṭaḥāwī (d. 321 H., 933 C.) [a Ḥanafī authority], *Sharḥ ma'ānī al-āthār* (Cairo: Maṭba'at al-Anwār al-Muḥammadiyya, n.d.), 4:220. This version is not in the common ḥadīth collections (compare Nasā'ī 8:320 (Ashriba)). The much more common versions are, e.g., Muslim (Ashriba 71-73); al-Nasā'ī, 8:327, 299.

Legal scholars, crediting different *aḥādīth*, disagreed extensively on the substances that fall within prohibited *khamr*.

Similarly, the Qur'ān fixes no punishment for drinking *khamr*, but aḥādīth prescribe punishment by lashing. The latter disagree, however, on the number of lashes, supporting both forty and eighty.

> From Jābir b. 'Abd Allāh that the Prophet said, "He who drinks *khamr*, lash him."[79]
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> From Anas that the Prophet (S) would flog for *khamr* with sandals and palm branches forty [strokes].[80]
>
> From Anas b. Mālik (R), that there was brought to the Prophet (S) a man who had drunk *khamr*, and he flogged him with two palm leaf stalks (*jarīdatayn*) about forty times. He [Anas] said, "Abu Bakr also did it, and when 'Umar [became Caliph], he consulted the people, and 'Abd al-Raḥmān [b. 'Awf] said, 'The lightest of the *ḥudūd* is eighty,' and then 'Umar so commanded."[81]

There is a modern trend of independence from the medieval canon of accepted ḥadīth works, found (though in very different forms) in both "conservative" or textualist, and "liberal" or modernizing, wings, though much more so among the latter. Among modern textualists, such as the Wahhābīs in Saudi Arabia, it is common to subject the aḥādīth to a scrutiny, which, though still on traditional lines, is more

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[79]Abū Dāwūd (Ḥudūd 4482); al-Tirmidhī (Ḥudūd 1444); Ibn Māja (Ḥudūd 2573); al-Dārimī 2:175-76 (Ashriba, bāb 10).

[80]Muslim (Ḥudūd 35). Without mention of forty, al-Bukhārī, 4:171 (Ḥudūd); Abū Dāwūd (Ḥudūd 4487); Ibn Māja (Ḥudūd 2570).

[81]Muslim (Ḥudūd, 33, 34); Abū Dāwūd (Ḥudūd 4481); al-Dārimī 2:175 (Ḥudūd).

rigorous than was usually done medievally (at least among lawyers).[82]

B. THE THIRD ROOT: CONSENSUS OR IJMĀ', AND THE REJECTION OF POSITIVE LAW

Ijmā', the third root of the law, means "agreement," "decision."[83] Technically, it is the unanimous agreement of all qualified legal scholars of an age upon a legal rule. Ijmā' lends a legal rule an authority equal to a rule unequivocally established by the Qur'ān or sunna.

The logic of the uṣūl al-fiqh requires that ijmā', like sunna, derive its authority from revelation, i.e., from proofs in either the Qur'ān or the sunna. But so validating ijmā' is hardly as easy or obvious as the dignity of the source would seem to require. Indeed, classically there were profound doctrinal disagreements over the valid scope of ijmā', disagreements that have deeply influenced legal determinations, and that have survived until today.

In the Qur'ān the verse most often cited as authority for ijmā' is the following:

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[82]Even students in the College of Sharī'a of the Imām Muḥammad University of Riyadh are expected to carry out classical examinations of the aḥādīth they cite, and to state their own conclusions as to their relative validity. It is asserted that it is now far easier than it once was to evaluate aḥādīth, since the necessary references are now widely available. Indeed, computer databases are emerging to automate parts of the process.

[83]Lane, *Lexicon*, 2:455-56.

> But as for him who, after guidance has been vouchsafed to him, cuts himself off from the Apostle and follows a path other than that of the believers -- him shall We leave unto that which he himself has chosen, and shall cause him to endure hell: and how evil a journey's end! [4:115]

In the sunna is a ḥadīth that provides a proof far less ambiguous, but that, oddly in view of the momentousness of the issue, is of very unsure authenticity.

> God will not unite my community upon an error [lit., "straying"].[84]

Early assertions of ijmā', even in the early third century, were rife with uncertainty and disagreement. Indeed, several early scholars denied its validity as a source of law altogether (and thus ijmā' is not itself agreed upon unanimously). Others fought about its scope: open issues were whether ijmā' required the agreement of the entire umma, whether minorities of scholars could be disregarded, and whether ijmā' justified the enforcement of merely regional agreements of scholars.[85] In ijmā''s early history, large and flexible claims of ijmā' tended to be made by the people of

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[84]al-Tirmidhī (Fitan, 2167) ("gharīb"); Ibn Māja (Fitan, 3950) ("da'īf"). The claim is made that with other similar aḥādīth it attains status as widespread [*mashhur*] or even universal [*mutawātir*] as to content [*ma'nawī*]. See al-Ghazālī, *al-Mustaṣfā*, 1:175-76; Ibn Ḥazm, *al-Iḥkām*, 4:497; 'Abd Allāh 'Abd al-Muḥsin al-Turkī, *Uṣūl madhhab al-imām aḥmad --dirāsa uṣūliyya muqārina*, 2d printing (Riyadh: Maktabat al-Riyāḍ al-Ḥadītha, 1397 H., 1977 C.), 326. One may discern in the weak authentication of this ḥadīth indications of ḥadīth specialists' reservations toward ijmā'. For Schacht's views on its authenticity, see *Origins*, 91.

[85]Schacht, *Origins*, 82-97.

opinion,[86] who asserted local ijmā' to shore up the transcendental sanction for their systems of laws. Meanwhile, restrictive versions of ijmā' were characteristic of the people of ḥadīth. Note that each group's position on ijmā' accords with that group's characteristic preference between the aspirations to meta-ordering and to pan-ordering: compare the reluctance of people of ḥadīth to dilute the transcendence of God's word with merely human judgments, regardless of whether the latter are in agreement, with the eagerness of people of opinion to find divine sanction for the verdicts of human reasoning, most especially when those verdicts are common and widespread.[87]

This reveals for us a further, very fundamental distinction between the people of ḥadīth and the people of opinion that will recur in various guises in what follows. This is a distinction as to degree of toleration for indeterminacy and for the resulting difference of opinion. For the proponents of meta-ordering, their concessions in face of the limitations of revelation required that they, however

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[86]For an analysis of Ḥanafī views of ijmā', see Zysow, *Economy*, 198-246; Abdur Rāhim, *Principles*, 115-136. Zysow states: "The classical Ḥanafī theory is entirely in favor of *ijmā'* and consistently adopts those positions which were felt to facilitate the application of the doctrine." Zysow, *Economy*, 200.

[87]Note how attractive, in order to achieve an explicit, universal law fulfilling pan-ordering, it is to have a means to reduce difference of opinion and to counteract the uncertainty otherwise fostered by meta-ordering's epistemological stringency.

regretfully, acknowledge ẓann and legal indeterminacy; because they firmly maintained that legal truth derives only from divine revelation, then available human sources of truth, being of a much lower epistemological order, are powerless to reduce the latter's indeterminacy. Their recognition of indeterminacy indeed heightens their transcendentalizing impulse; in fact, transcendence in legal truth entails, as the other side of the coin, legal indeterminacy. Put in another way, if revealed texts are to stand as proxy, or model, of transcendent truth, and if the latter's finiteness is not superseded by some mundane method of decision (whether textual or extra-textual), then indeterminacy becomes inseparable from, indeed the very sign and token of, that transcendence.

In contrast, proponents of pan-ordering, in seeking a universally applicable, explicit paradigm for human life, naturally were receptive to means to bring about a workable legal certainty, and with it, general acceptance and application of derived laws. They showed less concern for the tender misgivings of individual pious conscience, and more for a firmly and outwardly knowable universal pattern allowing obedience to, and fulfillment of, God's order. Paradoxically, they often celebrated the fact of difference of opinion among scholars,[88] since this afforded latitude within the divine

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[88]The slogan in this context is a saying, claimed, but with only the weakest support, as a ḥadīth of the Prophet, "Difference of opinion in my umma is a mercy [*ikhtilāf ummatī raḥma*]." See Jalāl al-Dīn 'Abd al-Raḥmān al-Suyūṭī, *Jam' al-jawāmi'*, 7 vols. to date (Majma' al-Buḥūth al-Islāmiyya, al-

law, which then could be narrowed down for application by reference to other principles. Note that, by its predilections, pan-ordering shows an admiration for explicit knowability in the law -- one of the virtues of positive law. Meta-ordering esteems this value also, but only as to the explicit divinely revealed law itself.

Note a subtle point, that meta-ordering carried to an extreme defeats its own purpose, and turns into its opposite. Meta-ordering, as we shall see in various contexts, cannot relent from striving toward a perfection of knowledge, and must turn from suggestions of relativism, approximation and expediency. As we noted, this very striving opens up indeterminacy. Thus, the higher the authority one requires for every decision, the more unlikely it is that that authority will be determinative. Even when texts have a clear and certain meaning, how to apply them to concrete situations usually engenders uncertainty; it is often impossible to derive concrete decisions from lofty texts. But if one cannot abide in this middle state, and demands certainty, one must turn either to a mechanical literalism[89] or to the sort of extra-textual (or constitutive[90]) routes to truth followed by pan-ordering. In either case, the transcendence of truth that first aroused ardor dissipates. One can make the inverse

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Azhar, 1390 H., 1970 C.), 1 (Part 1):260.

[89]As in the Ẓāhirī school. See n. 40 above.

[90]See n. 39 above.

point about pan-ordering, that if its ambition to universal coverage is pushed to an extreme, and it seeks to regulate down to the infinitesimal and unique, then it too loses its epistemological footing and its hold on certainty, and reverts to an individual and transcendent reference point. In other words, like extreme meta-ordering, pan-ordering breaks down at the level of concrete application. Its downfall is not, however, loss of certainty, but rather the relative coarseness of its external, institutionalized, positivizing, constitutive techniques. In the infinitesimal, even pan-ordering reverts to the individual conscience, which must alone strive to comprehend and apply the rules.[91]

Returning to ijmā', by the time of the classical theories of uṣūl al-fiqh emerging after al-Shāfi'ī, all had come to accept the doctrine of ijmā' as requiring that unanimous agreement of scholars conclusively establishes a point of law. But otherwise severe disagreements persisted, as to the circumstances under which ijmā' comes to exist and as to ijmā''s probativity relative to other sources of law. Some scholars pointed out how wholly unlikely a true unanimity is, and if it should occur, that it could ever be satisfactorily proved. For example, many candidly admitted the impossibility of requiring an explicit agreement from all scholars; the most that could be imagined was that no dissent be heard or heard of; many argued that such silence did not imply assent.

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[91]On these general points, cf. p. 184, 188 below.

Others wondered how the reliable legal scholars were to be identified; perhaps one would be overlooked? Then, even if agreement occurs, how will that fact be reliably transmitted to later generations? Despite such very sensible misgivings, almost all conceded that many instances of ijmā' occurred in the time of the first generation after the Prophet, for the reason that then the qualified scholars were known, and many of them were located in Medina. Some scholars denied that thereafter any ijmā' could exist at all,[92] acknowledging only that there occurred conformities of view, or failures to know of difference of opinion. Such scholars regarded these concurrences of view as conveying no more than presumptive truth, not the apodictic certainty of a proper ijmā'. Vigorous difference of opinion continued on more detailed issues: whether a later generation's consensus could abrogate the solution of an earlier; whether, if an earlier generation had discussed a matter, fixing two different views, this should itself be an ijmā' that no third view was possible; if this latter position is accepted (it was generally), then if a later generation should settle on one of the two views, is debate then foreclosed, or can the rejected view still be readopted? All these scholastic-sounding debates actually

[92]Among these was Ibn Taymiyya (d. 728 H., 1328 C.), mentioned above as of great influence in Saudi Arabia.

cause differing results in legal practice, as we shall see in the next Chapter.[93]

The Western mind finds the ijmā' doctrine at first glance very appealing. The doctrine seems to allow the Muslim community to make its own law, even after the death of the Prophet, and thereby free Muslims from eternal servitude to a fixed body of revelation. It would seem to provide a potentially all-encompassing method to render the divine law positive in two senses of the term: clearly knowable, and susceptible of change. But, according to its theoretical formulation, ijmā' must disappoint such hopes.

First, no ijmā' can deviate from, or have any force on, a matter already determined in the Qur'ān or the sunna; and every ijmā' ought to have a support in an argument derived from these prior two sources. The subsidiary ranking of ijmā', and its own inherent tendency to operate both retrospectively and within the confines of past debate, meant that it cannot be used to build in the air, or to alter directions already taken.

Second, if one attempts to apply ijmā' strictly in conformity with theory, it proves extremely elusive, indeed metaphysical: it could be held to fix with certainty hardly any rule not already established by a text or age-old universal practice (such as certain rules of prayer or pilgrimage). Medieval Muslim scholars themselves remarked the

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[93]See Chap. 2, n. 103, below.

frequent contradictions and errors made in claims that such and such a legal rule was the object of an ijmā'.[94] Tentative lists made of legal rules sanctioned with ijmā' were not lengthy at all, and were themselves accused of bias and error.[95] In legal argumentation, a claimed ijmā' usually cannot survive the tests for it to qualify as certain truth -- even the tests of the proponent of the claim. Usually such a claim is proffered, in effect, to express the important fact that past generations were not known to differ, and to lend a view a presumption of truth; this presumption is relative to the degree of agreement, the proof for the view agreed upon, and the group whose agreement is consulted.[96]

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[94]More confident assessments (such as the Ḥanafī Ibn al-Humām asserting that there are hundreds of thousands of instances of ijmā', see Abdur Rahim, *Principles*, 125) probably relate to the internal practice of the schools, particularly the Ḥanafī school. See Zakī al-Dīn Sha'bān, *Uṣul al-fiqh al-islāmī*, 2d ed. (Beirut: Maṭābi' Dār al-Kutub, 1971), 104.

[95]Abū Bakr Muḥammad b. Ibrāhīm al-Nīsābūrī Ibn al-Mundhir (d. 317 H., 921 C.), *al-Ijmā'*, ed. Fu'ād 'Abd al-Mun'im Aḥmad, 3d. ed. (Alexandria: Dār al-Da'wa, 1402 H., 1982 C.); Abū Muḥammad 'Alī b. Aḥmad b. Sa'īd Ibn Ḥazm (d. 456 H., 1065 C.), *Marātib al-ijmā' fī al-'ibādāt wa-al-mu'āmalāt wa-al-i'tiqādāt* (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.). Ibn Taymiyya strongly criticized the latter for failing to exact the requirements for valid ijmā'. Ibid.

[96]This merely presumptive use of ijmā', recognizing that ijmā' claims rarely fulfill the theory, is indeed recognized in the theory. Such ijmā', called "ẓannī," meaning "probable," or "presumptive," can be opposed by other proofs and arguments. See Ibn Qudāma, *Rawḍat al-nāẓir wa-junnat al-munāẓir fī uṣūl al-fiqh 'ala madhhab al-Imām Aḥmad b. Ḥanbal*, with commentary by 'Abd al-Qādir b. Aḥmad Ibn Badrān (d. 1346 H, 1927 C.), *Nuzhat al-Khāṭir*, 2 vols., 3d printing (Riyadh: Maktabat al-Ma'ārif, 1404 H., 1984 C.), 331-346.

At least as to our concerns in law,[97] therefore, on grounds of both theory and practice, it is best initially to understand ijmā' as not a primary but a secondary source of law, a post-hoc support for views already strong. Far from supplanting the Qur'ān and sunna as the material source of the law, ijmā' hardly contributes, in a more than atmospheric way, to rendering the divine law more material or positive. As to ideal theory, ijmā''s formulation assures it a certain incorporeality, and defeats its concrete realization, or institutionalization, in anything of this world. As to

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[97]Ijmā' had its effect not only as technical legal doctrine, but as a tenet of the faith which influenced Muslim beliefs and practices by its sheer existence. In a technically loose, popular, and atmospheric way, ijmā' offered reassurance, however logically circuitous, that the community had, after all the turnings of its history, remained authentically linked with the Prophet and within God's will. This sort of "ijmā'" could lend the majority on any issue a comfortable conviction that God shared their views. Only with reference to this vague ijmā', and to overly emphatic statements of al-Ghazālī and others, are justified suggestions that by ijmā' fiqh consecrated the worship of saints; see C. Snouck Hurgronje, *Selected Works of C. Snouck Hurgronje*, ed. G.-H. Bousquet and J. Schacht (Leiden: E.J. Brill, 1957), 56; Goldziher, *Muslim Studies*, 2:332-33. Such an ijmā' was easily refuted by anyone in the minority, as, for example, Wahhābīs did in rejecting the cult of saints. 'Abd Allāh Ṣāliḥ al-'Uthaymīn, "Muḥammad Ibn-'Abd-al-Wahhāb: the Man and His Works" (Ph.D. diss., University of Edinburgh, 1972), 269. It seems that it is this broad cultural conception of ijmā', transplanted as fundamental legal doctrine, that is the source of the common Orientalists' assertion that ijmā' undergirds the entire superstructure of law. "[T]he ijmā' has, in practice, become an adequate basis for the whole law, which makes all other bases superfluous." Snouck Hurgronje, *Works*, 56. Gibb speaks of "a third channel of revelation." H.A.R. Gibb, *Mohammedanism*, revised ed. (Oxford: Oxford University Press, 1970), 65. See generally Snouck Hurgronje, *Works*, 55-59; Coulson, *History*, 77-79. At least as to uṣūl al-fiqh, this assertion is wholly false. See Zysow, *Economy*, 198-281.

practice, ijmā' rarely operates as more than the claim -- itself very much rooted in common-sense -- to the perpetuation among a like-minded group of a unanimity already achieved.

Analyzing this outcome in view of the early positions on ijmā' of the people of ḥadīth and of opinion, we find once again an apparent victory of the people of ḥadīth and the proponents of meta-ordering.

C. THE FOURTH ROOT: ANALOGY OR QIYĀS, AND THE DISCIPLINING OF HUMAN REASONING

"***Qiyās,***" or "analogy," is the title usually given to the fourth root. It refers to a method of extending a judgment established by one or another of the prior three sources to a new case. The extension depends on the showing of some ground of analogy held in common between the old and the new cases. This ground of analogy is called the "legal cause" or ***'illa.***

Only with qiyās, the last of the four roots, do we encounter a method having the open purpose of expanding the content of the revelation. In adopting analogy, scholars chose what they considered least likely to corrupt the transcendent truth of the texts method with human whims. Even adopting a method so natural, if not inevitable, aroused great debate. Supports for its use were found in the Qur'ān and

sunna,[98] but none of these was sufficiently authenticated or explicit to settle matters. Debate continued on whether qiyās was a valid source of law, and, if so, how it competed with other sources.

Here again, the debate is usefully traced according to the division between the people of opinion and of ḥadīth. Here again, we find each of the two groups exhibiting a tendency to align with one of the two aspirations within the law ideal. The people of opinion, predictably, made qiyās the means to preserve their accumulated legal acumen from downfall to aḥādīth. Seeking comprehensive legal code, they employed an analogy inspired by a free, highly rationalist, legal method. Texts, on the other hand, they tended to treat as relatively discrete, even as historical, in significance. Thus, the law itself emerged as a web woven of qiyās around the discrete cases afforded by the texts. Indeed, the people of opinion went so far as to keep track of points where a revealed case strained the web, declaring such a case to be "against qiyās" and, as a result, even more narrowly applying it.

In contrast, the people of ḥadīth subordinated reason whenever authority from aḥādīth was available, believing that,

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[98]The Qur'ān contained much that could be interpreted for and against qiyās, none of which was very explicit. See Goldziher, *Ẓāhirīs*, 85-88. Aḥādīth were more relevant, but remained bitterly disputed, both as to authenticity and meaning. See ibid., 97-102.

even if merely probable, evidence of God's revelation was far preferable to human judgment. They preferred to express their legal views simply by reciting apposite aḥādīth; they tended to believe that the texts had a very broad, even comprehensive, reach, recognized only by those sufficiently learned in the texts. In interstices where there were no texts, at least no texts other than highly general ones, they had a tendency, because there firm divine knowledge was lacking, to declare matters legally neutral [*mubāḥ*].[99] Thus, one of the greatest jurists among the people of ḥadīth, Aḥmad ibn Ḥanbal, put qiyās last in his list of uṣūl authorities, after even deficient Prophetic aḥādīth and after reports about the Prophet's Companions; he said qiyās should be used only when unavoidable, as a matter of necessity.[100] Other scholars denied the validity of qiyās altogether.[101]

As to practice, qiyās is the root most responsible for diversity in legal determinations. In the nature of things qiyās simply cannot be made an unequivocal, reproducible, scientifically controlled process. For example, as mentioned above, wine is prohibited in the Qur'ān using the word "*khamr*," meaning, most literally, grape-wine. If this literal meaning of *khamr* is accepted, then is an intoxicant distilled

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[99]According to a frequently heard conception, God's silence implies, in the case of worship, prohibition, and in the case of worldly affairs, permission or status as *mubāḥ*.

[100]Discussed p. 189 ff below.

[101]See n. 40 above.

from grain prohibited? Not if grapeness, or wineness -- each a close literal 'illa -- is the cause. But if intoxication or impairment of reason -- each a broad purpose- or utility-driven 'illa -- is the cause, then yes. Even then, is it only intoxication, rather than the drink itself, that is forbidden?

As this example shows, qiyās is susceptible of highly varying uses, and these variations relate complexly with differing positions on how revealed texts and human reasoning work together in the enterprise of the law. Thus, qiyās may be a literal, logic-bound hermeneutic, favoring legalism over moral substance. Or it may be the simple parataxis of cases, based on one or another literal or concrete commonality, with no concern for supervening system. Or it may be the apt title for a process by which jurists show due respect for revealed truth, and gradually advance legal systematization by working outward from innumerable particular revealed rulings. Or analogy can become conscious of broad substantive aims of the law, by asserting that the 'illa in an existing rule is some utility or objective perceptible in light of the law's overall aims, or stated in some other highly general text.

It followed that, under any one heading of the law, a vast variation in legal rulings was possible. Examples of such variations from Saudi Arabia will appear below.[102]

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[102]See p. 223 below.

D. INDIVIDUAL REASONING, OR IJTIHĀD, AND THE DISTINCTION BETWEEN SHARĪ'A AND FIQH

It is often suggested that only with the fourth root, qiyās, do human reasoning and human fallibility enter into derivations: Qur'ān and sunna are known texts, and ijmā' holdings are conspicuous and uncontrovertible. But of course no text is free of uncertainties. Indeed, Muslim scholars developed the religious sciences to deal with the basic types of such uncertainties. Even before they are interpreted, texts must be fixed in so many ways: authenticated, obscure words traced, alternative readings aired. For the Qur'ān, which was not revealed all at once or in a logical order, but piecemeal in response to specific situations, there are many problems in relating texts in their subject matter or chronology; in fact, some texts were known to abrogate others; the specific events precipitating revelations (called the "occasions of revelation") required study historically, since these contexts were an aid in interpretation. As we discussed above, sunna suffers from all these uncertainties, and others, and fixing ijmā' presented still worse problems.

And all these obstacles only precede those of legal interpretation proper. A vast science of interpretation was developed as part of uṣūl al-fiqh, dealing with dozens of subtle issues: for example, when does an imperative signify command, when a mere recommendation?

We have noted that scholars acknowledged, for all these reasons, that only rarely did the four roots lead mankind along a certain path to God's law, and that -- despite Qur'ānic admonitions -- most of their rulings were nothing but ẓann. The work of attaining to such rulings by legal derivation according by the methods of uṣūl al-fiqh is called "***ijtihād,***" lit., to strive, belabor oneself, exert effort.[103] More generally, the term "ijtihād" applies to a believer's effort to fulfill God's will in a situation where it is impossible to know that will with certainty. For example, a Muslim in a remote place must make a sincere effort, practice ijtihād, to determine the direction of Mecca for prayer. As to ijtihād to determine the law, however, the layperson may not undertake it independently, since success depends vitally on possessing a great deal of knowledge about the four roots of the law and how they are used. Therefore, it was early recognized that only those persons may practice legal ijtihād who meet certain high qualifications of learning and piety; these scholars are called ***mujtahid***s. All who lack these high qualifications are obliged, to one degree or another, to accept the leadership of the mujtahids.

Islamic law fundamentally distinguishes between rules that are certain, in that they are proved by an explicit text or confirmed by an ijmā', and those that are uncertain, based

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[103]It is from the same root as *jihād*, translated "holy war." The common root has the meaning of "striving."

on ẓann. As to the first, difference of opinion is by definition impermissible. As to the second, which are infinite in number, difference of opinion is permitted. The second category alone is open for the exercise of ijtihād. The law also shows a constant concern for the relative *degree* of certainty that a proof contributes, or that a rule possesses.

Islamic law harbors another vital distinction, between two Arabic terms that respond, each in its own way, to the English term "Islamic law."[104] The first term is sharī'a, introduced above, the name for God's own divine, infallible law, revealed through His messengers, or the "path" of God-given guidance. The second term is ***fiqh***, literally, "understanding," meaning men's fallible effort toward an understanding of the sharī'a, and by transference, the actual accumulation of knowledge gained through this effort. This distinction is vital for our purposes.

E. THE HISTORICAL ELABORATION OF FIQH AND OF ITS LEGAL SYSTEM

So far we have discussed the law as an ideal, an intellectual system, in order to introduce certain concepts

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[104]Islamic law could also be defined as that remainder after laws which are "merely religious" and not legal "in our sense" have been subtracted. Cf. Schacht, *Introduction*, 1.

and to provide a foundation for contrasts with Western legal thought. But the Islamic law is hardly the sort of abstract system it has seemed so far. It was a working law from the time of Muḥammad onward. Let us now begin our study of it as actual law and legal system, beginning with an introductory sketch of its history.

Muḥammad, at once ruler and prophet, was the head of a state and a legal system, and was himself chief judge. Reports show him, when appointing governors in far-off provinces, instructing them on judicial functions. At his death, the questions of the succession to power, and of the continued existence of Islam as a religion and as a state, were urgently raised, since he himself had not explicitly provided for these transitions. In the end, at the suggestion of the influential Companion 'Umar b. al-Khaṭṭāb, and then by acclaim, Abū Bakr was chosen as his ***khalīfa***, or successor or caliph. Abū Bakr had been an early disciple of the Prophet and remained an upright and pious close friend. The Prophet had appointed him to lead the prayers in his final illness. To Abū Bakr, though not forceful by personality, fell the task of insisting, ultimately by warfare against seceding Arab tribes, that after Muḥammad there were no further religious dispensations, and that the umma as a religious community survived, and survived moreover as a full-fledged state. He fixed these matters permanently in history.[105]

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[105]Hodgson, *Venture*, 1:197-98.

After a mere two years of Abū Bakr's caliphate, succession, by deed of Abū Bakr thereafter publicly acclaimed, passed to 'Umar b. al-Khaṭṭāb, another of the Prophet's closest disciples. 'Umar, indubitably one of the most influential men in history, we shall often encounter, since he is the model of the legal Muslim in the public sphere. He is remembered for his forceful character, for his courage and promptness to act. But he combined this with warm devotion to God and His Prophet, ready self-sacrifice, and a stern sense of principle.

It was under 'Umar that the extraordinary episode of the sudden Muslim conquests of the known world occurred. He set up the administration of these vast regions, rigorously adhering to the legal and ethical standards of Muḥammad's administration, yet feeling no hesitation to adopt preexisting legal institutions and administrative methods, and to invent new ones, where needed. He was the first to appoint persons to judicial office;[106] he was the first to set up a prison;[107] he established the legal regime governing relations with conquered adherents of the earlier religions.

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[106]E.g., Abū Zayd 'Abd al-Raḥmān b. Muḥammad Ibn Khaldūn (d. 808 H., 14067 C.), *al-Muqaddimah*, trans. Franz Rosenthal (Princeton: Princeton University Press, 1967), 173; contra Schacht, *Introduction*, 16, 24, disbelieving stories of qāḍīs appointed by the Righteous Caliphs.

[107]Shams al-Dīn Abū 'Abd Allāh Muhammad b. Abī Bakr b. Ayyūb Ibn Qayyim al-Jawziyya (d. 751 H., 1350 C.), *al-Ṭuruq al-ḥukmiyya fī al-siyāsa al-shar'iyya aw al-firāsa al-marḍiya fī aḥkām al-siyāsa al-shar'iyya*, ed.Muḥammad al-Fiqī (Cairo: Maṭba'at al-Sunna al-Muḥammadiyya, 1373 H., 1953 C.), 100.

After 'Umar differences over the legitimacy of power in Islam became violent; 'Umar and his two successors to office 'Uthmān and 'Alī, all died by assassination. There followed decades of painful civil wars, stirred explosively by the immense stakes in religion, doctrine, wealth and power. These cataclysmic events forced the great schisms of the Muslim body surviving until today, and etched deep the lines of later Muslim doctrine -- religious, legal and political. Finally, after all the strife, for the Sunnī majority of the now-divided Muslim body, succession settled in the worldly Mu'āwiya (660-680 C.), the fifth holder of caliphal office and the founder of the Umayyad dynasty. For Mu'āwiya and his successors, the pattern of rule, though still simple and principled, was, in comparison with the standard of the Righteous Caliphs he succeeded, one of worldly kingship. Significantly, with Mu'āwiya the capital of the empire moved from Medina to Damascus.

During the Umayyad period came the beginnings of the scholarly disciplines of the religious sciences, among them Qur'ānic recitation, Arabic grammar, Qur'ān interpretation, the preservation of ḥadīth, Prophetic biography, history, and the study of fiqh. As to law, in various geographical centers, chiefly Medina, Mecca, Damascus, and Kufa and Basra in Iraq, circles of scholars formed. Each center developed its own corpus of law, having a special character. Each drew on the traditions preserved locally from the time of the

Prophet, passed on from the Companions who had settled in that city, to the Successors of these Companions, and thereafter from master to disciple, through each center's own chain of legal scholars.[108]

In each circle out of a great many leading scholars certain ones attracted the strongest following and over time increasingly came to represent their center not geographically but in their own names. In Iraq, Abū Ḥanīfa (d. 150 H., 767 C.) emerged, eclipsing others and his own teachers, his fame increased by the brilliance of two disciples, Abū Yūsuf (d. 182 H., 798 C.) and Muḥammad al-Shaybānī (d. 189 H., 805 C.). In Medina, the leading scholar was held to be Mālik b. Anas (d. 179 H., 795 C.), who wrote the first law book to survive, the *Muwaṭṭa'*, consisting of aḥādīth organized by legal topic, with mention of the legal rulings of Medina. Then, in a development reflecting departure from a geographical principle in the evolution of schools of thought, a school formed around al-Shāfi'ī (d. 204 H., 820 C.), who studied with Mālik in Medina, came into extensive contact with followers of Abū Ḥanīfa, including al-Shaybānī, in Baghdād, and eventually settled in Egypt. Finally, in the next generation after al-Shāfi'ī, Aḥmad b. Ḥanbal (d. 241 H., 855 C.), centered in Baghdad, attracted loyal followers to his approach to law centered on ḥadīth studies.

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[108]See Schacht, *Origins*, 6-10.

This entire development occurred in the generations straddling a civil war that, ending in 132 H., 750 C., shifted power from the Umayyad and to the 'Abbāsid dynasties. With the 'Abbāsids the emerging class of religious scholars or ***'ulamā'*** (sing. ***'ālim***, meaning literally "learned," i.e., possessor of knowledge or science), gained a new access to power; the 'Abbāsids, seeking means to Islamic legitimacy to distinguish themselves from the Umayyads, strove to ally to themselves the arbiters of Islamic truth. With profound reluctance born of decades of civil and theological strife, and after agonizing over the costs of affiliating themselves with a power already known for ruthless self-interest, the 'ulamā' accepted the 'Abbāsids' offer to cede to them powers over certain state offices or functions in return for their cooperation with the state. The 'ulamā' thereafter acquired the rightful claim, by title of learning purely, to all offices by which sharī'a rights were promulgated or enforced. With the 'Abbāsids were established the root patterns of cooperation between the ruler and the 'ulamā' that have largely determined constitutional forms of the Islamic legal system and state from then to the present day.

By the early 'Abbāsid period, the followings of the various leading jurists began to solidify into self-conscious schools, now weaning themselves from geographical identifications.[109] Of these schools (called *madhhab*, plur.

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[109]Schacht, *Introduction*, 57.

madhāhib, roughly, "school of thought"[110]) there emerged many Sunnī schools; among them were the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī schools, each named after one of the influential jurists just mentioned. Each such eponym was called ***imām***, meaning "leader."[111] Schools other than these four gradually died out.[112]

Henceforth, scholars did not attempt to elaborate the law for themselves afresh from the Qur'ān and sunna. Rather they tended to follow in the path of one or another of the earlier great founders, first in their uṣūl and increasingly in their specific rulings. In their vast undertaking to elaborate from the four sources a legal and ethical value for every human act, scholars generated great tomes, ostensibly relying on the personal authority of the school's progenitor, but going beyond or even differing with him in many particulars. Later works appeared as elaborations of earlier ones, in long chains -- digest, commentary, digest, commentary. New thought still penetrated: it was needed for overlooked issues as well as

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[110]Lit., place or way of going, it means idiomatically, a way of opining, believing, etc., and also, opinion, tenet, belief, etc. Therefore, the term, as used in "adopting the madhhab of so-and-so," expresses vividly the idea of taking another's path in opinions, manner of thought, etc.

[111]The word "imām" has other meanings. See Chap. 3, n. 39, below.

[112]Schacht states that this development was complete by the end of the 7th H., 13th C. century. Schacht, *Introduction*, 65. The Ẓāhirī school, see n. 40 above, enjoyed a late, brilliant efflorescence under the pen of Ibn Ḥazm of Spain (d. 456 H., 1065 C.).

wholly novel ones; improvements were made in theory, presentation, consistency and system; the existing variety of views within each school was exploited to suit preference and circumstance.

After all these developments, the vastness of possible elaborations from the Qur'ān and the sunna had been narrowed down to four coherent schools of thought. And even these four schools, engaged in continuous and vigorous debate, tended to draw together. They drew together particularly in the essentials of the uṣūl al-fiqh, in which Shāfi'ī's solutions were influential. Eventually all four schools acknowledged the same four chief sources; their differences survived in the manner of their use, and in certain other sources of law, now redefined as subsidiary. Then, through recognition that human thought necessarily diverged in realms of ijtihād, the schools came to acknowledge an obligation of mutual acceptance and respect. Many scholars came to believe, on the ground of ijmā' theory, that the true ruling on any legal issue was to be found among the views of the four schools, and that other views, either those abandoned in the past or newly devised, should be excluded.

This is not to say that within each school there were no differences of opinion: these were rife, and often as sizeable as differences among the schools. On most issues there remained irreducibly the option of several opinions. However, and particularly under pressure from the ruler and from the

needs of legal practice for legal uniformity (as shall be discussed further below), this variety was narrowed and restricted. Finally, a single, accepted view could be identified in each school; the justification for accepting one view was phrased variously, sometimes that it was the "better" view, or the "well-known" view, or sometimes, ambivalently, the view "on which legal opinion is issued." This accepted view could vary relative to time or place.

Membership in one or another school became part of the identity of the layman. Theory considered school adherence to be a matter of free choice, to be made on such criteria as one's personal estimation of the founding imāms; it made provisions on such matters as whether, once a choice was made, the individual must follow a single school's rules consistently, without adventitious changes. No doubt, this sort of individual choice is conceivable in matters of prayer and other ritual, and in much family law; but as one progresses outward from the personal sphere, one sooner or later must confront persons of other schools, and be obliged to bring problems before a qāḍī, who himself[113] would belong to a school. One can see easily that practical considerations would tend to spread adherence to a single school throughout communities and regions, and how these same considerations

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[113]The propitious contemporary usage of the feminine as well as or in lieu of the masculine gender will be often omitted in what follows as anachronistic; for one reason, Islamic rulers, judges and scholars were extremely rarely women.

would exert pressure also at the level of state enforcement. At the latter level, another factor supervenes, in that the ruler himself must, if not a mujtahid himself, follow a school, and this colors legal determinations he makes affecting the community at large. He may favor one school's 'ulamā' in making appointments of qāḍīs. Quite apart from such points, rules sought unification of the law for its own sake: for example, they appointed qāḍīs on condition they apply a particular school; commanded the choice by qāḍīs of a particular legal view within a school; and, as occurred in the Ottoman Empire, decreed that throughout their realm one school alone was to be applied by courts and muftīs.[114]

In view of all these forces toward school conformity, we find that, despite the explicit theory of conscientious individual choice, school adherence was from the very beginning influenced heavily by two factors: communal and regional conformities; and official enforcement. The history of all the four schools shows the operation of these factors. The Ḥanafī school, begun in Iraq, became widespread in Syria and eastward through Turkish Central Asia to India. It has always been particularly fortunate as to official endorsement. It received the earliest official endorsement, being favored by the early 'Abbāsid caliphs; it gained the support of the Seljūqs, and was officially adopted as the law of the Ottoman

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[114]Detailed discussion of these three situations follows in Chapter Three.

Empire.[115] The net result is that the Ḥanafī school is today the school of the majority of Muslims, in regions from China to the Levant. Similarly, the Mālikī school, beginning in Medina and Egypt, spread early to the Muslim West. It was adopted in Spain and North Africa by the Umayyad and other dynasties of that region. It is still the predominant school in North Africa. In both the Mālikī and Ḥanafī cases, then, we find a conjunction of two points: broad geographical diffusion and widespread and consistent state enforcement. The Shāfi'ī school comes in third place with regard to influence. It arose in Egypt, and was widely followed also in Iraq, Persia and Central Asia. It competed successfully with the Ḥanafī school for the favor of populations and rulers of the central Muslim lands.[116] It spread to East Africa and the western and southern regions of the Arabian peninsula, including the Ḥijāz or the region of Mecca and Medina, and thence moved through coastal trading routes further East, becoming eventually the school predominant in Southeast Asia. The last of the four schools to arise, the Ḥanbalī, had never (until recently) any state endorsement, but was adopted by populations in Baghdad, Damascus and the Arabian peninsula.

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[115]J. Schacht, "Maḥkama," *Encyclopedia of Islam*, 2d ed.; W. Heffening and J. Schacht, "Ḥanafiyya," ibid. For example, Egypt, though its schools include the Mālikī along the northern coast, and the Shāfi'ī in Cairo and Lower Egypt, applies Ḥanafī law in the courts, even in family law, because of the long Ottoman rule in the country.

[116]W. Heffening, "al-Shāfi'ī," *Shorter Encyclopedia of Islam*.

The school enjoyed an influence disproportionate to the number of its adherents; reasons for this include, first, its being associated with a powerful religious movement arising in Baghdad, which was influential there throughout the ninth through thirteenth centuries C. and thereafter in Damascus;[117] and second, the fact that it attracted more than its share of capable and influential scholars.[118] In the eighteenth century, in the Ḥanbalī domain in central Arabia, there arose the Wahhābī movement, which was not only in fiqh but in spirit firmly in the Ḥanbalī camp. Thus, Saudi Arabia, when it was united in 1926 under the Wahhābī banner, became also Ḥanbalī in fiqh.

F. THE UNIVERSALITY OF SHARĪ'A AND THE TERM "LEGAL SYSTEM"

In the Introduction, we discussed how an impulse dictated by Western ideas of law study, and the need to be assured that observation is on common ground, in common currency, with the idea of law in the West, requires us to adopt as method the observation of the practice of the law. We concluded that the practice would afford a more stable grounding for the subtle and demanding task of grasping divergences in the reality

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[117]Henri Laoust, "Le Hanbalisme sous le Califat de Baghdad (241/855 - 656/1258)," *Revue des Études Islamiques*, 1959:67-128; idem, "Le Hanbalisme sous les Mamlouks Bahrides (658-784 / 1260-1382)," *Revue des Études Islamiques*, 1960:3-71.

[118]This is not my own observation, but I cannot find its source.

architectures of the two legal worlds. For example, we are told that Islamic courts are "religious" courts, while Western courts are not. If we then observe Islamic courts, in a context allowing comparison with Western courts, we should find functional differences of operation suggestively related to this important distinction. These differences, like the outcroppings of inner strata, should lead us to deeper perception of the structure of an Islamic court. This perception should qualify us to respond to the comparative inquiry entailed by the statement that Islamic courts are "religious."

This program requires us to define a commonly-held zone of "legal system" and "legal practice," within which to confine our direct observations of legal behavior. Law in the West has become positive, subsisting in an external, secular, and public sphere. To talk, then, about comparisons with modern Western law, we shall need to confine our observations to this positive legal sphere.

This, as we now know, is to impose a foreign framework on Islamic law, since the latter claims a much broader scope of application. As revealed by the contents of any fiqh manual, Islamic "black-letter" law comprises not only "law" in the usual sense, but also and indissolubly, religious, moral, familial and social norms and guidance -- including religious ritual, personal hygiene, family obligations, good manners and social ethics. Law governs the believer when he prays,

bathes, feeds his family, greets others in the street, weighs goods in the balance, concludes a contract, offers testimony in court, acts as judge, engages in warfare. All of these "laws" and their application can be seen as positive, in the sense that the rules can be known and compliance with them observed; but they hardly all seem "laws" in the usual sense. This is as to substantive rules of the fiqh. Fiqh rules governing procedure and providing for systems of application exhibit the same universality: they include systems of application that are private, individual or purely religious, i.e., sited in the individual's conscience; they then extend to family, group, communal and social controls on behavior; and finally they include the enforcement mechanisms of state power -- public, legal and constitutional. Again these strands are brought together indissolubly, all considered within and intrinsic to the law. Thus, a believer enforces the law when he compels himself to arise for dawn prayer, when he disciplines his children, when he reconciles quarreling neighbors, when he refuses to aid an immoral business transaction, when he brings immoral or illegal behavior to official attention, when as a religious scholar he advises others or preaches from the Friday pulpit, when as a citizen he protests to the government about its failings, and when as a state official he collects alms-taxes, convicts a murderer,

or invokes a treaty.[119] In concept, in all these roles, the duty and manner of enforcing law on others shares the same root with one's purely personal moral code. Thus, in holding a role of authority over others, obedience to the divine law governing that role is indissolubly both a public duty owed others and a personal duty, like worship, owed God. Legal behavior is typically at once inward devotion, outward religious worship, and secular legal act; a legal determination is at once an inquiry into transcendental truth and a promulgation of binding secular law. These remarks intimate how widely divergent is the shape, the architecture, of the ideal representations of these two legal systems, considered as integral wholes.

If, then, we confine our observational field to that of Western positive law, what consequences will this have for our method? Of course, our method intends the observed events only as fixed points from which to explore, using also ideal representations, the much larger internal reality architecture of Islamic law. But, still, does not a narrow field of observation threaten a distortion of vision? Should we not also observe and compare Western and Islamic private prayer, family life, communal pressures to conformity, and so forth?

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[119]I justify here ignoring private applications, to concentrate on legal phenomena in our sense, and thereby put off for another day inquiring how these private acts take different form from counterparts in the West because of their continuity with such legal phenomena.

The answer is yes, but limitations on us force approaching the material using the particular template of Western law. We must compensate for the limitation with a special caution. Our sense of the Western legal world-view is vigorous. To counterbalance it we must observe, and keep in mind, some of the great axes that define the Islamic legal world. The evidence already given in this Chapter has exposed a few of these axes, at the level of doctrine. For example, we have begun to realize that the Islamic legal world denies or views very differently certain cherished dualisms -- of religious and secular, transcendent and mundane, church and state, private and public, individual and social. In learning Islamic law material we must exercise care not to import habits of legal thought born of these dualisms, and remain open to other possibilities; we also need a compensating tension not to imagine differences where they do not exist.

In view of the above, let us define the term "Islamic legal system," which we have already used several times. This term, which has no Islamic counterpart, shall refer to those phenomena that occupy, in terms of function, a sphere of social ordering roughly congruent to that of the Western legal system.[120] Special cautions accompany this artificial term. The accustomed understanding of "legal system" in the West,

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[120]It does little good to attempt precision here in defining the term in its Western sense; my own thinking is informed by H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

deriving from secular and positive laws and constitutional systems, may cause us to see law-making when done formally by legislatures or courts, but not, for example, in legislation contained in the Qur'ān and thus fixed in the minds of all, or in a declaration by an esteemed religious academy on an ancient legal-doctrinal controversy.[121]

It would be less dangerous, but too cumbersome, to say instead that we shall inquire into the functions of adjudication, constitution and legislation. The advantage of these latter terms is that they possess roughly overlapping counterparts in fiqh terminology: there is for adjudication the topic of *qaḍā'*; for constitution, fiqh topics of *aḥkām sulṭāniyya* (or *uṣūl al-ḥukm*) and *siyāsa shar`iyya*; for legislation, topics from uṣūl al-fiqh, especially ijtihād, and again *uṣūl al-ḥukm* and *siyāsa shar`iyya*. (These terms coincide only if we take them also as not only bodies of law, but also as functions.)

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[121]A positivist conception of the legal system such as Hart's can here be exploited, oddly enough, to counter our bias toward positive law, by suggesting means to observe laws of all types -- even "divine" or "moral" ones -- in their observable legal effects. This is a starting point for comparisons with our own system. By doing so I do not, obviously, adopt other tenets of legal positivism of law, such as the separation of law and morals, or of law and custom, etc. Cf. Roberto Mangabeira Unger, *Law in Modern Society* (New York: The Free Press, 1977), 52-54, for a definition of "legal system" as purely modern.

PART III

PLAN OF FOLLOWING CHAPTERS

In the following chapters, discussion of legal and constitutional practice in Saudi Arabia will proceed by division of observed phenomena into two areas: first, judicial practice, including judicial lawmaking; and second, state legislation and related constitutional questions.

This may seem to invert the natural order: should not the larger order of the legal system, the state, be appreciated first, and then judges' actions studied as part of it? But that is the beginning of a contrast. Since this is a religious legal system, we must begin with the individual actor in it. We start by inquiring into ijtihād, the fundamental method by which not only judges, but also the Islamic adviser of conscience called the *muftī* -- and indeed even laypeople confronting any uncertainty -- must determine for their own consciences the content of the Islamic law.

Thus, in the next chapter, Chapter Two, we study the Saudi Islamic court.[122]

Chapter Three then moves to the stage of greater complexity, taking up the realms of state legislation and constitutional order.

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[122]In taking up the court we skip over the private, family and communal spheres of application and enforcement of the law. Of the communal the most doctrinally elaborated category is the *ḥisba*, or the duty to "order the good and forbid the evil." See Chap. 3, n. 22 below.

C H A P T E R

T W O

T H E J U D I C I A L S Y S T E M

PART I

INTRODUCTION TO QAḌĀ', THE ART OF JUDGING

A Saudi Arabian judge's first words, on introducing me to his court, a commercial court, were, "This is the judgment only of this world. In the Hereafter we shall be confronted with all those on whom we give judgment here, and asked to give an account."

This statement springs from certain reported sayings of the Prophet Muḥammad. A number of potent aḥādīth form the conception of ***qaḍā'***, or the art and function of judging, in Islam; they are the staple of fiqh discussions of the art of judging.

> The just qāḍī will be brought on the Judgment Day, and confronted with such a harsh accounting that he will

wish that he had never judged between any two, even as to a single date.[1]

One who is appointed judge [*qāḍī*] is as slaughtered without a knife.[2]

Judges are three: two in the Fire, and one in Paradise.[3]

These sayings are surprising to the Western ear -- they hold that even the just qāḍī will rue his judgments; that appointment to the office is a metaphoric slaughter; that a judge has poor odds for the Hereafter. How could these texts so describe the function of applying God's law -- which one would expect to be of highest merit?[4] The most revered authorities of the law are reported to have avoided, even at the cost of actual or threatened punishment, appointment as qāḍī.[5]

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[1]Ibn Ḥanbal, 6:75; al-Bayḥaqī, 10:96. See Burhān al-Ā'imma Ḥusām al-Dīn 'Umar b. 'Abd al-'Azīz al-Ṣadr al-Shahīd (d. 536 H., 1141 C.), *Sharḥ adab al-qaḍī li-al-Khaṣṣāf*, ed. Muḥyī Hilāl al-Sirḥān, 4 vols. (Baghdad: Government Of Iraq, Ministry Of Awqāf, 1397 H., 1977 C.), commenting on work by Abū Bakr Aḥmad b. 'Umar al-Shaybānī al-Khaṣṣaf (d. 261 H., 875 C.), 1:136 n. 5.

[2]Abū Dāwūd (Aqḍiya 3571-72); Ibn Māja (Aḥkām 2308); al-Tirmidhī (Aḥkām 1325). See al-Ṣadr al-Shahīd, *Adab al-qāḍī*, 1:145 n. 4.

[3]Abū Dāwūd (Aqḍiya 3573); al-Tirmidhī (Aḥkām 1322); Ibn Māja (Aḥkām 2315). See al-Ṣadr al-Shahīd, *Adab al-qāḍī*, 1:163-4.

[4]See p. 150 below.

[5]See N.J. Coulson, "Doctrine and Practice in Islamic Law: One Aspect of the Problem," *Bulletin of the School of Oriental and African Studies*, 18 (1956): 211-226.

The warning extends to the litigants, as shown in another saying of the Prophet:

> You bring me lawsuits to decide, and perhaps one of you is more skilled in [presenting] his plea than another, and so I judge in his favor according to what I hear. He to whom I give in judgment something that is his brother's right, let him not take it -- for I but give him a piece of the Fire.[6]

According to these texts, acting as ***qāḍī***, or judge, entails severe moral risk. Why? The reason is that the qāḍī's judgments determine rights, and take from some and give to others. In the typically condensed and concrete style of the fiqh, it is said that they declare lawful blood, property and sexual pleasure. These determinations, the Qur'ān has shown us, only God makes legitimately, through His law. The Qur'ān characterized failure to judge by God's command as unbelief, oppression; no judgment is righteous unless it be by the sharī'a.

In the face of moral hazard how then does the qāḍī proceed? No doubt, if a clear text of the Qur'ān or the sunna entails a legal judgment, the judge applies it, and then may rightfully call it God's judgment. But what of the vast sphere of legal judgments based only on ijtihād, and therefore, as we discussed, uncertain, based on mere ẓann or surmise? By what title does the judge apply his human apprehension of what is right, and not another's?

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[6]al-Bukhārī 4:204 (Ḥiyal, Bāb 10); Muslim (Aqḍiya 4); Abū Dāwūd (Aqḍiya 3583); al-Tirmidhī (Aḥkām 1339) ("*ḥasan ṣaḥīḥ*"); al-Nasā'ī 8:847; Ibn Māja (Aḥkām 2318).

Particularly if, as frequently happens, even those more learned than he have differed diametrically on the issue, how can he then rive families, disinherit relatives, seize property, or condemn accuseds?

These aḥādīth, warning of eternal peril, seem directed against not mere misfeasance or malfeasance in office, but at no less than the failure to achieve God's own immediate justice in the concrete case before him. Does this not put the judge in an impossible position? How can he achieve the like of God's transcendentally righteous judgment of the cause?

Another version of the second ḥadīth quoted above is instructive.

> Judges are three: two in the Fire, and one in Paradise. A man who has knowledge, and judges by what he knows -- he is in Paradise. A man who is ignorant, and judges according to his ignorance -- he is in the Fire. A man who has knowledge, and judges by something other than his knowledge -- he is in the Fire.[7]

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[7]See n. 3 above. There are numerous other versions, some more harsh on the judge, some more lenient. Of the former is one that says one who judges and is in error is in the Fire. Of the latter is one that says that one who knows the truth and commits oppression deliberately is in the Fire, and that one who judges without knowledge and is ashamed to say 'I do not know' is in the Fire. al-Ṣadr al-Shahīd, *Adab al-qāḍī*, 1:163-167. Another version, more copious, clarifies that the condemned ignorance is that causing destruction of men's rights, that the condemned oppression is that which is deliberate, and, cutting the other way, that the knowledge of the redeemed judge is that which agrees with the truth. Abū Bakr Muḥammad b. Khalaf b. Ḥayyan Wakī' (d. 306 H., 918 C.), *Akhbār al-quḍāh*, 3 vols. (Beirut: 'Ālam al-Kutub, n.d.), 1:15: "[O]ne who knows, and judges according to his knowledge and does oppression therein and transgresses, is in the Fire; one who is ignorant and judges the people and destroys their rights and consumes them by his ignorance is in the Fire; one

In this version the first sentence is parsed, the outcome in the Hereafter made to depend on the qāḍī's knowledge and whether he applies it. "Knowledge" here is taken to mean knowledge of sharī'a.

In a famous ḥadīth, the Prophet is reported to have asked Mu'ādh b. Jabal on deputing him governor over Yemen,

> By what shall you judge, O Mu'ādh? He said, By the Book of God Most High. He said, Then if you do not find [anything there]? He said, Then by the sunna of His Messenger. He said, Then if you do not find [anything there]? He said, I will exert as to it my opinion [*ajtahid fī dhālika ra'yī*]. Then the Messenger of God (S)[8] said, Praise to God who has blessed the messenger of His Messenger with that approved by His Messenger.[9]

Judgment, when there is no clear provision of the Qur'ān or the sunna, depends upon the process of ijtihād, or the qāḍī's fully exerting his opinion to attain to the truth.

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who knows, and judges in accordance with what he knows, and that agrees with the truth, is in Paradise."

[8]I use the abbreviation (S) in translations for the Muslim invocation of blessing on Muḥammad, which almost invariably follows his mention. The invocation is *ṣallā allāhu 'alayhi wa-sallam*, meaning "May God bless him and give him peace."

[9]Abū Dāwūd (Aqdiya 3592); al-Tirmidhī (Aḥkām 1327). See al-Ṣadr al-Shahīd, *Ādab al-qāḍī*, 1:126-7. For views rejecting its authenticity see Abū Muḥammad 'Alī b. Aḥmad b. Sa'īd Ibn Ḥazm (d. 456 H., 1065 C.), *al-Muḥallā*, ed. (with comparisons with edition by Aḥmad Muḥammad Shākir) (Beirut: Dār al-Āfāq al-Jadīda, n.d.), 1:63; Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1950), 105-6.

'Umar b. al-Khaṭṭāb, in a famed letter of instructions to Abū Mūsā al-Ash'arī, whom he deputed as governor to Baṣra, is reported[10] to state:

> Use your understanding in matters that cause hesitation and perplexity in your heart [*yatalajlaj fī ṣadrika*] on which there is no [verse of the] Qur'ān or sunna.
>
> Learn the similarities and the analogies [*al-ashbāh wa-al-amthāl*], then compare [*qis*, a word related to qiyās] matters after that. Then adopt the most pleasing of them to God, and the one closest to the truth in your view [*i'mad li-aḥabbihā ilā allāhi wa-ashbahihā bi-al-ḥaqqi fīmā tarā*].

and

> Do not let a judgment [*qaḍā'*] that you judged yesterday and then reconsidered, and that you were guided to a wiser opinion [*li-rushdika*] about, prevent you from returning to the truth [*al-ḥaqq*], for verily truth is not voided [*lā yubṭiluhu*] by anything [alt. versions: for verily truth is ancient (*qadīm*)]. Know that [reconsidering and] returning to the truth is better than persistence in error.[11]

Clearly, the qāḍī exerts effort to attain to <u>the</u> truth, to God's own judgment of the issue at hand.[12] This truth is to be learned from revelation, i.e., from the Qur'ān and sunna.

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[10]Emile Tyan, *Histoire de l'organisation judiciare en pays d'Islam*, 2d ed. (Leiden: E.J. Brill, 1960), pp. 77-82, following Margoliouth, Goldziher, and Schacht (*Origins*, 104), argues that it is a forgery of the third century, on the evidence that before the end of the second Hijrī century it is not mentioned in the legal sources most likely to have relied upon it. Ibn Ḥazm, *al-Muḥallā*, 59-60, rejects it. Note that for our purposes its authenticity is nearly irrelevant, given its centrality in later accounts of the qāḍī art.

[11]Translated from an edition of the Arabic text (with comments and translation) by D.S. Margoliouth, "Omar's Instructions to the Kadi," *Journal of the Royal Asiatic Society* (April 1910): 307.

[12]See n. 18 below concerning some who deny that God has any ruling in matters of ijtihād or uncertainty.

Where the Qur'ān and sunna afford no explicit ruling, then the qāḍī must draw his ruling from them using similarities and analogies. Any one attempt at that truth may be in error, and so judged even by the qāḍī himself in a subsequent judgment.

We see from all these texts that the only answer to the dilemma posed the qāḍī -- how without moral ruin imperfect man may judge when the sole righteous judgment is by God's transcendent truth -- is the exercise of ijtihād. This statement is, indeed, close to tautology, since ijtihād can be seen as the name for the answer to this dilemma. Or, ijtihād is properly understood only when melted in the crucible of this dilemma.[13]

Thus, it is hardly surprisingly that all the four schools, with the exception of the Ḥanafī,[14] impose as a

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[13]Conceptually, on might argue that this dilemma, in its fundamentals, is equally posed by any action at all, however solitary and individual, taken in the face of uncertainty about the divine will. Yet, it is indisputable that the dilemma has added dimensions in the case of application, judgment, on others. Most importantly, the crucial aḥādīth fixing the conception of ijtihād -- all cited in this section -- specifically concern judgment, the law's forceful implementation, and not individual actions. Thus it is fair to say that the conception of ijtihād is grasped in its fullness solely in this context of qaḍā'. A related point is that ijtihād <u>cannot</u> be grasped if understood merely as "legal reasoning," "interpretation," or "opinion," i.e., as an intellectual exercise distant from enactment in the concrete.

[14]An early Ḥanafī treatise on qaḍā', while beginning in the first sentence with the declaration "It is not permitted to anyone that he undertake qaḍā' unless he is knowledgeable of the Book, the sunna, and ijtihād of opinion and [legal] theory," also recognizes throughout the possibility of the qāḍī not having attained this standard. It advises the qāḍī to consult learned men, in order to supplement and correct his own knowledge. It permits a qāḍī to judge according to the

condition to qualification as judge the capacity of ijtihād, that is to say, that the appointee must be a mujtahid. (The qualifications necessary for the mujtahid -- essentially a pious character and specific attainments in the religious sciences -- are discussed below.[15])

Does the practice of ijtihād, if by a mujtahid, cut the knot of uncertainty by ritual effect, sealing the result with God's certainty? Does the mujtahid by a charismatic priestly office transmute uncertainty to certainty, and infuse the concrete with the transcendent? Neither of these. Ijtihād's claim to truth remains dependent on its objective arguments and proofs from knowledge conveyed in revelation; properly, no regard is paid to the person of the mujtahid beyond requiring a minimum of piety.[16] Since by definition ijtihād operates only where the revelation affords no certainty, the mujtahid

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opinion of another scholar, if he himself has no view; but if he has a conviction, he cannot judge in conflict with it. Abū Bakr Aḥmad b. 'Umar al-Shaybānī al-Khaṣṣaf (d. 261 H., 875 C.), *Kitāb adab al-qāḍī*, with commentary by Abū Bakr Aḥmad b. 'Alī al-Rāzī al-Jaṣṣāṣ (d. 370 H., 981 C.), ed. Farhat Ziadeh (Cairo: American University of Cairo, 1978), 29, 37-44.

[15]See p. 154 below.

[16]There were some fringe groups crediting free choice by sincere pious individuals. See Taqī al-Dīn Aḥmad Ibn Taymiyya et al. [hereafter "Banū Taymiyya"], *al-Musawwada fī uṣūl al-fiqh*, Muḥammad Muḥyī al-Dīn 'Abd al-Ḥamīd, ed. (Beirut: Dār al-Kitāb al-'Arabī, n.d.), 503. On the other hand, one must recognize that imāms attained exalted status in popular hagiography.

never claims that he states God's true judgment.[17] He ends his proof not with "This is God's judgment," but with "God knows best" [*allāhu a'lam*]. In all these respects, ijtihād reflects the stamp of meta-ordering's toleration of indeterminacy in the interest of exalting revealed knowledge.

There were, however, classical uṣūl views that, functionally at least, sought to overcome this sentence of indeterminacy and lend ijtihād holdings an assurance of divine truth. These were various views affirming an ancient legal maxim, "Every mujtahid attains truth [*kull mujtahid muṣīb*]," and asserting that, however various their outcomes, all mujtahids' choices were equally assured of divine approval. While these views were reluctant to claim that God entertained more than one truth for a single proposition, they held, in several variations, that He had not finally determined the correct answer, and lent mujtahids' outcomes at least the effect of divine truth.[18] These positions were a theological

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[17]For the view of some that the correct outcome has an unquestionable proof in revelation, and the scholar is obliged to find it or be sinful, see Sayf al-Dīn Abū al-Ḥasan 'Alī b. Abī 'Alī b. Muḥammad al-Āmidī, *al-Iḥkām fī uṣūl al-aḥkām*, 4 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1400 H., 1980 C.), 4:246. Shihāb al-Dīn Abū al-'Abbās Aḥmad b. Idrīs al-Qarāfī (d. 684 H., 1285 C.), *al-Iḥkām fī tamyīz al-fatāwā 'an al-aḥkām wa-taṣarrufāt al-qāḍī wa-al-imām* (Aleppo: Maktab al-Maṭbū'āt al-Islāmiyya, 1967), 65, 85, declares that the judge's decision is God's for the particular case, but this statement has to do with the judgment's effects, and is by analogy only.

[18]al-Āmidī, *al-Iḥkām*, 239-264; Banū Taymiyya, *al-Musawwada*, 496-503; idem, *Majmū'at fatāwā Shaykh al-Islām Aḥmad Ibn Taymiyya*, comp. 'Abd al-Raḥmān b. Qāsim al-'Āṣimī, 35 vols. (Riyadh: Kingdom of Saudi Arabia, n.d.), 20:19-38.

effort to account for, and to sanction, the observed cacophony of sincerely held ijtihād positions, by admitting, in effect, that the revelation under-determines the law. But such ideas pay a price: they weaken the ideal impulse behind the Islamic legal venture, that through the revelation man may hope to draw toward, perchance to know, God's own, transcendentally true judgment of his affairs. They tend to shift attention from the objective content of an ijtihād, and the proof it offers, toward the mujtahid and his subjective conviction of correctness.

The pluralism these groups did admit is of various degrees. Some declared God had neither fixed on a single legal truth, nor indicated one in His revelation, but instead sanctions with truth whatever a mujtahid should conclude. Another position, the majority view of the Ḥanafī school, retreats from this endorsement of pluralism of truth, but still reaches the same result in terms of function: while it holds that a true ruling for every case exists "with God," and that God has afforded a proof for it in His revelation, yet, in terms of the <u>obligation</u> on mankind to <u>attain</u> that truth, the mujtahid must attain, not the truth itself, but only a subjective conviction that his choice is the "most like" [*ashbah*] what God would have revealed, had He done so explicitly; this choice then enjoys, in terms of its legal significance, a truth equal to God's own choice. Even in their claim that legal truth is single, the Ḥanafīs cherish a nuance: they do not quite say that each legal truth is fixed even "with God"; He adopts rather what to Him is "most like" what He would have revealed had He done so. This formulation seems an attempt to maintain unity of truth while still explaining how the revelation fails to determine it adequately.

The majority view,[19] and the view followed in Saudi Arabia,[20] however, rejected these positions. This view expresses itself through a ḥadīth:

> If a judge [*ḥākim*] judges, and practices ijtihād, and attains the truth, he has two rewards. If he practices ijtihād and is in error, then he has one reward.[21]

This ḥadīth clearly indicates that there is only one truth with God. It suggests that revelation does afford workable guidance to the truth -- thus man earns his reward for his effort to follow it. But since even the erring mujtahid earns reward, the guidance in the revelation is not so clear that men ought to be punished for failing to recognize it. The contrasts with the previous views are subtle, but fundamental. Here there is less danger of lapse into subjectivity and relativism. The mujtahid remains under the obligation to attain to God's one true judgment of the cause; that judgment is explicitly attainable; divine right and wrong are objectively knowable from texts revealed by God; argument remains possible that one view is more likely correct than another. But these results also are obtained only at a price:

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[19]al-Āmidī, *al-Iḥkām*, 4:246-7. The latter states that from each of al-Shāfi'ī, Abū Ḥanīfa, Aḥmad b. Ḥanbal and al-Ash'arī, both views -- for and against -- have been reported. Ibid., 4:247.

[20]'Abd al-Raḥmān al-Qaḥṭānī al-Najdī Bin Qāsim, *al-Durar al-saniyya fī al-ajwiba al-najdiyya* (Riyadh: Dār al-Iftā', 1385 H., 1965 C.), 4:48-9.

[21]al-Bukhārī 4:255 ff. (I'tiṣām, bāb 13, 20, 21); Muslim (Aqḍiya 13); Abū Dāwūd (Aqḍiya 3574); al-Tirmidhī (Aḥkām 1326); al-Nasā'ī 2:223 (Quḍāh); Ibn Māja (Aḥkām 2314).

an admission that the divine legal truth is, in vast areas, functionally indeterminate, or, as the scholars would put it, known to a certainty only to God. Which mujtahid has two rewards can be known only in the Hereafter.

The great Ḥanbalī Ibn Taymiyya (d. 728 H., 1328 C.)., whose thought, as mentioned previously, is so extraordinarily influential in Saudi Arabia, states this majority view as follows:

> Only one [mujtahid] is correct. What is sought for every issue is to hit upon [*'uthūr 'alā*] a judgment that is the ruling [or judgment, *ḥukm*] "with God" [*'inda allāh*]. For that there is a proof, and what leads to divergence [of opinion] from it is not a proof. The mujtahid is obliged [*mukallaf*, i.e., charged by God's law] to attain that ruling that is fixed "with God" [i.e., in God's eyes], to follow the path to it, and to attain to its proof. If he is correct, he has two rewards. If he is in error, he is excused, because of the obscurity of the means to perceive it [*mudrik*] and the difficulty of the path, and has one reward, because he aimed to seek the truth.[22]

It should be remembered that for neither position -- that all mujtahids are correct or that only one is correct -- is the mujtahid to adopt subjective choice or truth relativism: he is to practice true ijtihād,[23] seeking God's utter truth. If he fails to practice ijtihād he earns not reward but punishment, even if by chance he hits upon the correct result. We shall draw additional conclusions from this debate below.

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[22]Banū Taymiyya, *al-Musawwada*, 503.

[23]Note that method of ijtihād must be correct, and that God has provided means to know the correct uṣūl al-fiqh, as he did the correct fundamental rational principles on which all of Islam are based.

The vital point for now is that both of these positions allow the pious qāḍī in good conscience to exercise his function. While aware of his moral risk, he is aware also that if he properly practices ijtihād, he fulfills his share in God's justice, and may look forward, not only to escaping punishment, but to reward. On the other hand, if he does not employ ijtihād at all -- if he is ignorant and judges "according to his ignorance," or if he is knowledgeable and judges oppressively "by something other than his knowledge" -- he must anticipate punishment.

The earnest qāḍī can draw further solace from aḥādīth commending the just qāḍī:

> The just are in the presence of God on pulpits of light on Judgment Day, on the right hand of Mercy -- and each of His hands are right hands -- those who did justice in their judging, in their families and in every thing in their charge.[24]

> God is with the qāḍī as long as he does not commit injustice. When he commits injustice then He leaves him, and Satan attends him.[25]

This gives the basic moral setting for qaḍā'. With slightly different results, the same calculus of moral risk is applied to another scholarly office in the legal system; this is the function of ***iftā'***, meaning the giving of a legal opinion, called ***fatwā***, plur. *fatāwā*, in answer to the request of one of the faithful. The 'ālim performing iftā', called a ***muftī***, states his view on the legal rule applying to a

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[24]Muslim (Imāra 18); al-Nasā'ī 8:221 (Ādāb al-qāḍī).

[25]al-Tirmidhī (Aḥkām 1330) ("*ḥasan gharīb*").

hypothetical fact situation put to him by the applicant; the statement is merely advisory, and its application is voluntary.[26] Fatwās often play a role in court actions, parties submitting them to the qāḍī in support of their cases; such fatwās do not bind the qāḍī but merely lend scholarly support to a legal determination sought by the party. Qāḍīs themselves consulted muftīs, to aid them in their determinations of law. If fatwās, then, play such a basic role in the application of law, what moral risk do muftīs run? We shall discuss the point further below; in general, scholars assess the moral risks of iftā' as less than qaḍā', chiefly because fatwās give mere advice, and do not bind.[27]

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[26]Although this is the basis of fatwā, circumstances can arise whereby a layman becomes bound by a particular fatwā, as when he has no alternative source of guidance, or he is already committed to the school view contained in the fatwā, etc.

[27]Shams al-Dīn Abū 'Abd Allāh Muḥammad b. Abī Bakr b. Ayyūb Ibn Qayyim al-Jawziyya (d. 751 H., 1350 C.), *I'lām al-muwaqqi'īn 'an rabb al-'ālamīn*, ed. Ṭāhā 'Abd al-Ra'ūf Sa'd, 4 vols. (Beirut: Dār al-Jīl, 1973), 1:36-8

PART II

THE THEORY OF IJTIHĀD IN SAUDI ARABIA

As seen from its centrality in qaḍā', ijtihād in theory and practice dominates mountainously the profile of the traditional Islamic legal system of Saudi Arabia, the profile that we set in the Introduction as our goal to explore. We set therefore as our task, for the remainder of this Chapter, to explore this feature of the landscape across a few reaches and inclines, mapping contours as we go.

Many possible transits could be taken from where we are, and the ones chosen may not seem tightly logically related and ordered, certainly until the larger picture is grasped. But as a general guide to our progress, for the rest of the Chapter our general direction will be from the ideal to the practical. A corollary, in one sense, is that our direction is from the individual toward the public. Recall that the concept of ijtihād is relevant not only to judging; being the name given to every human effort to ascertain God's law in cases of uncertainty, it is just as vital in every sphere of

application of the sharī'a mentioned above -- individual, familial, communal -- and not merely those within the legal system. Nor is there any distinction drawn in the theory between ijtihād by a judge, a muftī, a private scholar, or a ruler.

This Part II introduces ijtihād in Saudi Arabia, both in theory and in its historical and traditional practice. This discussion may seem still ideal, perhaps disappointing a reader eager to see contemporary Saudi practice. But patience is needed while we set this foundation, since this idealist medieval theory is the conscious content of contemporary Saudi legislative theory and practice.

Leaving general theory, Part III takes up ijtihād in the iftā' practice of Saudi Arabia -- thus moving one step toward the public sphere. At last, in Part IV, we arrive to consider ijtihād in the practice of the courts. This Part divides according to ijtihād in determining the ruling (substantive law), and ijtihād in determining the facts (procedural law). At that point we end consideration of ijtihād in adjudication, and in Chapter III enter fully into the public sphere, taking up legislation and law application at the level of the state.

A. FREEDOM OF IJTIHĀD VS. THE "CLOSING OF THE DOOR OF IJTIHĀD"

Returning to our discussion of the qāḍī's ijtihād, we should first ask, what are the qualifications entitling a qāḍī to practice ijtihād, which alone preserves him from ruin? A first qualification is to be *'adl*, possessing *'adāla*, or sound religious practice and good character. Only the just, the righteous, are held capable of arriving at truth. Next, there are requirements of knowledge. One must know the legally relevant Qur'ānic texts, usually numbered at 500, and be aware which of these are abrogated by others, which came first, which are general and which restricted, which clear and which vague. He should know the important legal aḥādīth, or at least how to consult them in reference works. He must know upon what ijmā' has been formed. One must know the Arabic language accurately enough to understand the Qur'ān and sunna. One must know the rules governing methods of deduction of legal rules from their sources and the ranks of legal sources.[28]

None of these qualifications would seem that august, or rare of fulfillment. Yet despite this, and despite the

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[28] 'Abd al-Wahhāb Ibrāhīm Abū Sulaymān, "Khaṣā'is al-tafkīr al-fiqhī 'ind al-Shaykh Muḥammad b. 'Abd al-Wahhāb," in Jāmi'at al-ImAm Muḥammad b. Sa'ūd al-Islāmiyyah Markaz al-Buḥūth, *Buḥūth Usbū' al-Shaykh Muḥammad b. 'Abd al-Wahhāb* 1:390 (Riyadh: Imām Muḥammad b. Sa'ūd Islamic University, 1403 H., 1983 C.), citing Abū Ya'lā Muḥammad b. al-Ḥusayn al-Farrā', *al-'Udda fī uṣūl al-fiqh;* Muwaffaq al-Dīn Abū Muḥammad 'Abd Allāh b. Aḥmad b. Muḥammad Ibn Qudāma (d. 620 H., 1223 C.), *al-Mughnī wa-yalīhi al-sharḥ al-kabīr,* 12 vols. (1972; repr. Beirut: Dār al-Kitāb al-'Arabī, 1403 H., 1983 C.), 11:380; see generally, Wael B. Hallaq, "Was the Gate of Ijtihad Closed?," *International Journal of Middle East Studies* 16 (1984): 5-7.

preceding demonstration of the degree to which ijtihād is vital to the enterprise of application of the law, there came a point -- no precise date is known[29] -- when scholars began to claim that ijtihād had ceased, that the "door of ijtihād had closed." Thereafter, even scholars were to pay blind obedience to some scholar of the past, without inquiry into the basis for the latter's views, exactly as laymen had been obliged to follow mujtahids since the beginning. The practice of legally following another without independent inquiry is called ***taqlīd***, meaning literally the conferring of a badge of authority on another. One who practices taqlīd is called a ***muqallid***.

By Orientalists and modern Muslims great emphasis has been placed on the "closing of the door," for varying purposes. For our purposes we need to make two sets of observations, which appear at first to be opposed. First, it is unquestionable that as time progressed in Islamic legal development, paths laid down in the past were rarely openly departed from. Solutions of the past, first in fundamentals but increasingly in details, were considered to exhaust all alternatives in the search for truth, a feeling supported

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[29]Variously dated in the ninth, tenth, eleventh, and fifteenth centuries. Schacht, *Introduction*, 70-71 (by 900 C.); Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 80 (early 10th C.); Marshall G.S. Hodgson, *The Venture of Islam* (Chicago: University of Chicago Press, 1974), vol. 2, *The Expansion of Islam in the Middle Periods*, 406, 448 (15th, referred back to 9th).

atmospherically if not always precisely by the concept of ijmā'. The resulting situation is partly summed up in the fact, already referred to, that fiqh development became circumscribed in four accepted schools. But beside this, even within each school the day-to-day discussion of legal doctrine came to be conducted usually in terms, not of the original revealed sources of the law, but of the opinions of the school's own authorities, with an extraordinary emphasis on the views of the school's eponym. Each school's early luxuriating variety of views on every issue was narrowed continually, until in the end on each issue each school professed a single view applied in practice.

Our second set of observations is, on the other hand, to note that, alongside assertions of a universal taqlīd, one also encounters wholly contrary claims and practices regarding ijtihād. In the midst of gloomy remarks about the extinction of mujtahids, great mujtahids continued to appear, known and even generally proclaimed as such. Throughout the centuries many -- particularly from the Shāfi'ī and Ḥanbalī schools[30] -- wrote polemically against a general habit of taqlīd as stultifying to the sharī'a spirit.[31]

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[30]Significantly, in view of what follows, these were the schools with the narrowest application as law of the land, and the least official endorsement. Taqlīd is most characteristic of the rationalist Ḥanafī school, which so early cooperated with the 'Abbāsid dynasty, and, reportedly even under Abū Yūsuf, bound its judges as muqallids to apply its opinions.

[31]Hallaq, "Gate."

Thus, clearly the "door of ijtihād" had not closed for all, or at all levels, or for all purposes. Perhaps the significance of the "closing of the door of ijtihād" can be learned from exploring the relation between these two sets of observations. In what follows I sketch a new approach to this complex problem, arising from indications in the Saudi Arabian material.

Let us begin with an obvious point, that there are numerous weighty reasons why the rules of law enforced within a single geographic area and legal school should be relatively predictable and fixed. Not only are all legal actors benefited thereby, for evident practical reasons; even in ideal terms, should not the mass of laymen expect the same virtues of a law they believe to be divine? Also, what if the common run of judges and muftīs simply cannot be held to the levels of knowledge, rectitude and piety essential to their roles under the ideal law? And what if wielders of power fail to submit properly to sharī'a, and instead seek to crush scholarly objectivity in lawmaking and adjudication to serve their own interests? Clearly, an obligation upon rank-and-file judges and muftīs to hew to a single school's views would provide an attractive solution to all of these challenges.[32]

From such considerations the hypothesis is suggested that the doctrine of taqlīd had its origins in the sphere of

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[32]The point is made implicitly in a famous work on public law by the Shāfi'ī al-Māwardī (d. 450 H., 1058 C.) in a passage to be discussed in Chapter Three. See p. 701 below.

application of the law, and that the doctrine is best understood in terms of legal schools' roles in the internal dynamics of actual legal systems. This hypothesis would account for the two conflicting sets of observations about the door of ijtihād, by locating each on a different level: compulsory taqlīd at the level of ordinary scholars and the day-to-day application of the law, and claims to ijtihād freedom at the level of elite scholars whose public stature and freedom from professional or institutional constraint allow them to innovate openly.

Let us enter the debate on ijtihād and taqlīd, and test this hypothesis, by comparison of two authors' statements, both from the 19th century, both endorsing long-held traditional views. One is a Ḥanafī, living in Damascus, not far from the Wahhābī strongholds of the Arabian Peninsula; the other is a Wahhābī Ḥanbalī shaykh. The latter, the Wahhābī, position is the one to which modern Saudi Arabia is heir, and will be the one to concern us throughout this book. The former position we include for its value in comparisons, and because it is the position against which the Wahhābīs[33] -- and after them the modern Saudi 'ulamā' -- so vigorously

[33]As here, I shall use this term to refer to the religious movement (called "Wahhābism" by outsiders, see Introduction n. 19, above), only for the period before the emergence of the modern Saudi state after 1926, and shall use "Saudi" for all later periods.

polemicize. Thus one must know of it to understand thought and practice in Saudi Arabia.[34]

Ibn 'Ābidīn, a scholar of Damascus and the last important traditional Ḥanafī author (d. 1252 H., 1836 C.), represents the school most wedded to the concept of taqlīd. In a short treatise he discusses taqlīd and ijtihād, largely through quotes from earlier Ḥanafī authors.[35] He offers a classification of mujtahids, in which mujtahids are arranged in ranks, understood in rough terms to have succeeded each other chronologically. First are absolute mujtahids, such as Abū Ḥanīfa and the other imāms (i.e., founders of schools); second are mujtahids within the school, who follow their imām only in his uṣūl, such as Abū Ḥanīfa's companions, chiefly Abū Yūsuf and Muḥammad al-Shaybānī; third are mujtahids in issues [*masā'il*], who can derive rules only in cases not dealt with by their predecessors, following them in uṣūl and otherwise in derived laws [*furū'*]; fourth -- and here the classes of mere muqallids begin -- muqallids capable of "derivation"

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[34]A second reason is to assist the reader in relating the matter of this book with Western writings on fiqh. The taqlīd style of Ibn 'Ābidīn's writing is the style of legal reasoning with which Western study of fiqh has been, from the time of its first acquaintance with Ḥanafī practice in the Ottoman Empire and in India, chiefly acquainted and preoccupied. The overwhelming importance of the Ḥanafī school geographically thus may have warped our understanding of such aspects of other schools as are being discussed here.

[35]Muḥammad Amīn b. 'Umar Ibn 'Ābidīn (d. 1252 H., 1836 C.), "Sharḥ al-manẓūma al-musammāh bi-'uqūd rasm al-muftī," in idem, *Majmū'at rasā'il Ibn 'Ābidīn* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 9-52.

[*takhrīj*], meaning those capable, not of deriving holdings directly from the uṣūl, but only of elaborating and clarifying earlier holdings within the school; fifth, muqallids capable of expressing preference for one view in the school over another; sixth, muqallids capable of distinguishing strong views from weak, or established views from rare; and seventh, muqallids "who know not right from left." At each level he names actual scholars; the last mujtahid he names, Fakhr al-Dīn Qāḍīkhān, died in 592 H., 1196 C., while the earliest muqallid he names, Abū Bakr Aḥmad al-Jaṣṣāṣ, died in 370 H., 981 C. In his own time, only "utter muqallids" exist. Although Abū Ḥanīfa himself is reported to have said, "If a proof seems good to you, hold with it," and "If the ḥadīth is valid, it is my opinion," yet, Ibn 'Ābidīn holds, this does not imply permission to adopt a view wholly different from any of the school; and in any case, this permission does not extend to those of his time. He cites certain mechanical rules by which alone the muqallids of his time must determine which views should be followed.[36]

> You are aware that it is most correct that the mujtahid muftī choose [among the views in the school], and give as his opinion the view with the stronger proof, and not be bound to proceed according to rule.[37] But since the mujtahid muftī has died out in our time, and only the utter muqallid remains, we are obliged to proceed by rule, and give our opinion, first by the view

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[36]Ibid., 26-28, 39-41.

[37]Ibn 'Ābidīn thus admits that, in choosing views within the school, consideration of the revealed proof for positions is the ideal practice of the muftī.

> of the imām, then [by so-and-so's view], then [by so-and-so's] [i.e., following the mechanical rules of preference among transmitted views] as long as we do not see the mujtahids in the school declaring another view correct because of the strength of its proof, change in times, or something else which appears proper to them . . . .[38]

Despite the scheme of declining classes of ijtihād he endorses, he defends the great Ḥanafī of the 15th century, Kamāl al-Dīn Muḥammad Ibn al-Humām (d. 861 H., 1457 C.) in his practice of inquiring into the proofs, and assigning preference to views according to their proof; he even quotes with approval the statement that Ibn al-Humām was of the rank of ijtihād, and with him his student Qāsim.[39] But Ibn al-Humām may be followed by Ḥanafīs only when he makes choices among existing Ḥanafī views; when he, as he did at times,[40] adopts positions differing with all previous Ḥanafī positions, his views cannot be followed, and for this rule Ibn 'Ābidīn invokes the support of Qāsim himself.[41] Thus, Ibn 'Ābidīn does not deny that great scholars may appear and interrupt the expected sequence of decline; he does not reject out of hand their ijtihād, but he makes careful provision that such scholars do not disrupt school identity and discipline. All the lesser lights who acknowledge Ḥanafī identity are duly warned that the genius of such as Ibn al-Humām can be

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[38]Ibid., 28.

[39]Ibid., 32.

[40]Ibid., 51.

[41]Ibid., 32.

benefited from only within the predefined limits of the school; otherwise, they must see Ibn al-Humām as not a Ḥanafī at all. Thus, Ibn 'Ābidīn insures that the rules of group identity and discipline continue undisturbed despite the innovations of an independent genius.[42] Here he betrays that taqlīd discipline is a theoretical construct having origins distinct from any denial of the root, fundamental ideal of individual ijtihād.

In distinction to those who can weigh the revealed proofs, for the scholars of Ibn 'Ābidīn's day development of the law is confined to the epistemologically lowest levels of justification recognized in the sharī'a, contingent, mundane plane of human needs and conventions. Ibn 'Ābidīn holds that custom, necessity, or change of circumstances may be invoked to justify substituting a view of the school otherwise considered weak or abandoned for the view ordinarily binding; to vary from the views of the authorities in such cases is only apparent deviance, it being rather merely to follow them truly. Note that because of this holding, the rules of the school as applied can no longer be something laid down by the earliest scholars, or even in the books: Ibn 'Ābidīn cautions that even were a man to memorize all the books of the school,

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[42]Nonetheless, for an example of the manner in which a thought by Ibn al-Humām was made the pretense for a development in the law, see Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988), 84 ff.

he would still need to apprentice himself in everyday practice, since many matters are determined according to custom and exigencies varying from time to time.[43]

Our second scholar is Ibn Mu'ammar (d. 1225 H., 1811 C.).[44] His statement reflects the characteristic Wahhābī position on taqlīd.

> Adopting the [revealed] proof [for a position] without considering the statements of [other] 'ulamā' is the function of the absolute mujtahid. The muqallid, who does not satisfy the conditions [of ijtihād], is obligated to practice taqlīd and to consult those with knowledge. . . . [But the idea that one must follow a single school, never leaving it,] is a false view which Satan has cast upon many claimants to knowledge. . . . [T]hey imagine that study of the proofs is a difficult matter, of which only an absolute mujtahid is capable. [They imagine] that one who considers the proof [for a view] and differs with the imām [of his school on the ground of the proof] has departed from taqlīd and claimed for himself absolute ijtihād. . . . [They have even arrived at a claim] that one associated with the school of an imām is obliged to accept that school . . . even if it differs with the Qur'ān and the sunna. Thus, the imām of the school is to the members of his school as the Prophet is to his Community, it being impermissible to depart from his view or differ from him. . . .
>
> If these fanatic adherents of the schools find a proof, they compare it with the statement of their imām, and if the proof agrees with the statement, they accept it, and if it differs they reject it. They follow the statement of the imām and resort to stratagems in rejecting aḥādīth by every means they can find. If it is said to them, this is a ḥadīth of the Prophet of God (S),

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[43]Ibn 'Ābidīn, "Sharḥ," 46.

[44]Ḥamad b. Nāṣir b. 'Uthmān b. Mu'ammar al-Najdī al-Tamīmī was born in Najd and studied under Ibn 'Abd al-Wahhāb in Dar'iyya. He is most famous for having defended Wahhābī doctrines in a 1151 H., 1738 C. debate with Meccan scholars sponsored by the Sharīf of Mecca, a defense later published. After the Wahhābī conquest of the Ḥijāz he was inspector over the rulings of qāḍīs of Mecca. Rudolph Peters, "*Idjtihād* and *Taqlīd* in 18th and 19th Century Islam," *Die Welt des Islams*, XX, 3-4 (1980).

> they say, are you more knowledgeable in ḥadīth than [our] imām? . . .
>
> . . . You will find the fanatic adherents of the schools in many matters differing with the explicit positions of their imāms, and following the views of the latecomers in their school, for they are desirous of what the latest has said, and then the latest. . . . For the people of every age judge only by the view of [the scholar] closest to them. The more the time is distant the more the views of the predecessors are abandoned and avoided, until the books of the predecessors are hardly found among them. . . . [The Ḥanbalī school is given as an example of such practices.][45]

Thus, Ibn Mu'ammar condemns the practices toward which the Ḥanafī view of Ibn 'Ābidīn tends, such as an exaggerated reverence toward the first authorities of the school, while actually taking the applicable law from the last and most local sources.[46] He considers it incumbent on scholars to look to the proofs offered by those of whom they intend to practice taqlīd. In his view, to choose among these scholars' views, perhaps because of a ḥadīth of the Prophet, is apt, and remains taqlīd, since even so one follows the opinion of another. The practice he advocates is most commonly referred to as ***tarjīḥ***, meaning literally "to declare preponderant, to declare weightier in the balance."

Thus, Ibn Mu'ammar's position, in contrast to that of Ibn 'Ābidīn, would open, even to those unqualified to be mujtahids, continual resort to the revealed sources -- the

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[45]Bin Qāsim, *al-Durar*, 4:27-30.

[46]Space does not allow its development here, but this protest is identical in substance to that made much earlier by al-Shāfi'ī against schools of law based on ra'y and local practice. See Schacht, *Origins*, 86, where al-Shāfi'ī accuses his opponents of taking from "the last generation."

Qur'ān and the sunna -- to review the proofs of views, even those of the greatest imāms.

Before drawing further comparisons between these two scholars, it will be useful to deepen our grasp of Ibn Mu'ammar's views through review of writings of Ibn Taymiyya and his student Ibn Qayyim al-Jawziyya, known also as Ibn al-Qayyim[47] (d. 751 H., 1350 C.). Ibn Mu'ammar, and other Wahhābī shaykhs, in such polemics against taqlīd echo, and often quote, these writings.

Not only here, but in nearly every matter, the 'ulamā' of the Wahhābī movement are inspired directly by Ibn Taymiyya.

> Among us the Imām Ibn al-Qayyim and his shaykh [Ibn Taymiyya] are two rightful imāms among the Sunnīs, and their books are to us among the most highly regarded. However we do not practice taqlīd of them in every question, since everyone's opinion is adopted and rejected except that of our Prophet (S).[48]

Shaykh Ṣāliḥ 'Alī al-Ghuṣūn, member of Permanent Board of the Supreme Judicial Council and of the Board of Senior 'Ulamā',[49] stated that the Wahhābīs followed the "school" [*madhhab*] of Ibn Taymiyya and Ibn al-Qayyim in both their uṣūl (meaning their root principles in both theology and law) and their elaborated fiqh.[50] In modern Saudi Arabia, the influence of

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[47]Shams al-Dīn Abū 'Abd Allāh Muḥammad b. Abī Bakr Ibn Qayyim al-Jawziyya.

[48]Bin Qāsim, *al-Durar*, 4:8.

[49]Hereafter, "Shaykh al-Ghuṣūn."

[50]Shaykh al-Ghuṣūn, interview with author, Supreme Judicial Council, Riyadh, Dec. 18, 1984.

Ibn Taymiyya and Ibn al-Qayyim continues. For example, Shaykh al-Ghuṣūn stated that the most important source for the understanding of the uṣūl al-fiqh of modern Saudi 'ulamā' is *I'lām al-Muwaqqi'īn*, a book of Ibn al-Qayyim.[51]

Ibn Taymiyya, even more than other Ḥanbalīs, waged open war on taqlīd.[52] To him blind adherence to the views of men, rather than fresh resort to the wellsprings of God-given truth in the Qur'ān and the sunna, was vital error. He understood the command in the Qur'ān,

> if you are at variance over any matter, refer it unto God and the Apostle, if you (truly) believe in God and the Last Day. . . . [4:59]

to mean reference of legal questions to the Qur'ān and the sunna, and nothing less.

> God Most High commanded in His Book that upon disagreement resort is to God and His Messenger, and He did not command upon disagreement [resort] to anything identified by any [other] principle [*mu'ayyan aṣlan*].[53]

This is a claim that any principle of resolution of legal differences, other than resort to the Qur'ān and the sunna *per*

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[51]Ibid.

[52]This notwithstanding Laoust's claim that "Tout en condamnant le [taqlīd] Ibn Taimīya n'a pas expressément formulé la nécessité de 'rouvrir la porte de l'*igtihād*' et encore moins revendiqué pour lui-même ce privilège." Laoust's observation is to be accounted for by the fact that to make such claims would contradict Ibn Taymiyya's theory root and branch. Henri Laoust, *Essai sur les doctrines sociales et politiques de Taki-d-Din Ahmad b. Taimiya* (Cairo: Imprimerie de l'Institut Francais d'Archéologie Orientale, 1939), 228.

[53]Quoted in Bakr b. 'Abd Allāh Abū Zayd, *al-Taqnīn wa-al-ilzām: 'ard wa-munāqasha* (Riyadh: Maṭābi' Dār al-Hilāl, 1402 H., 1982 C.), 56.

se, is illegitimate. To him, then, such a duty prevents one from giving total adherence to any single school of law, which many in his time believed the duty of every Muslim.

> On the issue of requiring following a single school, and forbidding shifting to another, there are two [opposed] views in the school of Aḥmad [b. Ḥanbal] and others. [As for] the view that anyone other than the Prophet (S) must be obeyed in every command and prohibition, it is against the ijmā'. As to permitting it [one may say what one likes.] [But] one who requires taqlīd of a particular imām must be asked to repent, and if he refuses, he is to be killed [i.e., his view is so indefensible that it makes him an apostate deserving the death penalty]. If one says that [following a single imām] is fitting, he is ignorant and erring.[54]

Thus, it is an indisputable heresy to require obedience to any single man. God, not mere man, is deserving of obedience. He allows that it may be another issue whether one is bound to follow a single school of law; on this even the Ḥanbalīs have differed. His own view is that such a view is wrong, and that even the unlearned should not be placed under that restriction.

> The muftī and the soldier and the common man, if they speak of a thing according to their ijtihād, whether by ijtihād or by taqlīd, intending to follow the Messenger to the extent of their knowledge, do not deserve punishment, this by the ijmā' of the Muslims, even if they have committed an error on which there is an ijmā'.[55]

> If a Muslim, whether a learned man or not, abandons what he knows of the command of God and His Messenger

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[54]Ibn Taymiyya, *al-Fatāwī al-kubrā li-Ibn Taymiyya*, 5 vols. (Beirut: Dār al-Ma'ārif, 1398 H., 1978 C.), 4:625.

[55]Ibn Taymiyya, *Majmū'at*, 35:379.

(S), for the view of any other, he deserves punishment.[56]

Ibn Taymiyya would have all men, learned and unlearned, resort to the revealed texts and to argumentation and reasoning upon them, in the degree to which each is capable.

> For people to know the preponderance of one view over another is easier than to know which scholar is more learned and more religious [and thus more deserving of taqlīd].[57]

Ibn Taymiyya refers here to the view of many who would require a layman's adherence to a single school, that even in such a case the layman ought to exert the effort to determine, in his own conscience, which imām or school is the more deserving of adherence;[58] this obligation would seem the minimum if the individual's conscience is to be involved in the fixing of the legal standard for his behavior. But Ibn Taymiyya would prefer even for the unlearned that they consider individual opinions with their proofs.[59]

Judges or muftīs are of course under a greater obligation:

> There is an ijmā' of the 'ulamā' that judgment and iftā' based on whim [hawā], or on a statement or argument without any consideration of tarjīḥ, are forbidden. One must act as required by his conviction . . . and this by ijmā'. . . .[60]

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[56]Ibid., 374.

[57]Ibn Taymiyya, *al-Fatāwī al-kubrā*, 4:625.

[58]Ibn Taymiyya, *al-Fatāwī al-kubrā*, 2:237-40, esp. 238.

[59]Ibn Taymiyya, *al-Fatāwī al-kubrā*, 2:237-40.

[60]Ibn Taymiyya, *al-Fatāwī al-kubrā*, 624.

He finds that, by ijmā', a judge must not judge without considering the reasons why his judgment is more correct -- in terms of the divine law -- than other views. Failing to do so is associated with judgment by mere whim [hawā].

Through such considerations, Ibn Taymiyya is led to state a general rule that all men, according to their ability, are under obligation to consider the various opinions advocated by 'ulamā', and to choose among differing opinions according to their detailed proofs. This rule would not prevent taqlīd, but would restrict it to a minimum.

> Fiqh in religion is knowledge of the rules of the sharī'a with their revealed proofs. . . . But some among the people may not be capable of [knowing] the detailed evidences in all his affairs, so he is not held to what he is unable to know, while he is obliged to do what he is capable of. As for one capable of reasoning from the proofs, [there are three views:] that taqlīd is prohibited to him absolutely, that it is permitted to him absolutely, or that it is permitted to him upon need, as when time is too short for derivation from the proofs. This last view is the most just. . . . Everyone's ijtihād is according to his capacity. Thus, one who studies an issue in which the 'ulamā' have differed, and thinks that supporting one of the views are texts having no opposition of which he is aware after study such as one like him is expected to perform -- such a one faces two alternatives. First, he may follow the view of the former imām, merely because he is the imām whose school he studied. Such as this is not a sharī'a proof, but mere convention, opposed by the convention of another based on his study of the school of a different imām. The other alternative is that he follow the view which in his opinion predominates because of the texts which support it. [This alternative, then, constitutes] his agreement with an imām, by whom he counterbalances the other imām. The texts are preserved from being contradicted by the practice, with respect to him. This is the alternative that is appropriate. . . . [To] one who says, the latter view may have a proof preponderating over this text, and I do not know it, it shall be answered that God Most High said, "Fear God as much as you are able" . . ., and the knowledge and fiqh of which

> you are capable in this matter has led you to the view that this position is preponderant, so you ought to follow it. . . .[61]

To summarize then, we find that Ibn Taymiyya, and the Wahhābī movement after him,[62] hold that a judge or muftī, even when not a mujtahid, is obliged to examine the proof for legal views to the extent of his capability, and to adopt that view for which the proof seems to him stronger. This position we shall henceforth refer to as the "dalīl theory." The word "***dalīl***," the Arabic word which has been translated above as "proof" and "evidence," literally means a guidepost or indicator, or in the law, a proof inserted by God in the Qur'ān and sunna to point toward the true rule of law.

Comparing these views, then, with those of Ibn 'Ābidīn, we find the two positions differ distinctly in their styles of approach to the problem of taqlīd and ijtihād. We have already noted the key difference between the two views: Ibn Taymiyya, and after him the Wahhābīs, endorse the ideal of the dalīl theory as the standard for all, particularly for the qāḍī and the muftī, while Ibn 'Ābidīn stubbornly denies its application to his age, even to its scholars, and insists instead on general rigid adherence to the accepted views of the school. The significance of this contrast would seem immense, both practically and theoretically. At the practical

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[61]Bin Qāsim, *al-Durar*, 4:20-21.

[62]'Abd Allāh Ṣāliḥ al-'Uthaymīn, "Muḥammad Ibn-'Abd-al-Wahhāb: the Man and His Works" (Ph.D. diss., University of Edinburgh, 1972), 266-275.

level, Ibn 'Ābidīn's view would seem to dictate a much greater fixity and predictability in the law's application, a single view to be followed by all adherents of the school in a single place and time, while Ibn Taymiyya's view would seem to leave individual opinion, even the qāḍī's and muftī's, unconstrained in choosing between various views with acceptable proofs. At the theoretical level, the two views differ completely in the ideal form within which those who every day issue judgments and fatwās are to justify their actions. Ibn 'Ābidīn requires justification macrocosmically, within a historical juristic institution, the Ḥanafī school, which acts and evolves corporately[63]; the legal wisdom of centuries of inimitable forebears, long occupied with the objective indicia of truth, ought to overrule any latecomer's individual preference based on these same indicia; individual creativity survives only to deal with contingent circumstance. Ibn Taymiyya, on the other hand, requires justification microcosmically, at the level of the individual legal actor; the individual moral survival of the qāḍī or muftī is at stake; the individual's conscience seeks in each specific case a fresh drawing from divine sources, whose transcendent importance is thereby instilled in the immediate and the everyday.

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[63]Cf. the school's construction of ijtihād in the qāḍī, see n. 14 above, which rather than focusing on the individual act of conscience engages in a prolonged discussion of the relation between the qāḍī's opinion, if he has one, and the opinions of his peers, consultants and predecessors.

Converging here very dramatically are a number of distinctions utterly vital to understand Islamic law both from within and from without. Some of these distinctions we have already identified; others we shall make explicit shortly. (Of the former, we easily discern here the various contrasts we have identified under the headings of "every mujtahid is correct," the aspirations to meta-ordering and to pan-ordering,[64] and the people of ḥadīth and of opinion.) All these distinctions are deeply inter-connected, and operate throughout the legal system -- in law-finding (uṣūl), law-making (legislation by the state and by the 'ulamā'), law-application (the practice of the judge), and the constitution and structure of the legal system (such as in the relations of ruler and 'ulamā'). They tend to define an overarching divergence between two manifold trends in Islamic law; by suggesting this overall divergence, and by describing a dialectic in the practice and in how legal tasks are shared out, they profoundly illuminate the Islamic legal world. Importantly for us, they also do so in a manner extraordinarily adapted to Western eyes, since they explore that legal world along meridians that, with suitable extension, locate meaningfully also the Western legal world in relation to the Islamic.

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[64]In particular, recall the suggestion, see p. 63 above, that the manner in which meta-ordering and pan-ordering together divine the legal world can be rendered by two axes, one vertical and one horizontal.

Returning to the distinctions over taqlīd, let us note that these arise at the level where law is every day made and applied, because there Ibn 'Ābidīn, but not Ibn Taymiyya, is willing to set up a system of justification -- the corporate entity of the school -- alternative to the ideal, to operate precisely where circumstances are less than ideal. At the level of the ideal theory of ijtihād, of the question whether the door of ijtihād is closed in an absolute sense, Ibn 'Ābidīn says very little, and that indirect: he does not say that ijtihād is impossible but only that it is factually non-existent; indeed, he recognizes in the recent past a relative ijtihād and even hints that highly qualified scholars may evade his restrictions. Thus, the difference between the authors seems not to be in the individual ideal, but rather in the relevance of that ideal to actual legal systems.

The dalīl theory is emphatically the position adopted by the 'ulamā' of Saudi Arabia on issues of ijtihād, and on "the closing of the door of ijtihād." It was repeatedly affirmed to me that, in Saudi Arabia, no one holds that the "door of ijtihād" is closed. Shaykh al-Ghuṣūn attested that there is no difference of opinion on this point.[65] Dr. Ḥamad al-Faryān, Deputy Minister of Justice,[66] asked, "Who would have

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[65]Shaykh al-Ghuṣūn, interview, Dec. 18, 1984.

[66]Deputy Minister of Justice for Financial and Administrative Affairs (hereafter Dr. al-Faryān). This individual as administrator is in charge of administrative support of the judicial system, as scholar is author of a doctoral treatise on Ibn Taymiyya and instructor at the

the right to close the door?" He said that every 'ālim must perform tarjīḥ, and never, while recognizing that a certain view has a better dalīl, abandon that view on the ground that he is not a mujtahid, and instead follow the school of so-and-so. Ijtihād is requisite according to one's capability, and thus ijtihād exists in degrees and subdivisions.[67] Prof. 'Abd al-'Āl 'Aṭwa, Professor of Qaḍā' and *siyāsa shar'iyya* at the Supreme Institute of the Judiciary,[68] stated that "There is no dalīl, nor half-dalīl, nor quarter-dalīl, for the closing of the door of ijtihād." He stated that ijtihād subsists until the Day of Judgment; nothing prevents even now the appearance of an absolute mujtahid, although none now seems to exist, for many reasons; among them may be colonial influence and the material-mindedness of the present-day. He suggested that it was perhaps to bar the unqualified that the idea was spread.[69] Finally, in an authoritative statement that dalīl theory applies in the judicial system, Shaykh Ṣāliḥ b. Muḥammad al-Laḥaydān, President of the Permanent Board of the Supreme

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Islamic University.

[67]Dr. al-Faryān, interview with author, Ministry of Justice, Riyadh, Oct. 15, 1984 and Nov. 11, 1984.

[68]This Egyptian scholar (hereafter Prof. 'Aṭwa) came some twenty years ago from al-Azhar University to teach law in Saudi Arabia; he several years ago retired.

[69]Prof. 'Aṭwa, interview with author, High Judicial Institute, Riyadh, Mar. 1 and 8, 1985.

Judicial Council and the highest ranking full-time qāḍī in the Kingdom,[70] stated:

> The qāḍī of Saudi Arabia is not obliged or compelled to restrict himself to the school of Aḥmad, but rather has the right to judge in the case in accordance with that to which his ijtihād leads, even if that is not the Ḥanbalī school. . . . It is not said to him, perform ijtihād within the school or without it; rather, he is requested to judge by that which he believes to be the truth.[71]

> The judges of the Kingdom are Ḥanbalīs, even though they do not commit themselves in every one of their cases to the school of the Imām Aḥmad. This is because the root principle is that of "acknowledgement of leadership" [*ittibā'*, literally, "following"], not taqlīd with no seeking of the dalīl. One practicing ittibā' of a particular school does not abandon [it] if he differs with it on the ground of a dalīl which in his view applies, since all the imāms opined that the essential principle is [to adopt] that for which the dalīl exists.[72]

(The term *ittibā'* is often used to convey the peculiar mix of taqlīd and ijtihād often resulting from adoption of dalīl theory.[73]) Shaykh Sulaymān b. 'Abd Allāh al-Muhannā, Qāḍī of

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[70]This scholar (hereafter Shaykh al-Laḥaydān) is also a member of the Board of Senior 'Ulamā'.

[71]Shaykh al-Laḥaydān, written responses to author's questions, January 13, 1985.

[72]Ibid., Feb. 27, 1985.

[73]The term was so used early, as by Abū 'Umar Yūsuf b. 'Abd Allāh al-Qurṭubī Ibn 'Abd al-Barr (d. 463 H., 1071 C.), *Jāmi' bayān al-'ilm wa-faḍlih wa-mā yanbaghī fī riwāyatih wa-ḥamlih*, 2 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1397 H., 1978 C.), 2:109-120. The term is employed in discussions whether a layman may depart from a school to which he otherwise belongs. Some would require him to follow the school in all matters. Ibn Taymiyya differs, writing: "One who follows [*ittibā'*] the imām and then differs with him [to follow another imām] on certain matters because of the strength of the proof [*dalīl*] or that one of [two imāms] is more knowing or pious, has done well. No question is raised

the Higher Court of Riyadh,[74] confirmed that he and fellow judges do consult the dalīl, and are in that sense mujtahids. He told me they consult the late Ḥanbalī books only as indexes enabling them easily to locate the relevant dalīls.[75] Shaykh Aḥmad b. 'Alī al-'Umarī, Chief Qāḍī of the Jedda Summary Court,[76] claimed a lesser order of ijtihād, in choosing among variant views of the Ḥanbalī school according to "circumstances and concomitants" [*ẓurūf wa-mulābasāt*]. He agreed when I called this *ijtihād fī al-madhhab*, meaning "ijtihād within the school."[77]

A number of authorities in Saudi Arabia assert that the goal of sharī'a education in Saudi universities is to produce scholars capable of relative degrees of ijtihād. Prof. 'Aṭwa

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as to his good character, and this without disagreement [among scholars]." Quoted in Manṣūr b. Yūnus b. Ṣalāḥ al-Dīn b. Idrīs al-Bahūtī (d. 1051 H., 1641 C.), *Kashshāf al-qinā' 'an matn al-iqnā'*, ed. Hilāl Muṣaylihī Muṣṭafā Hilāl, 6 vols. (Beirut: Dār al-Fikr, 1982 H., 1402 C.), 6:292-93.

[74]Hereafter, "Shaykh al-Muhannā."

[75]Shaykh Sulaymān b. 'Abd Allāh al-Muhannā, interview with author, Great Shari'a Court of Riyadh, Riyadh, (1), Mar. 20, 1983. This is the justification offered even for King 'Abd al-'Azīz's order that the Ḥanbalī school should be applied in the Ḥijāz after its conquest: "in view of the ease of reference of the books of [that school], and the obligation [its] authors undertook to mention the proofs after [the] issues." Judicial Council, Decision No. 3, 7 Muḥarram 1347 (June 25, 1928), confirmed by the King 24/3/1347 (Sep. 9, 1928), reprinted in Institute of Public Administration, *Majmū'at al-nuẓum, Qism al-qaḍā' al-shar'ī* (Riyadh, n.d.), 11.

[76]Hereafter "Shaykh al-'Umarī."

[77]Shaykh Aḥmad b. 'Alī al-'Umarī, interview with author, Summary Court of Jidda [*al-Maḥkama al-Musta'jala bi-Jidda*], Aug. 7, 1985.

stated that achieving the degree of ijtihād needed to perform tarjīḥ is "not difficult," and this is in fact the goal of education in the High Institute of the Judiciary, which provides graduate education for future judges. All the fiqh schools, not just the Ḥanbalī school, are taught, and the professor compares the dalīls offered by each, and engages in tarjīḥ.[78] Thus, the Institute graduates a number of students each year who, in degrees according to their individual capacities, qualify for this ijtihād. Shaykh Bakr Abū Zayd, First Deputy Minister of the Judiciary,[79] writes that to students in Saudi Arabia those sciences are taught which, when measured against the conditions of ijtihād given by the fiqh authorities, are found to comply, or approximately comply. The deficiencies in some are the result of human weakness.[80] Dr. al-Faryān stated that education of judges provided them with the "tools of ijtihād" enabling them to perform tarjīḥ.[81]

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[78]This was confirmed by a student in the Imām Muḥammad b. Sa'ūd Islamic University Sharī'a College [*Kulliyyat al-sharī'a*], Salim Morgan, interview with author, Riyadh, June 21, 1983.

[79]Shaykh Bakr Abū Zayd (hereafter Shaykh Abū Zayd), is a former judge, a foremost scholar of Ibn al-Qayyim, and second-in-command at the Ministry of Justice.

[80]Abū Zayd, *al-Taqnīn*, 46-47.

[81]Dr. al-Faryān, interview, Aug. 15, 1984.

B. THE SPIRIT OF IJTIHĀD IN THE WAHHĀBĪ MOVEMENT

Since in Saudi Arabia the practice of ijtihād, according to the ideal of the dalīl theory, is a reality, we need to explore ijtihād further, and from a specifically Saudi perspective. One can separate out three aspects of ijtihād needing to be considered: its "spirit," by which I mean its characteristic tenor arising from its origins in the thought of Ibn Taymiyya and the ideology of the Wahhābī movement; second, its theory, the exposition given internally of the method of ijtihād; and finally, its practice. In all respects, Saudi Arabian 'ulamā' have remained faithful to the tenets of the Wahhābī movement, and through the latter to the thought of Ibn Taymiyya.

Considering first "spirit," again we find forms of legal thinking contrasting intriguingly with forms based on school adherence and taqlīd, such as prevailed elsewhere. The precedents for the Saudi positions fall within a theological trend called *salafī*, named after its attempt to return to forms of religious thought and practice of the *salaf*, or "forebears," thereby opposing admixtures in Islamic thought from conquered cultures, particularly Greek thought and philosophy. This group draws inspiration from Ibn Ḥanbal, among others, and opposes itself to kalām, or Islamic dogmatic theology, including Ash'arism, the mainstream trend known in

the West as Islamic orthodoxy.[82] As will be clear as we proceed, this salafī approach exhibits, in particularly ardent and thoroughgoing form, various tendencies we have so far associated with the denial that "every mujtahid is correct," the aspiration to meta-ordering, and the people of ḥadīth. We shall here confine our examination of "spirit" to our fundamental concern, namely, the extent and manner in which the dalīl theory is implemented in the legal system.

A useful starting point is statements of Ibn 'Abd al-Wahhāb himself (d. 1206 H., 1791 C.), the founder of the Wahhābī movement, on the most basic principles by which to determine legal rules. He begins by noting a ḥadīth of the Prophet, by which he states that

> I have been given the comprehensive statements [*jawāmi' al-kalim*].[83]

He gives the meaning of this, on the authority of the fiqh and ḥadīth scholar al-Zuhrī (d. 124 H., 742 C.), to be that God joined for him many matters in a few words. The point of it for Ibn 'Abd al-Wahhāb is that for the fixed words of the revelation God intended an extraordinary generality of application, one word covering cases without number.

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[82]L. Gardet, "Allāh," *Encyclopedia of Islam*, 2d ed., 415-7. The law establishing the Board of Senior 'Ulamā', to be discussed below, see p. 213, requires any non-Saudi appointee to be a "salafī." *Niẓām wa-lā'iḥat sayr al-'amal fī Hay'at Kibār al-'Ulamā'*, Royal Decree A/137, 8 Rajab 1391 (29 Aug. 1971), Sec. 2 (hereafter cited as *Niẓām Kibār al-'Ulamā'*).

[83]Muslim (Masājid 5-7).

Ibn 'Abd al-Wahhāb proceeds to state four principles, drawn as literally as possible from texts of the Qur'ān or the sunna, which texts he says are examples of the "comprehensive statements." Upon these principles revolve all legal rules. These are:

> The first principle is the prohibition of attributing [matters] to God without knowledge.[84]
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> The second principle is that everything on which the Legislator has remained silent is an absolution, which no one has the right to declare forbidden, obligatory, recommended or reprehensible.[85]
>
> The third principle is that the neglecting of the clear dalīl, and offering as a dalīl a vague expression, is the way of those who swerve from the truth. . . . God said,
>
> > [He it is who has bestowed upon thee from on high this divine writ, containing messages that are clear -- and these are the essence of the divine writ -- as well as others that are allegorical.] Now those whose hearts are given to swerving from the truth pursue that part of the divine writ which has been expressed in allegory [seeking confusion, and seeking its interpretation; but none save God knows its final meaning. Hence, those who are deeply rooted in knowledge say: 'We believe in it: the whole is from our Sustainer' . . .][86]
>
> What a Muslim must do is to follow the clear [message], for, when he realizes the meaning of the allegorical, he finds it not differing from the clear but in agreement with it. When he does not, then he must follow those "deeply rooted in knowledge" in their saying, "'We believe in it: the whole is from our Sustainer'."
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> The fourth principle is that the Prophet (S) "stated that the permitted is evident, and the prohibited is evident, and between them are the doubtful cases [*mushtabihāt*]." He who does not comprehend this principle, and desires to make about every issue a

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[84]See [7:33].

[85]These are four of the five legal statuses [*aḥkām*] referred to at p. 71 above. Implicitly invoked are [5:101] and many aḥādīth.

[86][3:7]. Bracketed portions supplied.

> decisive statement, has gone astray and leads others astray.[87]

These principles all reveal anxiousness to rely on the texts of the revelation over and above all else. The first principle prohibits declarations of divine law not justified by revelation: the second that God meant matters not dealt with by texts to be left unregulated, and it is error to provide them with legal values; the third is that clear texts where they do exist must be followed unflinchingly, without turning to that which is unclear; the fourth is that, while the law's prohibitions and permissions are clear, much else in the law is not, and one should not attempt to determine everything in the law decisively. Obviously, together these four principles indicate a willingness to cling to texts, boldly drawing out their implications however extensive when these are clear, but also not imposing on the divine law rules which its texts do not declare -- scrupulously maintaining a mental indeterminacy on the question -- and in both cases renouncing all clever niceties of argumentation and interpretation based on what is merely vague or doubtful.

In a different statement, Ibn 'Abd al-Wahhāb also mentions the ḥadīth on "comprehensive statements," and ties it with the Qur'ānic verse,

> Today have I perfected for you your religious way of life [*dīn*] . . . . [5:3]

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[87]Bin Qāsim, *al-Durar*, 4:3-4.

To Ibn 'Abd al-Wahhāb, this verse, indicating that after the revelation nothing further is needed to know man's way of life, clarifies the meaning of another ḥadīth, where the Prophet's condemns "new things" and "innovations":

> You are under the obligation of my sunna, and the sunna of the Rightly Guided Caliphs after me. Beware new things in affairs, for every new thing is an innovation, and every innovation is a straying and every straying is in Hell.[88]

After the revelation, anything for which a basis cannot be found in the revelation is a straying, an error. Finally, he argues that the verse of the Qur'ān:

> And if you are at variance over any matter, refer it unto God and the Apostle . . . . [4:59]

includes an affirmation that the Qur'ān and the sunna do afford a solution for every contested matter.

We should before proceeding expand on the second principle from Ibn 'Abd al-Wahhāb's first statement, to the effect that silence of the Legislator implies absolution. This refers to a basic principle of the Ḥanbalī school,[89] given particular emphasis by Ibn Taymiyya.[90] Left unsaid by

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[88]al-Tirmidhī ('Ilm 2676) ("*ḥasan ṣaḥīḥ*"); Ibn Māja 1:15-6 (Muqaddima);Abū Dāwūd (Luzūm al-sunna 4607); Ibn Ḥanbal, 4:126-7.

[89]Though all schools recognize something like this in principle, the Ḥanbalī school stands out in the degree that it applies it in practice. Prof. 'Aṭwa, interview, Mar. 25, 1985; H.E. Dr. Muṭlab 'Abd Allāh al-Ṉafīsa (see n. 127 below), interview with author, Riyadh, Nov. 17, 1982.

[90]A clear example is Ibn Taymiyya's bold views in contract law. See, e.g., Ibn al-Qayyim, *I'lām*, 1:344-349. Laoust, *Essai*, 246-47, claims that Ibn Taymiyya's consideration of utility extended even to *'ibādāt* -- see next note.

Ibn 'Abd al-Wahhāb is that this principle as stated applies only to one hemisphere of the law, ***mu'āmalāt***, lit., "mutual dealings," meaning relations of human beings among themselves, and not to the other hemisphere, ***'ibādāt***, lit., "acts of worship," meaning relations with God.[91] A fuller statement would be that, as to worldly dealings, everything is permitted, as long as no text reveals its prohibition, while in matters involving the relationship to God, everything is forbidden, as long as no text reveals that it is permitted. Thus innovation [*bid'a*] is prohibited in 'ibādāt, but allowed in mu'āmalāt unless there is conflict with a text. In mu'āmalāt, moreover, there are far fewer texts than there are in 'ibādāt.[92]

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[91]See, e.g., Bin Qāsim, *al-Durar*, 7:481-484, an opinion that coffee is permissible on this ground. See generally al-'Uthaymīn, "Ibn-'Abd-al-Wahhāb," 260-66.

The term 'ibādāt confuses somewhat by suggesting a limitation to ritual acts of worship. Rather, it includes matters to our minds secular but on which God in Islamic law has, in a sense, claimed jurisdiction, such as rights of life, sexual intercourse, and property. Thus, taking life or having sexual relations requires explicit divine sanction.

[92]As explained by Ibn Taymiyya,

> Part of justice in [*mu'āmalāt*] is evident, and known by everyone through his reason, like the purchaser's obligation to deliver the price . . . .
>
> Another part is hidden, on which divine laws are revealed. . . . Most of the prohibitions of mu'āmalāt of the Book and the sunna lead to the realization of justice and the prevention of injustice, in the trifling and the great, . . . like usury and gambling . . . .
>
> Part of this Muslims have disagreed about, because of its being hidden and difficult to understand. One may consider this contract or delivery valid and just, even though another finds injustice in it requiring its invalidity. God said, "Pay heed to God and pay heed to the Prophet . . . ." [4:59] The root principle in this

From statements thus far, it seems that Ibn 'Abd al-Wahhāb's legal theory may contrast with the ordinary conception of the fiqh, the copious jurisprudence of the four schools, in two key respects (concerning ourselves here with mu'āmalāt only): one is to increase the legal reach of the revealed texts, by asserting their breadth of force and application, tending away from fiqh's characteristic treatment of revealed cases as atomic instances, extrapolated into a network of law only by qiyās and other forms of human reasoning; the other, to the contrary, is to decrease the reach of those texts, by abandoning the attempt, characteristic of fiqh, to develop from them rules to cover all cases, since for many cases the texts afford either no or uncertain counsel.

These two points may be clarified by observing that together they reflect the hierarchization of truth that we noted is part of meta-ordering. Note that the first point increases the reach of texts by elevating their reach,

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> is that, of all the mu'āmalāt to which people have need, the only ones that they are prohibited are those the prohibition of which the Book and the sunna indicate, just as, of all the 'ibādāt by which people draw near God, the only ones that are lawful [*yushra' lahum*] for the people are those the lawfulness of which the Book and the sunna indicate. For the religion is what God laid down, and the prohibited is what God prohibited. This is in distinction to those whom God blamed, when they prohibited, without God, what God did not prohibit, they associated with Him that in which God sent down no authority, and they laid down for themselves in religion that which God did not allow. . . .

Ibn Taymiyya, *al-Siyāsa al-shar'iyya fī iṣlāḥ al-rā'ī wa-al-ra'iyya* (Cairo: Dār al-Sha'b, 1971), 178-180.

declaring that they have sublime, all-encompassing, even universal, scope. The second point decreases their application, but again by elevating them, in the sense that their sublime epistemological order holds them aloof from mere human reasoning, such as qiyās, which otherwise would build outward from them laws of its own making. Both moves are inspired by a sharply heightened aspiration to transcendence that the texts are the medium to fulfill.

Another useful exploration of the two points is to see them as two apparently contradictory claims about the role of human reason in law. The first point tends toward a claim that the divine guidance conveyed in revelation is complete and perfect,[93] and supersedes resort to human reason. The second point tends to a claim that in a vast sphere the divine texts, though they may provide guidance, afford no certainty, and that in that sphere therefore human sources of law may operate unconstrained by claimed binding divine truth, as long as in return they make no such claim for themselves.

Returning to Ibn 'Abd al-Wahhāb, note that any understanding of his statements involves recognizing a divine guidance, perfect, sufficient in itself, yet never, in vast spheres, of such a nature as to vouchsafe certainty to human reason or heart. How does such a perfect divine guidance

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[93]We have previously noted that "completed" here is ambiguous: does it mean that revelation covers the complete field of man's legal needs, or rather that it conveys God's complete revealed law, which may be more limited? See p. 48, 62 above.

exert itself? It is clear that Ibn 'Abd al-Wahhāb does not see qiyās as the full answer to this question. He does consider qiyās one of the legitimate exegetical techniques by which to generate needed rules of law in the absence of certainty, but he opposes the idea that it can derive laws for all cases, and that the laws it derives have any claim at all to the sanctity of revealed texts.

Reviewing the whole, we may venture that Ibn 'Abd al-Wahhāb here suggests that the sharī'a's universality, or the aspiration to pan-ordering, is to be fulfilled, not by a complete system of explicit rules (the position we have associated with pan-ordering), but rather by constant, ardent submission to the very words of the revelation.[94] Therefore we find once again a profound religious piety of submission to

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[94]Laoust well describes the Wahhābī "théologie morale":

> La religion tout entière doit appartenir à Dieu. Dieu a créé les hommes pour être servi. Ce service discipliné qui'il importe de vouer à Dieu seul implique deux grands principes: la volonté de ne servir que Dieu et celle de le faire conformément aux orders qu'il a lui-même édictés par la voix de son Prophète. . . . [L]a foi comprend l'adhésion foncière du coeur, la prononciation des formules sacrementelles et la mise en pratique des pratiques élémentaires de l'Islām. Elle consiste à se résigner à la décision soveraine de Dieu, à se dévouer à la communauté par le bon conseil et l'action, à éviter les faute graves, en un mot "à servir Dieu dans tout l'univers", avec une vigilance d'autant plus minutieuse que l'associationnisme parvient à se glisser dans le coeur sous les formes les plus subtiles et les plus insaisissables. *Aussi peu de doctrines, dans l'Islām, réalisent à ce point la fusion étroite du dévouement mystique et du respect littéral des prescription du fikh que le Wahhābisme*, que l'on peut ainsi définir comme la sincérité la plus parfaite mise au service de la Loi. [Emphasis added.]

Laoust, *Essai*, 532-33.

revelation coupled with a cognitive indeterminacy of the religious law.[95] The piety is that of verses quoted by Ibn 'Abd al-Wahhāb above, on the unclear portion of the Qur'ān:

> [N]one save God knows its final meaning. Hence, those who are deeply rooted in knowledge say: 'We believe in it: the whole is from our Sustainer' . . . [3:7][96]

Here we observe a clear case for use of our methodological hypothesis, mentioned in the first Chapter, that a transcendentalizing stance should be imagined as an

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[95]This stance appears the same as one well-known in another theological context, that of understanding anthropomorphic descriptions of God found in the Qur'ān and sunna, as, for example, having a face and hands or as seated on a throne. There this stance is summed up in the term "*bilā kayf*," i.e., "without any how." A Wahhābī text approves of Mālik's statement on the problem: "Nous savons que Dieu se tient sur son trône. Le comment de la chose nous échappe. Y croire est un devoir, poser des questions à ce sujet une innovation blâmable." Quoted by Laoust, *Essai*, 516; see al-Uthaymīn, "Ibn-'Abd-al-Wahhāb," 223-230; Gardet, "Allāh," 412.

[96]Here again, the immediate descent of these positions is from Ibn Taymiyya and Ibn al-Qayyim, who argued all of them forcefully. For example, Ibn Taymiyya argued strenuously the universal application of the revealed texts: the terms of the texts themselves cover most cases dealt with using qiyās, while, taken in their most general application, they cover <u>all</u> cases; they should be reverted to first to resolve disputes. Ibn Taymiyya argues that therein are rediscovered the true methods of Ibn Ḥanbal himself. Ibn Taymiyya, *Majmū'at*, 19:280-85; idem, *al-Fatāwī al-kubrā*, 1:490-3; 'Abd Allāh 'Abd al-Muḥsin al-Turkī, *Uṣūl madhhab al-Imām Aḥmad -- Dirāsa uṣūliyya muqārina*, 2d printing (Riyadh: Maktabat al-Riyāḍ al-Ḥadītha, 1397 H., 1977 C.), 102. The drift of these views is further revealed in various polemics, such as against the use of technical fiqh terminology as intervening between the believer and the direct words of the Qur'ān and the Sunna, which alone "heal hearts," Ibn al-Qayyim, *I'lām*, 4,170-172; or, as we have seen just above, encouraging laymen, not to mention scholars, to obey the Qur'ān and sunna directly, without feeling bound instead to follow learned men. Here shown is a salafī tendency to assert that men ought to address their problems unmediated to the revealed texts, not relying on the intervening structure of the elaborated fiqh.

experience of a particularly inner sort, or, as defining space on the inward reachs of the emerging legal architecture. Ibn 'Abd al-Wahhāb here portrays a doctrinal stance clearly inner in the sense we defined, in that it claims to be both ultimate epistemologically, and to rely extraordinarily little on reason or outward experience -- except as is necessitated by the texts themselves, or by their use.

Well illustrated here also are certain interrelations between the two aspirations, meta-ordering and pan-ordering. Ardent meta-ordering, as here, claims to encompass pan-ordering as well, and to attain under its own aegis the universalization of the revealed law. It believes that the end of pan-ordering is met incidentally while fulfilling its own program, through the ardent submission of the individual conscience to transcendent guidance in approaching each concrete situation as it arises. But such a program, so atomic in its rulings, can hardly satisfy pan-ordering's aspiration to a firm universal paradigm for human life. On the other hand, ardent pan-ordering (as observed in, say, Ibn 'Ābidīn) has the opposite tendency, to feel that meta-ordering is fulfilled incidentally in the operation of its program, i.e., through the school institution's assured reliance on God's transcendent sanction for its developed system of rules, a sanction claimed on the ground of ijmā' and the school's

faithfulness in following the ijtihād of the great ones of the past.[97]

These points are illustrated in detail by other expressions of Ibn 'Abd al-Wahhāb. He wrote that the faith [*'aqīda*] by which he worshipped God, and that of the pious forebears [*salaf*], was to follow the dalīl from the Qur'ān and the sunna, and to compare the views of the 'ulamā' to that. If a ḥadīth is definitive in meaning, and esteemed as valid by those knowledgeable in ḥadīth sciences, then his characteristic, bold assertion -- taken from Aḥmad b. Ḥanbal himself -- is that it must be followed over the views of anyone, whosoever he may be [*kā'inan man kān*]. This is so even in a case where the imāms of all the four schools are in opposition (this being a case where many classical authors would claim a binding ijmā').[98]

'Abd Allāh, son of Ibn 'Abd al-Wahhāb, wrote that, when the Wahhābīs state that they follow the Ḥanbalī school, they mean that they endorse the five uṣūl al-fiqh of the Imām, as given in a statement by Ibn al-Qayyim.[99] The first is the

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[97]Cf. p. 105 above. Recall that, while neither of these interpretations wholly won, at the level of ideal and theory (as stated here) meta-ordering's vision was by far the stronger. Only in practical terms, after being recast at a lower epistemological level, pan-ordering's version could prevail. We will note how, even in Saudi Arabia, patterns in the practice congruent with those justified here can be found.

[98]Bin Qāsim, *al-Durar*, 4:5. The point was reaffirmed by Shaykh al-Laḥaydān, written responses, Feb. 27, 1985.

[99]Ibn al-Qayyim, *I'lām* 1:29-33.

"texts" of the Qur'ān and the sunna, according to which, if they exist, he would give his opinion, and not turn to anything differing from them, or anybody, whosoever he may be. The second is the legal opinions of the Companions of the Prophet, to which Aḥmad gave an authority extraordinary among the imāms of the schools,[100] because they were deemed best to know the Qur'ān and sunna. Third, if the Companions differed he would not depart from their views, but accept the view which he felt closer to the Qur'ān and the sunna. Fourth, he would follow certain weaker or technically deficient ḥadīth. Fifth, qiyās, which he would employ only in case of necessity.

The critical point in these uṣūl is Ibn Ḥanbal's cleaving to "texts"[101] against the view of anyone whosoever he may be. Expressed here is not only the truth priority of the Qur'ān and the sunna, which is a truism, but also an assertion that this priority is a program for legal reasoning and for pious obedience to the law. If a text answers the need, one does not proceed further, to consider the views of men; no one thus

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[100]Ibn Ḥanbal would follow the Companions even if the view were traceable only to some of them, as long as it was not contradicted by others to his knowledge, although not claiming for the result their ijmā'. On the possibility of ijmā', after the age of the Companions, Ibn Ḥanbal had expressed a famous doubt: "One who claims ijmā' is a liar" [*man idda'ā al-ijmā'a fa-huwa kādhib*]. Significantly, ijmā' does not appear in this list.

[101]The term "text" [*naṣṣ*] is ambiguous. It can mean an authenticated text of revelation, or it can mean what is not only authentic but is either "clear" or "unambiguous." Note that an true ijmā', because it binds as does revelation, can be called a *naṣṣ*. al-Turkī, *Uṣūl*, 99-100.

relying on the text can be faulted. Professional fiqh practice, in stark contrast, recognized that much ground had been covered by one's predecessors, and often claimed that ijmā' blocked deviation from accepted views; such practice began instead with the latest books, very rarely with the Qur'ān and the sunna. Thus, Ibn 'Abd al-Wahhāb criticizes those who would hold that late scholars are incapable of directly learning and following the Qur'ān, and warns those who think that the fiqh is only the study of the books of certain late scholars. He states:

> The Ḥanbalīs are the least prone of all people to innovation. [Yet] most of the *Iqnā'* and the *Muntahā* [two late Ḥanbalī authorities] conflicts with the view of Aḥmad and his explicit statements, not to mention the ḥadīth of the Messenger of God (S).[102]

Thus, to advocate reversing this order, to consider first revealed texts, then the views of the earliest generations, has impact on legal method and outcome. This impact is augmented when combined with an assertion of the universality of application of the texts. The position being set out here is related fundamentally to opposing views on ijmā'[103] and qiyās.[104]

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[102]Bin Qāsim, *al-Durar*, 4:6.

[103]This note briefly describes a few notable differences as to ijmā' between the Ḥanbalīs and the Ḥanafīs, here again using these two schools as representatives of opposed trends sketched here. These differences deserve particular attention because the geographical and numerical dominance of the Ḥanafīs has caused Western authors in the past to focus on them, and to take their views as the sum of ijmā' theory.

First, on each of a number of disputed positions about ijmā', the Ḥanbalīs pick positions narrowing the scope of ijmā', while the Ḥanafīs choose broadening positions. For example, Ḥanbalīs, among them Saudis, deny that, as to any

issue on which a past generation has held a variety of views, a later ijmā' may be formed on any single one of these views; in other words, they deny that any later agreement can authoritatively narrow a difference of opinion that already exists. In contrast, the Ḥanafīs allowed later generations to reach ijmā' on one of the views of the earlier generation. The Ḥanbalī view is motivated by respect for the earliest generations, and inability to declare impermissible and wrong the view of any revered early authority. Ḥanbalīs also argue that, as a factual matter, no such later agreement has ever occurred. Shaykh al-Ghuṣūn, interview, Feb. 9, 1985. Among many other examples of ijmā' doctrine on which the schools similarly differ are: whether ijmā' can be constituted by majority agreement (Ḥanafī) or requires unanimity (Ḥanbalī); whether heresy [*bid'a*] short of infidelity [*kufr*] does (Ḥanafī) or does not (Ḥanbalī) exclude a scholar from consideration in ijmā'; whether ijmā' may be constituted by tacit agreement (Ḥanafī) or requires explicit unanimity (Ḥanbalī -- Ibn Qudāma defends the tacit ijmā', but only with reference to the Companions); whether the historical fact of ijmā' may be transmitted by isolated information [*āḥād*] (Ḥanafī) or requires universal transmission [*tawātur*] (Ḥanbalī). Compare M.A. Abdur Rahim, *Principles of Muhammadan Jurisprudence* (London: Luzac & Co., 1911), 115-136, with Ibn Qudāma, *Rawḍat al-nāẓir wa-junnat al-munāẓir fī uṣūl al-fiqh 'ala madhhab al-Imām Aḥmad b. Ḥanbal*, with commentary by 'Abd al-Qādir b. Aḥmad Ibn Badrān (d. 1346 H, 1927 C.), *Nuzhat al-Khāṭir*, 2 vols., 3d printing (Riyadh: Maktabat al-Ma'ārif, 1404 H., 1984 C.), 1:331-338.

Second, as reflected in the last paragraph, many Ḥanbalīs, following Aḥmad, express skepticism about claims of ijmā'. They profess to take ijmā' claims, certainly as to generations after the Companions, as merely rebuttable presumptions of truth, strong in proportion to the unanimity of and proof for the claimed agreement, but not apodictic. (In fact, as briefly noted in Chap. 1, Ibn Taymiyya, claiming to follow Aḥmad, has been read to deny any ijmā' after the Companions.) For them ijmā' claims may compete poorly against other proofs, particularly aḥādīth. For example, they may prefer a valid ḥadīth to agreement of the four founders of the schools. Compare this with the position of many scholars for whom such an agreement is the equivalent, or practical equivalent, of an ijmā'. See n. 98 above. Further, compare it with the common Ḥanafī position that a ḥadīth should not be considered if it contradicts views of the school's own founders.

Third, Ḥanbalīs, at least when in a *salafī*, Ibn Taymiyya, strong meta-ordering vein, insist on practicing, and not merely professing, the correct priority order among the roots of the law -- Qur'ān, then sunna, then ijmā'. Thus, they

The views of the Wahhābīs above enable us now to make certain useful observations about opposing tendencies in debate about the qualifications to practice ijtihād. If ijtihād is largely the garnering of texts where they exist, and depreciates the sharī'a value of other sources, often preferring to leave matters unregulated by fiqh than to resort to them, then the virtue of the mujtahid will be seen to lie less in intellectual or technical attainments or virtuosity than in knowledge of Qur'ān and ḥadīth, and in bold and perceptive adherence to these.[105] Moreover, if as we have suggested, ijtihād is to function within an atmosphere of pious, ultimately non-cognitive, submission to the whole of the revelation, a mujtahid's attainments in piety may be emphasized as much as those in knowledge. Finally, if the revealed texts are seen as direct and immediate guides to

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reject the idea, found occasionally, that scholars ought to turn first to the ijmā' and agreements of past scholars, and only after that to the texts.

Such doctrinal disagreements can have consequences in practice. Saudi freedom of ijtihād is augmented by the fact that ijmā' does not bar applying sound aḥādīth or the opinions of the earliest generations, even when such positions are not adopted by any of the four schools. An example is Ibn Taymiyya's position, now held by Shaykh Bin Bāz, that a triple divorce should be counted as single.

[104]See Chapter One, Section C, on qiyās, p. 111.

[105]Recall the position, mentioned above, that each mujtahid is correct, strong in the Ḥanafī school. This position tends to deny or weaken the proposition that God gave a dalīl for every question, and to talk of a conviction "in the heart" of the mujtahid that one view is "better." Such positions reduce the effort to ground results objectively in the texts, and tend to see ijtihād as an intellectual art.

righteous life, without mediation through a structure of legal rules institutionally fixed, then ijtihād will tend also to be seen as a perennial necessity and less an exalted station reserved to the distant past.[106] Thus, we find the Wahhābī Shaykh 'Abd al-Laṭīf Āl al-Shaykh (d. 1285 H., 1869 C.) saying,

> It is incumbent on those under religious obligation [*mukallafīn*] in every time and place to adopt [the reported sunna] which is valid and established from the Messenger of God (S). No one has the right to swerve from this to anything else. . . . [Let the unlearned] follow the most learned of the people of his time, and those before them, especially those who are known for following the sunna, for soundness of doctrine, and for being untainted by proponents of *bid'a* [innovation]. These are the most deserving of people and the closest to the correct view and to being inspired with wisdom and enunciating it.[107]

A final question arises, whether the positions considered under this heading, learned from Wahhābī writings, remain valid in modern Saudi Arabia. They do, and are confirmed on every hand. Asked to name authoritative books on uṣūl al-fiqh as applied by the judges of Saudi Arabia, Shaykh al-Ghuṣūn recommended Ibn al-Qayyim's text and a certain compilation of

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[106]Many other differences also arise. For example, it is a salafī position to criticize discussion of cases which have not arisen, preferring that they be decided afresh in the circumstances in which they arise by the one obliged to decide them; while the more rationalist, taqlīd-based tendency is to discuss these, in order that those less qualified will have the necessary rule to hand when needed.

[107]Bin Qāsim, *al-Durar*, 4:54.

Wahhābī writings.[108] Shaykh al-Laḥaydān gave me much instruction in total agreement with the foregoing.

Yet the intellectual world of these Saudi 'ulamā' has drastically changed from the world even of Ibn 'Abd al-Wahhāb. The change does not alter so much their belief in these points, but the manner in which that belief is held. Much to be said here falls outside the scope of our work, and can be learned elsewhere. A few relatively obvious, but very general, observations can be made. There is a vital shift in the intellectual stance of Saudi 'ulamā': they are no longer leaders in a militant sect bent on reforming a hostile Muslim world, but rather members of the international Muslim scholarly community, leagued now to confront the greatest challenge they have seen since the Mongol invasions -- an all-engulfing Westernization and modernization. Indeed the Saudi 'ulamā' often exercise a certain authority among this scholarly community. The Wahhābī viewpoint has profited immensely in acceptance and respect over the two centuries since Ibn 'Abd al-Wahhāb: partly it won its new place through its own early ideological gains on Muslim ground, it moved much more with the swell of great historical changes, and then, renouncing its violence against fellow Muslims with the forming of the Saudi state, it profited directly as that state gained in power and wealth. Mostly owing to the exigencies of

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[108]Shaykh al-Ghuṣūn, interview, Dec. 18, 1984, referring to Bin Qāsim, *al-Durar*, 4:3-69, cited above.

opposing Western power and secular ideologies, Middle Eastern Muslim religious sentiment has turned from the Sufistic trends prevailing at the West's onslaught, and toward the themes sounded by Ibn Taymiyya. Particularly among legal thinkers, Ibn Taymiyya's stock has shown a phenomenal rise. To Muslims as a whole, the Wahhābī legal positions, founded four-square on Ibn Taymiyya, need seem no longer obscurantist, narrow, intransigent, retrograde, but can be viewed as authentic, vigorous, purifying, prescient. Yet, despite a more favorable world reception, and despite the current easy influence won by Saudi money, Saudi 'ulamā', particularly in the younger ranks, have come to judge themselves more from an international perspective. This may mean, as I observed, that the Wahhābī and Ḥanbalī characteristics of local thought and practice, handed down by emulation and apprenticeship, may seem to younger 'ulamā' ignorant or provincial; these may be losing out in favor of the explicit, intellectually rigorous ideologies in common currency in the modern Islamic world. The result seems to be less artless piety, and more ideology.

Changes in the system of qāḍī education contribute to such shifts. The eldest of qāḍīs now serving were trained as they had always been, in mosques, by their own Wahhābī mentors. Education outside the country was inadmissible as

preparation for judgeship.[109] The next generation, now the senior qāḍīs, had their education in a judicial institute, staffed largely by professors from Egypt.[110] Nowadays judges are required to have at least baccalaureate degrees in sharī'a; while these are usually gained from a college of sharī'a in Saudi Arabia, a liberalizing step now recognizes equivalent education gained abroad.[111] The High Institute of the Judiciary, mentioned above, offers graduate level courses in sharī'a.

The matter taught in the three colleges of sharī'a in the Kingdom, each a college within one of the three "Islamic universities,"[112] no longer aims just at a working knowledge of Ḥanbalī fiqh,[113] but to study all the religious sciences, and in fiqh all the four schools equally, with, as mentioned above, knowledge of the dalīl and instruction in tarjīḥ. Although it seems indubitable, and assumed on all sides, that the intellectual preparation of judges is now superior, yet something may be lost when instruction is no longer in mosques

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[109][Ḥāmid Muḥammad Abū Ṭālib, *al-Niẓām al-qaḍā'ī fī al-mamlaka al-'arabiyya al-sa'ūdiyya* (Cairo: Dār al-Fikr al-'Arabī, 1404 H., 1984 C.), 26.

[110]al-'Umarī, interview, July 24, 1983.

[111]Kingdom of Saudi Arabia, *Niẓām al-qaḍā'*, Royal Order No. M/64, 14 Rajab 1395 (July 22, 1975) (Riyadh: Maṭābi' al-Ḥukūma, 1396 H., 1976 C.), Sec. 39.

[112]al-Imām Muḥammad b. Sa'ūd in Riyadh, Umm al-Qurā in Mecca, and the Islamic University of Medina.

[113]al-'Umarī, interview, July 24, 1983.

from the society's most acclaimed scholars-cum-practitioners, whose credentials were earned in religious-social leadership and from popular esteem, but rather from scholars, many of them foreign, with intellectual attainments shown by university degrees, usually from al-Azhar in Cairo and now increasingly from the Saudi religious universities themselves.

C. THE THEORY OF IJTIHĀD IN THE WAHHĀBĪ MOVEMENT AND SAUDI ARABIA

We have discussed so far the "spirit" of ijtihād, quoting statements resembling declarations of faith. What specific statements did the Wahhābīs make about the theory and method of their ijtihād? When asked about their own ijtihād the Wahhābīs traditionally answered with reserve, partly because of the vigorous attacks against them in the Muslim world, accusing them, among other things, of arrogating to themselves ijtihād. For example, one son of Ibn 'Abd al-Wahhāb stated:

> In fiqh law [*furū'*] we are in the school of the Imām Aḥmad b. Ḥanbal. We do not denounce anyone who practices taqlīd of any of the four imāms, but [denounce it of] anyone else [the Shi'i schools are named specifically]. We do not lay claim to the rank of absolute ijtihād, and none of us asserts it. However, in some questions, if we find valid a clear text of the Book or of the sunna, neither abrogated nor restricted, without something opposing it of greater strength, and one of the four imāms holds it as his view, then we adopt it, and we abandon the school.

By this statement, they would leave the Ḥanbalī school only on the argument of a clear, revealed text, an event that would be

rare, particularly in the case of that school.[114] Even then, they do not allow themselves, in contradiction to their own principles and to the practice of Ibn Taymiyya, to adopt a view not held by any of the four schools.

Even short of leaving the school, there is the problem of choice among opposed views within the school. The Ḥanbalī school is particularly rife with contradictory views, usually all attributed to Aḥmad himself. Ibn 'Abd al-Wahhāb states that his method then is as follows:

> If the statement of Aḥmad and the statement of [his] companions [i.e., the members of the school] differ, then, we say, in the matter of difference resort is to God and to His Messenger, not to the statement of Aḥmad or to the statement of his companions, nor to the preponderant from among these. . . . [As for] your position, if each of them is based on a dalīl, then [consider that] true dalīls do not contradict each other, but that each part of the truth confirms each other part. . . . In sum, whenever you see difference, refer it to God and the Messenger, and if the truth becomes clear to you, follow it, and if it does not become clear to you, and you have need to act, then adopt the view of one in whose knowledge and religion you have confidence.[115]

Here he allows no extraordinary respect even for the views of Aḥmad, but would weigh all Ḥanbalī views afresh against the sources. But the independence of this investigation seems oddly in contrast with his apparently undertaking it only upon finding a Ḥanbalī difference of opinion, ignoring Ḥanbalī differences with other schools, and also with his so readily admitting taqlīd wherever "the truth is not clear." Examples

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[114]Bin Qāsim, *al-Durar*, 4:27. This is given as the reason for adopting the Ḥanbalī school.

[115]Ibid., 4:4.

from Ibn 'Abd al-Wahhāb's corpus reflect his method. Thus, an example of his ijtihād concerns whether a particular form of partnership, *muḍāraba*, can be formed by contribution not of cash but of property. He writes:

> From Aḥmad it is related that [it] is not permitted. A group [of Ḥanbalīs] chose this view, but do not give for it any sharī'a argument we know of. From Aḥmad it is related that it is permitted, and the value of the goods at the time of the contract is made the capital [of the partnership]. [He quotes the report of this view from Aḥmad.] A group chose this. It is the correct view, because the principle in worldly affairs [as opposed to matters of worship] is that that only is prohibited which God and His Messenger prohibited, because of the [latter's] saying,
>
> > He has been silent about things as a mercy to you, not by oversight. Do not inquire about them.[116]

This is in contrast with the accepted opinion of the Ḥanbalī school,[117] which is, as Ibn 'Abd al-Wahhāb states, not supported by text but rather by the legal logic of the institution of muḍāraba. Ibn 'Abd al-Wahhāb looks for a text, and not finding it has recourse to one of his basic principles; noticeably he does not consider the detailed arguments of the 'ulamā', or consider their number on each side of the issue.

In modern Saudi Arabia, authorities would certainly own allegiance to the formulas given by Ibn 'Abd al-Wahhāb above. Yet many facts now indicate a definite change in the theoretical climate, in the direction of a freer ijtihād. One clear difference is a great reluctance on the part of all

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[116]Quoted in Abū Sulaymān, "Khaṣā'is," 400.

[117]Ibn Qudāma, *al-Mughnī*, 5:124-126.

'ulamā' I met to admit to any school affiliation at all. The Wahhābīs, in response to the then felt necessity of school affiliation, had had to insist, by a rather odd logic, that while practicing dalīl theory they remained fully members of the Ḥanbalī school (the argument was essentially that in contradicting school views they but followed Ibn Ḥanbal's methods and wishes); this precaution seems no longer necessary. Now a prevalent view emphasizes the common enterprise of the schools and claims that in uṣūl the agreement of the four schools far outweighs their differences.[118] Previously only an absolute mujtahid, of the rank of the founders of the schools, had the authority to elaborate his own uṣūl al-fiqh, and others had to acknowledge the authority of an imām at least in this. It appeared that each school was, in its uṣūl and approach, a self-sufficient world, from which one might venture, by title of dalīl theory, to learn and even appropriate the proofs and holdings of other schools, but still on the terms of one's own school. Now in contrast it seems asserted that there is a common vantage point from which the views of all the schools can be learned and evaluated, and tarjīḥ conducted between them, while remaining independent of any school. In all these respects,

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[118]Dr. 'Abd al-'Aziz b. 'Abd al-Raḥmān b. 'Alī al-Rabī'a, interview with author, Kulliyyat al-sharī'a, Imām Muḥammad b. Sa'ūd Islamic University, Riyadh (April 21, 1985).

Saudi Arabian thought seems in line with international Islamic trends.

Yet, again in line with international practice, in Saudi Arabia it still seems beyond the pale that a scholar claim an absolute ijtihād, one free of the solutions of the past and omnicompetent for the future. A new concept, group ijtihād, i.e., ijtihād issuing from councils and academies of 'ulamā', has, however, come forward as a partial substitute, which seeks by the strength of numbers, and the relative universality deriving from consulting many viewpoints and approaches, to overcome the lingering impotence of any individual ijtihād. This concept has still to gain theoretical formulation and full acceptance. In Saudi Arabia a group named the "Board of Senior 'Ulamā'" issues fatwās on important issues demanding special study or submitted to it by the Government.[119] Similar bodies, though with a more academic appearance and function, exist in other countries. Internationally, academies of scholars have been formed to collect scholars from the entire Muslim world. One of these, the Islamic Fiqh Academy, subsidiary to the Muslim World League, is considered to be sponsored by Saudi Arabia, and is located in Mecca. The president of the Academy is Shaykh 'Abd al-'Azīz b. 'Abd Allāh Ibn Bāz (called Shaykh Bin Bāz[120]).

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[119]*Niẓām Kibār al-'Ulamā'*.

[120]"Bin" is used in many Saudi surnames, such as Bin Bāz, and not pronounced in classically correct form as "Ibn."

Another academy, of virtually the same name, is subsidiary to the Organization of the Islamic Conference, and has its seat in Jedda.

D. THE PRACTICE OF IJTIHĀD IN THE WAHHĀBĪ MOVEMENT AND TRADITIONAL SAUDI ARABIA

We now have completed discussion of the general theory of ijtihād, and pass on to a subject that will occupy us for the remainder of the book, namely, the practice of ijtihād, how it is used in the application of the law. Here we introduce the ijtihād practice of contemporary Saudi Arabia by considering briefly characteristics of the Wahhābī, or traditional Saudi, practice of ijtihād. Here, once again, we are discussing ijtihād not of judges merely, but of all qualified scholars, whether private citizen, scholar, muftī or judge. In Part III of this Chapter we shall take up contemporary ijtihād in the more public role of the muftī, and in Part IV consider ijtihād in the still more public role of the judge.

It has been long observed that the Wahhābīs preached ijtihād far more than they practiced it.[121] Thus, no unprecedented opinions are reported from Ibn 'Abd al-Wahhāb.[122] Several present-day Saudi authorities confirmed to

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[121]See, e.g., Laoust, *Essai*, 523-24. Wahhābī deviations from the late Ḥanbalī school views are very rare, and most of these turn out to be opinions advocated by Ibn Taymiyya.

[122]Abū Sulaymān, "Khaṣā'is," 392.

me that Ibn 'Abd al-Wahhāb should not be considered a mujtahid in fiqh, but rather in *da'wa* or in religious reawakening; one stated that he was not even a ***faqīh***, or scholar of fiqh. As mentioned above, the Wahhābīs' position on taqlīd was to allow it wherever capability in ijtihād is lacking. Thus, while they maintained vigorously the religious obligation of ijtihād, they still were able to endorse all the practices of taqlīd followed by others, but merely as acts permitted religiously to those not rising to the higher standard, not as an obligation upon all, learned or unlearned.[123] On this ground, particularly when coupled with humility as to their learning, the Wahhābī shaykhs seemed as likely to follow the late authoritative Ḥanbalī school as were Ḥanbalī adherents anywhere, except in respect of more frequently following Ibn Taymiyya's views. It became a characteristic of the Wahhābīs to uphold their ijtihād principles as bright ideals -- informing no doubt the manner of application of law, as we shall discuss presently, and legal ijtihād at the upper levels of the legal hierarchy -- while in so far as the content of the law as daily applied in the legal system was concerned, they clung closely to accepted Ḥanbalī positions, even those of the books *Iqnā'* and *Muntahā* derided above. As a general

[123]E.g., Bin Qāsim, *al-Durar*, 4:16-18.

rule, this characteristic remains true of Saudi Arabia today, as we shall see.[124]

This result corresponds to the actual goals of the Wahhābī movement. These were not at all to change the fiqh, but rather to reawaken religion in a people who had fallen away. In fact, the one strong point of religion in Najd, or the central Arabian Peninsula, before the Wahhābī movement had been a tradition of scholarship in Ḥanbalī fiqh. The people were accustomed to the Ḥanbalī fiqh, and that fiqh had been accommodated to their needs. As long as social change was minimal, little need was felt for change in law. Shaykh al-Laḥaydān stated this, admitting that the Wahhābī 'ulamā' have been mostly muqallids until now, since their concerns were, until recently, local. The Wahhābīs' bitter differences with other Muslims were not as to fiqh rules at all, but in *'aqīda*,

[124]A later Wahhābī scholar, 'Abd Allāh b. 'Abd al-Laṭīf Āl al-Shaykh (d. 1339 H., 1920-21 C.), complains about this state of affairs: "If there but were concern here for the state of affairs existing at the time of the Islamic *da'wa* and our 'ulamā' and shaykhs, then they would be an example and model to us, especially after [Ibn 'Abd al-Wahhāb's] statement . . . that most of the *Iqnā'* and *Muntahā* differed from the statements of Aḥmad . . . ." Bin Qāsim, *al-Durar*, 4:55.

or dogma, meaning theological positions;[125] differences in fiqh rules were merely regional.[126]

This points toward an additional reason why the positions of the Wahhābīs were so uncompromising in 'aqīda, and usually unremarkable otherwise. As consequences of these principles, the Wahhābī revolutionary ardor, its banner revealed truths, was far less biting in mu'āmalāt than in 'ibādāt, and Wahhābīs showed themselves willing to accept presumptively established practice and traditional Ḥanbalī norms. We shall discuss in the remainder of this chapter how this aspect of their approach has facilitated the development of law and acceptance of new legal institutions.

The point is well expressed in a comment by Dr. Muṭlab al-Nafīsa, President of the Bureau of Experts of the Council of Ministers.[127] In reference to the fiqh of mu'āmalāt, he

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[125]This is if we count among these issues the question of ijtihād we are discussing. More important, however, to the Wahhābīs and their opponents were Wahhābī positions on practices associated with Sufism, particularly ritual and supplication performed at tombs of saints. Falling out with the majority of Muslims, Wahhābīs went to the extent of declaring the infidelity of those who perform such practices and of waging holy war against them. See, e.g., Bin Qāsim, *al-Durar*, 7:358-60 (on people of Mecca). For an excellent description of Wahhābī theological tenets, see al-'Uthaymīn, "Ibn-'Abd-al-Wahhāb," 220-266.

[126]Shaykh al-Laḥaydān, interview with author, Supreme Judicial Council, Riyadh, Jan. 6, 1985.

[127]H.E. Dr. Muṭlab 'Abd Allāh al-Nafīsa (hereafter Dr. al-Nafīsa) is a Western trained jurist, holding an S.J.D. degree from Harvard Law School, where he wrote a thesis arguing that the jurisprudence of the Ḥanbalī school, because of its flexibility, was compatible with the economic development of Saudi Arabia. Dr. Nafīsa and the Bureau have had, for a long

said that Saudi 'ulamā' traditionally have not thought philosophically about law, or attempted to elaborate formal rules for every eventuality. New ideas are accepted when merely not in conflict with the texts, spirit and principles of the sharī'a, without any elaborate legal derivation. As for old ideas, their failure to question received Ḥanbalī school rules has this approach as its cause, and not any taqlīd rigidity.[128]

For these reasons, if we wish to observe the impact of these Wahhābī legal ideals on law, it may be misplaced effort to inquire into deviations from "black-letter" Ḥanbalī fiqh. Apart from ijtihād in wholly novel cases (even systems of taqlīd then admit ijtihād), these ideals' impact seems to be rather in the method or practice of application of these black-letter rules. In method certainly, we can see reflected the "spirit" of their ijtihād claims. Consider, as an initial point, that, as to legal reasoning and justification, even a muqallid Wahhābī or Saudi shaykh differs from a muqallid Ḥanafī, simply in the fact that the former feels obliged to be aware of a revealed textual basis for his view. Note that this awareness could constitute ideal fulfillment of dalīl theory, even though it entails no deviation from received

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period, far-reaching impact on every piece of legislation adopted by the Council of Ministers, since they are charged either to draft or review all proposals for regulatory legislation.

[128]Dr. al-Nafīsa, interview with author, Riyadh, Nov. 17, 1982.

school views. The barometer of ijtihād is not the holding of certain special or unique views, but rather the scholar's exerting his full capability to gain conviction from ultimate sources that his view is the most likely true. The Wahhābī and Saudi shaykhs state that their admiration for the Ḥanbalī books is due to these books' custom of citing the textual support for their holdings, instead of merely quoting Ḥanbalī scholars. In giving ordinary fatwās to the public, modern Saudi scholars invariably cite the Qur'ān and the ḥadīths relevant to their view. By way of contrast, some Ḥanafī writings enjoin muftīs never to follow any revealed text on their own; they cannot opine on a matter if they find no school statement regulating it.[129] It may seem at first that the difference between these approaches is only in ideal legal justification.[130] Yet, to achieve precisely this difference in justification is a chief burden of Ibn Taymiyya's or Ibn al-Qayyim's polemics, which have the evident motivation of changing not only pious belief but also legal behavior. Let us allow the evidence to accumulate on this issue.

A second observation is closely related. People comment[131] on a spirit, still alive in the senior shaykhs of

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[129]See p. 160 above.

[130]Whenever questions are novel, difficult or obscure, results would be affected by strong divergences in mental structures of justification.

[131]A relevant story is told in George M. Baroody, "Sharī'a: Law of Islam," *ARAMCO World*, Nov.-Dec. 1966, 26-28, which, though short, is a most vivid and useful description of

Saudi Arabia, to give opinions responsive to immediate circumstance, calling directly and solely upon revealed texts, without concern for the opinions of men. This is, of course, the spirit and practice preached by Ibn 'Abd al-Wahhāb.[132] Yet, in actual practice, this immediate, text-driven ijtihād comes to almost the same thing as the conscientiously dalīl-conscious conformity described in the last paragraph, since it is so heavily modulated by a respect for traditional views, at least when these are known,[133] far greater than the doctrine of ijmā' would require;[134] these determinations always seem to end up in a choice of one of the preexisting views. Yet, again as a spirit, a declaration of freedom, a pious practice -- and again perhaps as a legal method -- it is worlds apart from a frank dependence on other scholars' views in a complex etiquette of school adherence.[135]

Aramco's court cases in the sixties.

[132]See p. 190 above. Of course this corresponds to Aḥmad's call to follow texts first, without diverting to anyone or anything else.

[133]The freedom felt may have been much greater among scholars largely ignorant of traditional views, and with little leisure for research. These could proceed in good conscience.

[134]See n. 103 above.

[135]An example, albeit extreme, confirming aspects of the above, is a phenomenon reported to me from a student, that among students in the Islamic University in Medina, enthusiasm for ḥadīth has been aroused by the greater ability of modern scholars to collect and then collate early manuscripts of ḥadīth scholars, and thus to refine the received information about the Prophet's Sunna within the traditional norms of criticism; this enthusiasm has infected the legal field,

Shaykh Bin Bāz, the muftī of the Kingdom, was named to me as an exemplar of this practice. Certainly as expressed, his fatwās are built directly upon the revealed texts, with a minimum of exegetical reasoning. Apart from an ijmā', he may mention other scholars (and not Ḥanbalīs only), registering differences of opinion, but he ends with his own preference. And, on several issues of great practical importance to daily life, professing the spirit and method we discussed, he does set forth opinions differing from the accepted Ḥanbalī school, and from the positions usually applied in the courts.[136]

We shall return to the issue of the conformity with Ḥanbalī views, when we consider the practice of ijtihād in Saudi courts, in Part IV of this Chapter.

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leading many into sweeping criticisms of fiqh where based on ḥadīth now seen as flawed; some even go beyond to assert that ḥadīth studies are a self-sufficient basis for law: that on a legal issue it should suffice simply to quote relevant authenticated ḥadīth, not attempting legal analysis beyond that. Morgan, interview.

[136]He is famous for a position that the earth is flat, which he bases on arguments from sense experience and logic as well as revealed texts. Muḥammad 'Abd al-Jawād Muḥammad, *al-Taṭawwur al-tashrī'ī fī al-Mamlaka al-'Arabiyya al-Sa'ūdiyya* (Cairo: Maṭba'at Jāmi'at al-Qāhira, 1397 H., 1977 C.), 60-61.

PART III

IJTIHĀD IN FATWĀ PRACTICE

Ijtihād so far has been discussed in general, as it is practiced even by the private scholar. Now we proceed to consider ijtihād applications specifically within the legal system. A suitable entry point is at the door of iftā', since iftā' is the next step in progression from private to public. We first discuss in greater depth the nature of iftā', and then compare it with qaḍā', shedding light on the latter. We then investigate, as an illustration of the role of iftā' in practice, indications, from the practice of a Riyadh marriage court, of the complementarity in practice of qaḍā' and iftā', each taking advantage of the other's specialization. Analyzing this material, we draw conclusions that will be helpful in Part III, which concerns court practice.

A. THE NATURE OF IFTĀ'

The institution of iftā' always has existed in Islamic legal systems. In origin and essence it is a private, not public, legal function. It derives from the religious duty of those subject to the law to seek advice from those most

learned in it, and from the corresponding duty of the latter to share their knowledge.

> Ask those possessed of knowledge [*dhikr*] if you do not know.
> [16:43].[137]

The institution became, reportedly as early as the first century,[138] state-sponsored and an important function within the legal system. Private iftā' has always persisted, however, and is ineradicable, since no one can prevent people from seeking the advice of others. It seems that the better qualified 'ulamā' served much more often as muftīs than as qāḍīs, and indeed their knowledge was the resort of qāḍīs as well as of private parties. In the Ottoman system, the function of iftā' was bureaucratized in a hierarchy, which, for the Arab lands, was staffed locally, though answering to the center in Istanbul.[139] A state institution of iftā' is still maintained in many Muslim countries.

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[137]This is probably more justly interpreted as referring to the 'ulamā' of the Jews and Christians. See, e.g., *Tafsīr al-Imāmayn al-Jalālayn* (Beirut: Dār al-Ma'rifa, n.d.), 357.

[138]Emile Tyan, "Judicial Organization," in Majid Khadduri and Herbert J. Liebesny, eds., *Law in the Middle East*, only 1 vol. issued (Washington, DC: Middle East Institute, 1955), 1:249; Abū Bakr Aḥmad b. 'Alī b. Thābit al-Khaṭīb al-Baghdādī (d. 463 H., 1071 C.), *Kitāb al-faqīh wa-al-mutafaqqih*, ed. Ismā'īl al-Anṣārī, 2 vols. (Riyadh: Maṭābi' al-Qaṣīm, 1389 H., 1979 C.), 2:154.

[139]H.A.R. Gibb and Harold Bowen, *Islamic Society and the West: A Study of the Impact of Western Civilization on Moslem Culture in the Near East*, 2 vols. (New York: Oxford University Press, 1957), 133-38.

In Saudi Arabia two public agencies exist to issue fatwas.[140] The first is the Board of Senior *'Ulamā'*, composed of about 15 senior religious-legal scholars ['*ulamā'*, sing., *'ālim*] appointed by the King. The Board conducts studies and adopts formal fatwas on major public issues, acting either in response to an inquiry from the King or independently. The second agency is the Standing Committee for *Iftā'*, made up of four members of the Board selected by the King, who work full-time responding to requests from private citizens for guidance on their personal affairs. The Standing Committee falls administratively within an independent governmental body, a "General Presidency," charged with administering not only private *iftā'* but also religious research, "Call" (i.e., the propagation of Islam), and "guidance" (i.e., public instruction in religion).[1] The Presidency also provides administrative support to the Board of Senior *'Ulamā'*.

Fatwās play a vital role in all forms of private enforcement of the law. Obviously, the fatwā is highly suitable to guide individual conscience in the performance of religious observances and obligations, such as prayer, fasting and pilgrimage, of which the doctrinal regulation is immensely complex. In fact, this is probably the predominant category

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[140]Kingdom of Saudi Arabia, *Nizām wa-lā'ihat sayr al-'amal fī Hay'at Kibār al-'Ulamā'*, Royal Decree A/137, 8 Rajab 1391 (Aug. 29, 1971).

of fatwā content.[141] Next in importance in iftā' content is probably the family law, particularly because the Saudi family is highly private and deeply controlled by social norms based on religion, family honor and reputation. A fatwā can often adequately resolve a family law dispute without the drastic measure of court action, which might also noise the dispute about. As important as these two categories are in fatwā practice, fatwā requests can cover any matter in the law, and do. As state-sponsored free legal counseling, iftā' is often a valuable service. I have seen fatwās sought by law firms interested in predicting outcomes in sharī'a courts.

Shaykh Bin Bāz is the most famous and powerful contemporary 'ālim in Saudi Arabia. He holds a number of important positions, including that of General President of the Presidency just mentioned, member of the Board of Senior *'Ulamā'*, and member of the Standing Committee. Owing to these positions and his general influence, he is unofficially called Mufti of Saudi Arabia.

A fatwā by Shaykh Bin Bāz as published in a religious magazine gives the flavor of a fatwā:

> "Reader Muhammad al-'Umari sent us a question, in which he says: I became extremely angry at my wife, because of a small thing she did, and after my anger subsided, my wife told me that I pronounced a divorce during my anger, a single [and therefore revocable] divorce. I sat down to remember if this divorce had issued from me, and then remembered it, but I was not

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[141]Gerd-Rudiger Puin, "Der moderne Alltag im Speigel Hanbalitischer Fetwas aus ar-Riyād," *Zeitschrift der deutschen morganländischen Gesellschaft* 3 (Supp. 1977): 589-597.

> sure of it completely. I do not have the intention of divorcing my wife, but my tongue slipped, and anger overcame me without any object, while I have confidence that my wife was not lying. I retracted the divorce at once . . . . I request from Your Eminence your fatwa whether the divorce occurred . . . .
>
> Answer: . . . The safer course for you is to count this divorce [toward the maximum of three divorces] and consider it as having occurred, because of what you wrote about remembering it, and your confidence in the statement of your wife, in fulfillment of the Saying of the Prophet (S), "One who is wary of dubious cases is delivered in his religion and his honor," and his Saying, "Leave what causes you doubt for what does not cause you doubt"[142]

The fatwā shows the cautelary approach appropriate in counsel to conscience. This can extend even to a caution that other scholars disagree with the muftī; thus, after giving his own opinion that a certain divorce by oath has no effect since unintended, the Shaykh states,

> It is proper that the Muslim not use such types [of oath-divorces] because many of the 'ulamā' have the opinion that the divorce occurs thereby, even if he did not intend its occurrence . . . .[143]

B. CONTRAST BETWEEN IFTĀ' AND QAḌĀ'

We touched above on contrasts between qaḍā' and iftā' in terms of the moral risk they incur. Comparisons along this

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[142]Shaykh Bin Bāz, "Fatāwā," *al-Da'wa*, 7 Rabī' al-Thānī 1407, Dec. 8, 1986, pp. 26-27. *al-Da'wa* is a weekly published in Riyadh by the Mu'assassat al-Da'wa al-Islāmiyya al-Ṣuḥufiyya [The Islamic Call Press Establishment], founded by the former Muftī of the Kingdom. It seems to be firmly, if not formally, under the Presidency just noted, and thus a governmentally sponsored religious organ.

[143]Shaykh Bin Bāz, "Fatāwā," *al-Da'wa*, 12 Shawwāl 1407, June 8, 1987, p. 28.

line are wonderfully productive of insights into Islamic law and its application. A statement of the contrasts is the following, from Ibn al-Qayyim. After declaring that the qāḍī is morally at a greater risk than the muftī, he explains:

> Every danger faced by the muftī is faced also by the qāḍī, and additional dangers afflict the latter that are special to him. But the danger of the muftī is greater in one other respect, that his fatwā states a [finding of a] general divine law [*sharī'a 'āmma*] concerning both the requestor and others. As for the judge [*ḥākim*], his ruling [*ḥukm*] is particular and specific [*juz'ī khāṣṣ*], not extending to anyone but the two parties. The muftī opines in a ruling that is generally worded and generally applicable [*ḥukm 'āmm kullī*], that to one who does so-and-so is applicable such-and-such, or one who says so-and-so is obliged to do such-and-such. The qāḍī makes a particular judgment [*qaḍā' mu'ayyan*] upon a particular person, and his judgment is specific in terms and obligatory, while the fatwā of the scholar is general in terms and not obligatory. Each of them has tremendous reward, and great risk.[144]

To spin these contrasts out more fully, we can derive, merely from the different structures and functions of qaḍā' and iftā', a number of differences with regard to their status as determinations of moral law, which will further illuminate for us the nature of qaḍā'.

First, iftā' involves neither enforcement nor compulsion, even where iftā' is an institution supported by the state; it is purely advice to conscience, and compliance in action remains the responsibility of the parties, not the scholar himself.[145] Qaḍā', on the other hand, has as its outcome

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[144]Ibn al-Qayyim, *I'lām*, 1:38.

[145]al-Turkī, *Uṣūl*, 660-663. Iftā' is said to be binding -- meaning morally, not by legal sanction -- on muqallids under certain circumstances, such as conviction that the fatwā

compulsory action: its judgment takes from one and gives to another. The court is simultaneously a religious body constituted by sharī'a to enforce its law and an arm of secular power wielded to resolve disputes; compliance with it is compulsory in both religious and secular terms. This contrast with the voluntariness of iftā' is the primary reason scholars give why iftā' involves a lesser moral risk than qaḍā'.

A second contrast, dovetailing in a significant way with the first, is that the muftī is concerned with the bāṭin of his inquirer, meaning here the inner truth of his state, while the qāḍī is concerned with the ẓāhir, meaning the truth as it outwardly can be known. Since the muftī offers guidance for voluntary compliance, he has as his object advising the party how his action is to be evaluated in the latter's inner forum, with respect to the bāṭin. Qaḍā', because it deals in outer proofs and compels outer actions, can only claim to be the forum of outer truth, the ẓāhir. The qāḍī's judgment cannot lay claim to necessary truth in the bāṭin, or to compel conscience, even where the legal rule applied is itself a certitude, for the reason that the secret reality of the event, and the parties' or the witnesses' true inner states such as their truthfulness or dishonesty, may have escaped the qāḍī. Quoting again from 'Umar's instructions to the qāḍī:

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is right, or the muftī is the best available, and so forth. Such rulings do not change the conclusions being drawn here.

> God has taken responsibility in your [the qāḍī's] stead for the secrets [*inna allāh tawallā `ankum al-sarā'ir*] and averted [responsibility] from you by [means of] the explicit [evidence or proofs] [*dara' `ankum bi-al-bayyināt*].[146]

The qāḍī is not responsible for that which only God can know, but may justifiably rely on the methods of proof established by the law. That the qāḍī is thus relieved does not assist anyone else involved; each remains subject to the verdict of his own conscience on that which he knows.[147] Thus, a party justifiably convinced of the falsity of a judgment on the facts must not fulfill it, if it involves him in injustice or sin. As quoted above from the Prophet:

> You bring me lawsuits to decide, and perhaps one of you is more skilled in [presenting] his plea than another, and so I judge in his favor according to what I hear. He to whom I give in judgment something that is his brother's right, let him not take it -- for I but give him a piece of the Fire.[148]

An example is a woman against whom a man establishes marriage in court by procuring false witnesses. She must absent herself, seek release from him by payment, and resist his advances, by force if necessary. If she injures or even kills

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[146]See p. 143 above.

[147]Ibn Qudāma, *al-Mughnī*, 11:408, stating that only Abū Ḥanīfa holds that the judge's decision changes the bāṭin as well as the ẓāhir: e.g., a woman who obtains a divorce by false witness can in good conscience marry one of the witnesses. Similar issues of formality and substance arise as to whether the qāḍī can take as evidence his own knowledge of the facts. Ibid., 11:400-03.

[148]See p. 140 above.

him, she in conscience owes no blood-money, though a court may require her to pay it.[149]

Third, the muftī assumes the facts stated to him by the applicant, usually in highly brief and abstract form.[150] Thus, despite its specialization as advice to conscience, the fatwā remains aloof from the particulate uniqueness of circumstance where moral decisions must be made. The judge, however, does confront the context of real facts in the midst of which his judgment is to uphold religious law; he must find and construct the legally relevant facts. His duty is, however, mitigated as described in the last paragraph, by being permitted to rely upon the sharī'a-determined system of pleading and evidence.

Fourth, a fatwā is usually requested and given to a single individual privately, while qaḍā' involves both the opposed parties and others in interest, as well as the judge. Therefore, on the side of the recipient the fatwā is private and individual, while the judgment is public and multiple. Even on the side of the muftī iftā' is private and individual, since the muftī, even where he is appointed and paid by the state, merely gives his personal advice, which has value

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[149]al-Bahūtī, *Kashshāf*, 5:337-38. A party cannot resist the outcome, however, on matters uncertain, whether fact or law, that the qāḍī decides by ijtihād. Thus, even a mujtahid party is bound by a qāḍī's ijtihād.

[150]Historically (but not now in Saudi Arabia) it was a common practice to formulate fatwās anonymously, in terms of Zayd and 'Amr (like Richard Roe and John Doe).

according to his reputation of learning and piety. In contrast, the qāḍī's role is public in one of the Western senses of the term, in that the qāḍī wields the secular authority of the state.

Fifth, there is the contrast noted by Ibn al-Qayyim, as the sole distinction implicating iftā' in greater moral risk than qaḍā'. This was that the "fatwā states a [finding of a] general divine law concerning both the requestor and others," being "generally worded and generally applicable," while the judgment is "a particular judgment upon a particular person," not "extending to anyone but the two parties." Thus, a fatwā can take on a life of its own by encompassing many potential situations, while qaḍā' spends its force in the specific judgment. This contrast introduces a fundamental characteristic of qaḍā' to which we shall return, that court judgments are seen as momentary, atomistic events, with no precedential effect, even for the judge who issued them. Thus, as already quoted, 'Umar, in his instructions to his qāḍī, says,

> Do not let a judgment [*qaḍā'*] that you judged yesterday and then reconsidered, and that you were guided to a wiser opinion about, prevent you from returning to the truth, for verily truth is not voided by anything . . . .[151]

Thus, 'Umar is reported to say, "I adjudged in the matter of the grandfather [a much vexed issue of inheritance law] various judgments [*qaḍāyā*], in each of which I did not desist

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[151]See p. 143 above.

from [seeking] the better."[152] A persistent striving for truth should not be inhibited by any secondary considerations, here consistency with one's own, or another's, past holdings. This is as to the judge's responsibilities of conscience. As to the parties' consciences, it is provided that, in cases where the outcome is within the scope of ijtihād, i.e., not ascertainable with certainty, then the qāḍī's judgment "cuts the difference of opinion," i.e., overcomes the uncertainty of conscience in that specific case.[153] Necessity compelling the determination of the indeterminate, God has ordained judging. The judgment is not thereby made religiously true; it may still be in God's eyes a wrong ijtihād; but it is the religious justification for compelling, and performing, action in the ẓāhir. This effect is, however, spent in the specific case. But as to questions not in the sphere of ijtihād but open to knowledge with certainty, such as when a party procures false witnesses, then, again, in conscience, and in the bāṭin, the parties are not excused or bound.

A great many lessons may be drawn from all these contrasts, and we shall do so shortly, for comparisons with Western law. For now, let us note several ideas that recur across these contrasts. Note that law here can be binding in

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[152]Quoted in al-Ṣadr al-Shahīd, *Adab al-qāḍī*, 1:178.

[153]See, e.g., Ibrāhīm b. Muḥammad b. Sālim Ibn Ḍūyān (d. 1353 H., 1934-5 C.), *Manār al-sabīl fī sharḥ al-dalīl (dalīl al-ṭālib li-nayl al-maṭālib li-mar'ī b. yūsuf al-maqdisī)*, 2 vols., 4th printing (Beirut: al-Maktab al-Islāmī, 1399 H., 1979 C.), 2:469.

two distinct senses: one, in the ẓāhir, enforced by state power; the other, in the bāṭin, enforced by religious conscience. These are not understood Islamically as separate -- God and Caesar -- but as strongly inter-reacting, and widely overlapping, with each other; indeed, were there an ideally functioning legal system, they would coincide in every case. Note that, apart from rules stated explicitly in revelation, in neither case is a general legal rule considered binding per se; it must be brought together with two other constituents before it becomes binding: concrete circumstance, and an act of conscience. These points will be further explained in what follows.

C. FATWĀS IN THE COURTS OF SAUDI ARABIA

These clear oppositions between iftā' and qaḍā' suggest that they perform distinct, yet complementary, functions in the application of the law. What role do fatwās play in the application of the law? How does iftā' relate to the system of laws and courts that to Western eyes is the formal legal system? Some hypotheses about these interactions emerge from observations in the Marriage Court of Riyadh. This court, it seems, has adopted the practice of honoring the fatwās of Shaykh Bin Bāz in situations where both parties agree, even though the rules it thereby enforces conflict with the judgments it would itself impose. From these practices derive

important insights into the nature of legislation and adjudication in Islamic legal systems.

The practices observed all involve questions of divorce by the husband's repudiation [*ṭalāq*]. In fiqh, a husband may repudiate his wife by merely declaring his repudiation, without formal requirements, even of witnessing. Such divorce occurs in three degrees, i) revocable, ii) irrevocable in the lesser degree, and iii) irrevocable in the greater degree. Revocable divorce may be retracted by the husband at any time during the wife's waiting period [*'idda*], usually three months, following *ṭalāq*. Irrevocability in the lesser degree, incurred when the *'idda* expires after a revocable divorce, permits remarriage. Irrevocability to the greater degree, however, bars even remarriage until the wife has married another and that marriage comes to an end; this irrevocability is incurred when the husband has divorced the wife three times.

The first instance of practice in the Marriage Court involves the so-called "triple divorce," or a divorce in which the husband pronounces three *ṭalāq* divorces at a single time, thereby seeking to make a fatal, final separation. What is the validity in fiqh of such a divorce: should it count as three or only as one? The traditional view is to consider the act sinful, but valid: it has full effect as triple. This view is the one generally applied in Saudi courts, was the

Wahhābī view,[154] and is the unanimous view of all the four schools of law.[155] It is even the position adopted in an important study and fatwā by the Board of Senior 'Ulamā'.[156] Shaykh Bin Bāz, however, agreeing with one of Ibn Taymiyya's most famous opinions,[157] holds that a triple divorce is to be counted only as single.

In the Marriage Court, a couple appeared and related that the husband had uttered a triple divorce, which they wished to avoid. It turned out that they had already been to Shaykh Bin Bāz, who had instructed them to ask the qāḍī to prepare for them a statement of the facts of their case, on the basis of which the Shaykh would then issue his fatwa. The qāḍī explained to me that, had the parties instead tried their case before him (as might have occurred had the wife insisted on the fact of divorce),[158] he would have been obliged to give

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[154]Bin Qāsim, *al-Durar*, 8:379-380.

[155]In many Muslim countries this result is changed by statute, by declaring virtually all forms of ṭalāq to be single and revocable. Jamal J. Nāṣir, *The Islamic Law of Personal Status*, 2d ed. (London: Graham & Trotman, 1990), 119-121. Many contemporary *fiqh* scholars hold similarly.

[156]Lajnat al-Buḥūth al-'Ilmiyya, al-Riyāsa al-'Āmma li-idārāt al-Buḥūth al-'Ilmiyya wa-al-Iftā', "Ḥukm al-ṭalāq al-thalāth bi-lafẓ wāḥid," *Majallat al-Buḥūth al-Islāmiyya*, 1 (no. 3, 1977): 27-173. The minority opinion is unsigned, but Bin Bāz's view on this issue is well known.

[157]Ibn al-Qayyim, *I'lām*, 3:30-50.

[158]Such a suit would probably arise on the husband's complaint that the wife was *nāshiz*, or recalcitrant, for leaving the family home. Lajnat al-Buḥūth al-'Ilmiyya, al-Riyāsa al-'Āmma li-idārāt al-Buḥūth al-'Ilmiyya wa-al-Iftā', "Ḥukm al-nushūz wa-al-khul'," *Majallat al-Buḥūth*

effect to the triple divorce.[159] In this way the court facilitated the parties' mutual resort to an opinion it itself could not issue, but which, when the parties had received it as advice from an esteemed scholar, they could rely upon in justifying their immediate remarriage.

The second example from Marriage Court practice involves the issue of divorces issued in extreme states of anger: should such divorces be invalidated as not intended, on the analogy to divorces uttered by one asleep or in a swoon or faint? The Ḥanbalī view, and the one that would be applied in the marriage court, is to disregard the divorce only when the speaker was so angry as to have virtually lost consciousness, and, in particular, to have had no recollection of his act.[160] Shaykh Bin Bāz, however, as indicated by the fatwā cited above,[161] invalidates such divorces if the husband denies intent to divorce. In the Marriage Court I observed a case where a husband said that he had divorced his wife on

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al-Islāmiyya, 1 (no. 3, 1977): 177-225.

[159]Court of Guarantee and Marriages [*maḥkamat al-ḍamān wa-al-ankiḥa*], Great Shari'a Court of Riyadh [*al-Maḥkama al-Kubrā bi-al-Riyāḍ*], Riyadh, personal observation, Apr. 19, 1983.

[160]Ibn Qudāma, *al-Mughnī*, 8:254-5; Manṣūr b. Yūnus b. Ṣalāḥ al-Dīn b. Idrīs al-Bahūtī (d. 1051 H., 1641 C.), *Sharḥ muntahā al-irādāt*, 3 vols. (Beirut: Dār al-Fikr, n.d.), 3:120; idem, *Kashshāf*, 5:235.

[161]See fatwā quoted above p. 214. Bin Bāz appears to be in agreement with Ibn Taymiyya and Ibn al-Qayyim. See Ibn al-Qayyim, *Zād al-ma'ād fī hudā khayr al-'ibād*, ed. Ṭahā 'Abd al-Ra'ūf Ṭahā, 4 vols. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1390 H., 1970 C.), 4:52; Ibn al-Qayyim, *I'lām*, 3:52-54.

three separate occasions over several years, but declared that the first divorce was the subject of a fatwā from Shaykh Bin Bāz invalidating it on the ground of his mental state. The qāḍī credited this result without further investigation, and suggested at once that the parties remarry (i.e., conclude a new marriage contract). The wife, however, would not consent to the remarriage, leaving the husband helpless.[162]

Shaykh Bin Bāz has a third similar opinion, which, however, I did not see upheld in court. This concerns the common practice of declaring a divorce by conditional oath -- in effect, a divorce conditioned on a future event -- which is often done to provide an extreme sanction for an assertion. An example is "My wife is divorced if I ever drink wine again." The prevailing Ḥanbalī view,[163] the practice of the courts, and a decision of the Board of Senior 'Ulamā',[164] all uphold such divorces according to their terms. Shaykh Bin

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[162]The *'idda* had expired, and apparently no valid prior revocation could be shown under the circumstances. The fatwā appeared to be accepted by all litigants present. The court also implicitly upheld the fatwā, since otherwise it would have demanded, before considering remarriage, either proof of, or the wife's conceding, facts like the husband's loss of consciousness or total failure to remember.

[163]See, e.g., al-Bahūtī, *Kashshāf*, 5:284. Compare Ibn al-Qayyim, *I'lām*, 1:279-80, 3:54-61.

[164]Lajnat al-Buḥūth al-'Ilmiyya, al-Riyāsa al-'Āmma li-idārāt al-Buḥūth al-'Ilmiyya wa-al-Iftā', "al-Ṭalāq al-mu'allaq," *Majallat al-Buḥūth al-Islāmiyya* 2 (no. 1): 51-94. A minority of the Board, however, including Shaykh Bin Bāz, differed, and adopted a dissenting opinion. In almost all Muslim countries this outcome is reversed by statute. Nāṣir, *Personal Status*, 117-18. Many present-day scholars endorse this outcome.

Bāz, however, declares such divorces invalid if the husband did not intend to divorce.[165]

In these instances we observe a few aspects of practical applications of the complementarity of iftā' and qaḍā' in the Islamic legal system. The practice observed here, a court honoring the parties' mutual resort to an opinion of an important muftī, cannot be assumed without further research to be a constant feature of Islamic legal systems, but it is instructive. It leads us to speculate about the roles prestigious muftīs may have played in historical legal systems. It has often been remarked that the iftā' was the avenue through which the accommodation of school fiqh to changing social and economic realities occurred.[166] Our

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[165]Shaykh Bin Bāz, "Fatāwā," *al-Da'wa*, 7 Dhū al-Qa'da 1406, July 14, 1986:

> Reader Kh.Kh.Ḥ. from al-Qaṣīm sends us a question in which he states: I made an oath against my younger brother upon divorce [*ṭalāq*] if he went out of the house. Despite this he went out. When I made this oath upon divorce, I did not intend divorce, but merely intimidation, and I was in great anger. But after my anger subsided, I forgave him. I request a fatwa: has a divorce occurred or not? May God preserve and keep you. Answer: If the facts, questioner, are as you have described them, and you did not intend the occurrence of the divorce if your brother went out, and you intended only to restrain and frighten him, then you are obliged to perform the atonement [*kaffāra*, certain acts of charity or, failing these, fasting, Qur'ān 5:89] according to the more correct of the two opinions of the *'ulamā'*, and no divorce of your wife occurs thereby. . . . God is the giver of good fortune.

See also fatwā cited n. 142, 143 above.

[166]Tyan, "Judicial," 248; Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 142-42, 148.

observations suggest that reasons for this can be found in the complementarities in moral and legal functioning of the two offices. The fatwā form may provide means to implement views that would otherwise be impossible or unwise to endorse as legislation in the courts. Looking to our examples, it is worth asking the reasons why the marriage court (and perhaps the school itself) hews to its positions and not the views of Shaykh Bin Bāz. One reason is that even a mujtahid judge in the marriage court would hesitate to apply, in a matter so intimate to families, and merely on the strength of his own views, standards deviating from common practices and expectations acquired over ages. Yet, when parties apply a fatwā to themselves, this hesitation is far reduced. This is particularly clear for the position holding a triple divorce to be single. A second reason is that Shaykh Bin Bāz's positions are certainly more practicably enforced as fatwās than as judgments in court. Each of them depends on exquisitely subjective facts, chiefly, the actual intent behind the husband's words. If rules of this sort were applied as general legislation, the judge's conscience might well be insecure in the justice he did; he might be making *ṭalāq* the plaything of the husband.[167] In a fatwā, on the other hand, it is the party who takes responsibility for the

[167]This is especially so since Islamic legal procedure does not allow parties to testify on their own behalf. In such situations the law often simply credits a party's word as to his or her intent.

objective truth of the facts and for doing justice in context; moreover, the divorce can be avoided only if the wife does not resist. A last reason is that perhaps, despite its abstraction, the fatwā form is better suited to these cases than court decision, in that the muftī can craft the fatwā more freely to respond to the circumstances, to the extent he knows them, and can explicitly address moral matters, such as subjective intent, sincerity, or a wife's resistance to reunion, that are formally irrelevant to court judgments.

D. COMPARATIVE EXCURSUS: INSTANCE-LAW VS. RULE-LAW

Before progressing to court practice, we pause to review some of the above results -- the oppositions between the taqlīd practice of Ibn 'Ābidīn and the dalīl theory of Ibn Mu'ammar and Ibn Taymiyya; the contrast between the fiqh spirit and method of the Wahhābī shaykhs and their staid conformity in legal outcomes; the distinctions between iftā' and qaḍā' in their moral construction; the role of iftā' as a mode of law application complementary to the court system -- and draw from these a basis on which to make comparisons with Western legal ideas.

Let us start by pointing out, with some oversimplification, the more obvious divergences from our legal ideas. First, we can easily see that some of the dualisms which are common stock in trade when Westerners

discuss law, such as public/private, state/individual, general/specific, formal/substantive, objective/subjective, take highly different slants. Where do we draw the line between public and private lawmaking or enforcement, when all general statements of law are intended but as a scholar's personal advice to the inner consciences of others (whether this other is citizen, judge, official or scholar), and when court judgments, while enforceable judgments of the state, are rulings arising from the deeply personal ijtihād of the judge and expiring with his judging of that particular case? Neither could be called unreservedly public legislation, state enforcement, or private scruple or compliance. And how, moreover, should we in such a case assign the distinctions between general and specific, or between formal and substantive? Or how should we apply the distinction between objective and subjective, when a fiqh statement considers persons or events only as abstract classes, but aims at subjective conscience, and when a judgment, which does consider objective proof for its facts, is by a judicial ijtihād considered unique to concrete facts?

Second, let us try to locate in all of this a concept like a favorite Western concept of law, that of a system of formal, objective, publicly known, generally applicable, compulsory rules, whether determined from general, published legislation, from the decisions of courts purporting to expound the law, or from authoritative scholarly accounts of

the law. Attempting this, we find no such concept of law, with two exceptions -- first, at the extreme of greatest divine authority, epistemological certainty and religious obligation, we find those rules which are unambiguously established by revealed texts or are universally known and agreed upon, such as the obligation of five prayers daily; and second, at another extreme, at the level of expediency and practical necessity in the application of the law in times grown "corrupt," we locate the law of the standard school fiqh manuals, held binding by qāḍīs accepting school taqlīd. Otherwise, we find nothing like law as we esteem it.[168]

Confirming and extending results from above is a statement from Ibn Taymiyya:[169]

> In general, universal matters[170] . . . the judgment is God's and His Messenger's, and the judge [*ḥākim*, which covers any one who issues a judgment, and thus can mean judge or ruler] one of the Muslims. . . . With force and compulsion he has no right to give judgment except in the specific case in which his judgment is sought. . . . The sharī'a that every Muslim must follow, and that those in

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[168]Max Weber, relying on the Orientalists' knowledge of the Islamic courts in his time, coined the term "Kadi justice" as the name of a type of justice which was wholly substantively irrational. See Appendix B.

[169]Perhaps Ibn Taymiyya here is arguing against his own imprisonment for holding views held to be opposed by the ijmā', such as his view of divorce, which is one of the positions he names in the passage quoted from below as being exempt from compulsion.

[170]By this term is meant, judging from his use of it elsewhere, fiqh rulings in the abstract. Cf. al-Qarāfī, *al-Iḥkām*, 80, referring to the fatwā as "*shar'* *'āmm*," while the qāḍī's judgment is peculiar to the specific facts.

> authority must support and fight for, is the Book and the Sunna . . . .[171]

Ibn Taymiyya is asserting that, apart from the Book and the Sunna (and most would add the ijmā'), i.e., in the realm of ijtihād, law remains formally indeterminate,[172] and no generally stated, generally applicable, statements thereon are capable to bind. If compulsion is exerted, this would be improperly to foreclose legitimate difference of opinion, and to coerce conscience.[173] Like fatwās, any assertion of an ijtihād ruling can but guide the conscience of those crediting it, but, not grappling with particular fact and circumstance, it cannot bind. Acts become binding only through an ijtihād

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[171]Ibn Taymiyya, *Majmū'at*, 35:360, 372, 376.

[172]In explaining why restricting a qāḍī to a single scholar's view is condemned, Ibn Farḥūn (a Mālikī, d. 799 H., 1397 C.), says, "The truth is not in any definite thing." Burhān al-Dīn Abū al-Wafā' Ibrāhīm b. 'Alī b. Abī al-Qāsim Ibn Farḥūn, *Tabṣirat al-ḥukkām fī uṣūl al-aqḍiya wa-manāhij al-aḥkām*, 2 vols. (Cairo: 1301 H., 1884 C.; reprint ed., Beirut: Dār al-kutub al-'ilmiyya, n.d.). Ibn Taymiyya wrote: "God Most High commanded in His Book that upon difference resort is to God and His Messenger, and He did not command upon difference [resort] to anything identified by any [other] principle [*mu'ayyan aṣlan*]." Quoted in Bakr b. 'Abd Allāh Abū Zayd, *al-Taqnīn wa-al-ilzām: 'ard wa-munāqasha* (Riyadh: Maṭābi' Dār al-Hilāl, 1402 H., 1982 C.), 56. Ibn Qudāma affirms that "truth is not confined to a single school." *Mughnī*, 11:482.

[173]Ibn Taymiyya unfolds from transcendence of the law a stirring statement of human freedom. For him transcendence yields freedom, and not mystifying constraint, because his transcendence is so ruthless. Islamically at least, transcendence if epistemologically honest engenders its mirror-image in indeterminacy.

His position extends to a claim that even the qāḍī, who ordinarily has the power to fix a determinate outcome in the concrete case, can lose that power when uncertainty has too much infected the law. Ibn Taymiyya, *Majmū'at*, 35:377.

applied to the action itself, an act of conscience by which God's law is brought into relation with specific fact, whether conducted by the individual himself in the forum of the bāṭin, or by a judge or other authority in the forum of the ẓāhir.[174]

Pointed to in this pronouncement is an extraordinary conception of law, which we now have glimpsed from enough angles to approach directly. This is a conception in which law is epitomized, not in systems of objective, formal, general, public, compulsory rules, but in a unique decision of individual conscience issued in evaluation of a concrete act.[175]

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[174]Interestingly, this point is tersely put by al-Māwardī (d. 450 H., 1058 C.), the author of the most important fiqh public law work, remarking on the requirement that a qādī be a mujtahid: "This is because appointment [of a *qāḍī* to adjudicate] specific cases [*furū'*] of the *sharī'a* is a necessity, and this is not achieved except by one who is [in himself] committed to the truth [*multazim al-ḥaqq*] and not one who merely enforces it [*dūna mulzimih*]." Abū al-Ḥasan 'Alī b. Muḥammad al-Māwardī, *al-Aḥkām al-sulṭāniyyah wa-al-wilāyāt al-dīniyyah* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1398 H., 1978 C.), 66.

[175]See, for an example of a discussion particularly revealing of the point, al-Qarāfī, *al-Iḥkām*, 65-66. But the result is not often insisted on, but instead emerges, usually tacitly, as the ultimate logic toward which the system is pointed, like the vanishing point of its entire perspective. As I hope is clear from the entire discussion, contending against this logic are other trends or conceptions, which worked, though at less ultimate levels, to keep law in the foreground and prevent it from collapsing into this distant vanishing point. These opposing trends get greater play in some schools and scholars than in others. Cf. Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Cambridge, MA: Ph.D. diss., Harvard University, 1984), 460, noting how ijtihād is pervasively modeled in the literature on the individual believer's duty to find the qibla for prayer, and to that extent is understood in the sense of "an individual application of a rule of law." He

The idea of law inhering in a unique event is conceivable if the lawgiver is God, since, conceivably, true unique judgments for all events reside "with God" [*'inda allāh*]. But to man, in contrast, God's law is revealed only in revealed texts, to be augmented by his own powers of reasoning and perception; man's fiqh must make shift with language and processes of reasoning, and therefore also abstract meanings of words and general categories of thought. Yet, as shown by the way the aspirations to meta-ordering and to pan-ordering together define its legal world, fiqh did not relent from understanding that the sharī'a -- any less than the perfect divine will itself -- minutely, universally, evaluates all events. Ijtihād is precisely the effort to attain this knowledge: to draw near God's true evaluation for each particular event by applying uṣūl al-fiqh to concrete reality. God's sharī'a may be unknowable in either its infinity or its certainty, but it is not for all that either metaphysical, inscrutable or relativistic.[176]

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quotes the Ḥanafī Abū al-Ḥasan 'Ubayd Allāh al-Karkhī (d. 340 H., 952 C.) to the effect that such is the dominant sense of ijtihād.

[176]The contrast between rule-law and instance-law shows, in its intricate, meaningful, relationships to the other distinctions we have earlier discussed, that it roughly parallels those distinctions. Cf. p. 172 above.

Two examples of these relationships:

First, the relationship to various traits distinguishing meta- and pan-ordering, and the people of ḥadīth and of opinion. If one's uṣūl al-fiqh yield, for ordinary derived rules of law, certainty (largely because of a high valuation of ijmā' and qiyās), then one tends to posit confidently that those rules, despite their abstraction from facts, are true in

the bāṭin as well as the ẓāhir. In contrast, if the only truth is in revealed texts, many of which (the aḥādīth) yield only ẓāhir evidences, then truth is known only to God in the bāṭin, and approached through the discipline of ijtihād in the individual conscience and unique episode. The first lends itself more to legal conceptions paralleling Western ones in their generality and reference to at-large legal realities; the second lends itself more to the legal conceptions here described.

Second, and more intricate, the relation to the "every mujtahid is correct" debate. As to this debate, the text proceeded largely according to the majority view. Let us inquire how far it needs modification under the various minority positions. At the ideal theoretical level, very little modification is needed, since, for all these positions, each individual case demands that the qāḍī, who ought to be a mujtahid, reach conviction that his judgment is the most correct. The truth-pluralist versions, however, add to this that in the bāṭin there is neither a correct ruling nor a revealed dalīl to point to it; the qāḍī's judgment not only cannot bind in the bāṭin, but it also cannot even hope to "hit upon" truth in the bāṭin. Paradoxically, attaining "truth," never assured, is for these theories far less daunting -- it depends solely on the usūl al-fiqh being correct, and the qāḍī's entertaining a subjective conviction of a relative legal truth. Although, again, even according to these theories, fastidious method requires a fresh ijtihād for *every* case, however routine, in order to transmute the judgment into a sharī'a one, one wonders why anyone would trouble to do this ijtihād. First, as to the law, if there is no one correct view or one correct dalīl, why exert oneself beyond locating the appropriate ruling by an acclaimed, undisputed mujtahid from the past, since his ijtihād certainly was faultless? Second, as to the facts, why not, instead of seeking out the concrete and unique, simply mechanically operate the sharī'a evidentiary rules, which yield legally creditable facts in the ẓāhir, since the case has no unique legal construction anyway in the bāṭin?

Several tendencies are common to both these results. First, in both there is a tendency to turn away from the bāṭin, which is to found nowhere but in the individual qāḍī's conscience, toward the ẓāhir. Second, in both there is an impetus to look to general rules as binding. As to law, the divine ruling for the particular case may be found with certainty and unity if the applicable law is textually certain [*qaṭ'ī*], and with certainty but not unity in applicable abstract fiqh opinions reported from unquestioned mujtahids. If instead one fashions one's own ruling for the case, one achieves neither certainty nor unity. As for the facts, because these reliable rulings are found in the abstract, a

We at once caution, however, that Ibn Taymiyya's statement, and its view of law, though theoretically cogent and, as we have seen abundantly, determined by the law's highest justifications and ideals, would seem in his time an idealistic and polemical position, locating him at one extreme of a continuum having, at the other extreme, a view accepting compulsion of fixed school views throughout a legal system. We have studied this continuum from several aspects. Ibn Taymiyya's position on it is clear from his positions on certain doctrinal controversies, in each of which he persistently advances the religious and legal authority of texts, and each of which we have encountered previously: (i) the universal reach and application of revealed texts;[177] (ii) uṣūl al-fiqh views restricting ijmā' and qiyās, such as his skepticism of any ijmā' after the Companions,[178] his accepting as probative singular aḥādīth,[179] his giving them precedence over qiyās, and his requiring strict rank order -- Qur'ān, sunna, ijmā', qiyās -- in ijtihād;[180] (iii) his view that only one ijtihād view is correct, and that God's true ruling exists

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secure match with them is best achieved by fixing the facts explicitly and formally in the ẓāhir.

These are both then examples of how changes in apparently obscure, theological doctrines can contribute substantially toward significant differences in the application of the law.

[177]See n. 96 and Chap. 1, n. 41.

[178]See n. 103 above.

[179]See Chap. 1, n. 68, above.

[180]See n. 21 above.

for each particular case, which the mujtahid is obligated to find, and to which God has provided in His revelation a dalīl.[181] Such positions cut, in multiple, complexly related ways, at the equally multiple roots of the widespread comfortable conception -- common to the other pole of the continuum -- that God's law had been so successfully explored by the Community as to permit relaxing the vital tension of finding God's law in the particular, the individual and the concrete.

In Ibn Taymiyya's time, a legal system habituated to taqlīd, supported by a vague concept of ijmā', had so far overtaken the general consciousness that fiqh had become -- in this respect -- not so foreign <u>in function</u> from our ideas of law. In other words, the generalized perception of the law had proceeded even further in this direction than pure legal theory -- even of the Ḥanafī Ibn 'Ābidīn quoted above -- would justify. The layman would rarely distinguish in his being bound between what was ijtihād-based and what was known of a certainty, and he was not competent to draw the distinction (and in fact, as we shall see, even the learned differed in drawing it). Rather, a layman, one holding office in the legal system, or the ordinary 'ālim thought that a great mass of very well-known rules, whether in prayer, divorce or contract, bound, more or less of their own force, him and all his fellows in his school, even though, as he knew, laymen of

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[181]See p. 149 above.

another school thought the same way about often very divergent rules. The very pervasiveness and profundity of this complacency is what lends the exaggeration and polemical tone to Ibn Taymiyya's statement.

After this caution, two points emerge about this legal vision that law inheres in a unique act. The first is to note the extraordinary degree to which, as shown not only in Ibn Taymiyya's theory but in the very logic of the law's centrally accepted doctrines, the ultimate conception of Islamic law is one in which the West's favored concept of law is so strikingly absent, entering only by the super-addition -- and this only at the maturity of the fiqh -- of a theory, that of school taqlīd, which by its own admission was a falling off from the high standards of the fiqh's origins, justified only by necessity.

The second point is to note how perfectly practical a concession -- certainly in our estimation -- something like school taqlīd is for a functioning legal system. This is strikingly shown in the Wahhābīs' own adherence in practice to the Ḥanbalī fiqh books, even though by their theories of ijtihād or taqlīd they were not obliged to do so.[182] Westerners now only with difficulty could understand a legal system that renounces all means to unify, or even reconcile, contradictions in legal views between two judges on the same court, or even between the different judgments of the same

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[182]See p. 163 above.

judge. Or, how would we comprehend a legal system where a law to govern every aspect of one's everyday life, even the most pressing, would reside only in myriad revealed texts, some affording certainty and determinate results, but most providing only vague, conflicting, bits of guidance; or, at a remove from the texts, where law would consist of a bewildering multiplicity of learned opinions, each competing for one's allegiance? These are overstatements in that they so literally and relentlessly translate Ibn Taymiyya's polemic, directed at what we have called "spirit," into the day-to-day application in the legal system, beyond the limits which even Ibn Taymiyya intended.

Both of these points readily convince us that there are many naturally occurring obstacles -- natural to any "legal system" as we have defined the term -- that prevent a spirit such as Ibn Taymiyya's from being carried fully into implementation. In the remainder of the book, we shall be looking for these obstacles, what and where they are, precisely in a system, that of Saudi Arabia, which seeks to implement Ibn Taymiyya's views.[183] But we hardly expect these natural obstacles to be so determining as to have forced Saudi Arabia to adopt, whether explicitly or implicitly, a law or legal system functionally equivalent to a modern Western legal system. In the moral and legal topography there is much

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[183]See p. 165 above.

middle ground between their conceptual high ground and our own.

For example, what about many phenomena that are clearly vital to legal systems but which we do not want to call "law," or even "lawlike" (though we may allow them the adjective "legal") -- such as many phenomena that are either informal, particular, subjective, private, unique, occasionalistic, voluntary or individual in various ways?[184] For example, is it to us "law," "law-finding," or even "law-enforcement," when an individual evaluates the legality of his own action, and amends his behavior or not accordingly, or gives advice to another on how to comply with the law, or in administering affairs chooses courses of action to further an objective of the law? Such a unique legal act we would describe as a "compliance" with, or an "application" or "elaboration" of,[185] a law -- this is if a law "covers" it; failing that, perhaps the event is "legal process"; or it may be called "arbitrary," "discretionary," "policy," or "private action." Is it even "law" to us when a judge singles out, from the tangle of

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[184]The role of such legal acts even within Islamic law will hereafter not figure in our discussion, because they cannot easily be juxtaposed with corresponding phenomena in the West.

[185]It may be objected that the role of the judge in the common law tradition evades this characterization. It does, but only partially, since the judge in his judicial process understands that he applies and generates rules within a fabric of precedent applicable to all similar cases. A less stark contrast with the Western system will be possible using a framework set up below. See p. 332.

indications and evidence, the operative legal facts of a case? This we want to call a question of "procedure." We well recognize that without all these events, which fall outside "law," law would be a disembodied, formal abstraction; indeed, much of the work of Western legal theory in this century has been dedicated to showing some of the consequences of distortions and narrowness inherent in this conception of law.[186] Meanwhile, in sharī'a, the theory of ijtihād is a single thread uniting all these acts -- and with them the rulings of a qāḍī or muftī -- representing them all as elaborations or determinations of the law.

Again, a judge in any system engages in a process of "ijtihād" in subsuming a concrete case under a general rule. Western thought has often regarded this process as trivial, now admits it is vital, but still finds it intractable theoretically.[187] In Saudi Arabia, on the other hand, although the distinction is recognized between constructing the facts and elaborating the law, both are still called "ijtihād": "*ijtihād fī al-wāqi'*," "ijtihād as to the occurrence," or "as to the reality" (we will call it "fact-ijtihād") which is practiced even by the muqallid, and

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[186]I am thinking of Realist and Critical Legal Studies attacks on formalism. See, for a most pertinent example, Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review*, 89 (1976): 1685-1778.

[187]See, e.g., K.N. Llewellyn, *The Bramble Bush* (New York: Oceana, 1960), esp. 53, 73-76; Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Education* 36 (1986): 518-562.

"*ijtihād fī al-ḥukm*," "ijtihād as to the ruling" (we will call it "ruling-ijtihād"), practiced only by the mujtahid. This distinction, which we shall use for the rest of this Chapter, probably arose in order to identify a sort of discretion observed even when a qāḍī does not practice ijtihād as to legal rules; as we shall see, Wahhābī dalīl theory encourages that discretion.[188]

A special nomenclature is needed to facilitate reference to this contrast between Western and Islamic legal ideas: let us call law inhering in the unique event "instance-law," as opposed to "rule-law," meaning law consisting of general rules. The opposition between these terms seems to identify promising lines of contrast between Western and Islamic systems.

The full significance, and context, of this opposition, however, needs much more development. To start, let us use the new nomenclature to declare a new line for research drawing on the observations of the last few paragraphs. We observed that, on the one hand, our familiarity with a rule-law legal system makes us skeptical whether an instance-law system can work. We anticipate that certain "natural obstacles" will confront a legal system proceeding under the

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[188]Again, the distinction is not vital to the system, or that commonly noted. See, e.g., Abū al-Ma'ālī 'Abd al-Malik Ibn 'Abd Allāh al-Juwaynī (Imām al-Haramayn) (d. 478 H., 1085 C.), *Ghiyāth al-umam fī al-tiyāth al-ẓulam*, ed. Muṣṭafā Ḥilmī and Fu'ād 'Abd al-Mun'im (Alexandria: Dār al-Da'wa, 1979), 220-221; Ibn al-Qayyim, *Badā'i' al-fawā'id*, 4 vols. (Beirut: Dār al-Kitāb al-'Arabī, n.d.), 4:12-13; idem, *I'lām*, 1:87-88.

banner of the Islamic instance-law ideal, and force it partially into rule-law forms. On the other hand, we were able to detect in ourselves and Western legal systems a degree of conceptual blindness to apparent instance-law forms in our midst. Together these observations suggest that, in both legal systems, the two forms of law may exist, each performing characteristic functions, without this being fully acknowledged in either's ideal legal theory; each system may cherish a special blindness for the alternative to its favored type of law. Exploring how in either system -- for us here the Islamic -- both forms of law are used and interact will shed light on what unites and what separates the Western and the Islamic legal systems; it may also instruct us on the nature of instance-law and of rule-law, including the issues whether, when considered across the two legal systems, each of the two types operates in characteristic ways on legal behavior, or fulfills certain essential tasks.

Therefore, the question that will be before us, as periodically redefined, for the remainder of this book is, to what extent, and in what ways, does the effective functioning of even an Islamic legal system demand concessions to rule-law forms? How far into the practice can the legal system carry its instance-law ideal? We have already found signs of rule-law concessions: most obviously, the broad complex of ideas behind school taqlīd. In Saudi Arabia, we noted that ijtihād may be more independent and free in instance-law contexts

(such as individual, private fatwās, or fact-ijtihād) than in rule-law contexts (such as promulgating publicly a general rule of fiqh, or determining the ruling applicable to facts fixed after a formal procedure).

PART IV

IJTIHĀD IN THE COURTS

We have quoted above ringing affirmations that the dalīl theory is the basis for elaboration of law in the Saudi courts.[189] Let us now inquire the extent to which this claim, in fact and spirit, is reflected in the realities of the court system -- how in actual practice taqlīd and ijtihād work themselves out under the aegis of the dalīl theory and Wahhābī idealism.

In discussing qaḍā' we add a new element to our discussion of ijtihād -- although some of the results of this addition were discussed above, in drawing comparisons with iftā': this is that qaḍā' weds to ijtihād the element of state compulsion, while until now our discussion of ijtihād hinged on only the free individual conscience. And since, in an Islamic system, the material power to compel action is concentrated in the hands of the ruler, we now encounter the ruler as an essential partner to the mujtahid in the

[189]See p. 173 above.

enterprise of judging. Yet, for purposes of this Chapter we shall ignore this partnership and assume that the 'ulamā' administering the judicial system are free to act without interference from the ruler, though they may rely on the ruler's material power whenever necessary. To do so is artificial; but for the Saudi legal system it is in one respect not a severe distortion, since the original compact between the imām and the Wahhābī 'ulamā' has led to a long-term custom, to be discussed in Appendix A, by which the 'ulamā' enjoy full, independent authority in qaḍā' matters. This custom has placed on the shoulders of the 'ulamā' themselves the responsibility to make of qaḍā' an effective, practical system. Here we wish to study the measures they have taken to achieve this. We must remember, however, that a vital dimension is being excluded, and that the world we explore -- both the theory and the practice -- will seem somewhat two-dimensional, and taste of a consciously held idealizing world-interpretation, which, in the real Saudi Arabia and the real Islamic legal system, contends with others. Even so, it will be evident at many points -- because we do examine the practice -- how this third dimension intrudes. In the next Chapter, adding in the vital dimension of power, we consider ruler, state and legislation, and explore key areas of cooperation and competition between the 'ulamā''s world-interpretation and that of others. Having

done that, we shall wish to look back on the material covered in this Chapter, to see it in fuller light.

To explore judicial ijtihād in Saudi Arabia, the discussion, covering the remainder of the Chapter, will fall into two parts, one concerned with ruling-ijtihād [*ijtihād fī al-ḥukm*], and the other, concerned with fact-ijtihād [*ijtihād fī al-wāqi'*].

A. IJTIHĀD AS TO THE RULE OF LAW TO BE APPLIED

Taking up ijtihād as to the ruling, we shall follow four lines of inquiry, united by our interest in the relationship between instance-law and rule-law forms. The first is to discuss additional aspects of a problem already encountered, and to which we shall return: how, by explicit law and in practice, the Saudi system combines vigorous defense of the qāḍī's instance-law ijtihād, with a system-wide, predictable -- nearly rule-law -- adherence to a single school, the Ḥanbalī. The second line of inquiry is to determine whether Saudi Arabia tolerates a form of instance-law particularly opposed to rule-law and to our ideas: a qāḍī's altering of his position on a single legal question from case to case, in response to the concrete fact. The third is to examine the practice of appeal, to see to what extent, now after Saudi Arabia has in place a system of Western-modeled appellate courts, the system upholds conceptions of instance-law and

freedom of ijtihād, or instead indulges temptations to implement rule-law. The fourth line of inquiry is to examine the jurisdiction of the highest judicial body in the system, which is both appeal court and supervisory board, and analyze the rule-law/instance-law characteristics of the peculiar form of authority and leadership it exercises over the ijtihād of lower courts.

1. Ijtihād and Ḥanbalī Conformity among Saudi Qāḍīs

First, we return to the Ḥanbalism of Saudi qāḍīs. We have previously quoted at length from the Wahhābī profession of ijtihād and dalīl theory, and discussions of proper ijtihād method; and mentioned the seemingly paradoxical habit of Wahhābī 'ulamā' to adhere closely to late Ḥanbalī fiqh rulings. This section is not intended to give the final solution to this puzzle, but only to restate it in the context of contemporary Saudi courts. The puzzle, indeed, states a problem to be considered throughout the remainder of the Chapter.

As the Wahhābīs before them, Saudi judges often describe themselves as Ḥanbalīs. As discussed above, this does not mean that any sort of strict taqlīd prevails. Every qāḍī or official in the judicial system I asked asserted that qāḍīs adhere to dalīl theory. Some of these, concerned to deny the blind taqlīd abhorred in their philosophy, preferred to assert

that the qāḍīs were not Ḥanbalīs at all.[190] Others, including Shaykh al-Laḥaydān,[191] as quoted above, acknowledged that Saudi qāḍīs "are Ḥanbalīs, though they do not commit themselves in every one of their cases to the school of the Imām Aḥmad." He explained this Ḥanbalism as did his Wahhābī forebears, that school affiliation was "acknowledgement of [Aḥmad's] leadership," meaning following his uṣūl in determining the dalIl; in particular, placing adherence to texts over the views of anyone, even Aḥmad himself. Shaykh Aḥmad b. 'Alī al-'Umarī,[192] claimed for himself an ijtihād by which he chose among variant views of the Ḥanbalī school, selecting one, perhaps even one "weaker in dalīl," according to "circumstances and concomitants" [*ẓurūf wa-mulābasāt*] of the case, and agreed with my suggestion that this is "ijtihād within the school."[193] Dr. Ḥamad al-Faryān[194] explained that qāḍīs are required to be Ḥanbalīs in their fiqh, but only as a starting point, for the sake of unification of the system. As individuals become more qualified, they may pass beyond the school's views, still then being called Ḥanbalīs in the

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[190]Shaykh Sulaymān b. 'Abd Allāh al-Muhannā, interview with author, Great Shari'a Court of Riyadh [*al-Maḥkama al-Kubrā bi-al-Riyāḍ*], Mar. 20, 1983.

[191]See Appendix D, List of Interviewees.

[192]See Appendix D, List of Interviewees.

[193]Shaykh Aḥmad b. 'Alī al-'Umarī, interview with author, Summary Court of Jidda [*al-Maḥkama al-Musta'jala bi-Jidda*], Aug. 7, 1983 and Sep. 4, 1983.

[194]See Appendix D, List of Interviewees.

extended sense advocated by the Wahhābīs. He explained that the identification of all qāḍīs as Ḥanbalīs aids the understanding of ignorant persons, who otherwise would think the 'ulamā' differed totally.[195] Dr. al-Nafīsa said that qāḍīs are bound by the Ḥanbalī school only as an "orientation" or "trend" [*ittijāh*].[196]

Despite these views, it is overwhelmingly the case that judgments follow accepted Ḥanbalī views. As confirmed by practicing lawyers and other regular participants in the system, the surest (and only) guide to predict sharī'a court behavior on any matter on which the fiqh lays down rules is the fiqh of the late Ḥanbalī manuals. Many of the system's rules of practice and administrative routine rely on this presumption. But, as these same observers of qāḍī behavior will attest, the presumption is hardly conclusive, since a qāḍī may, supported by the doctrines just described, choose to apply a different view, though usually one from the Ḥanbalī school.[197] Indeed, some of these variations are widespread and well-known. Shaykh al-Ghuṣūn[198] mentioned minority views on the issue of the triple divorce[199], and on a question

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[195]Dr. al-Faryān, interview, Nov. 11, 1984.

[196]Dr. al-Nafīsa, interview, Riyadh, May 10, 1985.

[197]Though again, the Ḥanbalī school has a great variety of views.

[198]See Appendix D, List of Interviewees.

[199]See p. 223 above.

whether in certain crimes [*ḥudūd*] confessions are admissible when the accused asserts, without proof, that the confession was coerced.[200] A disagreement I observed is whether circumstantial evidence, including pregnancy in adultery and the smell of liquor on the breath, may be used to prove such crimes.[201] None of these views entail departure from the Ḥanbalī school.[202] Other examples are discussed below.

Our task, therefore, in this section is to explore how these two facts, vigorous support for dalīl theory and a fairly predictable conventional Ḥanbalī jurisprudence, relate to each other.

We must first treat a subsidiary issue, the widespread assumption that Saudi qāḍīs are bound, by certain orders of King 'Abd al-'Azīz, the founder of Saudi Arabia, to apply only the dominant Ḥanbalī view. On examination this situation turns out to have been true only for some decades, and only for part of the country; nowadays authorities refer to these orders as "repealed."[203] It is worthwhile to know why these decrees were issued, how they were applied, and why they were repealed. But this historical investigation meets with

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[200]al-Shaykh Ṣāliḥ 'Alī al-Ghuṣūn, Member, Supreme Judicial Council, interview with author, Riyadh, Nov. 14, 1984.

[201]al-Rasheed, "Criminal," 203-04.

[202]Ibid.

[203]Prof. 'Aṭwa declares that the decrees still apply. Prof. 'Aṭwa, interview, June 14, 1983; idem, *Muḥāḍarāt*, 142-43. All others differ.

difficulty in determining some basic facts: (i) whether these decrees, issued originally to apply only to the Western province, the Ḥijāz, were ever applicable outside Ḥijāz; (ii) whether, even if they were extended to all regions, the 'ulamā' acknowledged or observed them; (iii) how, in the absence of any express repealer, the view is held that the decrees are no longer valid.

This question raises rather directly the excluded issue of the ruler's role in qaḍā', and involves us prematurely in the topic of the King's authority to administer the judicial system, discussed in the next Chapter. Much of the material of the rest of the Chapter has this last topic as sub-theme; to its significance in this respect we shall return. In what follows, we shall encounter a number of decrees, orders, regulations and ordinances issued by the King, and by the executive agency charged to administer the judicial system, the Ministry of Justice. For now, let us adopt the following three rules of thumb: one, that the Saudi 'ulamā' lend to any such piece of positive law only such obedience as is justified by sharī'a; two, that the sharī'a confers power on the King to regulate administrative matters; and three, that administrative matters include the organization of the court system and the allocation of its jurisdictions.

The organization of the Saudi judicial system, and its historical evolution, are described in Appendix A. The decrees that compelled judgment according to the dominant

Ḥanbalī school are a key part of this history. When the Ḥijāz was conquered, its courts were applying all four schools of law, most significantly the Shāfi'ī and Ḥanafī schools. Its own qāḍīs and muftīs, many of them highly esteemed and sophisticated, were largely Shāfi'ī. King 'Abd al-'Azīz faced the difficulty of consolidating his authority over such 'ulamā', while at the same time accommodating his own 'ulamā', whose views and outlook conflicted sharply with the former's. These problems implicated several larger ones the King faced. One was to assert an effective authority over both the Ḥijāz and his own often fanatical following; another was to pacify and reassure world opinion, which was concerned lest the fanaticism of the Wahhābīs bring chaos and destruction to the Holy Cities, as it had early in the 19th century.[204]

The King's answer to these problems, as to legal matters, was, first, to declare that the law of the Ḥijāz was sharī'a, and that all four schools deserved respect. Second, he delegated to a consultative council the duty to propose a new judicial system to replace the existing one.

The court system which the council proposed, and which King 'Abd al-'Azīz adopted, was more modern than the previous one, and included a body to hear regular appeals and multiple-judge benches, both innovations[205] with respect to Islamic

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[204]Solaim, "Constitutional," 84.

[205]I shall not discuss multi-judge question beyond the following comments. There are strong, and early, precedents indicating that a judge should act with consultation [*shūrā*].

law. But this system was limited to the Ḥijāz. Elsewhere in Saudi Arabia, the court systems remained starkly simple, even primitive. For three decades after 1926, the judicial system continued to be bifurcated in this way, one system for the Ḥijāz and one for the rest of the country.

Soon after its creation, the "Judicial Supervisory Board" in the Ḥijāz proposed an order, later "confirmed" by the King, that judges are bound to rule by the opinion "on which fatwās are given" of the Ḥanbalī school.[206] A subsequent order[207] clarified this by requiring that judgments be given according

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Tyan, "Judicial Organization," 247; Prof. 'Aṭwa, *Muḥāḍarāt*, 10. Scholars discussed the validity of appointing judges with the condition that they decide together, holding it improper on grounds of the inconvenience of tie votes. Tyan, "Judicial Organization," 245; Prof. 'Aṭwa, *Muḥāḍarāt*, 139-140. Thus, Ibn Taymiyya says it is valid if there is one above them to decide ties. Ibn Taymiyya, *al-Fatāwī al-kubrā*, 4:629. A Saudi fatwā gives as reason for three-judge review in serious criminal cases "the release of obligation and avoidance of the spilling of blood." Lajnat al-Buḥūth al-'Ilmiyya, al-Riyāsa al-'Āmma li-Idārāt al-Buḥūth al-'Ilmiyya wa-al-Iftā', "al-Ḥukm fī al-saṭū wa-al-ikhtiṭāf wa-al-muskirāt," *Majallat al-Buḥūth al-'Ilmiyya*, pt. 2, no. 12 (1405 H.), 78. In procedural regulations, Kingdom of Saudi Arabia, *Tanẓīm al-a'māl al-idāriyya fī al-dawā'ir al-shar'iyya*, Royal Confirmation No. 109, 24 Muḥarram 1372 (Oct. 13, 1952) (Riyadh: Maṭābi' al-Ḥukūma, 1398 H., 1978 C.), sec. 69, it is provided that each judge on a bench of more than one judge may decide by himself giving his reasons.

[206]Such a command followed long-standing Ottoman practice, though foreign to Wahhābī thought. Judicial Council, Decision No. 3, 7 Muḥarram 1347 (June 25, 1928), confirmed by the King 24 Rabī' al-Awwal 1347 (Sep. 9, 1928), reprinted in Kingdom of Saudi Arabia, *Majmū'at al-Nuẓum, Qism al-Qaḍā'*, 11 [hereafter cited as "Decision No. 3"].

[207]Reprinted without number or date in Kingdom of Saudi Arabia, *Majmū'at al-Nuẓum, Qism al-Qaḍā'*, 11.

to the views of two particular late commentaries;[208] if these differ or no opinion is found in them, or if the books are unavailable to the qāḍī, then the decision is to be made according to another two books,[209] and failing these, any other books of the school, choosing the simplest of them. In a case where applying the Ḥanbalī view would entail hardship and conflict with public utility, the view of another school could be adopted.[210] Two years later the King decreed that, in courts possessing more than one judge, if judgment is given according to a rule fixed in the Ḥanbalī books, a judge could rule singly; whenever there is no such rule, and the matter demands "ijtihād," then the court should rule as a body.[211] Another decree allowed law of other schools to persist as to certain local matters like agricultural tenancies.[212]

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[208]Two books by al-Bahūtī (d. 1051 H., 1641 C.), *Sharḥ muntahā* and *Kashshāf*.

[209]Ibn Ḍūyān, *Manār*, and Manṣūr b. Yūnus b. Ṣalāḥ al-Dīn b. Idrīs al-Bahūtī (d. 1051 H., 1641 C.), *al-Rawḍ al-Murbi'* (Cairo: Maṭba'at al-Sunna al-Muḥammadiyya, 1374 H., 1955 C.), a commentary on Mūsā b. Aḥmad al-Ḥujāwī (d. 968 H., 1560 C.), Zād al-Mustaqni', which is an abridgement of Ibn Qudāma's *al-Muqni'* and was once frequently memorized by Saudi shaykhs. See Sa'ūd b. Sa'd Āl Durayb, *al-Tanẓīm al-qaḍā'ī fī al-mamlaka al-'arabiyya al-sa'ūdiyya* (Riyadh: Maṭābi' Ḥanīfa, 1403 H., 1983 C.), 314.

[210]Decision No. 3.

[211]Royal Will No. 647, 20 Rabī' al-Awwal 1349 (Aug. 14, 1930), reprinted in Kingdom of Saudi Arabia, *Majmū'at al-Nuẓum, Qism al-Qaḍā'*, 15-16.

[212]Soliman A. Solaim, "Constitutional and Judicial Organization in Saudi Arabia" (Ph.D. diss., The Johns Hopkins University, 1970), 98.

Read in historical context, these orders appear to be an attempt to bring the Ḥijāzī legal system into conformity with Wahhābī-Ḥanbalī practice and to facilitate the new government's dominance in the Ḥijāz.[213] It would seem that, from the Najdī and Wahhābī perspective, the mechanisms of appellate courts and multi-judge benches were desirable, because they served the ends of consolidating and centralizing power over the Ḥijāz, and advancing the country's unification. At the same time, from the foreign and Ḥijāzī perspective, the regulations had the advantage of a modern and progressive appearance. The acquiescence of Najdī 'ulamā' in these measures shows their recognition, despite their Wahhābī ijtihād spirit, of the need for an effective country-wide uniform adherence to a single school.[214]

The Najdī 'ulamā', however, apparently prevented these orders' application to Najd and the rest of the country. When in 1957 the Ḥijāz system was extended throughout the country (apparently without formal regulation, but merely by letting it out that the regulations issued for the Ḥijāz now applied everywhere), one can still be certain that the orders compelling Ḥanbalī law did not apply to Najd. Evidence for

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[213]Significantly, all of my sources on the history of the legal system tend to gloss over the significance of its three-decade bifurcation, and ignore the formal restriction to the Ḥijāz of the King's orders concerning the system.

[214]Dr. al-Faryān said that this provision was due to a shortage of "qualified qāḍīs." Dr. al-Faryān, interview, Mar. 6, 1983.

this is that in 1954, probably in anticipation of the unification, appeals -- the mechanism by which in Ḥijāz compliance with Ḥanbalī views was enforced -- were abolished. In 1962 they were restored, with the creation of new appeal courts[215] nationwide, called the "Board of Review." (A reason given for the restoration is that the abolition of appeals caused a great burden of extraordinary appeals to fall on the King.[216]) But with the restoration we find a new, clear provision preventing appeal from being used to restrict judicial ijtihād -- a concession no doubt demanded by the Najdī 'ulamā'.[217] The provision, in the new appellate court decree, read as follows:

> Judgments of the qāḍīs must be respected, such that none of them shall be reversed unless it differs with a text of the Book, the sunna or the ijmā', or it differs with the trial judge's own opinion. No judgment requiring reversal shall be reversed except by the trial judge [who issued it], as long as he does not refuse; if he refuses, then the appeal court has the right to reverse it.[218]

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[215]The first appeal court was styled Committee of "Supervision" [*murāqaba*], changed in 1931 to "Review" [*tamyīz*]. Abū Ṭālib, *al-Niẓām*, 22. The appellate bodies are still referred to as "Boards [*hay'āt*] of Review," though the 1975 Regulation of the Judiciary defines them as branches of the "Court [*Maḥkama*] of Review." There remains resistance to calling these courts "courts." We compromise herein by referring to the "Court" as a "Board," in the singular.

[216]Rasheed, "Criminal," 59.

[217]al-Rasheed, "Criminal," 233 & n. citing letters from the Muftī (1955) and the head of the judiciary in Najd to this effect.

[218]Decree No. 16-3-3136, 20 Shawwāl 1381 (Mar. 26, 1962), arts. 6, 7.

Writing in 1969 two Meccan scholars declared that this provision signalled the advent of ijtihād freedom in the High Court of Mecca (in the Ḥijāz), and markedly affected the jurisprudence of that court.[219]

Decree law now, therefore, agrees with the qāḍīs' doctrinal declarations of ijtihād freedom. The law of Saudi Arabia is that qāḍīs may rule according to "that to which their ijtihād leads them," even if such is not a Ḥanbalī view, or even a view from one of the four schools.

Returning, then, to our basic concern, how this freedom is exercised in practice, we find difficulties confront our investigation. In the nature of things, tough cases of ruling-ijtihād are not routine, and observations in the general sharī'a courts, even for several months, turn up few cases. There is no case reporting or any other reliable

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[219]Muḥammad Aḥmad Ibrāhīm 'Alī and 'Abd al-Wahhāb Ibrāhīm Abū Sulaymān, "Recent Judicial Developments in Saudi Arabia," *Journal of Islamic and Comparative Law* 3 (1969):12. Precedents exist, however, in earlier regulations, even the first. The 1927 decree creating the court system stated that, as to the Summary Courts, reversal ran only for conflict with a text or an ijmā', Abū Ṭālib, *al-Niẓām*, 19, but as to appeal from other courts, it speaks only generally of "supervision," "inspection," and "review [*tadqīq*], . . . reversal and affirmance," or remand with instructions. Royal Decree of 4 Ṣafar 1346 (Aug. 2, 1927), in Institute of Public Administration, *Majmū'at al-nuẓum, Qism al-qaḍā' al-shar'ī, min sanat 1345 ilā sanat 1357* (Riyadh: Institute of Public Administration, n.d., reprint of 1357 H., 1938 C. edition), sec. 5. Regardless, it is clear that judgments were reversable for failure to apply an appropriate Ḥanbalī rule.

method to investigate court ijtihād in extenso.[220] There is the additional factor -- to be discussed below -- that a great majority of all cases, and perhaps most of all the novel ones, are settled by reconciliation.

By far the most frequent cases of ruling-ijtihād are those involving modern situations not treated in the traditional law. Here I did observe such problems dealt with, not by close analogies to Ḥanbalī fiqh texts, but rather by direct reference to the revealed texts or general principles. An example is a case described to me by the attorney who defended it, where a sharī'a court qāḍī confronted, quite possibly for the first time in his career, the concept of the limited liability of an artificial person, a modern concept introduced by the 1965 Companies Regulation. The suit was brought by an employee of a limited liability company against a shareholder of the company, seeking payment of wages. The issue was whether the provisions of the Regulation upholding limited liability, and the fact that the company was already before another Saudi court in bankruptcy proceedings, should bar liability of the shareholder. The qāḍī held for the plaintiff, quoting a saying of the Prophet, "Pay the worker before his sweat dries." In another example, a senior appeals judge, confronting a defense by one accused of drug possession

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[220]Court reports are not published, and can be perused only with the consent of the judge, and then in a limited fashion. The same rule holds, even more stringently, in appellate courts. See n. 248 below.

that he "knew nothing" about the drugs found in his car, asked a research assistant to find aḥādīth on the point. He did not request research in the fiqh of Ḥanbalī or other schools.[221] The working library of the Supreme Judicial Council has half its shelves dedicated to Qur'ān and Sunna, and only one-sixth to the fiqh of all the four schools.

Results in cases where the fiqh law is not developed, and there is no commonly shared approach among the 'ulamā', are often unpredictable, reflecting a broad discretion in the qāḍī. For example, the sharī'a courts are in agreement that bank interest is forbidden *ribā* or usury in the Qur'ānic sense, and that a creditor is entitled to judgment only for his principal. This position led to a number of cases where a debtor to a bank would assert that the accounts of his lending history with the bank, sometimes stretching over many years, should be revised to allocate all loan payments to principal. Of course, in most cases, this proposition has the result of the bank becoming suddenly not the creditor of the customer, but his debtor, and often in very large amounts. Obviously, and as qāḍīs were well aware, if the sharī'a court system were to accept such claims, the stability and future of the banking system of the country would be severely threatened. Saudi qāḍīs have reportedly met the challenge in highly varying ways. At least one qāḍī did give judgment against the bank on such a claim, but on appeal the case

[221]Shaykh al-Ghuṣūn, interview, Apr. 21, 1985.

seemed to have been stalled.[222] Another qāḍī reportedly decided, on the ground that both parties were at fault, and that neither should benefit from his wrongdoing, that the customer should pay his unpaid interest, but into court for distribution to charity.[223] The Jedda commercial court determined on a policy of enforcing the interest terms of a loan agreement, but only as to amounts of interest already paid by the customer, irrebuttably presuming that the customer knew that interest was illegal, and therefore intended to make a gift to the bank; but it reallocated to principal any payments of interest or penalties after the due date of the loan, and any interest assessments that the court found excessive.[224]

In view of the difficulties of observing trial-court ijtihād, the best vantage-point from which to carry out further observations of the extent of qāḍīs' freedom to practice ijtihād is at the higher level of the appeals courts, the subject of the third and fourth sections.

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[222]al-Rasheed, "Criminal," 31, 58.

[223]Mr. Shadi Dabit, Officer of Saudi American Bank, Interview with author, Riyadh, Oct. 1, 1985.

[224]Committee for the Settlement of Commercial Disputes [*Hay'at Ḥasm al-Munāza'āt al-Tijāriyya*], Jidda Branch, Decision No. 218/1407, March 15, 1407.

2. Ad Hoc Choice between Ḥanbalī Views

Before taking up appeals, let us raise a particular question of ijtihād freedom suggested by the concept of instance-law. Does the freedom to practice ijtihād mean that the qāḍī is free to vary, from case to case, his holding on a single abstract legal proposition? The interest of this question is that it poses, at a sensitive point, our expectation that neither qaḍā' nor adjudication can avoid rule-law patterns; we expect that this is, in other words, one of the natural obstacles confronting a thoroughgoing instance-law ideal.

The Saudi system frowns on any such ad hoc variation of legal views, this both on practical and theoretical grounds. As to the former, Shaykh al-Ghuṣūn[225] stated that the appellate court expects a qāḍī not to change his view "without a satisfactory reason," this "to avoid talk" [*qīl wa-qāl*].[226] "Talk" refers ambiguously to the lay public's perceptions on many possible matters of concern to 'ulamā': one, whether judges are corrupt or ignorant; another, and far weightier, the degree of 'ulamā' success in discerning God's law, naturally assumed to be single and unchanging.

In terms of the theory of Islamic qaḍā' sketched so far, on the other hand, we might wonder why a qāḍī would not be

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[225]See Appendix D, List of Interviewees.

[226]Shaykh al-Ghuṣūn, interview, Nov. 14, 1984.

allowed to seek, without fully rationalized grounds, to choose views in order to do justice in the individual case, without concern for rule consistency. Generally, the spirit and fundamental assumptions of uṣūl al-fiqh counter such behavior: a qāḍī is understood to reach his conviction on a legal question in a case by posing that question in general and abstract terms, as in giving a fatwā. This course is to some extent dictated by the very nature of the task of consulting authoritative texts, through textualistic uṣūl. Hence the reaction of a young judge, whom I asked about the possibility of such an *ad hoc* variation: puzzled, he declared that the qāḍī is not asked for his justice, but for that of the sharī'a.[227]

Above, however, we encountered an apparent clear endorsement of *ad hoc* choice, in Shaykh al-'Umarī's statement[228] that he allows himself choice among views according to circumstances of the case. This is, moreover, a position with strong classical support. Let us consider an example, related to me by Shaykh al-'Umarī, of this method. In two different automobile collision cases, he shifted between two Ḥanbalī views on how to treat a victim's contribution to his own death; the result was that in one case

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[227]Shaykh Farāj, Assistant [*mulāzim*] qāḍī, Feb. 9, 1985.

[228]See p. 249 above.

he imposed on one party[229] to the collision the full blood-money obligation for deaths occurring to the other party, while in another case he imposed only one-half that blood-money. The two views between which he chose are, first -- and this rule was laid down specifically for collisions -- that each party pay the full blood money for the death or injury of the other party, because each was the direct, physical cause of injury to the other; and second, a rule of more general application, that if, when a person is killed, he had shared in the causation of his own death, he shares also in the obligation for his own blood money, and therefore his heirs' recovery is reduced by a proportion equal to his share.[230] Applied to a collision, and assuming causation is equally shared, the second rule would result in each party paying half, not all, the blood-money of the other party. Thus, Shaykh al-'Umarī's solutions in the two cases appear to correspond to these two views. When questioned by the appeal court about the variation, he pointed out that in his first case, the defendant was drunk and had liquor in his car, and

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[229]Actually, upon his relatives, the *āqila*. In every case below not the party himself but his relatives are obliged to pay.

[230]The source of this rule seems to be in cases of indirect causation, not collisions. See Ibn Qudāma, *al-Mughnī*, 10:558-560; Ibn Ḍūyān, *Manār*, 2:335; n. 237 below (next note).

the deaths of five people resulted.[231] To Shaykh al-'Umarī, therefore, the fault of the defendant in the first case was a "circumstance and concomitant" of that case which led him to shift to a Ḥanbalī view imposing full liability.

Of course, Shaykh al-'Umarī's reasoning, and both of his decisions, may be consistent with a third view that allocates the total blood-money obligation among the parties according to the fault of each in causing the accident. It is significant, however, that Shaykh al-'Umarī did not propose this view; he did not because the traditional views turn primarily not on fault but on simple physical causation.[232] This third view is, however, now widely adopted in the Kingdom. I observed its routine application by Shaykh al-Muhannā[233] in the Greater Sharī'a Court of Riyadh.[234] This is

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[231]It is not clear whether all deaths occurred in the other car. Shaykh al-'Umarī did not mention fault in the first case, but probably there he found that the causation of the collision was shared.

[232]In cases of direct, physical causation, absence of intent or negligence excuses retaliation in kind, but does not excuse payment of blood money. Qur'ān [4:92]. The blood money obligation falls on the *'āqila* of the actor, i.e., certain of his male relatives. See Ibn Qudāma, *al-Mughnī*, 9:514-16.

Intent to kill is assumed if a deadly weapon is used. I learned from Mr. George M. Baroody, a lawyer who once worked for Arabian American Oil Company in Saudi Arabian, and represented it in Saudi courts, that in early days locomotive engineers narrowly escaped execution as murderers.

[233]See Appendix D, List of Interviewees.

[234]Court of Shaykh Sulaymān b. 'Abd Allāh al-Muhannā, Great Shari'a Court of Riyadh [*al-Maḥkama al-Kubrā bi-al-Riyāḍ*], court records (criminal), case no. 18 (29 Jumādā al-Thāniya and 5 Rajab 1403).

also the view adopted in the Regulation on Traffic, with regard to administrative criminal penalties for responsibility in causing death and injury.[235] Shaykh al-Muhannā, indeed, in allocating blood-money followed administrative determinations of fault by the traffic department, adopting these under the heading of expert testimony.[236] Note that this third position represents a new ijtihād, accomplished by extrapolating from conceptions available in the Ḥanbalī texts, under the impulse of improved technology and administration of traffic accidents, and probably also Western legal notions of fault.[237] Reasons for Shaykh al-'Umarī's reluctance to move

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[235]Kingdom of Saudi Arabia, *Niẓām al-murūr*, Royal Decree No. M/49, 6 Dhū al-Qa'da 1391 (Dec. 23, 1971) (Mecca: Government Press, n.d.). This regulation distributes responsibility according to the degree of "error" [*khaṭa'*] of those who "participat[ed]" in "causing" an accident. The regulation defines "the act giving rise to responsibility" as "inadvertence, lack of care or non-observance of regulations"; it appears that "error" is interpreted accordingly. Ibid., Secs. 195, 197-98.

[236]In one case, a Saudi man with ten children was killed in a collision with a water truck driven by a Syrian laborer. The representative of the heirs was considerably upset when the judge denied him all recovery on the ground of expert testimony which assessed his decedent as entirely at fault. Under the traditional law applying to collisions, and to most other cases of accidental death, he would have expected the full blood-money recovery. Great Sharī'a Court, Court records (criminal), Riyadh, No. 18 (29 Jumādā al-Thāniya and 5 Rajab 1403).

[237]The following outlines the extent of this ijtihād. Under the traditional law, as just noted, direct causation results in liability for blood money regardless of the absence of any fault. In cases where causation is indirect, however, something like consideration of fault does enter in. Then, the key consideration is whether the tortfeasor's act in some way trespasses against the sharī'a (in the sense here of moral duty) -- as in placing a stone in the public road, or digging

to such a position explicitly would be, partly, loyalty to the traditional texts, and reticence in claiming an ijtihād rank more exalted than "mujtahid within the school," and, partly,

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a well on another's property. Often a notion of negligence plays a part in determining such fault, but it is not explicit. Once fault is shown, then concern is simply with whether the actor caused the harm. There is then no precise concern with whether the wrongful act itself (or even less the fault or the precise wrongfulness of the act) itself caused the harm. In other words, while clearly conceptions of negligence play a vigorous role, they are not conceptualized as such, and the idea of causation dominates.

How are these rules applied in automobile collisions? As to direct causations, the rule seems to be reciprocal liability, or liability for the other party's harms. See Ibn Qudāma, *al-Mughnī*, 10:360-61 (two walkers who collide). As to indirect causations, the closest precedents are as follows. Ibn Qudāma, *al-Mughnī*, 10:361-63; Aḥmad b. 'Abd Allāh al-Qārī (d. 1359 H., 1940 C.), *Majallat al-aḥkām al-shar'iyya*, ed. 'Abd al-Wahhāb Ibrāhīm Abū Sulaymān and Muḥammad Aḥmad Ibrāhīm 'Alī (Jidda: Tihama Publications, 1401 H., 1981 C.), secs. 1452-1456 state rules for collisions of boats as follows: if both captains are at fault, then each pays the losses (including blood-money) of the other; if only one is at fault, he pays the losses of the other, and bears his own; if neither is at fault, then neither is liable. Thus, either reciprocal, full, or no damages fall on a captain according to whether he is guilty respectively of shared, sole, or no fault. Ibn Qudāma, *al-Mughnī*, 10:559-560; Ibn Ḍūyān, *Manār*, 2:335 also cite the case of three women; the first rode the second's shoulders, and the third pinched the second, causing the first to fall breaking her neck. The latter two each paid one third of the blood money, the first woman's heirs losing the one third attributable to her own act.

From rules of this sort, it seems that the Saudi traffic system has, first, chosen to treat car accidents as indirect causations; and second, learned to look not only for causation by an actor who has committed some wrong, but rather for causation by an act by virtue of its wrongfulness; and third, extrapolated from the ship and three-woman cases to adopt the refinement of percentages of fault.

unwillingness to articulate his considerations fully, and equip them with textual proofs.[238]

Thus, as in this example from Shaykh al-'Umarī, we can conclude that qāḍīs are not free to vary views irrationally, or without reasons at least potentially rationalizable and generalizable. But there is a more subtle possibility to be considered. Common enough in fiqh is the idea of choosing freely among views equipped with textualist proofs according to considerations foreign to the evaluation of those proofs. A conception often encountered -- characteristic of school-taqlīd positions -- is that all possible solutions to a problem have been thrashed out, by great ones of the past, and reduced to a fixed, exhaustive set; each of these then has an equal claim to truth (this last point is greatly facilitated by adoption of a "every mujtahid is correct" position,[239] but does not depend on it). In such a view, choice among these solutions very properly relies upon secondary considerations that do not engage the grounds for the views' exalted status.

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[238]This, taken with the discussion of iftā' practice above, shows how the availability of alternative views, provided either by innovative muftīs or from the school's traditions, can supply flexibility and complexity in the application of law in taqlīd-based systems, even case by case. As the example shows, doctrinal advances can be shielded behind combinations of such views.

[239]Here we see another instance where different views on whether every mujtahid is correct, and the relativism some favorable views can engender, can affect practical legal method. See Banū Taymiyya, *al-Musawwada*, 502, citing certain theologians' views that one may simply choose any earlier ijtihād view one wishes.

To some degree such a conception is intrinsic in the four schools' accepting each other's views as tenable, and allowing practical law administration to proceed on that basis. Also within schools many endorsements of non-textual grounds for choice may be found: for example, in the Ḥanafī school, Ibn 'Ābidīn was cited above[240] as allowing choice among the previous views of the school, adopting one weak or even abandoned, for reasons of custom, change in circumstances or necessity.[241]

But is not this sort of reasoning foreign to the proof [dalīl] emphasis of the Wahhābī theory? Certainly, a Wahhābī position is to condemn those who choose among opinions by secondary considerations, especially convenience or subjective preference, without considering dalīls.[242] But this ignores a subtlety in the theory: the uṣūl al-fiqh one is applying to the instance may properly allow reference to dalīls that are not textual.[243] Among such dalīls may be, for example, the conception of ***maṣāliḥ mursala*** or general utility (to be

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[240]See n. 42 above.

[241]For examples of state legislation on this principle from Ottoman times, see 515 below. Cf. in the Mālikī school, the doctrine of custom or *'amal* as justifying choice among views of the school. See J. Berque, "'Amal," *Encyclopedia of Islam*, 2d ed.

[242]See Bin Qāsim, *al-Durar*, 4:46.

[243]This point is often ignored in ordinary discussion even in Saudi Arabia -- cf. Shaykh al-'Umarī's adopting the position with the "weaker dalīl." The habit of speech is common in taqlīd contexts, such as when sources of law such as custom or practice ['*amal*] are invoked.

discussed further in the next Chapter), which was important in Ibn Taymiyya's fiqh, and which could strengthen the cause of one view (and its textual dalīl) over a contender in a manner tied to concrete circumstances. Shaykh al-Ghuṣūn stated that it is a practice among them that a qāḍī choose the view of one school over another because of a ***maṣlaḥa*** or utility.[244] The 'ulamā' emphasize, however, that the utility regarded must be one general to all, and not specific to individuals; still, one can imagine a Saudi qāḍī, on the ground solely of some general utility, exchanging one view for another from case to case. To give an example cited by Shaykh al-Ghuṣūn, a judge may choose for a certain crime a harsher penalty from another school due to an observed frequency of that crime. A ground for variation often similar in operation to that of maṣlaḥa is

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[244]Shaykh al-Ghuṣūn, interview, Jan. 20, 1985. A superb example is Decision No. 95, 6/11/1403 (August 25, 1982), of the Board of Senior 'Ulamā', in which the scholars represent themselves as choosing between two views according to the demands of current maṣlaḥa. (The two views concern the principle, stated in an earlier Board Decision, No. 53 (4 Rabī' al-Thānī 1397, March 24, 1977), of administering additional punishment to an offender in drinking or drug use who is recidivist despite repeated ḥadd punishments; the two views split on whether such additional punishment can include death or not.) The Board here gives qāḍīs its view advocating consideration of the harshest penalty in the current climate; as the Board notes, the qāḍī makes the choice of penalty for each individual case.

In the earliest texts where I have found this conception, it is connected with the legal flexibility allowed the ruler, to be discussed in the next Chapter. See p. ? below. In describing a judicial function closely associated with the ruler, the *maẓālim*, al-Māwardī, allows use of a procedure disputed among the schools whenever in the particular case circumstantial evidence indicates that justice would thereby result. al-Māwardī, *al-Aḥkām*, 89.

the appeal to highly general fiqh principles [*qawā'id*], such as "No harm and no causing of harm" [*lā ḍarar wa-lā ḍirār*].[245] These principles seem to be used to guide choice, as providing criteria to evaluate the success or appropriateness of this or that choice. Yet again, all these grounds -- fiqh principles, utility, custom, change in circumstances or necessity -- are conceived of as endorsing not unrationalizable, *ad hoc* shifts of view according to concrete facts, but positions capable of being justified in abstract terms, and of enduring across a class of cases.

To quote an example of what would be meant by choice of view according to the apparently highly vague ethical principle "No harm and no causing of harm," Shaykh al-Laḥaydān described a case where, due to a mistake by the local municipality in surveying land, a landowner built upon adjoining land. The trial court ruled that the building must be demolished, and the judgment was affirmed on appeal. The Supreme Judicial Council declared that this result conflicted with the principle "No harm and no causing of harm," in that it would destroy the property of one who had done no wrong; it suggested a different ruling, to which the trial court agreed, that the adjacent landowners be partners in the building, one

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[245]The saying is related as a fine [*ḥasan*] Prophetic ḥadīth by Ibn Mājah, Dāraquṭnī, Mālik, and others. Shaykh al-Laḥaydān said this saying has a different meaning than maṣlaḥa, in not being general but merely bilateral. Shaykh al-Laḥaydān, interview, Apr. 14, 1985. Perhaps Shaykh al-'Umarī's results, if they were to be rationalized in terms of dalīl, would have followed from this principle.

owning the land and the other the structure.[246] This Shaykh al-Laḥaydān told me was not a new rule; it is, however, not the result suggested by the usual handbooks.[247]

Summing up our results, we find that instance-law tendencies are not indulged here to the extreme, and that rule-law patterns are aided both by practical concern to secure the objectivity of law-making, and by a theoretical demand for rulings that are rationalizable consistently with the larger textualist and rational system of uṣūl al-fiqh. This we certainly expected; but did we not expect more reliable, tangible reassurances against a case-by-case arbitrariness, and firmer restraints on the instance-law impulse?

3. Appeal Practice and Its Constraints upon Qāḍī Ijtihād

The natural perspective from which to assess the freedom of qāḍīs to practice ijtihād is that of the appellate courts.[248] These courts have power to reverse improper

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[246]Shaykh al-Laḥaydān, interview, Jan. 20, 1985.

[247]See al-Qārī, *Majallat*, secs. 1375, 1400-01, 1423, 1429.

[248]This is not because the case-law at the appellate level is any easier to access; indeed, it is harder. There are not only no published reports of decisions, and the proceedings of the Board of Review are secret. The appellate procedure is conducted wholly on the written trial record prepared by the trial judge, including a memorandum of appeal submitted by the appellant, and usually involves no meetings with the parties.

decisions, and would be the proper instrumentalities to enforce any requirement of taqlīd.[249] What limits do these authorities apply in fact? Do their actions tend to uphold instance-law freedom in the qāḍī, or instead attempt to restrain him by rule-law?

To discuss appeals, we need first an introduction to classical Islamic conceptions of review of judgments. We have mentioned briefly above[250] the historical circumstances that accompanied acceptance by the Saudi 'ulamā' of the West-borrowed institution of multi-level courts and regular appeals. Here we shall show how, in adopting the concept of

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My numerous requests -- supported even by a letter from the Minister of Justice himself -- to be allowed to read some appellate case, even purged of identifying matter, were politely denied. (Therein note the independence of the judiciary.) Instead, what I present here was gleaned by dint of paying innumerable visits to the Supreme Judicial Council over a period of eighteen months. The great majority of these visits produced only glasses of tea with court staff; a prized few of them led to quarter-hour oral or written exchanges of questions and answers. Since these judges are at the head of the judicial and 'ulamā' hierarchy, I thought it worthwhile to spend this immense amount of time to earn their confidence in my sincerity and honesty, and hear a few words from them. To their credit, despite our short acquaintance, and despite a vast cultural gulf, Shaykh al-Laḥaydān and Shaykh al-Ghuṣūn did come readily to trust me with certain confidences, as revealed here. Shaykh al-Laḥaydān boldly agreed to answer my questions in writing. Yet, their own statements cannot fulfill my need, also revealed here, to read their case-files to document their actual practice. In this respect alone I believe they were short-sighted in dealing with their outlandish visitor.

[249]As will be shown below, the King and the executive branch do not interfere in the enforcement of judicial decisions.

[250]See p. 252 above.

appeal, the Saudi judiciary transformed it along classical Islamic lines, chiefly in order to protect freedom of ijtihād in the trial judge.

Traditionally, the norm of qaḍā' was the judgment by a single judge, from which no ordinary appeal lay. Review of one's own or another's judgments did occur, however, and is regulated by law. Again, a story from 'Umar gives the basic conception: A litigant reports to the Caliph 'Umar a judgment given by two other Companions in his case. 'Umar remarks, "If it had been I, I would have decided [differently]." The litigant then asks, "What prevents you, when the command is yours?" 'Umar responds, "If I could refer you to a text of the Qur'ān, or to a sunna of the Prophet, I would do so. But I refer you to an opinion, and opinion is held in common."[251]

The story displays the accepted basic rule of appeal in Islamic law; indeed, the rule is considered established by

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[251]Ibn 'Abd al-Barr, *Jāmi'*, 2:59, citing a story of 'Alī as caliph reversing a judgment of Shurayḥ, one of his judges. Ibn Qudāma declares that the account is either inauthentic or inapposite. Ibn Qudāma, *al-Mughnī*, 11:406. In another story, discussed by Āl Durayb, *al-Tanẓīm*, 163-64, 'Alī, when acting as the Prophet's qāḍī in Yemen, told the parties in a difficult case that they may, if dissatisfied with his judgment, await the Prophet's later review. On performing the pilgrimage, the dissatisfied parties put their case to the Prophet. After hearing them, the Prophet allowed 'Ali's judgment and then is variously reported to have said, "It is what has been adjudged between you [*huwa mā quḍiya baynakum*]," quoting Ibn al-Qayyim, *Zād*, or "It is as he said," from Ibn al-Qayyim, *I'lām*, 2:58. Wakī', *Akbār*, 1:95-96 has a third version. The story is certainly weak as a basis for modern appeals, though so cited in modern works. Muḥammad Salām Madkūr, *al-Qaḍā' fī al-Islām* (Cairo: Dār al-Nahḍa al-'Arabiyya, n.d.), 58; Āl Durayb, *al-Tanẓīm*, 163-64.

ijmā'.[252] The rule is that no judgment may be reversed, whether by the same or some other judge or authority, if it is based on ijtihād, i.e., if the judgment is not one dictated by (or, in other words, is not in conflict with) an indisputable proof from the sources of the law. We shall call this the "rule against ijtihād reversal."

The rule against ijtihād reversal is a corollary of an aspect of ijtihād we have mentioned, that scope for ijtihād exists only where divinely sanctioned certainty is unavailable. The thought is that, since within this zone of ijtihād variant opinions cannot be refuted by anything having divine authority, they must be tolerated. The rule against ijtihād reversal, then, coincides with rules about when one can accuse another scholar of being "wrong," or of "sinning."[253]

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[252]al-Khaṭīb al-Baghdādī, *Faqīh*, 2:65; al-Āmidī, *al-Iḥkām*, 4:273. For nuances of view among scholars casting claims of ijmā' in some doubt, see Ibn Qudāma, *al-Mughnī*, 11:403-06.

[253]Confirmed by Dr. al-Faryān, interview, Nov. 11, 1984 and Shaykh al-Laḥaydān, interview, Feb. 27, 1985.

One author (a Shāfi'ī) points out that, even in cases where ijtihād leads, because of the excellence of proofs, to "knowledge" that one view is correct, and a definitive judgment that all other views are wrong, yet the rule against ijtihād reversal entails that those holding this view must pardon those differing, and not accuse them of sin or evil motivation. Sin is established only by the sharī'a, which here provides by ijmā' for their exoneration. This is not to say, he points out, that acting on the basis of this incorrect view cannot be proscribed. When the mistaken mujtahid, for example, drinks date wine, prohibited by all schools but the Ḥanafī, he acts corruptly and can be punished. He also can be prohibited from judging according to this view, but once he does so, his mistaken judgment is still executed, just as some acts disapproved in the sharī'a are at times allowed full force. al-Khaṭīb al-Baghdādī, *Faqīh*, 64-65.

One Shāfi'ī author understands the purpose behind the rule to be the following:[254]

> [I]n reversing the judgment is an evil, because it leads to giving authority to some judges over others. It is not desirable that a judge have in his heart anything about another judge, [concerned] lest his judgment be followed by reversal, such that his judgement will not become stable. No one is entitled to control [*mulk*], and in that is a great evil.[255]

Other authors show by their arguments that, far from needing to justify the rule's scope for qāḍī freedom, they are concerned to justify the limitation the rule itself imposes on the freedom of action of the second judge, whose conscience dictates to him a result contrary to the first judgment. They give for the rule only a pragmatic justification, that without it conflict and instability of judgments would defeat the benefits for which the sharī'a ordained the office of qāḍī.[256]

I feel that the Wahhābīs differ with this Shāfi'ī author. On the one hand, they broaden the power of reversal, treating, for example, the drinking of date wine as properly subject to reversal (as to blame, see Banū Taymiyya, *al-Musawwada*, 503-04). But, on the other hand, they would not suggest, as al-Khaṭīb does, that the qāḍī can be subjected to restrictions beyond the rule of reversal. The Shāfi'ī's position is ambivalent probably because of a feeling that all the four schools' views are permissible by an ijmā' -- a proposition with which the Wahhābīs differ. See n. 253, 281 below.

[254]Such a purpose need not be mentioned to establish the rule, since it is established by ijmā'.

[255]al-Khaṭīb al-Baghdādī, *Faqīh*, 2:65.

[256]al-Āmidī, *al-Iḥkām*, 4:273; Zayn al-Dīn b. Ibrāhīm b. Muḥammad Ibn Nujaym (d. 970 H., 1563 C.), *al-Ashbāh wa-al-naẓā'ir 'alā madhhab Abī Ḥanīfa al-Nu'mān* (Beirut: Dār al-Kutub al-'Ilmiyya, 1400 H., 1980 C.), 105-108; Ibn Qudāma, *al-Mughnī*, 11:406.

The rule against ijtihād reversal has other functions besides governing the scope of appeals. It also accomplishes the effects of our rules of *res judicata* and collateral estoppel, and regulates comity between schools of law and the enforcement of judgments of one school by the courts of another.[257]

We include in the rule against ijtihād reversal the derivative rule concerning judgments based, not on erroneous ijtihād, but on no ijtihād at all -- as when the judge decides against his then-current conviction, or when he is evil-doing or ignorant. In such cases -- in a result striking to us -- it is provided that in proper principle the judgment ought to be cancelled <u>even if it is correct</u> (according to the reviewer), since it fails of an essential element.[258] Most scholars go on to note, however, that so to cancel is unnecessary as serving no practical purpose, since what was rightful was attained, though by false means.[259] This result displays extraordinarily clearly how vital and essential to qaḍā' is the actual <u>exercise</u> of individual ijtihād, the

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[257]Ibn Nujaym, *al-Ashbāh*, 105-108; 'Alā' al-Dīn Abū al-Ḥasan 'Alī b. Khalīl al-Ḥanafī al-Ṭarābulusī (d. 844 H., 1440 C.), *Mu'ayyin al-ḥukkām fīmā yataraddad bayn al-khaṣmayn min al-aḥkām* (Cairo: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1393 H., 1973 C.), 29-35.

[258]al-Ṣadr al-Shahīd, *Adab al-qāḍī*, 1:196. There are many striking analogues to this result. For example, it is held that a qāḍī or muftī must renew his ijtihād each time an issue is presented, thus not practicing taqlīd of himself.

[259]Ibn Qudāma, *al-Mughnī*, 11:407; Ibn Taymiyya, *al-Fatāwī al-kubrā*, 4:629.

qāḍī's personal act of conscience, quite apart from the correctness of the judgment reached.

The rule against ijtihād reversal is premised on an assumption that qāḍīs meet the qualifications of office, including capability of ijtihād. In such circumstances judges act independently of each other, as equals, without hierarchy. If, on the other hand, the legal system has decided that its qāḍīs are wholly incompetent to practice ijtihād (recall the views of Ibn 'Ābidīn the Ḥanafī above[260]), then qāḍīs' deviations from the views of those whom they follow with taqlīd can have no moral basis deserving respect, and must be traced either to insubordination, oversight, ignorance or corruption. On this assumption, the rule against ijtihād reversal would justify the strictest review of judgments.[261] Thus, in non-Wahhābī writings, we find recognition of a practice of inspection of qāḍīs' judgments, with a wide scope for review. Scholars mention that the ruler or his chief qāḍī ought to inspect the state of his judges and their opinions.[262] If a judge is known for ignorance or oppression,

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[260]See n. 160 above.

[261]See, e.g., Ibn Nujaym, *al-Ashbāh*, 105-108.

[262]al-Ṭarābulusī (Ḥanafī), *Mu'ayyin*, 29-35; al-Khaṭīb al-Baghdādī, *Faqīh*, 2:154 (as to muftīs). See Madkūr, *al-Qaḍā'*, 47.

his opinions can be examined. Ibn Taymiyya mentions this possibility.[263]

Therefore, since the rule against ijtihād reversal either excludes or compels review, depending on the system's recognition of ijtihād qualifications in the individual qāḍī, the scope of Saudi appellate courts' power to reverse is a reading of the depth of the system's commitment to dalīl theory.

As to Saudi Arabia, then, we find that the system takes the step of assuming a full ijtihād capability in the individual qāḍī, at least until the opposite is shown. Inability to carry out adequate ijtihād is understood as a disqualification for qāḍī office. In true Wahhābī fashion, and consistently with a thoroughgoing moral construction of the office of qāḍī, Dr. al-Faryān implied that disciplinary inquiry into a qāḍī's misbehavior, as in taking action without plausible dalīl, is identical to inquiry into whether he may be declared [*inkār*] in personal moral error for so acting.[264] The system is hardly unaware that a great many qāḍīs do not qualify as independent mujtahids, but will not relent from considering ijtihād essential in every case, recognizing that the circumstances of each case are unique; to complement his

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[263]Ibn Taymiyya, *al-Fatāwī al-kubrā*, 4:628-29. See also Ibn Farḥūn, *Tabṣirat*, 1:58.

[264]Dr. al-Faryān, interview, Nov. 11, 1984.

own powers of ijtihād, a qāḍī must seek the help of other 'ulamā' whom he respects. Shaykh al-Laḥaydān stated:

> It is incumbent on every qāḍī that he practice ijtihād in the case that is laid before him, and seek [*yataḥarrā*] the truth, and ask his colleagues and his *shaykhs* if the matter is obscure to him. This is a relative ijtihād, because each case has its circumstances and concomitants, and the situations that compel it, and the causes that bring about its existence . . . .[265]

The qāḍī's responsibility of ijtihād is indefeasible, since the he alone is responsible for issuing the judgment in the particular case. His ijtihād may lead him to seek aid of others, but even then it is he that must select these advisers, and bring their advice to bear on the case; the ultimate responsibility remains his. Shaykh al-Laḥaydān stated:

> It is not allowed in the sharI'a that [the qāḍī] abandon his opinion or adopt it for the sake of the opinion of another, even though that other be more senior than he in rank, or more broadly learned.[266]

From the assumption of ijtihād by the qāḍī, the system is led to the extreme stance of denying itself power to cancel any trial court ruling on a matter open to ijtihād.[267] The

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[265]Shaykh al-Laḥaydān, written responses, Jan. 13, 1985.

[266]Nov. 28, 1984, Jan. 13, 1985. Kingdom of Saudi Arabia, *Tanẓīm al-a'māl al-idāriyya fī al-dawā'ir al-shar'iyya* [Organization of Administrative Acts in the Sharī'a Agencies], Royal Confirmation No. 109, 24 Muḥarram 1382, June 26, 1962 (Riyadh: Goverment Presses, 1398), Sec. 46, states that qāḍī has the "right" to seek "guidance" from the "person above him" [*marja'uhu*].

[267]See Appendix A for the detailed rules governing appealability of judgments.

current Ordinance governing the appellate court recognize only one ground for reversal:

> If it is clear to the Board [of Review] that the judgment has contradicted a text of the Book, the sunna, or the ijmā', then it must prepare a decision thereon, with explanation of its grounds in the sharī'a, [which is sent] to the court which issued the judgment.[268]

According to this Ordinance, the Board is not empowered to reverse the judgment, without first engaging in an exchange of views with the trial judge. If after this exchange neither of the courts has changed its view, then the Board is obliged to reverse, but is empowered neither to give judgment itself nor to compel the trial judge to give judgment against his opinion. Rather, the Board must remand the case for retrial "anew" [*min jadīd*] before a different judge.[269] The appellate courts characterize their opinions as mere "guidance" for the judge, and disclaim power to order the qāḍī to do anything.[270]

Thus, the criterion for reversal and the procedure for appeal both reflect the principle that the crux of the judgment lies in individual ijtihād, and guarantee the qāḍī the scope of freedom of action necessary for that ijtihād.

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[268]Kingdom of Saudi Arabia, Ministry of Justice, *Lā'iḥat tamyīz al-aḥkām al-shar'iyya* [Ordinance for Review of Sharī'a Judgments], by Royal Confirmation No. 24836, 29 Shawwāl 1386 (Feb. 9, 1967), Sec. 13. Compare the clarity of the 1962 decree, quoted on p. 257 above.

[269]Ibid., Sec. 17.

[270]Shaykh al-'Umarī, interview (concerning appellate decision disclaiming any power other than "guidance" [*hidāya*]), Aug. 30, 1983.

This is strikingly shown when, although the professed scope of review is only to avoid fundamental errors which the qāḍī could be ordered himself to correct, even here the possibility of differences of opinion is recognized and another must examine the case. Nor has pressure for promptness in deciding cases, considered a vital feature of the sharī'a system, led to the streamlining of this procedure. Such circuitous procedures seem to be local modifications of the Western-inspired appeals court models[271] from which the system ultimately derived, for the purpose of preserving a proper scope of action for the conscience of the Saudi qāḍī.

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[271]There are some similarities between this system, even in nomenclature, and continental systems of courts of appeal. We will discuss here the French -- the system most influential in the Middle East. Most intriguing of these is the French denial to the Cour de cassation of power to implement its decision, requiring it to remand the case to another court of the same hierarchical rank as that from which the appeal was taken, which court is free to decide in conflict with the position of the Cour of cassation. This procedure can give rise to a second appeal, second remand, and even third appeal, but thereafter the lower court is bound by the Cour de cassation's view, and the latter may even be allowed to institute its own decision at that point. Arthur T. Von Mehren, *The Civil Law System: An Introduction to the Comparative Study of Law*, 2d ed. (Boston: Little, Brown & Co., 1977), 102-08. The Saudi system differs vitally from the French in several ways: (i) while both systems are concerned to prevent appeal courts from becoming legislative bodies, in the Saudi system it is the trial judge's lawmaking powers that are being protected, not the legislature's; (ii) the Saudi system does not reverse for any error of law, but only for certain serious ones; (iii) the first French appeal level, the cour d'appel, unlike the Board of Review, possesses all powers to retry the case, and may institute its own judgment; (iv) the Saudi Board of Review shows respect to the trial judge by discussing the case with him before deciding; (v) the Supreme Judicial Council unlike the Cour de cassation can never require the lower court to follow its judgment.

Statistics published by the Ministry of Justice indicate the level and type of supervision exercised by the appellate courts. First, reversals are extremely rare. In the year 1400 (November 1979 to November 1980), of a total of 8154 cases reviewed, only 70, or 0.9 percent, were reversed. The rate of reversal is noticeably higher in criminal matters (1.4 percent), than in civil matters (0.8 percent). Of the total reviewed, 2,084, or 26 percent, were returned with comments, before affirmance.[272] Again, a higher percentage (31 percent) applied in criminal matters than in civil (25 percent).[273]

Although the regulations expressly allow appeal courts to revoke solely for contradiction with "a text of the Book, the sunna, or the ijmā'," in actual practice one finds that this restriction is not as narrow as might first appear. The following gives five grounds for reversals that fall outside the apparent limit of the regulations.

First, an additional criterion of error, aside from the issue of ijtihād, is admitted: the failure to observe the sundry rules and regulations acknowledged by the judicial system -- such as administrative orders, royal decrees and regulations, ministerial instructions -- some of which include

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[272]It would seem that cases of reversal, which also go through the comments stage, are not included here. Nothing indicates whether in comment cases the trial court agreed with or otherwise accommodated the appellate court, or the appellate court dropped its objections.

[273]Kingdom of Saudi Arabia Ministry of Interior, *al-Kitāb al-Iḥṣā'ī al-Tāsi' [Ninth Statistical Book]* (Riyadh: Ministry of Interior, 1403 H., 1983 C.), 30-31.

rules of procedure and conduct of trial, or which determine qāḍī jurisdictions.[274]

Second, the Ordinance governing the appellate courts itself appears intended to open the door to broader grounds for reversal, although, in obedience to proper fiqh theory, the court does not so interpret the Ordinance. While requiring reversal only for conflict with text or ijmā', the regulation obligates affirmance only where "there is nothing to be noted" about the decision below.[275] The Board may always seek necessary "clarification" from a qāḍī.[276]

Third, a ground for reversal not apparent from the form of the basic rule applies when a judgment adopts a defensible ruling, but applies it in the wrong factual situation. Shaykh Abū Zayd characterized this as error in "understanding the facts," saying that this error accounted for 99% of reversible errors in judgments, while reversal for conflict with text was extremely rare.[277] The Shaykh al-Laḥaydān said that the most common cause of sending cases back is for the ruling not being in accord with the facts.[278] These statements refer not to a

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[274]al-Rasheed, "Criminal," 233-35; Āl Durayb, *al-Tanẓīm*, 361; Shaykh al-Laḥaydān, written responses, Nov. 28, 1984.

[275]Kingdom of Saudi Arabia, *Lā'iḥat tamyīz al-aḥkām al-shar'iyya* [Ordinance on Review of Sharī'a Judgments], Royal Agreement No. 24836 (29 Shawwāl 1386, Feb. 9, 1967), Sec. 12. The 1962 Regulation was much more clear.

[276]Ibid., Sec. 11.

[277]Shaykh Abū Zayd, interview, Apr. 24, 1985.

[278]Shaykh al-Laḥaydān, interview, Nov. 4, 1984.

qāḍī's error in determining fact,[279] but rather to the qāḍī's legal characterization or construction of the case. The explanation of this seems to be that judges who usually rule by choosing among well-known views, each of which is acceptable in itself as a legitimate ijtihād holding, will make most of their errors in choosing among their repertory of rules. This situation Shaykh al-Laḥaydān perhaps had in mind in several of his formulations of the rule against ijtihād reversal:

> [Q]āḍīs are obligated not to issue a judgment in conflict with the texts of the sharī'a and its basic principles, or unsupported by any dalīl from them. . . . No judgment is reversed unless it conflicts with an express text or an ijmā' or it has no sharī'a basis, such as when the qāḍī thinks that a text is probative in a case when it is not probative at all. This is the same as for the judges

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[279]in the Islamic theory of trial procedure, the qāḍī is not conceived of as weighing evidence, or indeed as finding facts at all; these are rather fixed through the operation of a formal legal machinery. The discretion of the qāḍī enters in, not in finding facts, but in adjusting that machinery and governing its inputs -- for example, in determining presumptions, or approving the credibility of witnesses. If his decisions in so doing are legitimate ijtihād, they are unappealable. This point will become clearer in discussion of fact-ijtihād below.

A distinction on appeal between findings of fact and determinations of law is prominent in Western legal systems, but I never heard it mentioned in Saudi Arabia. Both fall within reversals for conflict with a text. In the United States, the distinction exists because there is felt to be a need, partly because of the existence of the jury, partly because of emphasis on direct observation of testimony, to show greater deference to trial determinations of fact than of law. The chief reason why this distinction is not present also in the Saudi system is that it is unnecessary, since the rule against ijtihād reversal bars appellate courts from reversing matters of legitimate discretion, or ijtihād, whether as to the facts or as to the law.

> of any other law. Otherwise, why are appeals and cassation courts set up?[280]

Here the idea seems to be that the qāḍī simply makes an out-and-out error in understanding either the facts or the dalīl, with the result that his ijtihād is not a knowing one deserving protection. We will return to these reversals under the heading of fact-ijtihād.

Fourth, there is more subtlety than one would expect in knowing what is an "indisputable" proof justifying reversal, and the point requires an extended discussion. Paradoxically, there can be healthy disagreement whether a proof is indisputable. We shall single out three possible sources of disagreement on the point, all related to uṣūl al-fiqh.

The first source is disagreement in formulating the rule against ijtihād reversal, since one school may find that a particular proof is so strong as to justify constraining another's ijtihād, while another school may not. Thus, though all scholars agree that an explicit text from the Qur'ān or the authentic Sunna, or an ijmā', so qualifies, they differ as to qiyās: most schools allow for reversal based on a "clear" [*jalī*] qiyās, while the Ḥanbalī school does not.[281] Another

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[280]Emphasis added. Shaykh al-Laḥaydān, written responses, Jan. 28, 1984.

[281]Prof. 'Aṭwa, *Muḥāḍarāt*, 118; Ibn Farḥūn (Mālikī), *Tabṣirat*, 1:56 ("ijmā', general fiqh principles [*qawā'id*], clear text [*naṣṣ jalī*] or qiyās"]; al-Ṭarābulusī, *Mu'ayyin*, 29 (repeating latter); Ibn Qudāma, *al-Mughnī*, 11:407. Ibn Qudāma says that Mālik & Abū Ḥanīfa reverse only for ijmā', but that they themselves contradicted this rule, following aḥādīth where there was no ijmā'. Note that Ahmad b. Ḥanbal's

difference is as to when ijmā' is definitive enough to require reversal.[282] Note that as to both ijmā' and qiyās grounds for reversal are narrowed according to the doctrinal preferences associated with meta-ordering and instance-law.

The second source is differences as to uṣūl al-fiqh doctrines themselves. For example, some scholars may find that a definitive proof is established -- for example, that an ijmā' is proved, or that a text of the Qur'ān or sunna is obvious in meaning -- while others hold otherwise.[283] In such cases, one side sees the matter at issue as one of ijtihād, while the other does not. Such disagreements exist even

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clinging to text over the view of "whomsoever" would result in reversals where a rule based solely on ijmā' would not. Shaykh al-Laḥaydān, written responses, Feb. 27, 1985, approved of naqd on the basis of contradiction with even an explicit [*ṣarīḥ*] ḥadīth, even in a case where the view cancelled claimed the support of one of the four imāms or even of a Companion. So an issue can be shown to be ijtihādī not by the mere fact of a difference of opinion existing among the schools, but only by examining the view's dalīl to see whether it is uncertain. Ibid., Nov. 28, 1984, Jan. 13, 1985, Feb. 27, 1985. See n. 253 above. This willingness to denounce others' views as wrong [*inkār*] is a Wahhābī trait. The Wahhābī Shaykh 'Abd al-Laṭīf b. 'Abd al-Raḥmān declares wrong those who say that difference of opinion is a blessing, and those who allow *inkār* of an opinion only on the basis of contradiction with ijmā'. No, *inkār* can be based on any dalīl, though differences over ijtihād are excused. The *rukhaṣ*, or leniencies, of the law do not consist in choices among school views, but rather in certain more lenient judgments of the law, which must be supported by their own dalīls. Bin Qāsim, *al-Durar*, 4:37-54.

[282]See Chap. 2, n. 103 above.

[283]al-Ṭarābulusī, *Mu'ayyin*, 30-31; Shaykh al-Laḥaydān, written responses, Nov. 28, 1984, Jan. 13, 1985, Feb. 27, 1985.

between schools of law.[284] Thus, one cannot conclude that a judgment is immune from reversal simply because, after a canvass of opinion, some scholar -- or even one of the four schools -- is found to have supported it. More emphatically, among many Ḥanbalīs it is a characteristic, though strenuous, position to declare in error any view -- of whomsoever it may be, however supported by a putative consensus -- which falls into conflict with a clear text of the Qur'ān or valid sunna. As Shaykh al-Laḥaydān said,

> Every judgment shall be cancelled that conflicts with the text of a valid ḥadīth, even were such a ruling the opinion of one of the four imāms, or of those higher than them, the Successors and Companions . . . .[285]

In this case, meta-ordering and instance-law tendencies, which exalt the truth-status of texts, tend to expand the grounds for reversal, taking back some of the ground they relinquish as to ijmā' and qiyās.

This leads to the third source of disagreement, whether the zone of entailment of texts and ijmā' is to be narrowly or broadly construed. One extreme is the sentiment expressed, as noted above by Ibn 'Abd al-Wahhāb, and by Ibn Taymiyya,[286] and common to extreme meta-ordering positions, that the texts of the sharī'a cover all possible cases. As Shaykh al-Laḥaydān said,

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[284]Ibn Nujaym, *al-Ashbāh*, 105-08.

[285]Shaykh al-Laḥaydān, written responses, Feb. 27, 1985.

[286]Ibn Taymiyya, *al-Fatāwī al-kubrā*, 490-93; Ibn Taymiyya, *Majmū'at*, 19:280-290.

> [I]t is not possible that a problem occur and the Qur'ān and sunna not provide indications to its solution, either expressly or within the generality of those fiqh principles [*qawā'id*] derived from them.[287]
>
> Truth is confined within the Qur'ān, the sunna, and that indicated by them [*mā dallā 'alayhi*] explicitly or implicitly.[288]

For those seeing texts as all-encompassing in this way, the test for reversal cannot start by asking whether a ruling is governed at all by a text, in which case alone the possibility of conflict arises. Rather, the test is whether there is an indisputable proof from Qur'ān, Sunna or ijmā', with which the ruling is in conflict. Thus, the following are varying formulations of the this test -- not all of the same generality -- taken from various discussions with Shaykh al-Laḥaydān: (i) conflict with the "clear meaning" of a text [*naṣṣ ṣarīḥ*]; (ii) conflict with a text's "explicit meaning" [*ẓāhiruhu*]; and (iii) conflict with a text of indisputable entailment [*naṣṣ qāti' al-dalāla*]. A corollary of universalizing the reach of the Qur'ān and the Sunna is that the rule can be restated in a fourth way (as did Shaykh al-Laḥaydān): absence of an acceptable dalīl from the sharī'a texts, i.e., a ruling must have a textually-based dalīl,[289]

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[287]Shaykh al-Laḥaydān, written responses, Nov. 28, 1984.

[288]Shaykh al-Laḥaydān, written responses, Feb. 27, 1985.

[289]Shaykh al-Laḥaydān, written responses, Nov. 28, 1984. Ibn Taymiyya hints that can forgive differences of ijtihād only if based on textual arguments, not mere opinion [*ra'y*]. This would be an unacceptable difference of uṣūl in Saudi terms.

and that dalīl must fall within the range of permissible opinions as to the entailment of the texts.[290] Focus on this formulation returns us to the issue of disagreements in uṣūl al-fiqh.

Conflict with a "clear text" becomes potentially expansive when the text offended is one of the often highly general "principles" [*qawā'id*] referred to in Shaykh al-Laḥaydān's last quotation. These are taken either directly from Prophetic sayings, like the "No harm and no causing of harm" example already given, or are the products of induction from a great many fiqh rulings. Due to their great generality, the difficulty of assessing when they are impermissibly offended may allow broad license for reversal. An example of reversal on this ground appeared above, in the case of the building encroaching on neighbor's land, where the circumstance that the encroacher was faultless made demolition -- the ruling suggested by the usual sources -- a sentence reversibly in error.[291]

To give a single statement of these three sources of disagreement over what is "indisputable," it seems that a strong conviction, proceeding from arguments developed from one's own uṣūl and deriving clearly from a text, to the effect that a decision contradicts that text, seems ground enough for

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[290]Ibid., Nov. 28, 1984, Jan. 13, 1985, Feb. 27, 1985.

[291]See p. 271 above. There is another example below, where a mild criminal penalty is reversed because of offense with general rule. See p. 294 below.

reversal. Or, whenever the appeals court does recognize that minds may legitimately differ on an apparent contradiction with a text, it must refrain from reversal.

The following are Ibn Taymiyya's own formulations of such a test. He explains that one can conclude that a proof conveys certainty even when others disagree, or deny that the proof exists.

> Many of the issues in the derived rules of law [*furū'*] are [knowable by proofs] conveying certainty, even if there is difference of opinion as to [these issues], and even if the one in error is not accused of sin because the proof is concealed from him, just as [such ignorance] would preserve him [*qad sallamahu*] were he unaware of a text [that explicitly covered the case].[292]

In another place he discusses the standard for reversal:

> [M]atters are subdivided into two groups -- those that are definitively known to be correct, and those of which we do not know whether they are correct or in error -- in accordance with the dalīls and the degree to which the ruling is apparent to the inquirer. [If it is apparent to the degree that he says][293] 'I do not think [*aẓunn*] anyone who understood this would differ about it,' on this is based reversal of the judgment of the judge and of others.[294]

That uncertainty exists as to when a judgment conflicts with an indisputable proof is vividly demonstrated in cases where the three-judge appellate bench itself splits, two to one, in favor of reversal. As Shaykh al-'Umarī laconically observed, if his decision contradicted an indisputable proof,

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[292]Banū Taymiyya, *al-Musawwada*, 497.

[293]There seems to be a gap in the text.

[294]Banū Taymiyya, *al-Musawwada*, 504.

then how could the Board of Review itself be in disagreement?[295] (A strong sense of equality and independence exists among trial judges. Some judges are reputed not to forward some decisions subject to automatic appeal, considering doing so a mere waste of time.[296] Shaykh al-'Umarī remarked, when the Board of Review mentioned that it had no power to command but only to guide, "That is a two-way street."[297])

The fifth and last ground on which reversals are wider in fact than the rule stated in the regulations would indicate, is as to criminal convictions and sentences, the category where reversal is perhaps least restricted. One category of crimes, *ḥudūd*, to be discussed in the next Chapter, have a special status due to certain principles taken from the Sunna: one, that conviction of these crimes should be averted in the case of any doubt; and two, that it is better for the authorities to err in pardoning than in punishing. Thus, I observed a case where a conviction, clearly technically justifiable under the rules of the school, was reversed on the implicit ground that the appellate court (by a two-to-one

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[295]Shaykh al-'Umarī, interview, July 24, 1983.

[296]Ibid.

[297]Ibid., Aug. 30, 1983.

vote) appreciated the facts of the case as arousing doubt sufficient to require reversal.[298]

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[298]This case is an interesting example of appellate-trial court interaction, and is described here in full. A man, as attorney for his daughter, accused his daughter's husband of the crime of *qadhf*, or imputation of unchastity (one of the *ḥudūd* crimes), punishable by eighty lashes. He brought with him two witnesses, who testified that, because of discord between the spouses, the father had asked them to visit the husband and seek reconciliation, and before them the husband, very angry, had accused his wife of "becoming pregnant by someone besides me." In court the husband denied making this statement. Since two witnesses, shown to be of good character and unbiased, are adequate to prove this crime, the trial judge convicted. The case was returned to the qāḍī by the appeal court, by a divided panel (the most senior judge voting to affirm), on two grounds: first, that it did not appear from the record that the defendant had been given a chance to attack the witnesses' credibility, and second, that the husband's alleged language did not establish *qadhf*, since the statement is consistent with pregnancy from intercourse not adultery (*e.g.*, under former marriage, or with error or lawful excuse). The qāḍī brought in the defendant again, and asked him whether he had grounds to doubt the witnesses' veracity. He said that they were from his quarter, and had nothing against them, except that one of them had asked him to give a sum of money to the wife to conciliate her. The defendant also said that when he married her his wife was unmarried and a virgin. The appellate court returned the case a second time, stating, "Since it did not appear that the utterance . . . entailed the crime of *qadhf*, the judge must consult the books of the school" and cite supporting authority. In response the qāḍī cited the two most commonly consulted commentaries on the issue whether a man's statement "You are not my son" is considered *qadhf* of the boy's mother, showing the school splitting on whether this is *qadhf* expressly or by allusion [*kināya*]. (The law provides that, if the statement is an allusion, the defendant may be compelled to explain his meaning; if he explains it as innocuous, his word is accepted.) In its third remand, the appellate court remarked that the qāḍī's authority "weakens his position." It added reasoning to the effect that had the testimony been accurate, the defendant could have explained his statement, instead of denying it. In the result, the court reversed the judgment, referring it to another judge on the same court for retrial (the case was eventually dismissed for lack of prosecution). In a long separate opinion, one of the judges explained his decision on the principle that, in the *ḥudūd* crimes, convictions are to be averted whenever there is any doubt, and

Similarly, in another type of crime, *ta'zīr*, the sentencing for which is wholly left to the ijtihād of the qāḍī (discussed in the next Chapter), I observed the appellate court engage the trial court in debate, through requests for clarification, seeking it to increase a criminal sentence.[299] But the appellate court in those cases confined itself to exhortation, admitting it had no power to reverse. Shaykh al-Laḥaydān, however, asserted that appeal courts could justifiably reverse for lenient ta'zīr punishments. He cited a case where a trial judge, while sentencing an importer of a large quantity of drugs to an appropriate (i.e., severe) penalty, sentenced only to "blame" or censure in court one who knew of the drugs but failed to disclose their existence to authorities. This sentence was held erroneous in failing to recognize the principle of a citizen's obligation to society

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gave numerous arguments, including the possibility of blackmail, why cases such as this should be suspiciously regarded by qāḍīs.

The appellate courts' declarations suggest two possible grounds for its actions. One is a proposition that *qadhf* cannot be shown on proof of a merely allusive statement, if the defendant wholly denies having made that statement. Apart from its other difficulties, this proposition entails rejecting as a ground for the decision the alternative school view, applied in very similar cases cited in the Ḥanbalī texts, that the statement here is an express *qadhf*, in which case the defendant is not asked to interpret the statement at all. The second, and far more likely, ground, and the one explicit in the separate opinion, is the principle that *ḥudūd* crimes are averted by doubt. Grounds for doubt here are (i) the uncertainty affecting the ruling itself; (ii) an implication of self-interest in the witnesses; (iii) a suspicion of blackmail.

[299]Ibid.; Shaykh al-Laḥaydān, interview, Jan. 20, 1985.

to prevent evil, especially one of this magnitude.[300] Another observer has noted in appeals from ta'zīr convictions a willingness to use technicalities to reverse excessive punishments, despite recognition of the ijtihād nature of the sentence, partly on the justification of the principle that it is better to err in pardon than in punishment; an alternative course is to recommend to the King that he reduce the sentence through pardon.[301]

To summarize our review of the scope of appellate reversals, we find that the Saudi qāḍī is in fact given freedom to practice a broad ijtihād, and is not restricted to the Ḥanbalī or any other school. The appellate authorities willingly embrace these limitations on their authority, because they serve one of their vital ideal interests; this interest, as shall be made even clearer in the next section, is one that advocates, as the legislative method of the Kingdom, qāḍīs' broad, uninhibited, instance-law ijtihād. We also saw, however, that the appellate authorities have not let the stated limitations on their power prevent them from putting common-sense bounds on qāḍīs. Thus, they readily reverse when the qāḍī's decision, though a defensible ruling-ijtihād, nonetheless has gone wrong for other reasons: as when on its own terms it is erroneously applied to the facts or contravenes administrative procedures; or when it ignores a

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[300]Shaykh al-Laḥaydān, written responses, Feb. 27, 1985.

[301]al-Rasheed, "Criminal," 236-240.

pressing utility, extraordinary circumstance, or claim on common sense, to the point where it offends a basic sharī'a principle. In both these cases and others, the appellate authorities use reversals to encourage, broaden and educate the ijtihād of the trial courts.

We find once again then, as in the prior two sections, that Saudi Arabia has managed to maintain its instance-law predilections, and bring them out relatively unscathed from contexts where, according to our expectations, it would be sensible to constrain them.

4. Jurisdiction of the Supreme Judicial Council

Our final line of inquiry under the heading of ruling-ijtihād is to examine the jurisdiction of the highest judicial body in the system, in that it is both appeal court and supervisory board, and is in a position to exercise, in addition to its direct appellate powers, roles of authority and leadership over trial court ijtihād. To what degree does this body uphold instance-law authority, and refrain from using its hierarchical position to accomplish rule-law objectives?

As explained in Appendix A, at first there was only one level of regular appeals, heard by a body also serving as the supreme judicial authority. In the Ḥijāz from 1926, and elsewhere from 1957, an institution called the Presidency of

the Judiciary served both as the single regular appellate court, and as the authority for judicial appointment, supervision and discipline. This entity also performed all other functions connected with its status as the supreme religious authority -- including for example, giving of fatwās, supervision of religious instruction, and the employment and supervision of religious functionaries of all kinds. After the reorganization of nationwide government in the fifties and its centralization in Riyadh, the responsibilities of this powerful central authority were separated out into a number of new institutions, most of them outside the judicial system. Within the judicial system, authority to hear regular appeals had been earlier, in 1962, delegated to the Board of Review. In 1970, the Ministry of Justice was created, taking over administrative tasks in support of the judicial system. Thereafter, the powers of the body now called the Supreme Judicial Council were narrowed to the supervision, nomination and discipline of judges, and to acting as supreme and extraordinary court of appeals.

The 1975 Regulation on the Judiciary, which capped this development of the judicial system, fixes the organization and jurisdictions of the Board of Review and the Supreme Judicial Council.

As to organization, the Regulation provides that the Board of Review sits in three "circuits," for criminal, personal status, and other cases, with benches of three judges

(five for sentences of amputation and death).[302] The judges of the Board are selected by seniority from the judicial corps. As for the Supreme Judicial Council, the Regulation provides for a membership of eleven members; five only are full-time, who together compose the Permanent Committee of the Council; the membership meeting as a whole is the General Committee of the Council. The five full-time members are appointed by Royal Order from among judges of advanced seniority in the judicial corps. The six other members include five members *ex officio* -- the President of the Council, appointed by Royal Order; the President of the Board of Review; the Deputy Minister of Justice; and three of the most senior chief judges from the Grand Sharī'a courts of major cities.[303]

The Regulation of the Judiciary defines the jurisdiction of the Council under five headings. The Permanent Committee is charged with matters under headings (i) through (iii), unless the Minister refers them to the General Committee, while the latter considers all other matters. These five heads are as follows: (i) review of sentences of death, amputation and stoning; (ii) review of matters referred by the ruler; (iii) expression of opinions as requested by the Minister of Justice on matters related to judging; (iv) review of sharī'a matters as to which the Minister of Justice finds

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[302]Secs. 10-21.

[303]Secs. 6-9, 49.

it necessity to declare "general sharī'a principles" [*mabādi' 'āmma shar'iyya*]; (v) resolution of differences of opinion within the Board of Review[304] arising in the following fashion: if one of the circuits of the Board of Review decides, in a particular case, to deviate from an ijtihād earlier adopted by itself or any other circuit, the case is referred to the Board meeting as a whole, for its decision by two-thirds majority to allow the deviation; if this decision fails, the case is referred to the Supreme Judicial Council for resolution; also, if such a decision is reached, but the Minister of Justice opposes it, the case is referred to the Council.[305]

To summarize, heading (i) names the single subject-matter on which appeal to the Council is routine (death and amputation); heading (ii) provides for referrals, only through the King (and Crown Prince), for extraordinary review.[306] These two headings alone seem to be within the appeal function

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[304]Secs. 8, 20.

[305]These provisions probably were written in light of the conceptions such as that of the French Cour de cassation chambre mixte, and its function of deciding cases of particular importance, those referred by various persons, or which cross subject-matter areas or involve conflict between various chambers of the Cour. Von Mehren, *Civil Law*, 102-08.

[306]Dr. al-Faryān described a source of jurisdiction not spelled out in the Regulation, which probably are meant as scaled-down implementations of jurisdictions (iv) and (v). This is referral at the option of the Minister of Justice, particularly where the Board of Review is equally divided. Dr. al-Faryān, interview, Mar. 6, 1983.

as usually understood in Western law. Heading (iii) seems to refer to determinations related to the Council's judicial supervisory function (which includes trial of judges and the nomination of judges for appointment[307]); an example might be instructions to judges to observe administrative procedures. Headings (iv) and (v), however, suggest an authority for the Council that goes beyond mere supervision of the administration of the system and intrudes on legislative authority. These provisions are not even tied to decisions on specific cases, but involve declaring "general sharî'a principles," and deciding on the adoption of a new "ijtihâd" position to be consistently applied in appeals below. These provisions appear to be intended to endow the Council with a near rule-law-making function. Strengthening this impression is another section of the Regulation establishing a technical administration within the Ministry of Justice to prepare selected judgments for publication, deduce principles [*mabâdi'*] from judgments of the Board of Review, organize and index these and the principles decided by the Council (see above), and

> review judgments and express its opinion as to the fiqh principles [*qawâ'id*] on which they are based, with regard to the extent of their conformity to justice in the light of changing states and circumstances, in preparation to their being presented to the Supreme Judicial Council for it to decide principles [*mabâdi'*] as to them . . . .[308]

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[307]See discussion of judicial immunity in Appendix A.

[308]Judiciary Regulation, Sec. 89.

The provisions of headings (iv) and (v), therefore, clearly conflict with the appellate courts' perception of their role as we have so far observed it. Not surprisingly, therefore, it turns out that the judicial hierarchy has chosen simply to ignore these provisions.[309] Shaykh al-Ghuṣūn told me that the Regulation on the Judiciary in its entirety is concerned only with "administrative matters", and that the authority to issue "general sharī'a principles" is only for determinations on "matters of judging," i.e., the Council's judicial supervisory powers under heading (iii).[310] Shaykh al-Laḥaydān told me that the Council's decisions could bind judges only on "administrative matters." He added,

> The Council and the Board of Review work to guide the qāḍī, but the qāḍī may not see as correct what so appears to another. It is not allowed in the sharī'a that [the qāḍī] abandon his opinion or adopt it for the sake of the opinion of another, even though that other be more senior than he in rank, or more broadly learned. The Council may issue some directions and guidance as to operational matters [*ijrā'*], but not in fiqh, because its understanding does not bind anyone, since the qāḍī has

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[309]Notice here a phenomenon that we shall observe again: that 'ulamā' choose to ignore decrees or regulations they find distasteful or improper. As here, some provisions may be in practice dead letters; yet, they remain valid "law" -- in the sense of expressions of the King's will. Functionaries more under the King's command than the 'ulamā' remain bound by them. The 'ulamā' out of respect do not refer to them as rejected, or as opposed in principle, but simply either ignore them, or evasively interpret them, or describe them as not yet implemented, due to some impracticality in the provision, or some situation or circumstance. The provisions remain on the books, at best ideas for future implementation.

[310]Shaykh al-Ghuṣūn, interview, Nov. 14, 1984.

> freedom in his judging within the limits of the texts of the sharī'a and the principles of its fiqh.[311]

Here the supreme qāḍī authority itself is explicitly renouncing power to constrain qāḍī judgments in the slightest, beyond constraints already laid down indubitably by the sharī'a. Its power to constrain qāḍīs in "operational matters" is justified by a different principle, *siyāsa shar'iyya*, to be discussed at length in the next Chapter, based in the general welfare, and claiming a justification and priority subordinate to the fiqh.

As to the jurisdiction under (v), he said that such a situation -- a session of the Board of Review to consider a change in its ijtihād -- has never occurred. He stated,

> [N]either the Board of Review nor the [Supreme] Judicial Council has any right to legislate [*yusharri'*]. Each only evinces, as to particular cases, its opinion, and does not lay down for the qāḍīs principles [*qawā'id*] by which they are to give judgments. Therefore, no such session has occurred.[312]

This statement explicitly rejects the Regulation's proposal of a quasi-legislative role for the appeal courts. The only role it endorses for appeal courts is to express their opinions on particular judgments, each opinion mere guidance to the trial judge, powerless to state binding principles -- in effect, instance-law at the appeal level. The statement characterizes any deviation from this role as "legislation," seemingly

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[311]Shaykh al-Laḥaydān, written responses, Nov. 28, 1984, Jan. 13, 1985.

[312]Shaykh al-Laḥaydān, written responses, Nov. 28, 1984, Feb. 27, 1985.

identifying rule-law with legislation. All these observations will prove useful in our discussions of legislation and codification in Saudi Arabia, to follow in the next Chapter.

In line with these results, the Council in practice has not countenanced the Regulation's implied proposal that its decisions constitute a jurisprudence binding lower courts. As in his statement just quoted, Shaykh al-Laḥaydān emphatically denies that Council opinions bind trial courts. He stated that the Council does not circularize [*yu'ammim*] its decisions to the lower courts.[313] It is a striking and revealing fact, however, that the Ministry of Justice, being the creature of the Regulation and a part of the King's government,[314] follows a different interpretation of the Council's role under the Regulation. Dr. al-Faryān stated that, although aware of the Council's position, the Ministry circulizes Council opinions, or at least some of them.

Administrative authorities differ with the Council also on the point of whether its opinions bind qāḍīs prospectively. When asked whether, when the Council has decided a disputed point, qāḍīs are foreclosed from following their own ijtihād, Dr. al-Faryān asserted that they were. When asked, however, he explained that this is due to the practical consideration that the Council will review, and reverse, any conflicting

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[313]Ibid., Nov. 28, 1984, Jan. 13, 1985.

[314]Dr. al-Faryān referred to the Minister as holding a "political" [*siyāsī*] position, "not in the corps of the qāḍīs." Dr. al-Faryān, interview, Feb. 5, 1984.

judgment; he also admitted that if the Council is persuaded by the qāḍī's separate ijtihād, no reversal will occur.[315] Dr. al-Nafīsa similarly stated that the decisions of the Council bind the judge, but only if he is unwilling to be reversed, or his opinion cannot be distinguished.[316]

As these explanations show, the difference of opinion between the Council and the Ministry as to the power of Council precedents is only as to whether emphasis is on theory or practice. Those who claim binding effect offer no argument from theory, whether of regulation or of fiqh; and they do not deny that a competent qāḍī holding a conviction opposite to that of the Council may, without blame, give his best argument, seeking to modify the Council's view or distinguish his own case. Yet they are certainly right that the significance of the point in practice is virtually nil: due to the rule against ijtihād reversal, the Council must have viewed its first determination as dictated by a text; therefore, any subsequent qāḍī decisions questioning it will face a heavy burden of justification.

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[315]Dr. al-Faryān, interview, Feb. 5, 1984. On Mar. 6, 1983 he stated that the effect on lower courts is one of "guidance" [*irshād*], not "compulsion" [*ilzām*], since the latter's ijtihād, if "better," will prevail.

[316]Dr. Nafīsa, interview, May 10, 1985. Dr. al-Faryān admitted that the technical research arm of the Ministry had not developed as hoped, although it is compiling files of decisions of the Board and Council, by subject matter. Dr. al-Faryān, interview, Mar. 6, 1983. This agency also responds to questions from qāḍīs about judicial regulations and instructions. Shaykh al-'Umarī, interview, Aug. 7, 1983.

Moreover, even given their theoretical freedom, qāḍīs can easily find grounds in fiqh to justify changing their own views to fall in line with appellate court positions. First, qāḍīs will wish to avoid putting parties through pointless reversals. Justification for this outlook can perhaps be found in the utility [maṣlaḥa] of efficient resolution of a dispute, as a non-textual dalīl entering into the qāḍī's conscientious determination of the best judgment. Second, qāḍīs may legitimately weigh whether, due to shortage of time or of scholarly qualifications, they ought to undertake their own ijtihād. Recall that, following Ibn Taymiyya, Wahhābī theories required qāḍīs to practice only such ijtihād as they were capable of.[317] A qāḍī is, after all, under a duty to consult with those more learned than he.[318] Even under dalīl theory, the demands of conscience may be met by simply not accepting the judgment blindly, and instead learning, and being satisfied with, the justifications for it as given by higher courts or scholars.

Indeed, the significance of this issue lies rather in the the Council's insistence on the theoretical freedom of qāḍīs. We note here a conjunction, now familiar in these investigations, of a strong explicit position in defense of the ideal of qāḍī ijtihād, even in circumstances where (i) there are strong practical pressures toward, and common-sense

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[317]See n. 173 above.

[318]See n. 205 above, *re* consultation [*shūrā*].

reasons for, conformity; (ii) that conformity seems in fact to exist; and (iii) the theory affords rationalizations to condone that conformity.

Besides provisions of the Regulation of the Judiciary, the system affords three other avenues by which the Council could, if it so chose, exert rule-law-making authority. The first of these is that of the Council's "administrative orders" directed to trial courts. I am aware of no case where such an order of the Council decided an issue of ijtihād. The closest cases I found are two decisions of the Council which amount to findings of general situations of fact obtaining in the country at large, and which instruct functionaries in the legal system to act in accordance with those findings.

In the first decision, in 1981, the Council[319] ordered all notaries public[320] not to accept for registration any mortgage securing loans by commercial banks. This ruling had a large impact, effectively preventing bank use of mortgages. The order was instigated when notaries asked the Council to relieve them of these actions, which, they were convinced, implicated them in "usury" prohibited in sharī'a, referring to a ḥadīth of the Prophet condemning the "writer" of a usurious loan. In a previous order the Council[321] had required that, whenever a notary is certain that a transaction he is asked to

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[319]General Committee.

[320]And qāḍīs acting as notaries in small towns.

[321]Permanent Committee.

register facilitates interest, he not register it. That order was merely a specific implementation of existing law, since facilitating usury is against fiqh, and since, even under the regulations, a notary is to register acts only if in proper sharī'a form and in agreement with the Ḥanbalī school.[322] But in its 1981 order the Council took the matter another step, by making a factual finding about commercial bank mortgages:

> it has been definitely established to the full body of the Supreme Judicial Council that the loans granted by commercial banks are usuries.[323]

Although it appears to issue a fiqh rule for a general case, yet the order is properly only administrative, since the order is concerned with the provision of notary services (theoretically, only one of the methods to authenticate evidence), and not the judgments of courts. Since notaries have no power to find facts, the order is concerned to provide them a mechanical, rule-of-thumb, procedure to follow. If a judge, on the other hand, were to take cognizance of a case involving the issue, he would take the order, precisely because of its general and blanket character, as equivalent to a fatwā, and feel free to hear a specific claim to the contrary, as to either facts or law.

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[322]Kingdom of Saudi Arabia, *Nizām tarkīz mas'ūliyyāt al-qaḍā' al-shar'ī* [Regulation Allocating the Responsibilities of the Sharī'a Judiciary], Royal Confirmation No. 109, 24 Muḥarram 1382 (June 26, 1962) (Riyadh: Government Presses, 1398), Secs. 179, 182.

[323]Supreme Judicial Council, Decision No. 291 (25 Shawwāl 1401 Aug. 25, 1981).

The second example of an administrative order by the Council is a decision fixing, based on expert testimony, the current monetary values of the *diya* or blood-money, which the fiqh defines in terms of camels. This order is intended to bind all functionaries in the system, even judges. The latter are bound, however, only for the practical reason that to question the order is to reject the expert witnesses (on camel market values) whose evaluations were the basis for the Council's order; a judge could, however, still require payment in camels.[324]

Thus, administrative orders of the Council seem not to be used to encroach on judicial ijtihād freedom. The second remaining possible avenue by which the Council could exert a rule-law authority is that of "instructions" [*ta'līmāt*] occasionally issued by the Council as to matters of difference of opinion among judges.[325] According to Shaykh al-Ghuṣūn, these instructions seek to persuade qāḍīs to "draw closer to each other," to "avoid public criticism of the judiciary."[326] He told me that the orders intend no compulsion, which would make the qāḍī a mere "machine" [*āla*].[327] He named as an example of such an instruction a circular advocating the rule that a triple divorce counts as triple. As we have seen, the

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[324]Dr. al-Faryān, interview, Feb. 5, 1984.

[325]Shaykh al-Ghuṣūn, interview, Dec. 18, 1984.

[326]Shaykh al-Ghuṣūn, interview, Dec. 18, 1984.

[327]Ibid., Nov. 14, 1984.

debate on this point is indubitably within the realm of ijtihād, since an opposing view is held by the Shaykh Bin Bāz and before him Ibn Taymiyya. Shaykh al-Laḥaydān explained such instructions as means by which "[t]he Council and the Board of Review . . . guide the qāḍī," and he strenuously denies that qāḍīs are bound by such guidance.

These hortatory "instructions" represent the high-water mark of assertion of rule-law authority by the Council in ijtihād matters. Here, finally, we observe the Council admitting a concern for good order in ruling-ijtihād. On this issue, divorce, which so pervasively and vitally affects the public, in admitting a need to avoid "criticism of the judiciary," the Council may be acknowledging such popular expectations as that God's law ought to be single, that the judges ought to know it, and that the applicable legal rule in the country on such a matter ought to be fixed and predictable.

To sum up the Council's practice of its appellate authority, we find that the Council has declined to use, has even explicitly repudiated, a number of potential mechanisms to exert rule-law-making authority over lower courts -- whether these derive from explicit regulation or from its functions as supreme appellate authority and as judicial supervisory body. But this stringent theoretical and doctrinal position is only one part of the picture: two other essential features of the situation both favor rule-law, and

counterbalance the Council's position. First, there is the government's eagerness to regularize and stabilize judicial practice, put on record in the Regulation and by actions of the Ministry of Justice. We find that the Ministry, the creature of the Regulation and answerable to the King and Council of Ministers, takes practical steps that greatly increase qāḍī conformity to positions taken on appeal. One wonders whether the Council, which certainly possesses influence in the Ministry, does not in fact approve of such actions as useful, though it cannot take them itself; after all, the Council itself expresses a desire for voluntary conformity by issuing occasional "instructions" to qāḍīs. A second aspect of the situation favoring rule-law is the puzzling fact with which we began this Part: that, despite protestions of free ijtihād, yet, as is well-known by practitioners, qāḍīs practice conformity among themselves, customarily adhering to traditional Ḥanbalī views in general and to appellate positions in particular. Clearly, for whatever reasons, the 'ulamā' themselves feel pulls toward uniformity, and accommodate them at levels other than that of explicit law and theory.

Before leaving the topic of the power of the Council to influence qāḍīs toward uniformity of rulings, we should note mechanisms in the legal system which have a structurally similar effect, but involve fatwās instead of appellate decisions. The most important such mechanism is that of fatwās

issued by the Board of Senior 'Ulamā', following on research studies by members of the Board. Many of these fatwās are published.[328] Since they are the outcome of the combined ijtihād of many of the most respected and experienced Saudi 'ulamā' (there is an extensive overlap between the Board's membership and that of the Supreme Judicial Council), the Board's decisions seem to have a near-legislative effect on judicial decisions. It is impossible to know the exact extent of qāḍī conformity to the Board's decisions, but the qāḍīs whom I heard mention such decisions seemed to accept their holdings axiomatically. An example is a fatwā declaring valid a contractual provision imposing liquidated damages in the event of delay in performance, a provision that had long been common in government construction contracts.[329] Until this fatwā, the validity of the provision had been in extreme doubt, since it implicates classical strictures against uncertainty and unjust enrichment; after the fatwā, I observed willingness to enforce the provision, on the ground simply of the Board's fatwā.[330]

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[328]Though this is not always at once after they are reached.

[329]Lajnat al-Buḥūth al-'Ilmiyya, al-Riyāsa al-'Āmma li-Idārāt al-Buḥūth al-'Ilmiyya wa-al-Iftā', "al-Shart al-Jazā'ī," *Majallat al-Buḥūth al-Islāmiyya* 1, no. 2 (1395-6 H., 1975-6 C.): 61-144.

[330]Committee for the Settlement of Commercial Disputes [*Hay'at Ḥasm al-Munāza'āt al-Tijāriyya*], Riyadh Branch, personal observation, Jan. 25, 1985. The Committee still showed reluctance, and sought reconciliations in such cases, limiting their recovery to what is reasonable. Ibid.

The influence of fatwās of the Board of Senior 'Ulamā' is often fortified by commands of the King to implement them. Such orders often follow naturally, since the Board -- which exists, we recall, to study and give its opinion on issues referred by the King -- is often consulted on the propriety of a proposed action by the government. But when the fatwā's subject matter, and the governmental action taken in conformity with it, implicate also qāḍī judgments, complex issues arise, to be discussed in the next Chapter. An example is a Board fatwā declaring drug smugglers subject to the death sentence: on receipt of the fatwā, the King issued an order to the Ministry of Justice and the Minister of the Interior "to act accordingly, to inform those necessary, and to circularize it to the courts."[331] This command maintains a nice ambiguity about requiring compliance by the qāḍīs, as opposed to the Minister of Justice.

Scholars similarly desired certain conditions observed. Shaykh Ibn Jubayr, written answers, May 15, 1985. A similar case is a fatwā declaring the fiqh doctrine of *shuf'a*, or a right of first refusal, ordinarily applicable to sales among partners, to be inapplicable to certain real estate investment partnerships. I was told that this fatwā was successful in altering practice throughout the Saudi legal system. Shaykh Ibn Jubayr, interview, Apr. 30, 1985.

[331]Royal Cable 4/B/9666, 10 Rajab 1407 (Mar. 10, 1987). As another example, Order of Deputy Prime Minister No. 1894/8, 12 Sha'bān 1402 (June 4, 1982), communicating the Board Decision No. 85, 11 Dhū al-Qa'da 1401 (Sep. 9, 1981), on saṭū, etc., saying "We desire that you execute the order of His Majesty . . ., inform the courts and boards of appeal, . . . and stress to them observance of, and compliance [*taqayyud*] with, it."

A case similar to the last, but involving not the Board of Senior 'Ulamā' but the Chief Muftī acting alone, arose when the Minister of Finance sought the Muftī's opinion whether the operations of a certain government development bank were free of usury, and therefore exempt from the order of the Council forbidding registration of bank mortgages. The Muftī opined orally that the bank was exempt. At the request of the Minister of Finance, the King ordered the Minister of Justice to inform judges of the fatwā. The Minister complied by a circular that merely made reference to, and attached a copy of, the King's order -- a terseness in deference to the judicial system's sense of independence in such matters from both the King and the Muftī.[332]

5. Conclusion

To end our discussion of the qāḍī's freedom in ruling-ijtihād, let us try to draw up a final balance between rule-law and instance-law tendencies. Certainly, strongly favoring instance-law is that the 'ulamā' have vehemently upheld, not only in theory but in the explicit form of the practice, the grounding of the legal system in individual qāḍī ijtihād; they have unfailingly directed attention, in both practice and theory, toward the pure freedom of individual legal

[332]I reviewed a copy of the order in interview with Dr. Muhammad al-Husseiny, Legal Advisor, Saudi Industrial Development Fund, Riyadh, January 14, 1986.

conscience. To the opposing rule-law values, arising at the level not of the individual but of the legal system as a whole -- such as uniformity, predictability, and support for general welfare -- they have conceded extraordinarily little ground.

We ask, if this is truly the way the system works, should there not be irresistible pressures building toward rule-law values? We even want to ask, why has the system not broken down for lack of them? But through our discussions, we have gradually come to realize that rule-law mechanisms do exist, but not at the level of ideal justification, legal theory and explicit legal institutions. Satisfying rule-law needs are, most importantly, informal mechanisms, or patterns, of conformity among the 'ulamā' by which they achieve approximately the effect of general legislation. We found that such behavior does have its legal justifications, but we also found that these justifications share two characteristics: first, they are themselves cast in case-by-case terms (e.g., choice among legal views by general utility, a judge's consultation with other 'ulamā' in aid of his ijtihād); and second, they refer to contingent circumstance, such as the changing needs of the collectivity, and therefore fall lower, or have diminished truth-values, in uṣūl al-fiqh's hierarchy of proofs. Clearly motivating rule-law patterns among the 'ulamā' is something other than such theoretical justifications. What we find instead is an intensely

practical state of mind that rarely finds its way into theoretical discourse. As we have seen, the 'ulamā' are well aware of broad-scale, pragmatic, social-interest, and even political, challenges that their law must meet -- and must meet for the sake of religion as they see it. They evince concern for the public's confidence in their law and in them; for the ability of their legal system to meet the needs of society, both religious and material; and for maintaining a united front against contenders for their doctrinal, political and social influence.

Many of the lessons to be drawn from all this must await the next Chapter, where we will revisit much of the foregoing for its significance in understanding how the 'ulamā' cooperate, and compete, with the ruler in the process of legislation.

B. _IJTIHĀD AS TO THE FACTS OF THE CASE

We introduced above[333] the distinction between ruling-ijtihād [*ijtihād fī al-ḥukm*] and fact-ijtihād [*ijtihād fī al-wāqi'*], noting that both are an intrinsic part of the instance-law ijtihād obligation of the qāḍī, to exert himself to achieve God's judgment in the particular case.

Taqlīd theory, although it cannot deny the ijtihād of the qāḍī totally, in that he remains ultimately religiously responsible that his judgment is the right answer for the case, tends to see this sort of ijtihād as inconsequential alongside the sublime authority of fiqh as elaborated by the great mujtahids, which the muqallid qāḍī is bound to apply. Since the obligation of ruling-ijtihād is absent, and the qāḍī is seen as mechanically applying the ruling of another, he is to that extent displaced from the moral crux of ijtihād in the particular case; by association, and partly in justification of taqlīd, the importance of his fact-ijtihād is minimized also. The qāḍī's function tends to be thought of as little more than the mechanical running of the trial process -- especially when a muftī is available to advise him based on the facts once proved.

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[333]See p. 241 above.

In contrast, as we have seen, the Saudi Arabian legal system is encouraging its qāḍīs to assume the obligation of individual ijtihād tailored to the specific case. As Shaykh al-Laḥaydān stated:

> It is incumbent on every qāḍī that he practice ijtihād in the case that is laid before him, and seek [*yataḥarrā*] the truth, and ask his colleagues and his *shaykhs* if the matter is obscure to him. This is a relative ijtihād, because each case has its circumstances and concomitants, and the situations that compel it, and the causes that bring about its existence . . . .[334]

This obligation of ijtihād in the particular case obviously entails skills in addition to a theoretical knowledge of the rules of fiqh, however detailed. The term "*ijtihād fī al-wāqi'*" or fact-ijtihād, is used in Saudi Arabia to refer to all such aspects of judicial ijtihād, and as the label for the view that qāḍīs possess and practice greater freedom than their prevailing conformity to traditional Ḥanbalī law would suggest. But the distinction between ruling-ijtihād and fact-ijtihād is not fundamental either to uṣūl al-fiqh or to the theory of the judicial function; to grasp ijtihād in its ideal conception the two types must be seen as one whole.

The emphasis given the distinction in Saudi Arabia may be traceable to a number of statements by Ibn al-Qayyim, who urged an awakening of ijtihād at the level of the law's application.[335] Ibn al-Qayyim argued, in an entire book[336]

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[334]Shaykh al-Laḥaydān, written responses, Jan. 13, 1985.

[335]A similar exhortation by al-Juwaynī is in *Ghiyāth*, 220-221.

(frequently recommended to me by Saudi qāḍīs) and in scattered passages in his works, that qāḍīs should not cling mechanically to certain technical rules of evidence, but instead seek to prove the truth by whatever means available. This context afforded him an opportunity to advance a deeper philosophy, one learned from Ibn Taymiyya: that the justice sought by the sharī'a is not to be defined by conformity with rules derived in doctrinal purity aloof from concern for their realism or practical implementation. Rather, sharī'a calls for a justice that is to be realized, so far as fact and human nature allow, in the world; therefore, this sharī'a justice, if properly understood, cannot conflict with right reason, obvious fact, or practical justice. Criticizing those who limit themselves to certain canonical methods of evidence (essentially, testimony of two witnesses, confession and oath), and forego other sensible, practical methods of proof (for all of which he offers sharī'a precedent), he said,

> They close upon themselves valid methods by which truth is known from falsehood. They set them to naught despite their knowledge and the knowledge of the people that they are indications of truth, thinking that they are in conflict with the sharī'a. What makes them do this is a type of deficiency in their knowledge of the reality of the sharī'a, and of the harmonization between it and the world of fact.[337]

Accordingly, he praised in judges the practical skills to discern and penetrate to the truth [*firāsa*]; he cited examples

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[336]Ibn Qayyim al-Jawziyya, *al-Ṭuruq*.

[337]Ibn al-Qayyim, *al-Ṭuruq*, 4:372.

such as Solomon's stratagem, in the case where two women claimed a child, to identify the true mother by commanding that the child be divided in two; or the Qur'ān's approval of use of the circumstance whether Joseph's shirt was torn in front or behind to determine whether he assaulted, or fled from, Pharaoh's wife.

In this vein he often argued that ijtihād depends not only on knowledge of the rules of fiqh abstracted from reality, but also on knowledge of that reality, so that the true judgment of God in the particular circumstance can be approached most surely:

> The judge, if he is not a true faqīh[338] in the signs and indications of the state of affairs, as much as in the fiqh of the general rules [*kulliyyāt al-aḥkām*], causes the loss of legal rights. For, here there are two fiqhs that a judge must have: fiqh in the rules [applying to] events in general [*al-ḥawādith al-kulliyya*], and fiqh in the situations and circumstances of the people, by which he distinguishes between the truthful and the untruthful, the one who would uphold the right [*al-muḥiqq*] and the one who would nullify it [*al-mubṭil*], and then brings into conformity both these, both the factual [*al-wāqi'*] and the obligatory [*al-wājib*], and gives the factual its ruling from the obligatory.[339]
>
> Neither the muftī nor the judge [*ḥākim*] is capable of fatwā or rightful judgment without two types of understanding. One of them is understanding of the factual circumstance [*al-wāqi'*], fiqh of it, and uncovering knowledge of the reality of what occurred, by means of circumstances, indications and tokens, until he has exhaustive knowledge of it. The second type is understanding of what is obligatory in that factual situation, that is, understanding of God's ruling that He adjudged in His Book or upon the tongue of His Messenger

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[338]Recall that the root meaning of fiqh is "understanding," "perceptiveness."

[339]Ibn al-Qayyim, *Badā'i'*, 3:117.

> for that factual circumstance. Then he brings one into application with the other. . . . The ʿālim is one who arrives, by his knowledge of the factual circumstance and by his efforts to attain fiqh as to it, to knowledge of the ruling of God and His Messenger. . . .[340]

Ibn al-Qayyim here goes beyond a point uniformly included in discussions of the qualifications of judges and of muftīs, that they must be aware of such matters as local customs, habits, and language. He argues for a vigorous ijtihād, a fiqh, of the living reality, and merely of the texts of law, so that the application of God's law will issue in a living justice. Note the emphasis he gives here to the conception that for God a true judgment of the particular exists, and that that judgment may be realized from the Qur'ān and the Sunna, for each of the infinity of cases, i.e., as instance-law. Ibn al-Qayyim describes the skills needed by the qāḍī to achieve a correct result:

> The judge needs three things, without which he cannot validly give judgment: knowledge of the dalīls, the occasions [*asbāb*], and the evidences [*bayyināt*]. The dalīls show him the general sharīʿa ruling; the occasions show him whether [this ruling] applies in this specific context; the evidences show him the means to judgment [*ṭarīq al-ḥukm*] in the dispute. When he errs in one of these three, he errs in the judgment, and all errors of judges turn upon error in one or more of them. An example of this is when two dispute before him about the return of purchased goods for a defect. His judgment depends on knowledge of a sharīʿa dalīl that gives the purchaser the power of return. This is an ijmāʿ of the Community based upon [a ḥadīth] . . . . [Then the judgment depends] on knowledge of the occasion showing

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[340]Ibn al-Qayyim, *Iʿlām*, 1:87-88. The quotations seem to differ, in that the first identifies two "fiqhs," or legal sciences, while the second seems to go beyond these "fiqhs" to concern itself with the two "understandings" achieved through them.

> the applicability of the ruling of the Legislator in this specific sale. This is that [the complained-of] characteristic is or is not a defect enabling return. Knowledge of this does not depend on the sharī'a, but on the senses, habit and custom, or expertise, and such like. [Finally, the judgment depends] on evidence, which is the means of ruling between the litigants. This is whatever makes clear to him the truthfulness of one of them to a certainty or a probability . . . .[341]

We shall employ the common-sense three-part breakdown of the judicial process offered in this statement -- between ijtihād as to the ruling, the occasion, and the evidence -- to organize our discussion of fact-ijtihād.

Fact-ijtihād we might define here, then, as the function of determining the occasions and the evidences, encompassing thereby the process by which abstract rulings found in the fiqh texts are applied and issue as concrete judgments. We have already touched on the process by which the judge matches the ruling to the occasion, when we discussed appellate court reversals in instances where the judge failed to make an acceptable match, or, in Shaykh al-Laḥaydān's words, "when the qāḍī thinks that a text is probative in a case when it is not probative at all."[342] Here we shall discuss the process by which Saudi qāḍīs carry out these two functions, with a digression in the midst of the discussion of the first to underline certain distinctions thereby shown with Western law and legal conceptions.

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[341]Ibn al-Qayyim, *Badā'i'*, 4:12.

[342]See p. 285 above.

1. Ijtihād as to the occasion

a. Ijtihād as to the occasion as shown in the Saudi practice

Usually this function is straightforward -- the facts and the parties' claims point to a single ruling, and ijtihād as to the occasion is to determine whether the proven facts constitute a proper occasion for the ruling. How this is done will be discussed momentarily. But it is also possible that the correspondence between the event as shown by the evidence and a ruling in the fiqh may not be obvious. Thus a second and third context for ijtihād as to the occasion exist: when more than one legal characterization, or occasion, is possible on the proven facts, each with its own corresponding ruling; and when, even for a single occasion, the school offers more than one possible legal ruling.[343]

The second context is likely to arise in any difficult or novel case, in that the facts are given their characterization, and a ruling selected, in a single process culminating in final judgment. An example is afforded by the case of the encroaching building cited by Shaykh al-Laḥaydān, where the facts of the builder's blamelessness and the

[343]With regard to both these contexts, it is perhaps relevant that the general rule, applied in Saudi Arabia, opposes iftā' by the qāḍī on an issue that may come before him in court, in order to avoid use of stratagems by litigants, and embarrassment of the judge in the event he changes his ijtihād on trial or encounters there circumstances not revealed to him in seeking his fatwā. Abū Zayd, *al-Taqnīn*, 34-37.

Municipality's surveying error are relevant only according to the Council's choice of ruling. Since Shaykh al-Laḥaydān claimed the Council's ruling not to be novel; the fault of the trial court can be seen as error in assessing the occasion as a routine encroachment, for which demolition is the school view. The trial court's characterization of the occasion was impermissible because it failed to observe the additional fact of blamelessness, which implicated a fundamental sharī'a principle and mandated a different outcome. Obviously, in such cases the ijtihāds of the ruling and of occasion are difficult to disentangle.

The third context, where the school offers, for a single occasion, more than one ruling, may seem to concern only ijtihād as to the ruling. However, as discussed above, some qāḍīs (Shaykh al-'Umarī in our example) have chosen to interpret such instances of choice as one involving ijtihād as to the occasion, as a seeking of justice in the particular case, rather than as a weighing of the dalīls of competing rulings. We pointed out above that an alternative conceptualization of this process is to weigh also non-textualist dalīls, such as utility, within ruling-ijtihād, thus allowing a much greater contextualization in determining the ruling. However explained, the result, among qāḍīs conservatively wedded to traditional legal positions, is a greatly enlivened ijtihād in the judicial process. This is precisely the sort of observed ijtihād-spirit which draws

comment in Saudi Arabia, and is characterized as "ijtihād as to the facts."

Let us return, then, to the first and routine context, where only one occasion suggests itself, but the issue is whether the facts support it. Although one might expect this to be a mechanical process, it turns out that in Saudi Arabia this is a setting for active judicial ijtihād. Here there appears a distinction between the conceptualizations of the judicial function in the Saudi system and in the West -- although we may wish to question whether the distinction runs as deep in practice.

The distinction is not easy to grasp. Even on first observing courts, Saudi qāḍīs certainly seem to be doing precisely what Western judges do in fitting a rule to the facts. But soon a number of indications remind one that, for a Saudi qāḍī, a judgment is not conceptualized as merely a legal outcome triggered by proof of certain physical (and psychological) facts. A qāḍī's judgment is at once legal and religious (in our terminology), so the facts and their characterization must sound not only in a physical and legal but also in an ethical and religious realm. In this larger realm are necessarily dimensions of judicial activity to which our Western senses are not attuned; only after a certain exposure do we begin to discern those dimensions and that the qāḍī and parties are acting within them. Here one needs, then, to move around the activities of the Saudi qāḍī,

describing several facets of them which best elicit the sought-after distinction.

An apt beginning is a case I observed in part, involving a woman's demand for a judicial divorce on the ground that her husband was a habitual drunkard. The fiqh as applied in Saudi Arabia holds, first, that a wife may obtain a judicial divorce on the ground of harm [*ḍarar*] done to her by her husband, or for a serious defect in the husband, and, second, that habitual drunkenness constitutes such harm and such a defect.[344] In this case, the wife proved that her husband had been drinking for fifteen years. His criminal record showed that, throughout this period, he had been convicted numerous times for drinking and possession of alcohol; indeed, he was brought to the courtroom in manacles, awaiting trial on his latest arrest for a liquor offense. The man's appearance was one of a long-time alcoholic, to an exaggerated degree. The woman claimed also that he did not pray, he drank liquor during the daytime fast of Ramadhan, he beat and terrorized her and their children, and he had been unemployed seven years. Her son was present in court to corroborate her claims. The husband in reply admitted that his wife was a good, pious woman, claimed that he had never drunk, and, when

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[344]This is on ground either of defect [*'ayb*] in the husband, or of harm [*ḍarar*] to the wife if he beats or insults her. Court of Marriages, interviews, Apr. 18, 1983. As to defect, see 'Abd al-'Azīz b. 'Abd Allāh Bin Bāz, "Fatāwā," *al-Da'wa* (Riyadh), 18 Rabī' al-Awwal 1407 (Feb. 16, 1987), 26-27.

confronted with a letter confessing drink, asserted that he had begun to drink only recently, and that his son had framed him in his latest arrest.

Such evidence was enough to establish overwhelmingly the fact of the husband's confirmed drunkenness. According to the fiqh rules accepted in the Kingdom the judgment would then seem a foregone conclusion. Yet, to my surprise, the qāḍī adjourned the case on two occasions "in order to study the record." A younger qāḍī observing one of the hearings informed me that the wife will obtain the divorce "if she persists."

Here we sense more is at stake than we would observe in a Western trial where the law is so clear. I shall dare to interpret the qāḍī's thought-process, in order to suggest the distinction as I felt it when present. First, no doubt the most important reason the qāḍī delayed final decision was to ensure that the wife was set in her course and that the husband would not reform. This is according to his religious obligation implied in Qur'ānic verses to seek reconciliation of spouses,[345] and reflects that part of the office of qāḍī which is trustee of religion and piety. Thus, he shows himself more concerned with the present moral state of the parties than with past acts and their legal outcomes. Ultimately, however, if the wife persists, he will need to

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[345]The court can punish the defendant with lashes to convince him to cease acts harmful to the wife. Court of Marriages, interviews, Apr. 18, 1983.

make the crucial determination whether the facts constitute an occasion of "harm" or "defect" such as to justify divorce. These highly general terms sound, however, in an ethical and religious realm, and are not satisfied solely by proof of the fact of drinking. Accordingly, he extensively observed the behavior, and relationship, of the parties in several hearings, an effort quite unnecessary if the issue were simply drinking. Armed with his observations, he will then need to characterize the relationship legally; his guidance in this is not only fiqh rules, but, as this same qāḍī told me his scruples required, his own apprehension and evaluation of the dalīls from the Qur'ān and Sunna for these rules. Besides these he also has in mind the overall context of divorce and marriage in fiqh, together with all the relevant traditional material of lesser authority but vivid didactic effect, such as maxims, homilies and stories, and narratives of judgments by revered early Companions and judges related in books on the qāḍī's art. All these sources combine to form the qāḍī's moral and religious, as well as legal, construction of "harm" and "defect." Then, operating within the framework of these conceptions, he also is conscious -- and these affect his decision more immediately -- of the community norms and usages of marriage and divorce. Moreover, the two -- the religious/legal teachings and the accepted community practice -- interpenetrate, and, although the former is primary in

justification and authority, the two inevitably interpret each other in his mind.[346]

Perhaps this example, even with commentary, does not yet convey the contrast, since it involves family relations; although the terminology would be different, a small United States family court would appear to exercise a similar discretion, and be more concerned with a presently beneficial outcome than with legalistic or punitive consequences of past acts. Yet, the tendencies shown in this example I also observed in Saudi courts in other areas of law -- including commercial, criminal, and tort.

For example, I observed the same qāḍī as in the marriage case inquire at length into a case arising from a written contract, but with only the merest glance at the contract itself, seeking instead that the parties characterize their

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[346]Cf. Rheinstein's description of substantively irrational process of khadi (and justice of the peace) justice. The art of the "good khadi" is to articulate the "sound feeling of the people," without skill in which he cannot maintain his authority; to this extent his thought process merges into the substantively rational. Max Weber, *Max Weber on Law in Economy and Society*, ed. M. Rheinstein, trans. E. Shils and M. Rheinstein (Cambridge, MA: Harvard University Press, 1954), xlviii, lv. This would seem an apt description, to the extent that the generality and vagueness, or discretionary features, of rules delegate lawmaking to the qāḍī; it is obviously not at all true to the extent suggested by Weber's definition of khadi-justice as knowing "no rational grounds of decision [*Urteilsgründe*] whatever." Max Weber, *Economy and Society*, ed. G. Roth and C. Wittich, 2 vols. (Berkeley: University of California Press, 1978), 2:976. See Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (New York: Cambridge University Press, 1989), for a recent application of Weber's ideas to law in contemporary Morocco. [More comments to be added.]

dispute. This recalled an instruction from fiqh texts on the art of judging:

> If the qāḍī observes that documents have multiplied in the case, and that proofs and defenses contradict each other, and that its papers have become diverse, such that it has become impossible or very difficult to determine the truth about [the case], then the qāḍī may turn away from these papers, dispense with them, and order the parties to commence the claim anew. Imām Mālik reported this about several qāḍīs, and approved of it.[347]

The same tendency I observed time and again even in a commercial court. Qāḍīs wished to know what divides the parties, the parties' perceptions of the wrong, rather than to make an abstract legal determination by testing contract provisions and facts by fiqh rules.[348] Such observations lead into the discussion, to be taken up below, of the propensity of the qāḍīs to seek reconciliation of the parties.

Shaykh al-Laḥaydān once mentioned that both a Western judge and an Islamic qāḍī use ijtihād to apply general rules to specific cases. At that point I asked him whether there were distinctions between Western and Islamic judicial method. He mentioned the following: (i) the qāḍī is "being observed by his conscience," while the Western judge is not; (ii) the Western judge will be qualified to exercise his office even if in his private life he commits adultery or drinks; (iii) a

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[347]Prof. 'Aṭwa, *Muḥāḍarāt*, 115, quoting from Ibn Farḥūn; see also Coulson, "Doctrine," 224, quoting another Mālikī source advocating burning the papers.

[348]Committee for the Settlement of Commercial Disputes [*Hay'at Ḥasm al-Munāza'āt al-Tijāriyya*], Riyadh Branch, personal observation, Nov. 19, 1985.

Western judge may not act without statutory authority, or refrain from actions mandated by statute, while a qāḍī may; thus, a qāḍī may choose not to punish a man and woman who were found alone together, if one is advanced in age and the other not, to free a man accused by two witnesses of theft if he is of good reputation, to punish a crime[349] even without two witnesses if in his heart he is convinced of guilt, or to enforce a debt for one million dollars even without written evidence.[350]

All of these points suggest another sense in which the ijtihād of the occasion is infused with moral considerations. The qāḍī, his obligation owed to God's law, tends to identify the law of the case with the decision dictated immediately by his own conscience and ethical sense, and his legitimacy and duties in office with his role as an interpreter of God's law. All of Shaykh al-Laḥaydān's examples of qāḍī discretion involve an ethically driven ijtihād as to the occasion.

At this point we may understand why acceptance of dalīl theory, even by a qāḍī who uniformly applies accepted Ḥanbalī rules, makes a difference in application, as compared not only with Western legal theory, but even with a taqlīd theory of such as our Ḥanafī author, Ibn 'Ābidīn. If the qāḍī is entitled, indeed required, to approach the occasion by uniting

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[349]He specified *ta'zīr*, meaning the category of lighter punishments for moral correction to be discussed in the next Chapter.

[350]Shaykh al-Laḥaydān, interview, Feb. 17, 1985.

his apprehension of the dalīls in their form as immediately revealed by God, with his apprehension of the concrete moral situation before him, a unique form of ijtihād does result, regardless of the conformity or not of the final judgment with a rule in a fiqh treatise. This is an ijtihād which seeks, as we found dalīl theory to seek generally, to transmute God's transcendental justice into the concrete and everyday. Such a theory exults in the immediacy of contact in the qāḍī's conscience between God's revelation and the concrete decision before him, with a minimum of intermediation by any human authority. Significantly, Shaykh al-Laḥaydān, in his statement above, showed himself unable to conceive of a similar discretion in a judge whose authority was merely man-made, and applied merely man-made law.

Shaykh Abū Zayd once asserted, only in part for rhetorical effect, that, based on his own experience in the judiciary, even for traffic regulation qāḍīs should not be bound by legislated rules. This is because each case has its unique features, there being, for example, differences among drivers, some having prior offenses, in the condition of brakes, and so forth. He asked, isn't the object of legislation justice [*'adl*], and isn't the qāḍī required, as a prerequisite of office, to be of good character [*'adl*]?[351]

In this context we see the sharī'a's ideals of instance-law and meta-ordering fully reflected, and glimpse again the

[351]Abū Zayd, interview, Apr. 29, 1985.

peculiar conception of general legal rules in such a system. And we also see reflected, even here at an advanced stage of implementation of the law, Ibn Taymiyya's and Ibn 'Abd al-Wahhāb's insistence on pious submission to texts, and their zeal in preserving for the texts an immediate and unencumbered influence on action, through an ever-fresh ijtihād drawing upon them.

b. Comparative excursus

i. "Microcosmic interpretation"

This is an apt point to digress to build on our instance-law, rule-law distinction in order to give a name, "microcosmic interpretation," to the ideal that we find here pushing adjudication toward instance-law forms. This ideal is that the qāḍī strive, by penetrating to the concrete reality of the case before him, and then appraising that reality holding it against the divine command of revealed texts, to attain to God's true, transcendent law for that concrete case. "Microcosmic interpretation," then, is an instance-law-finding drawn from the transcendental, or it is the finding, in the substratum of an individual conscience, of the true, unique law for the concrete event. We use the term "microcosmic" to suggest the monadic law-making sought; to capture how a unique act of individual conscience fuses the concrete event and the revealed law together into a ruling somehow all at once concrete and abstract, secular and transcendent, inner and

outer, bāṭin and ẓāhir, individual and universal.[352] We use the term "interpretation" to remind us of the vital fact that, despite the central function of conscience, the divine law derives, not from sources within the mind or from some sort of immanent intuition or inspiration, but from material textual sources approached through the science of uṣūl al-fiqh.[353]

Microcosmic interpretation is, then, an instance-law-finding, but one with a particular type of justification. To explain the concept somewhat further, let us say that "instance-law," which we defined as law inhering in a single concrete decision, lies at one pole of an axis defined by the

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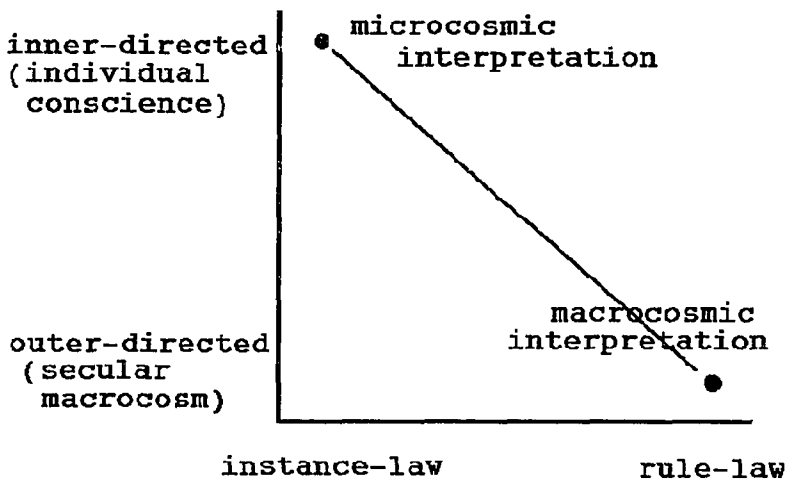
[352]Great care must be taken not to allow the distinction between microcosmic and macrocosmic to subside into the dualisms just noted, particularly (and this seems the most tempting) between individual and collective. Thus, recall that the microcosmic aspires to universality. Its atomicity, particulateness, is quelled by the universal overarching standard to which it appeals, which renders all (at least all who recognize it) as one, and the law they each uphold perforce the law of all. Thus the Qur'ān addresses the individual and the umma at once in the constant phrase: "O you who have attained to faith!"

[353]Note, as is obvious from our preceding discussions of ijtihād, that the interpretation of religious texts even on its own terms cannot, even in the case of the clearest, most applicable text, escape a great many secular referents. First, there are Arabic grammar and lexicography, the history of Qur'ān revelation, the sciences of ḥadīth authentication, all necessary to support the texts. Then there are ijmā' and qiyās, each with its own macrocosmic referents, though, as we have emphasized in Chapter One introducing them, the non-transcendentalizing aspects of these roots are minimized. Finally, we have mentioned certain relatively non-textual sources, such as utility; the contrast between these roots and textual ones is particularly significant in this context, in that they seem out of harmony with the ideal of microcosmic interpretation. Precisely this aspect of them occasions debate as to their use, which we discuss in the next Chapter.

degree of breadth and generality of the classes of cases to which a legal determination applies (with "rule-law" occupying the other pole). We need then a second axis concerned with the internal[354] ethical/legal sanction or justification of an interpretation. This axis runs between one pole, which we shall call "inner-directed," at which the sanction for a rule



[354]Note that the term "internal" means here internal to the individual conscience; below it will mean internal to the macrocosm.

inheres in, is encompassed within, an act of individual conscience, and the other pole, called "outer-directed," at which a rule's justification depends upon facts or beliefs about a world-existing collectivity, such as a legal system.[355] (We will need to refine this understanding of this second dimension as we proceed.) Microcosmic interpretation then inhabits the inner-directed pole of this second axis.

Obviously, a term "macrocosmic interpretation" is suggested, and may now be defined, simply by logical antithesis. Thus, this term must relate to rule-law rather than to instance-law: it is a lawfinding that issues in a general rule, which, in our instance/rule dimension, binds a class of cases, but no specific case. As to the inner/outer dimension, this interpretation is at the outer-directed pole just mentioned, i.e., it finds its immediate sanction or

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[355]Notice that this definition singles out a trait common to one pole in each of the various contrasts we have introduced. Recall the importance of this dimension in the Qur'ānic conception of transcendence and meta-ordering's transcendentalizing bent, See p. 72 above; in the conception of *bāṭin*, see p. 73 above; in Ibn 'Abd al-Wahhāb's stance upholding the universal reach of the texts, See p. 187 above. Evidently, my use of this definition relates intrinsically to certain points I have made about method: *e.g.*, the shift to experience. See Introduction, n. 8 above, and the proposed redefinition, criticizing Weber, of "charisma" in adjudication, See Appendix B.

justification in a substratum not of individual conscience but of a world-existing institution or collectivity (whether fiqh school, legal system, state or community).[356]

Note that much of what has preceded has had as object to show that the ideal of microcosmic interpretation runs deep in the meaning of law in Islam. In this Part we have observed repeatedly how both theory and practice in the Saudi Arabian legal system reflect an extraordinary emphasis on this ideal. This is not only as to the qāḍī function. Even the issuance of abstract, general rules by fatwā shows respect for microcosmic tendencies.[357] Recall that even if the muftī issues a general rule, it is not considered binding, and even if he chooses a rule on grounds deriving from the interests of the society as a whole, such as utility or regulatory convenience, the rule is a conscientious private religious judgment reached within a framework of religious texts. Notice further that law application in systems which have adopted taqlīd methods and school discipline have moved a substantial distance along the continuum from microcosmic toward macrocosmic interpretation.

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[356]It will be noted that the terms "macrocosmic" and "microcosmic" are not yet used to imply any reflective order or organic unity between the two law-findings. But see p. 485 below. Instead the terms here simply refer to law in two orders or worlds (*kosmos*), one small and inward-expanding, one large and outward-expanding.

[357]Iftā' would be roughly inner-directed rule-law. Note that it is not binding because it is not instance-law; its claim to truth is that it is inner-directed.

Finally, note that it is virtually at the macrocosmic extreme of this continuum that we find Western law -- in both its primary sense as state legislation, and, to a lesser extent, as judicial precedent. Even if we consider Western application of law, as in adjudication, we still find it close to the macrocosmic extreme of the continuum: in its explicit theory, we find, in place of individual conscience evaluating a concrete case with transcendentally revealed texts, instead a professional and bureaucratic expertise subsuming a concrete case under a binding, general law, an enterprise operative within a system of laws idealized as positive, formal, autonomous, public and secularly motivated. In, say, United States constitutional adjudication, the analogy to the Islamic ideal is closer, but even the most ethically stirring texts of the Constitution are less and less seen as having referents subsisting within the individual conscience, and are more and more related in one or another way to the temporal macrocosm, such as by seeing their source in society's "customary" or "traditional" norms. A still closer analogy would be to the process by which a jury reaches its verdict. We shall carry these observations further in the next Chapter.

Evidently, this pair of concepts, microcosmic and macrocosmic interpretation, builds upon all of the various distinctions and contrasts that we been accumulating.[358] The

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[358]A full list of them would be complex. The prominent ones are: meta-ordering versus pan-ordering; people of ḥadīth versus people of opinion; "every mujtahid is right" versus

basic direction of this Chapter has been from the inward, individual and private toward the outward, collective and public. It began with the fundamental individual religious dilemma of ijtihād, tying this back into the concerns of the first Chapter, particularly, to those contrasts, originating in Qur'ānic ideals of law, that we collected under the headings of the aspirations to meta-ordering and pan-ordering. After examining ijtihād in qaḍā and iftā' theory and practice, we found that these collected contrasts led to a further distinction, one between two general forms of law, namely, between instance-law and rule-law. This distinction we used to investigate ruling-ijtihād. Finally arriving, with fact-ijtihād, at the context of actual adjudication, we find once again all our contrasts -- between ideals, aspirations, doctrines and conceptions -- recombining to issue in a distinction rooted in adjudication per se, that between microcosmic and macrocosmic interpretation.

The process will be repeated in the next Chapter, where we consider the power of the state. There we introduce, and explore throughout that Chapter, the conceptions of microcosmic and macrocosmic sovereignty. Completing that task, we shall have made a full circle around the object of our study as announced at the beginning: the ideal of divine sovereignty.

"the correct mujtahid has two rewards"; indeterminate law versus positively knowable law; concern with the bāṭin versus content with the ẓāhir.

As discussed previously, all these distinctions, owing to the obscure parallelisms that we sense among them, suggest a certain manifold overall tension, or dialectic, in the Islamic legal system. The paramount value to us of this dialectic is that, arising from conceptions innate and authenticated in Islamic thought and practice, it simultaneously exposes meaningful tensions and tendencies within Islamic legal systems, and points out immediate, frontal contrasts with Western systems. In a way the effect is like that of surveying out two suitably located, secure points on one side of a gulf, from which to triangulate across to map the other side.

ii. Weber's "Kadijustiz"

An unfortunate side-effect of introducing a prosaic-sounding term like "microcosmic interpretation" is to diminish the sense for that profound, yet austere, exaltation of heart and mind induced by conviction that God Himself rules in the instant and the concrete, the miracle of His vouchsafed words affording perfect guidance to that ruling. Texts comprehensible to the mind, conveying certain knowledge, yield the tangible indications to God's own inscrutable Will. Seeking divine truth, the believing conscience exalts and intensifies that certain knowledge that affords this access, eclipsing that which is merely human, contingent or expedient.

To refer to phenomena such as this, Max Weber used the term "charismatic." Indeed, Weber chose the very term "*Kadijustiz*" to identify the ideal type, the pure concept, of "charismatic adjudication." The fame of this term, the exceptional attention it draws to the Islamic qāḍī, and its intriguing association of the qāḍī with the "charismatic," deserve our attention. To avoid interrupting the discussion, however, we include discussion of the term in Appendix B.

c. Ijtihād as to the occasion -- as reflected in fiqh writings

Let us return to the specific problem of ijtihād as to the occasion, this time following out our observations of the Saudi practice in the fiqh itself. All Islamic law, not only an idealizing dalīl theory, recognizes that a qāḍī must practice ijtihād in the occasion, even when he is a muqallid, and when the applicable rule is fully known. As stated by a Ḥanbalī, Ibn Qudāma (d. 630 H., 1231 C.),[359] the application of a fiqh rule requires a form of ijtihād called *taḥqīq al-manāṭ*, lit., the "ascertainment of the point of support," meaning here the investigation whether there exists in the particular case the proper basis to subject it to the fiqh ruling:

> The meaning of this [term] is that the encompassing principle [*qā'ida kulliyya*] [underlying the rule to be

[359]Muwaffaq al-Dīn Abū Muḥammad 'Abd Allāh Ibn Qudāma, hereafter referred to as "Ibn Qudāma," is the author of the works that have most defined the developed Ḥanbalī school.

> applied] is agreed upon or is explicitly given by a text, and [the faqīh] exerts ijtihād to ascertain its existence in the specific case [*far'*]. An example is our view, "For the wild ass a cow," because of His saying, "the amends [is] in cattle equivalent to what he has killed" [5:95] [referring to the Qur'ānic penalty for killing game while a pilgrim]. So [the faqīh] says that the equivalent is obligatory, the cow is an equivalent, and so [the cow] is obligatory. The first [proposition], i.e., that the equivalent is obligatory, is known by text [*naṣṣ*] and ijmā', while the ascertainment [*taḥqīq*] of the equivalence in the cow is known by a sort of ijtihād. Another example is ijtihād as to the *qibla* [direction of Mecca], because we say that the obligation to face the *qibla* is known by explicit text, but the direction of the *qibla* is known by ijtihād. Similar is the selection of the ruler, the [determination of] good character [such as in accrediting witnesses], the quantity of maintenance payments for support [of spouses and relatives], and such like. This is called "ascertainment of the support," when [the support] is known but knowledge of its existence in the several manifestations [*āḥād al-ṣuwar*] is difficult, so proof for it is sought in indicators [*amārāt*]. . . . This is not qiyās. . . . It is a necessity for every sharī'a because revelation by texts of the good character of every person and the maintenance of persons does not occur.[360]

The conception here is clearly not that of subsuming cases under general rules in our sense; it is not the general rule or concept that contains the law. Rather, through a particular revealed case or ruling, the revelation has conveyed knowledge of the "support," the "encompassing principle," by the existence of which in other concrete events God signals or indicates that the same ruling extends to those events. Such an approach is used only because the world is

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[360]Ibn Qudāma, *Rawḍat*, 2:229-32. He identifies another type of *taḥqīq al-manāṭ* also, which is "manifest [*jalī*] qiyās." Ibid. See also Ibn Taymiyya, *Majmū'at*, 19:285-290.

not such that God reveals His ruling in advance for each event.

Thus, in the context of application of law by a qāḍī, the qāḍī must seek by all indications to determine if the facts before him serve as an occasion for application of the rule. Shaykh al-Laḥaydān's instances, quoted above, of such ijtihād by the qāḍī all resulted in applications diverging, when viewed in abstract terms, from fiqh rules clearly covering them. Such ijtihād in application can be either broad or narrow, and can be either more or less conceptualized in terms of uṣūl al-fiqh. In Saudi Arabia, since qāḍīs are encouraged to approach each individual case as if it were a wholly novel problem in fiqh, then, even in applying a known rule, a qāḍī can justifiably use the full range of uṣūl al-fiqh methods -- such as the application of texts with highly general application (the "comprehensive statements"), or analogy directly from the textual source of the rule, perhaps a specific case judged by the Prophet -- to determine whether the occasion matches the rule or not.[361] This is a greater freedom than would exist in a taqlīd-based system, where we would expect deviations from applying a rule to be justified in terms close to the rule itself and its role in the legal system.

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[361]As we have seen, some qāḍīs prefer not to conceptualize their applications in uṣūl al-fiqh terms: thus, Shaykh al-'Umarī's use of "circumstances and concomitants," see p. 249 and p. 263 above.

Regardless of the system, ijtihād is inevitable to apply rules according to their purpose, such as by supplying unspoken exceptions. As do legislators everywhere, authors of fiqh rules do not state all of the rule's infinite conditions and exceptions, and expect judges not to apply them blindly as literal commands, but to interpret and apply them in the particular case consistently with the legal system as a whole. The qāḍī is expected to apply such rules within the ethical and religious as well as legal universe of the sharī'a. Authors of fiqh texts, in fact, rely heavily on this discretion in the qāḍī. This is shown in their common practice of stating fiqh rules using highly general ethical concepts or principles. We already have the example of the delegation to the qāḍī of authority to grant a woman a divorce for "harm" -- a term not defined or explained extensively in the texts. Concepts such as "fair dower" (more literally, "dower of the like," meaning a dower fixed by comparison with similar women, meaning similar in class, beauty, piety, state of virginity, etc.) or "fair rent" as the measure of damages abound in the fiqh. To the Western eye such rules often seem so lacking in legal structure as to be almost meaningless, and useless in application. Such legal writings not surprisingly have strengthened the conclusion of Western readers that the fiqh, which they tended to interpret as law in our sense, must have been written in isolation from the real world, and honored more in lip-service than in application.

> [The medieval origin of the fiqh] and the restricted possibilities of continual adaptation to changing conditions, have necessarily limited its direct influence on life. Furthermore, when its rule were formulated, they were not the result of a legislation which expressed the needs of contemporary society, but were the work of groups of scholars who kept themselves remote from the teeming life around them. . . .
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> [T]he schools of doctrinal learning have troubled themselves little about the practical requirements of daily life . . . .
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> . . .
>
> It is indeed unnecessary to stray away into the fine details of casuistry -- we have only to review superficially the primary rules of the Law which deal with the 'five main pillars' in order to arrive at the conclusion that it is in the long run an impossibility for the great mass of the citizens of any civilised state to live up to them.
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> . . .[362]

Prof. Coulson notes this characteristic of the fiqh in a discussion of Islamic contract law, but realizes that this reflects not an impractical spirit, but broad delegation to the qāḍī. Seeking to understand Islamic agency law in application, he observed that the fiqh provided only "general statements" on the standard of care owed by the agent, which "mean, in fact, very little", and that "the lack of case law and therefore the absence of practical and concrete illustrations, constitutes to Western eyes, a serious lacuna in the precise formulation of the Islamic law." On an issue of contractual damages, he noted that the legal scholars made

> "only superficial comment . . . . This is, in fact, a typical characteristic of the sharī'a texts in relation to contractual damages in general. Content to expound the substantive principle itself, they leave the

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[362]C. Snouck Hurgronje, *Selected Works of C. Snouck Hurgronje*, ed. G.-H. Bousquet and J. Schacht (Leiden: E.J. Brill, 1957), 73-4, 290.

> practicalities of the application of the principle to the courts, whose broad discretion in such matters is consequently an outstanding characteristic of traditional Islamic legal practice.[363]

The use of broad and vague ethical standards is hardly surprising in a law seeking to inculcate moral behavior. We should note in passing that fiqh rules, whether general in terms or highly specific, were not intended only for "legal" use in our sense, but also for utility in advancing their standard throughout the society. Often courts were not the only, or the best, forums for enforcement: in drafting rules the object may have been instead that the rules will be enforced by non-legal means: by individual conscience, family, advice and exhortation by religious leaders, social opinion, or business custom. At times enforceability by legal means had to be subordinated to enhance these other mechanisms. An example is the fiqh's reticence to construe as fully legally enforceable various mutual duties within the family. Moreover, the fiqh author is not attempting, in the fashion of a modern legislator, to state rules "binding" in the sense of determining the judgment of concrete cases. Rather, the fiqh author has in mind that his rules become binding only through a qualified qāḍī's ijtihād of the occasion; and he seeks to

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[363]Noel J. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (London: Graham & Trotman, 1984), 27, 87.

write his rule appropriately for such a process.[364] He may therefore delegate greater authority to judges than does a secular legislature.[365] Here let us recall, not for the last time, that Saudi 'ulamā' characterize judges applying written legislation as mere "machines."

2. Ijtihād as to the evidences

We leave now ijtihād as to the occasion, to take up the other arm of fact-ijtihād, that as to "the evidences," in Ibn al-Qayyim's definition.

Despite the intrinsic interest and importance of the topic of evidence in Islamic law, and the need for a major corrective of the impression left by Western scholarship on

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[364]Orientalists drew further support for the fiqh's unreality from fiqh texts' practice of considering wholly implausible cases. This practice is largely explained also by the delegation to the qāḍī of an extensive ethical and legal role. For example, causation for killing or injury is explained by odd stories: one person pushes another off a building, but before the victim strikes the ground, another decapitates him with a sword; the second actor is the murderer. See, e.g., George M. Baroody, trans. and commentator, *Crime and Punishment under Islamic Law: Being a Translation from Manār al-Sabīl . . . of Ibn Ḍūyān*, 2d ed. (published by author, 1979), 8; Ibn Ḍūyān, *Manār*, 2:317. Use of such examples can be understood in view of their utility as a means to state a rule which is at once legal and ethical; also, this form of statement is devoid of facts which could distort or encumber the qāḍī's exercise of ethical/legal qiyās, and is easily remembered, understood and applied.

[365]See, e.g., René David and John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3d ed. (London: Stevens & Sons, 1985), 94-101, 118-119 on judicial discretion in the French legal system.

the subject, we cannot undertake here a comprehensive treatment of the law as understood in the light of practice I observed in Saudi Arabia. This I must postpone to another occasion. Instead, in various places below I shall mention, briefly and without extensive substantiation, a few aspects of evidence law and practice useful to illustrate points otherwise at issue.

In what follows our focus shall be on giving an idea of the overall objective and method of the qāḍī's conduct of the trial, exhibiting a few traits that show how, viewed from our perspective, it so uncannily combines religious and secular functions, and how it continues the project of microcosmic interpretation into the finding of facts.

a. The religious-theoretical underpinning of the trial

To understand the qāḍī's ijtihād on evidence, we must remember that, morally and legally, the enterprise of finding the truth is one shared with the parties and the witnesses. The fundamental conceptions by which the Islamic law constructs this joint enterprise were previously introduced. We will briefly restate them here, noting the interrelation of the bāṭin or inner and the ẓāhir or outer aspects of actions in those conceptions.

In Islamic law the theory of the trial is constructed by imposing on each participant the religious obligation, in the bāṭin, of rightful action toward a just outcome, insofar as

his own actions in the drama are concerned. All participants other than he, on the other hand, may rely upon, or are bound by, the consequences of his actions, but only in the ẓāhir.

Thus, the qāḍī, who may be misled by a party's or witness's deceit, is not bound to attain to the utter truth of the facts of the dispute, i.e., to the facts in the bāṭin, and may rely on the ẓāhir of the evidence the parties present. Yet in finding the facts and the law he remains responsible, in the bāṭin, for true ijtihād seeking God's true judgment, with two rewards, in the bāṭin, if he is right, one if he is not, and punishment if he does not practice ijtihād. As to the parties, the qāḍī's judgment is binding, has religious force, only in the ẓāhir, while they are responsible in the bāṭin for the righteousness of their claims and denials -- to do injustice by means of the trial is to take a "piece of the Fire."

Thus, this theory grounds the trial at each step in one or another person's individual conscience, in the bāṭin, without imposing any obligation or positing any expectation that any participant, or the enterprise as a whole, achieve religiously what is beyond reach. The theory supplies the trial with a profound yet workable religious explanation and foundation microcosmically, in addition to its macrocosmic conception and justification simply as a pragmatically necessary part of the legal system as a whole. This introduces a profound contrast with a Western tendency to

exclude microcosmic dimensions in conceiving of political and legal institutions, defining these macrocosmically entirely. We will encounter this contrast repeatedly in the next Chapter.

b. The rules of evidence

How the religious burdens of trial are complexly shared among participants is vividly shown in the rules and procedures of evidence. The basic rule of evidence, appearing both in aḥādīth and in 'Umar's instruction to his qāḍī, is

> [The burden of producing] evidence is upon the one who asserts and the oath upon the one who denies [*al-bayyinatu 'alā man idda'ā wa-al-yamīnu 'alā man ankar*].[366]

This means that, to prove an assertion, one must produce evidence [*bayyina*], ideally two male Muslim witnesses of good character, and to disprove an assertion, one must swear an exculpatory oath.[367] Here our interest in these forms of proof is in learning how they are rooted in religious sanction, and in the bāṭin.

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[366]In this form it appears in al-Bayhaqī, 10:252. al-Tirmidhī (Aḥkām 1341), alone of the standard six collections, has it, but with "the oath is on the one against whom the claim is brought," with weak isnād. The phrase just quoted appears alone, however, in al-Bukhārī 2:78-79 (Rahn); Muslim (Aqḍiya 1, 2). See al-Ṣadr al-Shahīd, *Adab al-qāḍī*, 219 n.6.

[367]This does not apply in criminal cases, as will be discussed below. See p. 621 below.

As to the first, testimony, bearing truthful witness is enjoined in several Qur'ānic verses,[368] while aḥādīth depict the horrible consequences in the Hereafter of false testimony, a sin also punishable in this world at the qāḍī's discretion. Reflecting the reliance placed on these sanctions, qualification of a witness requires his accreditation as *'adl*, of sound religious practice and upright moral character, this shown either by the qāḍī's knowledge of him or by the testimony of two other witnesses. A witness must also not have any relationship to the parties or interest in the suit. The defendant is allowed to raise any point impugning the witness's character or disinterestedness. The witness is warned in a ḥadīth, "If like the sun, then testify; else leave it."[369] The requirement that the witness be morally certain of his or her testimony demands that the testimony be voluntary, ruling out subpoenas; thus, I observed a controversy wherein Saudi 'ulamā' repulsed, as against the sharī'a, the attempt to institute subpoena power even over policemen in criminal case.[370]

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[368] [65:2], [2:283].

[369] [H 10]. b.DUyAn: Ibn 'Abbās said, "The Prophet (S) was asked about giving testimony. He said, Do you see the sun? He said, If like to it then give testimony; else leave it." al-Khallāl relates it.

[370] Shaykh al-'Umarī, interview, Aug. 8, 1983; Ministry of Interior, Kingdom of Saudi Arabia, *Murshid lil-ijrā'āt al-jinā'iyya* (Riyadh: Ministry of Interior, n.d.), 64. In fact, this is especially so in criminal cases. See also al-Rasheed, "Criminal," 176-77.

Note that these precautions are so vital because the bayyina, once accepted by the qāḍī, is conclusive beyond rebuttal, it being considered an impossibility to prove the negative. The claimant thereupon wins his case.

The second prime method of proof, the exculpatory oath, is a solemn oath taken by the defendant to rebut any claim as to which plaintiff fails to satisfy his burden of proof with a bayyina. The qāḍī dictates the oath to the defendant to repeat, requiring him, swearing before God, to deny in absolute and specific terms the truth of the claim.[371] If the oath is taken, the defendant wins the case at once. Again, religious texts emphasize the sinfulness of a false oath, and religious stories abound, and circulate popularly, of how pious and innocent persons even refused to take the oath, in fear of its enormity, and of the frequent prompt sickness and death of those who take it with a guilty conscience.[372] I observed myself, even in commercial case, large sums lost by a party who, not only in defense of a claim refused to take the oath, but even, as claimant, scrupled to impose the oath on his opponent.[373] I heard from a lawyer of a case where a

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[371]This is if he has means to know the facts as to which he witnesses. In some circumstances he gives an oath as to his knowledge.

[372]Shaykh al-Muhannā (and assistant qāḍī), interview, Mar. 27, 1983.

[373]Committee for the Settlement of Commercial Disputes [*Hay'at Ḥasm al-Munāza'āt al-Tijāriyya*], Riyadh Branch, Decision No. 102/1401, 16 Rajab 1401 (May 19, 1981).

qāḍī stopped a person from taking the oath because his behavior betrayed so clearly a guilty conscience.[374] Yet no one is deluded that the oath does not provide the religiously unscrupulous ready means to injustice. A ḥadīth reports that a litigant protested to the Prophet, when told that, since he had no proof, he could claim the defendant's oath: "O Messenger of God, the man is an evildoer, unconcerned with that to which he swears, and is not restrained by anything." But the Prophet replied, "You have no other right against him," and warned the defendant that God would "turn from" those who take property wrongfully by their oaths.[375]

Clearly both these forms of proof have, in our terms, profoundly religious character. We must emphasize, however, that this does not at all mean that they are conceived as irrational ordeals, or as ritual appeals to the unseen. Much more are they seen as, again using our terms, secularly effective, factually reliable, methods of proof. Indeed, many observed points of practice, and responses to my questions, demonstrated that a qāḍī simply does not draw distinctions between religious and secular in these methods' functioning: though aware that each method draws on both these sources, to us so utterly distinct, the qāḍī weighs the two influences in a single balance. An instance of this is the legal rule that

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[374]Dr. Muḥammad Maḥmūd al-Ṣawwāf, Jidda, May 21, 1983.

[375]al-Bukhārī 2:78-79 (Rahn); Muslim (Īmān 206,207); Abū Dāwūd (Īmān 3245); al-Tirmidhī (Aḥkām 1340); Ibn Māja (Aḥkām 2321-23).

"The oath does not defeat the truth":[376] thus, if, after a defendant has taken the oath, the plaintiff becomes able to produce his evidence, the trial is reopened and the evidence heard. 'Umar is reported to have said, "The *'adl* bayyina is more just than the corrupt oath."[377] The defendant, then, with a perfect logic, is liable to punishment in this world at the discretion of the qāḍī for his false oath, since it was shown false in the ẓāhir, in addition to his punishment in the next world, if it was false in the bāṭin.[378]

A similar blending of religious and secular holds for testimony. I asked Shaykh al-Ghuṣūn and Prof. 'Aṭwa a hypothetical question requiring them to balance the testimony of eye-witnesses against convincing circumstantial or real evidence, the objective, of course, to gauge the importance of the individual conscientious sanction in evidence. Both found it obvious that the qāḍī would weigh each type of proof for its probability of truth; they seemed to consider the two as fungible. Yet, on being pressed, both admitted that they would likely give the testimony the greater weight. I asked them if this was due to the testimony being accepted as a

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[376]Ibn al-Qayyim, *al-Ṭuruq*, 112-13. It does not change the moral statuses [*dhimmā*] of the parties even in the ẓāhir. Ibid.

[377]Ibrāhīm b. Muḥammad b. Sālim Ibn Ḍūyān (d. 1353 H., 1934-5? C.), *Manār al-sabīl fī sharḥ al-dalīl (dalīl al-ṭālib li-nayl al-maṭālib li-mar'ī b. yūsuf al-maqdisī)*, 2 vols., 4th Printing (Beirut: al-Maktab al-Islāmī, 1399 H., 1979 C.), 2:468.

[378]Shaykh al-Muhannā, interview, Mar. 27, 1983.

point of faith, not reason [*ta'abbud*] -- i.e., because it had a ritual value beyond reason, or was enshrined as a canonical method. They both rejected this out of hand: no, the testimony is simply the more reliable proof. But then they accounted for this reliability by an explanation to us religious: the strong religious sanction for veracity in the witness's conscience. Finally, they explained that, although they inclined to credit the testimony, it would be weakened by the opposed evidence.[379] This could have many possible consequences: (i) the qāḍī would be unlikely to credit it to convict of the most serious criminal offenses; (ii) if the testimony is weakened enough, the qāḍī may reexamine his accreditation of the witnesses as possessing good character; (iii) the circumstantial evidence could influence the qāḍī's conduct of trial, such as by causing him to shift burdens of proof; and (iv) in many cases, particularly in minor criminal cases, the circumstantial evidence alone, without testimony, may be sufficient to carry the burden of proof.

Islamic evidence, then, seems to have combined, integrated, in ways resistant to our thought, proofs we wish to call -- according to our dualisms -- religious and profane,

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[379]Shaykh al-Ghuṣūn, interview, Apr. 21, 1985; Prof. 'Aṭwa, interview, Apr. 22, 1985. Many of these points were confirmed in general terms by Shaykh al-Muhannā, interview, Mar. 20, 1983. A Wahhābī doctrinal statement in full agreement is Bin Qāsim, *al-Durar*, 7:498, 505, which declares, citing Ibn al-Qayyim's *Ṭuruq*, that bayyina is not just witnesses, but whatever leads to truth; thus, the plaintiff's oath may be required even along with his two witnesses.

irrational and rational, magical/ritual and scientific, formal and substantive. It maintains the "formally irrational" (as in Weber's meaning) in the still supervening authority of witnesses and in the oath, which are the decisive and culminating actions in the evidentiary process -- but it sees these as merging with other "substantively rational" methods of proof in an overall effort to attain as closely as possible to the substantively true facts. Contrary to our ideas, these two approaches do not operate in separate worlds. The critical difference is that the Islamic procedure, although under an obligation to aspire to the veritable truth, the bāṭin, knows it cannot attain to it in certainty: it does not credit formal methods of proof as transcendental interventions guaranteeing bāṭin truth in the ẓāhir, which would be to posit that the bāṭin equalled the ẓāhir.[380] Rather they are credited as means of profound influence upon individuals, through internal, religious means, toward making overt their own conviction of bāṭin truth, and this influence is profound precisely because of the promise, not now positive or tangible, that these acts have certain consequences in the unseen. And, again, this promise or threat of the unseen is not relied upon against reason and experience, but is

[380]Again, compare the Ḥanafīs, some of whom did precisely this. See Baber Johansen, "Le Jugement comme preuve, preuve juridique et vérité religieuse dans le droit islamique hanéfite," *Studia Islamica* 72 (1980):5.

supported by temporal sanctions justified on moral grounds.[381] Clearly, there are a number of parallels to all of this in the treatment of bāṭin and ẓāhir in the theory of ijtihād.[382]

c. Conduct of the civil trial

As his ideal guide in the finding of facts, the qāḍī has two standards: one, that he must strive after God's perfect justice for that case, the other, that he may in good conscience rely on the ẓāhir of the parties' proofs. The latter principle could, of course, be exploited, and reduce the judge's engagement with the parties and the facts of the case to the administration of ritual-like, formal procedures. The early qāḍī Shurayḥ is often quoted seemingly in support of such a stratagem:

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[381]Weber's treatment of evidence aptly illustrates his basic approach, as discussed in Appendix B. On applying his treatment to the above phenomena, the following traits again emerge: (i) harsh separation of "formal" and "substantive," driving Islamic evidence to the irrational extremes of each of these; (ii) a tendency to see evolutionary, historical significance in the myriad alterations between formal and substantive methods of proof, all generally favoring movement toward the rational forms of these; (iii) giving religious motivations in evidence "flat" treatment as simply irrational; (iv) conceiving trial procedure as a macrocosmic event, neglecting the individual perspectives of judge, parties, and witnesses; and (v), in sum, his schema proves itself of little value in explaining the phenomena observed. Weber, *Economy*, 2:811-14, 842-44, 884.

[382]See, e.g., Part III of this Chapter, on the complementarity, exemplified by the functions of iftā' and qaḍā', of bāṭin and ẓāhir in the enforcement of the law.

> Judging is like live coals: push it away with two sticks [meaning the two witnesses].[383]

> Shurayḥ used to say to the two witnesses: "It is not I who invited you, and I do not forbid you to retract. No one other than you judges against this Muslim, and I judge today by the two of you, and by the two of you protect myself against the Day of Judgment."[384]

However, Saudi qāḍīs I observed did not use this stratagem to dilute their responsibility under the first principle. Instead, Saudi qāḍīs seem to see evidentiary procedures as only the final and most formal steps of a larger enterprise seeking to elicit the truth, an enterprise which exploits to the fullest, and in flexible fashion, the sense of ethical obligation of all the parties.[385] In what follows we shall discuss only the civil trial, postponing criminal trials to the next Chapter.

Religious sanctions, in the form of religion-inspired ethical norms and social mores, are at work in a dispute long before it comes to trial. Among the most important of these is that, in prevailing Saudi culture, dispute is disapproved within any identity group; a sense of a brotherhood in the shared identity and concern to strengthen group ties are invoked as reason enough to end the dispute. Members of such

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[383]Wakī', *Akhbār*, 2:287-8.

[384]Quoted in Ibn Ḍūyān, *Manār*, 2:465.

[385]That this is only one style of medieval Islamic court procedure is underlined by a glimpse at late North African procedures. See, e.g., Jacques Caille, *Organisation judiciare et procédure morocaines* (Paris: Librairie Générale de droit et de jurisprudence, 1948), 27, 35-38.

groups -- relations, friends, neighbors, co-workers, adjoining shop-owners, or mere bystanding Muslims -- readily involve themselves to heal a rift and smooth feelings. The instinct to do so seems deep in Muslim communities. Certainly one reason for this is that the Qur'ān enjoins it:

> All believers are but brethren. Hence, [whenever they are at odds,] make peace [*aṣliḥū*, meaning, create ṣulḥ] between your two brethren, and remain conscious of God, so that you might be graced with His mercy. [49:10]

> Requital of evil is an evil like to it. One who forgives and makes peace [*aṣlaḥ*], his reward rests with God, for verily, He does not love evildoers. [42:40][386]

It is an obdurate conflict that escapes all these group interests and can be resolved only at the supreme level of sharī'a. Understandably, then, in Saudi Arabia at least traditionally,[387] for a Muslim to threaten his adversary with suit before the qāḍī meant that he considered him beyond the stirrings of loyalty to their shared identities, and devoid of the mutual toleration, love and respect that should exist between brother Muslims.[388]

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[386]See also 4:114, 4:128, 42:40.

[387]Now in a more complicated and less communal commercial environment, the services of a commercial court or arbitrator in settling disputes can be seen as valuable, and resort to them as imputing less moral blame on the parties.

[388]I found this out in a dispute of my own, with a landlord, involving a technicality of notice in cancelling a lease. I was rescued from the consequences of my threat to go to court only by the informal mediation of a good Muslim friend, who succeeded easily in turning my determined adversary into a kindly patron --who readily waived the technicality, despite there being $10,000 at stake.

Obviously, then, most cases in court have had a long prelude. Once in court, the parties find themselves seated side by side, in two chairs almost touching,[389] having to explain themselves to the qāḍī, who appears a serious, even stern figure, whom they respect as wielding both religious authority and the power of the state.

Such are the parties' attitudes on beginning the litigation. As to the qāḍī, he is enjoined to adopt certain attitudes, stated in 'Umar's letter to his qāḍī:

> Exert your understanding [*ifham*] when people bring to you a claim for decision [*idhā udliy ilayka*], for it is useless to talk of a right which is not enforceable [*lā yanfa' takallum bi-ḥaqq lā nafādh lahū*].
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> . . .
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> Treat the people equally in your court [*majlis*, likely a reference to preference in seating] and in your regard [or attention, *wajh*], so that the noble shall not aspire to your partiality, nor the humble despair of your justice.
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> . . .
>
> Avoid distraction, distress, and annoyance with the litigants in the places of justice in which God enjoins recompense and lays up a goodly store.

There are many aḥādīth, and many pages of fiqh instruction, on these aspects of the qāḍī art. For example the ḥadīth:

> One put to the ordeal of judging between Muslims, let him be just between them in his expression, his gesture, his seating [*maq'adih*], their seating [*majlisih*], and not

[389]This is the textually required equality in seating [*majlis*].

> raise his voice against one of the litigants unless he raise it against the other.[390]

Similarly, explicit injunctions are given against judging when hungry, or angry, or distracted.[391]

Descriptions of the ideal qāḍī are that he is "strong but without violence, gentle but without weakness, the strong not aspiring to his falseness, and the weak not despairing of his justice."[392]

The qāḍī's first acts are to ask the plaintiff to state his claim, and then require the defendant to reply. Oral proceedings, not written pleadings, are the focus of the trial, although statements akin to letters to the court are used, and increasingly, in commercial cases. After each party's oral statement, the qāḍī will dictate the statement into the record, but of course distilled greatly, often with superb lawyerly skill,[393] into concise briefs, in written Arabic, of the party's position. If contract terms or written

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[390]They must neither be higher nor lower than the other, nor to the qāḍī's right or left. The report does not appear in the standard six collections. See 'Alā' al-Dīn 'Alī al-Mutaqiyy b. Ḥusām al-Dīn al-Burhān Fūriyy (d. 975 H., 1567 C.), *Kanz al-'Ummāl fī sunan al-aqwāl wa-al-af'āl*, 18 vols. (Beirut: Mu'assasat al-Risāla, 1399 H., 1979 C.), 6:102 (15032, 15033).

[391]See, e.g., Ibn Ḍūyān, *Manār*, 2:462.

[392]Ibn Qudāma, *al-Mughnī*, 11:385.

[393]There is here a sort of advocacy of each party's position. I often noticed a qāḍī improve, from a legal point of view, on a lawyer's statement of his client's position, at times as acknowledged by the lawyer. I hardly can recall a party proposing an amendment to a judge's summary of his position.

documents are vital to the case, they may be copied verbatim into the record. At the end of each session, the record is signed by the parties.

The exchange of statements is, however, rarely orderly -- there are usually interruptions from the defendant, or frequent alterations in the order of proceeding, and these are often tolerated, even contributed to, by the qāḍī. Though the qāḍī scrupulously moderates his own demeanor and maintains equality of treatment between the parties, as religiously enjoined, he will allow the parties to shout and gesticulate vigorously in addressing him, and to some extent each other. These debates can go on for several sessions, before any production of formal evidence is even considered.[394] Yet, since each party is bound by his admissions, many of these assertions and proofs find their way into the evidence, although frequently by strict fiqh rules their admission would otherwise be impossible or impractical.[395] In this way the pleading process fixes many facts, and greatly narrows issues. In general, the exchange seems little concerned with formal

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[394]Cf. Rosen, *Anthropology*, 8-9, 28.

[395]An example is a case arising in the Jidda branch of the Committee for the Settlement of Commercial Disputes [*Hay'at Ḥasm al-Munāza'āt al-Tijāriyya*] (to be discussed below), Decision No. 19/1407, 2 Muḥarram 1407 (Sep. 6, 1986). There the plaintiff claimed that he had with the defendant an oral agreement to split a brokerage commission, and that the defendant had received the commission, equalling 500,000 riyals, but paid the plaintiff only 25,000. The plaintiff obtained judgment entirely on oral and written evidence otherwise inadmissible, but which the defendant admitted, partly by way of raising affirmative defenses.

procedure and the rules of evidence, and directed instead at finding out in common-sense fashion what is the heart of the dispute.

All the admissions occurring in this interchange are, of course, voluntary. Though a party is compelled to give an answer to a claim duly raised against him, his answer may be a mere blank denial,[396] thereby putting his opponent to his proof, which, if produced, carries the day; or, if the plaintiff's evidence fails wholly or partially, he will be offered the oath. But parties show themselves highly reluctant, before the qāḍī and the other party, to deny categorically the other parties' assertions, or attack the technical admissibility or authenticity of his offerings of proof, if these recommend themselves to the qāḍī's common sense, and seem to demand an explanation. A party seems to find it difficult, for cultural and psychological reasons, to forego waging argument in defense of his good name, and putting forward positive defenses.

In my observation by far the greater part of dispositive facts entered the record through such exchanges between the parties. It is usually only for the few facts truly in dispute that the mechanisms of formal evidence were set into motion.

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[396]Ibn Ḍūyān, *Manār*, 2:465.

d. Reconciliation [Ṣulḥ]

In most cases this final stage of formal proof proves unnecessary for another reason. This is that it is only a rare case that proceeds to final judgment: the majority end by reconciliation [*ṣulḥ*], the settlement of the lawsuit by agreement of the parties, usually with the qāḍī's assistance. This phenomenon is an extremely important aspect of practical adjudication in Saudi Arabia, and, as evidence I have encountered would indicate, in other Islamic legal systems.[397] The basic principle here again is stated in 'Umar's letter to his qāḍī:

> Compromise [*ṣulḥ*] is permissible between the people, except a compromise which would make licit [*ḥalāl*] that which is illicit [*ḥarām*] or make illicit that which is licit.

This text, which reproduces a ḥadīth of the Prophet,[398] conveys the permission to the qāḍī, even after he is seized with a dispute, to relinquish the fixing of the final outcome to the parties' agreement, as long as the compromise does not

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[397]Ronald C. Jennings, "Limitations of the Judicial Powers of the Kadi in 17th C. Ottoman Kayseri," *Studia Islamica* 50 (1979): 179-180; Haim Gerber, "Sharia, Kanun and Custom in the Ottoman Law: The Court Records of 17th-Century Bursa," *International Journal of Turkish Studies*, 2 (1981): 133; El-Nahal, *Judicial Administration*, 19-20. In contexts with strong customary law, ṣulḥ seems to be a medium of accommodation. Aharon Layish, "Challenges to Customary Law and Arbitration: The Impact of Islamic Law upon Settled Bedouin in the Judaean Desert," *Tel Aviv University Studies in Law*, 5 (1980-82): 206-221.

[398]Abū Dāwūd (Aqḍiya 3594); al-Tirmidhī (Aḥkām 1352); Ibn Māja (Aḥkām 2353).

to his knowledge subvert basic norms of the sharī'a.[399] In Saudi Arabia, if the parties reach reconciliation before the judge, or so wish it, the court will approve the agreement, incorporate the fact of reconciliation into the record, and issue any necessary order for its implementation. If the reconciliation is to remain private, the plaintiff simply drops the suit.

The Saudi qāḍīs I observed showed great skill in achieving reconciliations. One judge in particular, Shaykh al-Muhannā, qāḍī of the Greater Sharī'a Court of Riyadh, whose sessions I observed for nearly one month, was consummate in

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[399]One Ḥanbalī author gives illustrations of impermissible sulḥ under this last limitation, as follows: "making illicit licit sexual relations [such as a reconciliation among wives that their husband will not have intercourse with one of them], licit illicit sexual relations, enslaving a free person, transferring lineage or clientage from one place to another, consuming usury, or negating a religious obligation, . . . or doing injustice to a third party. . . . " Ibn al-Qayyim, *I'lām*, 108-110. Another example is a compromise making licit what is illicit would be one upholding a contract's terms, when the issue in the case is the invalidity of the contract under the sharī'a, and the qāḍī had become convinced that the contract was invalid -- for instance, it was a contract for sale of wine. I observed a case where the qāḍī sought sulḥ for some time, though defendant, apparently suitably advised, insisted that the contract was invalid, and dispositive facts seemed agreed. Eventually the qāḍī had to give judgment as asked. His assistant explained he must have either wanted sulḥ on this basis, or was seeking more facts and details. Court of Shaykh Sulaymān b. 'Abd Allāh al-Muhannā, Great Shari'a Court of Riyadh [*al-Mahkama al-Kubrā bi-al-Riyāḍ*], court records (civil), case no. 56, 6 Rajab 1403 (Apr. 14, 1983). In a commercial court, the judges, who always pursued sulḥ, began at once to write up their judgment once they realized the contract was void for uncertainty. Committee for the Settlement of Commercial Disputes [*Hay'at Ḥasm al-Munāza'āt al-Tijāriyya*], Riyadh Branch, Decision No. 106/1405, 29 Dhū al-Qa'da 1405 (Aug. 15, 1985).

it. Before this court came all civil cases involving more than 8000 SR (about $2000) not between merchants. Over this time, of all such disputes, excluding cases for qiṣāṣ or blood money for injuries although there occurred reconciliations in these as well --I observed only two cases terminate in a ruling by the qāḍī.[400] In one the facts showed an invalid contract, in the other the defendant took the oath. Although, again, these were disputes that had already resisted the multiple social pressures toward reconciliation, yet Shaykh al-Muhannā could very often settle them by amicable agreement within a half hour, even when they involved large sums of money. In fact, I became impatient at not having the chance to observe the judge's ruling-ijtihād; this feeling the qāḍī and his assistants humorously but pointedly compared to a grave-digger's zeal for business. In Saudi sharī'a courts, according to several authorities, "the great majority" or "99 %" of all civil cases end in reconciliation. In two other courts I observed, both tribunals for commercial disputes between merchants, again reconciliation was the most common termination, though to a lesser extent.

A legal maxim, of frequent mention in Saudi Arabia, is "Ṣulḥ is best." This is taken from a verse of the Qur'ān, suggesting amicable divorce when a wife fears ill-treatment:

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[400]One is the case of the invalid contract, cited in n. 399 above. The other was a simple claim for money owed, without evidence, in which the defendant took an oath. Great Sharī'a Court, Riyadh, Court records (civil), No.31, 27 Rabī' al-Awwal 1403 (Jan. 11, 1983).

> [I]t shall not be wrong for the two to set things peacefully to rights between them: for peace is best [*al-ṣulḥ khayr*] [4:127]

I asked Shaykh al-Muhannā why he seeks reconciliation, when judgments were after all "by God's law." He gave two reasons: first, religious blamelessness [*barā'ah dīniyya*] for the qāḍī, parties and witnesses, since the parties or witnesses could be in error or lying, and the qāḍī could make an error in his ijtihād or dalīls; second, that judgment is harsh, causing hatred between the parties, while ṣulḥ brings people together.[401]

This explanation comes directly from authoritative texts and fiqh writings on the qāḍī art. 'Umar is reported to have said,

> Turn away the litigants, in order that they reach ṣulḥ, because judgment creates feelings of spite among a people.[402]

Ibn Taymiyya notes that judgment by the qāḍī's ruling, while it ends the dispute, and gives the party what is rightful (at least in the ẓāhir), is "bitter," may cause "difficulty" between the litigants and others, may "impugn" the judge and witnesses, and may involve the winner's "spitefulness" even in taking what is right. Ṣulḥ, on the other hand, not only ends the dispute but heals the split; this makes it better than a

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[401]Shaykh al-Muhannā, interview, Mar. 13, 1983.

[402]Prof. 'Aṭwa, *Muḥāḍarāt*, 37.

ruling, even if rightful claims were relinquished to achieve it.[403]

Shaykh al-Muhannā routinely encouraged the parties to settle by invoking these ideals, mentioning immunity from blame, peace of mind, charity and brotherhood. Such motivations do work strongly. In one case I read, the heirs of a man accidentally struck by a car suing for the blood money for the death (about $30,000) agreed to relinquish their claim. The judgment reads as follows:

> Because what occurred was as God decreed and ordained [*qaḍā' allāh wa-qadaruh*], and because of the weakness of the defendant's material position, [the plaintiffs] relinquish their claim for blood money, seeking the reward of God Most High.[404]

I was told that this is a common outcome in such cases.[405] Its principle is laid down specifically in the Qur'ān: after providing for indemnity to heirs for accidental death, the Qur'ān adds, "unless they forego it by way of charity" [4:92], After endorsing the principle of "a life for a life," the Qur'ān states:

> but he who shall forego it out of charity will atone thereby for some of his past sins. . . . [5:45]

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[403]Ibn Taymiyya, *Majmū'at*, 35:355-56.

[404]Great Sharī'a Court, Riyadh, Court records (civil), No. 2, 23 Muḥarram 1403 (Nov. 9, 1982).

[405]It is considered highly honorable; the opposite course entails taking money for one's bereaved. In murder cases, most honorable is forgiveness, then retribution [*qiṣāṣ*], and finally financial settlement.

I often observed that parties felt a need to justify to the court a prolonged failure to come to agreement, or their rejection of a settlement offer from their opponent.[406]

But in bringing about ṣulḥ the qāḍīs do not depend wholly on the parties' religious motives. Their practice fully demonstrated the truth of a maxim often quoted, "Ṣulḥ is near to judgment" [*al-ṣulḥ qarīb min al-ḥukm*]. Meant by this is that the qāḍī may actively, even forcefully, exhort the parties to ṣulḥ, according to his estimation of where justice lies, although he cannot go so far as to make the agreement or its terms involuntary. One author reports a Ḥanafī opinion allowing qāḍīs to "command" the parties to reach a settlement. He also writes that the more evident opinion in the Ḥanbalī school also permits this, but only when the qāḍī is in doubt as to the right disposition of the case; if he is not in doubt, he is bound to decide the case himself.[407] Despite the use of the term "command," I never observed qāḍīs force the parties to agree, but instead used persuasion, sometimes strenuous. Shaykh al-Muhannā used the term *waffaqahum*, lit., "brought them to agreement," to express in the record his success in attaining the parties' final acceptance of terms. His daily practice certainly demonstrated the strength of personality deemed an essential quality in a good qāḍī. In

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[406]Committee for the Settlement, Riyadh, observation, Nov. 27, 1985.

[407]Prof. 'Aṭwa, *Muḥāḍarāt*, 112.

accord with the condition for "commanding" ṣulḥ, Shaykh al-Muhannā employed forceful measures when it was relatively unknowable -- even to the parties themselves -- where justice lay, such as when a contract failed to regulate an important point, when there was an honest misunderstanding, or when the true facts could be known only from evidence difficult or impossible to obtain.[408] (Recall the quotation above about throwing away complex pleadings in a highly disputed case.[409]) Judgment in such cases would be particularly "harsh." Also, ṣulḥ seemed used frequently when cases involved events or institutions novel to the fiqh, for which fiqh provided few appropriate predictive rules for the parties and little guidance to the qāḍī. These are types of cases where the effectiveness of the fiqh as a system of formal, general rules, like a code in our sense, tends to break down, making the fiqh-dictated result seem "harsh," artificial, strained, unpredictable, and remote from the parties' common-sense ideas of fairness.

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[408]In discussing the *maẓālim*, an extraordinary judicial function associated with the ruler, discussed in the next Chapter, al-Māwardī (d. 450 H., 1058 C.) emphasized *ṣulḥ* and compulsory mediation in cases where there is no evidence or the facts for any reason remain in doubt, and where the parties remain recalcitrant even after religious admonition and intimidation [*irhāb*] by the judge. al-Māwardī, *al-Aḥkām*, 86, 87, 91. A Wahhābī writer, quoted in Bin Qāsim, *al-Durar*, 7:490, describes as the religious obligation of the pious qāḍī that he seek ṣulḥ whenever he is not confident of the correct ruling.

[409]See p. 329 above.

Qāḍīs very commonly suggest terms of settlement to the parties, and in this and other ways subtly hint where the case may lead if taken to judgment. In one case, where a tenant had withheld rent for the cost of repairs he had made to the property, Shaykh al-Muhannā informed the tenant that the law on tenant's repairs was not in his favor, without making a categorical statement or disclosing an eventual judgment, and then suggested possible bases for ṣulḥ not involving that element. When the tenant made a counter-proposal reintroducing compensation for repairs, the qāḍī refused to relay the offer to the landlord, because, he said later to me, it was "unfair" although he would have allowed it had the plaintiff agreed to it. The use of the term "unfair" here reminds us that inevitably, since this is divine law, a qāḍī's judgment of fairness is informed by, and merges with, his knowledge of the rules of fiqh. The qāḍī then adjourned the case, and at the next session the case settled easily.[410] In contrast, in the few cases I observed where the legal rule applying to a case was clear, and the dispositive facts fixed, the qāḍī would issue his ruling at once, without consulting the parties further.[411]

The qāḍī's broad discretion to encourage ṣulḥ can cover abuses, such as when the qāḍī is inept, lazy or dilatory. Of

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[410]Great Sharī'a Court, Riyadh, Court records (civil), No.38, 2 Jumādā al-Thāniya 1403 (Mar. 16, 1983).

[411]As in the cases of invalid contracts cited in n. 399 above.

course, settlements are unappealable. A possible general negative effect of the prevalence of ṣulḥ, at the present juncture in the legal system, is that it perpetuates a vacuum of law, substantive and procedural, relating to modern conditions; in such areas cases may be diverted into *ad hoc*, unpredictable tests of will, coerced by fear of even more unpredictable judgments or long delays.

On the positive side, ṣulḥ negotiations are a prime field for the qāḍī to pursue the ideal of adjudication held out by Ibn al-Qayyim: using judicial discernment and intimate knowledge of the people and their realities to achieve sound practical justice. No doubt the negotiations subject qāḍīs to moral strain, since the qāḍī esteems himself the protector of the rights of both parties, and cannot show, or appear to show, the slightest favoritism. He ought not suggest to one party a way of advancing his case; but he may aid a plaintiff in making clear his claim, and he may intervene with the plaintiff on behalf of the defendant seeking leniency or forgiveness.[412] Ibn al-Qayyim accuses of evildoing those who claim to conciliate between rich oppressors and claimants against them, when in actuality the former gets every advantage. He says that a rightful conciliator is one who "knows the facts, recognizes what is obligatory, and intends

[412]Prof. ʿAṭwa, *Muḥāḍarāt*, 110-111; al-Qārī, *Majalla*, Sec. 2074.

justice."[413] An illustration of such scruples is Shaykh al-Muhannā's refusal, just mentioned, to condone a party's offer of ṣulḥ, on the ground that he felt it "unfair," and this because it was based on a claim of right not supported by fiqh.

Two cases, from two different courts, are useful to illustrate the foregoing discussion. Both are not typical, but are cases where the courts were particularly forceful in advocating ṣulḥ. The first, from the Greater Court of Riyadh, involved a claim for four months' rent for a shop, about 14,000 riyals (about $4000), brought by an obstinate, ignorant, and elderly, landlord, against a more articulate, reasonable-sounding shopkeeper. The shopkeeper, who seemed to hold as assignee from another tenant, claimed that he had relinquished the shop four months before, giving the keys to the landlord; he talked of calling witnesses to prove his removal, and of showing, through the utility companies, that no electricity or telephone had served the shop for four months. After several adjournments, when still the defendant had not brought proof of surrender as promised, but only a slip showing part payment of past rent, the qāḍī announced that the case was coming to "proof or oath." He then proposed a settlement splitting the claimed rent. Both parties opposed this, the defendant talking again about bringing witnesses, but, after the qāḍī harangued the parties on the virtues of

[413]Ibn al-Qayyim, *I'lām*, 108-110.

ṣulḥ, the defendant said he would consent at 5,000 SR. The qāḍī offered the plaintiff 6,000, but the latter single-mindedly insisted on the full rent. Then, surprisingly, the qāḍī picked up the defendant's figure of 5,000, and after a burst of argument plucked from the latter his agreement, which was promptly entered in the record. The parties signed the record, the plaintiff with a wounded pride, the defendant with relief. As for the qāḍī, it was my distinct impression, unverifiable, that he regretted his haste; a palpable gloom seemed to pervade the rest of day, spreading to his young assistants.[414]

The second case, in a Riyadh commercial court, involved a dispute under a sub-contract for construction. The plaintiff was a young businessman, a contractor on a government project, intelligent and organized, equipped with complete records, while the defendant, the sub-contractor, was older, far less sophisticated, and demoralized, confronting bankruptcy. The plaintiff was suing for late performance penalties owed by defendant after his premature withdrawal from the project. The defendant answered by claiming that not he but the plaintiff was at fault for the early withdrawal, and that he had never received some of the payments plaintiff alleged making. Plaintiff produced records to prove his assertions; as to payments, he showed receipts signed by an

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[414]Great Sharī'a Court, Riyadh, Court records (civil), No.44, 28 Jumādā al-Ūlā 1403 (May 28, 1983).

engineer of defendant's, and also a signed and sealed letter on defendant's letterhead giving that engineer broad authority to act on his behalf. Defendant admitted the signature, seal and letterhead of the letter, but stoutly denied the truth of its contents, and continued to maintain he had never obtained the money. (One judge of the panel declared to me after the session that this defense to the letter was unacceptable.) The court said that the penalties sought by the plaintiff were "unreasonable" (though the plaintiff alleged that he had paid more than that in penalties to the government as a result of defendant's acts). The court proposed a ṣulḥ, on the basis that the parties split between themselves the amounts defendant denied receiving, and also split the claimed penalties, and that the defendant be allowed six months to pay the slight amount then owing. Both parties were very reluctant. The court encouraged them, arguing that ṣulḥ was advantageous to them both: to the defendant, because otherwise he might face a higher judgment, bankruptcy and jail; to the plaintiff, because the court had doubts about his claimed penalties, and a final judgment would be long delayed:[415] and to both, because ṣulḥ is religiously advantageous. Finally, after long discussion, both parties agreed, and seemed satisfied with the outcome. The end result was that the plaintiff lost his case almost entirely, despite its apparent technical strength. This appears to be for two basic reasons.

[415]This court had then a huge backlog.

First, the court was inclined against plaintiff's claim, which seemed to it narrowly contractual and morally uncompelling. Penalties for late performance, though no longer excluded on principle in Saudi courts,[416] still must overcome presumptions against them arising from sharī'a rules against undue enrichment and uncertainty in contracts. Secondly -- and this was mentioned as a key factor by one judge of the panel -- the court was aware of the defendant's disadvantage in the litigation, and his inability to pay a large judgment.[417]

The Saudi qāḍīs' seeking for ṣulḥ is obviously greatly benefited by, and therefore in one sense accounts for, two other aspects of ijtihād as to evidence that we have just discussed: the qāḍīs' common-sense approach to evidence, and their relatively informal conduct of trial. But these three aspects of the trial seem interconnected not merely as a single process aimed at settling cases, but also at a more fundamental level. As a first observation, note that all three of them are consistent with the ideal of concern for the true bāṭin rule of the case: (i) as to evidence, the qāḍīs do not unduly seize upon the power of the bayyina or oath to fix legally operative truths in the ẓāhir, neglecting their ideal of seeking truth in the bāṭin; (ii) as to trial procedure, they see the trial less as ritual orchestration of ẓāhir

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[416]See p. 311 above.

[417]Committee for the Settlement, Riyadh, observation, Nov. 25, 1985.

proofs than as a live moral interaction between parties in dispute; and (iii) as to their emphasis on ṣulḥ, this they say is due precisely to ṣulḥ's advantage in releasing the participants from the responsibility to strive toward the uniquely true judgment in the bāṭin. A second observation is that all the three aspects show a resistance to formalistic approaches, in either substantive or procedural law: thus, as to evidence and procedure, the qāḍīs avoid mechanical application of rules or procedures, and in encouraging extensive ṣulḥ they obviously give broad play to sentiments of solidarity and to common conceptions of fairness and practical justice, favoring these over the advantages of the formalistic application of abstract legal rules.[418] These two observations, one about the bāṭin ideal, the other about resistance to formalism in our sense, are quite likely related. Here again, as in the discussion of evidence, recommended to us is the exploration of the interconnections between two sets of opposed terms, one set Islamic and the other Western: "ẓāhir" and "bāṭin" on the one hand, and "formal" and "substantive," on the other, and ask to what

[418]See for useful discussion of formalism in legal systems, and its opposition to ideals of equity and solidarity, Roberto Mangabeira Unger, *Law in Modern Society* (New York: The Free Press, 1977). Weber would see in this phenomenon the influence of traditional authority.

extent the lines drawn in each system between these opposed terms parallel each other.[419]

e. Attorneys

Not surprisingly in view of their approach to trial, the Saudi sharī'a system opposes introducing into the sharī'a courts professional advocates of a Western stripe.[420] Traditionally, an "attorney" in the sense of an agent [*wakīl*] was allowed. But this office is solely one of deputation, the wakīl standing in court in the stead of the party, not as counselor and defender. A typical wakīl would be a senior male family member. Professional wakīls did exist traditionally, but these never were seen as officers of the

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[419]Evidence of the significance of these relationships exists in the practice of other Islamic legal systems and schools. As we noted at n. 18 above, positions upholding the maxim "every mujtahid is correct" deny that in deciding a concrete case there is a true result in the bāṭin, "with God" -- this denial going either to the existence of such a truth *per se* or to the relevance of such truth to the outcome. For such scholars the "truth" in a trial and judgment becomes either *per se* or effectively equivalent to the ẓāhir. Attention then naturally shifts to the means by which truth in the ẓāhir is established, i.e., to the bayyina and oath, to the mechanical rules allocating burden of proof, and to the subsuming of the proved facts of a case under proven and reliable fiqh rules. If all this is so, then such systems would also justifiably be called more external -- and more "formalistic" -- in their conception of law.

For the purpose of this comparison, one should note connections between bāṭin versus ẓāhir and indeterminacy versus positivity of laws. See p. 186 above.

[420]Shaykh al-Muhannā, interview, Mar. 5, 1983; Dr. al-Faryān, interview, Sep. 11, 1984.

court, nor did their use significantly shape the legal system.[421]

The grounds for Saudi 'ulamā' opposition to Western-style lawyers are easily understood. Dr. al-Faryān, for example, said that the courts oppose advocacy, since they feel it tends to expand, instead of simplify, the dispute, and drive the parties apart instead of together.[422] The ideas here are that lawyers would complicate and delay litigation now promptly and efficiently handled in direct and relatively informal proceedings, which so often end in ṣulḥ; already to Saudis litigation seems too prolonged and complex. Lawyers would inform parties of stratagems that would drive a wedge between the fiqh's legal rules and mechanisms and their moral roots, thereby tending to divert parties from moral obligations, and to subvert the moral mission of the trial. Lawyers concentrate on their clients' own narrow interests, and their representation inevitably inhibits the operation of sentiments of solidarity, tolerance or forgiveness. In any case, in sharī'a the qāḍī is the proper instrumentality to protect the parties from any disadvantage they suffer, and aid them within the judicial process. (In fact, I did observe qāḍīs perform this function, in aiding each party to state its case, in asking that particular evidence be brought, or in informing a

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[421]"The Office of Vekil (Wakil) in 17th. Century Ottoman Sharia Courts," *Studia Islamica* 42 (1975): 147-169.

[422]Dr. al-Faryān, interview, Sep. 11, 1984.

guarantor after judgment against him that he may sue the primary obligor.[423]) A qāḍī will determine when his protection is inadequate, and appoint a wakīl to defend one who seems incapable of defending their interests. Indeed, there is even accounted some advantage in parties' ignorance of the law and procedure in matters of detail.[424]

Despite such positions, there are two professional bars in Saudi Arabia, one admitted to the sharī'a courts and another to regulatory agencies and tribunals. In regulatory courts, including the commercial courts mentioned above, lawyers are extremely common. In sharī'a courts attorneys do appear, but not, in my observation, in most cases. To digress here from civil to criminal cases, in the sharī'a courts, representation of an accused by an attorney is typically not permitted at all. This is the traditional fiqh position,[425] understandable if an attorney is viewed as deputy to stand in one's stead during the trial. Now, however, by international standards, a denial of representation to an accused seems a denial of a basic human right. The Saudi perspective is that criminal law enforcement is a social good that must be weighed against certain refinements of individual rights; that here the qāḍī's dedication to the sharī'a immunities of accuseds

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[423]Greater Sharī'a Court, Riyadh, observation, Mar. 5, 1983.

[424]Abū Zayd, *al-Taqnīn*, 34-37.

[425]al-Rasheed, "Criminal," 143-46.

appropriately protect the accused, and strike the proper balance. Since the criminal trial is founded chiefly on principles of either religious atonement or moral correction, the qāḍī naturally wishes to deal with the accused directly. As one Saudi qāḍī explained it to me:

> The truth is brought to light through [the accused], because he is more aware of himself [*adrak bi-nafsih*] than is any other.[426]

In any case, qāḍīs have discretion to decide whether the party needs the protection of a lawyer -- hence a lawyer is often allowed to a foreigner.

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[426]Shaykh al-'Umarī, written responses to questions, August 1983.

PART V

CONCLUSION

Our working in this Chapter with such bland terms as "microcosmic interpretation" may have caused us to lose sight of the vital conflicts and tensions of the qāḍī's function. We have learned of the difficulties in achieving this microcosmic ideal, which entails, after all, that the qāḍī learn and apply, in every concrete case, the perfect law of God existing for that event, but known only to God in certainty. Indeed, we began the Chapter with revealed texts announcing, in stark terms, both the vital moral obligation, and moral peril, of such an undertaking. Most obviously, the qāḍī faces the challenge of deriving a ruling from the divine sources, which we called "ijtihād as to the ruling." This function, the most essential task of the faqīh and the stimulus for fiqh literature, has always received the most scholarly attention. Our investigation, however, went beyond this to two other problems, which arise from two characteristics of the qāḍī function that he does not share with fuqahā' generally. Both these problems concern the

application of the law, and both threaten vitally the realization of his microcosmic ideal.

The first of these problems is that of power. The qāḍī's decisions sound far beyond the *forum internum* of his conscience. He also wields external, temporal power, makes binding decisions and participates in a macrocosmic system of domination. How does his ultimately individual-grounded, religious, conscientious ideal fare under these conditions? Our treatment focused on the challenge of the pressures toward rule-law that a legal system exerts. The basic lesson we learned was that, to a remarkable extent, the Saudi legal system has succeeded in avoiding making overt concessions to these pressures, and, quite to the opposite, has pushed the competing standard of its own legal ideal astoundingly far into every-day application. The Saudi 'ulamā' make concessions to the macrocosmic, but these they bar from assuming a status equal to law as they esteem it. They make their concessions largely behind the scenes, by collegial measures among themselves, or by justifying them consistently with their own method, using proofs taken from the lower levels of their epistemological hierarchy.

The second problem is the vicissitudes of concrete reality. The qāḍī, unlike the muftī, must come to grips with fact, and cope with the insuperable obstacles to gaining certain knowledge of external events and the actions of others. Under the heading of ijtihād as to the occasion and

the evidences, we observed how the qāḍī must struggle to bring together in his ijtihād both a frank grasp of facts and the immediate inspiration of revealed texts, and how, through the concepts of bāṭin and ẓāhir, he modulates, and shares with the parties, the weighty obligation to achieve God's utter truth.

Our discussion has perhaps obscured the obvious, however. Place yourself in the position of a qāḍī deciding this case: a contractual transaction new to the Kingdom, documents lacking, parties intransigent, the plaintiff offering friendly witnesses, the defendant willing to swear, no obvious analogies among the opinions of Ḥanbalī forebears, no ḥadīth or Qur'ānic text in point, the interests of the modern economy pushing in one direction, traditional business custom in the Kingdom in the other, the public watching you as a member of the 'ulamā' and awaiting your decision -- and all the while remember that piety enjoins you to do God's very own justice, mindful that one qāḍī is in Paradise, two in the Fire.

Clearly, the qāḍī, and the 'ulamā' as a whole, despite their sublimely elevated goal, cannot, in the legal system they so impressively erect toward the fulfillment of that goal, wholly exclude the ẓann and *hawā*, the surmise and willfulness, condemned by the Qur'ān. They and their system must treat still with the conjectural, arbitrary and approximate; with the pragmatic, common-sensical and utilitarian; and even with the expedient, self-interested, and political. We must not forget that, as the 'ulamā' are aware

and their legal science indirectly concedes, such sources of law, so far from being excluded, provide as great a part of the actual stuff of everyday concrete judgments as do pristine derivations from divine words.

This Chapter has traced aspects of the 'ulamā''s attempt to incarnate their ideals in a workable fiqh legal system. For this Chapter we have artificially held fixed the variable of temporal power, assuming that the 'ulamā' had at their disposal all appropriate power. In the next Chapter we free that variable, and thereupon confront problems addressed here in much broader dimensions. Fundamentally, we shall be asking how the Islamic legal system manages and directs power toward its ideal ends. Specifically, we shall be asking about the relationship, whether cooperation or competition, between the 'ulamā' and the ruler, in seeking to achieve the goals of the Islamic state in this world and the next.

CHAPTER

THREE

STATE AND CONSTITUTION

PART ONE

THE THEORY OF THE STATE AND CONSTITUTION: GOD'S SOVEREIGNTY

A. INTRODUCTION

1. Truth and Power in the Qur'ān

> Indeed, (even aforetime) did We send forth Our apostles with all evidence of truth; and through them We bestowed revelation from on high, and a balance, so that men might behave with equity; and We bestowed from on high iron, in which there is awesome power [and evil, *ba's*] as well as benefits for man: so that God might mark out those who would stand up for Him and His Apostle, even though He is beyond the reach of human perception [lit., in the unseen] . . . . [57:25]

> And (as for) the believers, both men and women -- they are close unto [are responsible for] one another: they (all) enjoin the doing of what is right [*al-ma'rūf*] and forbid the doing of what is wrong [*al-munkar*] . . . . [9:71]

In Chapter One we noted that Islamic law raises in fundamental fashion the issue of power. In this section, let

us resume the discussion and the method of Chapter One, and consider quotations from the Qur'ān and aḥādīth to introduce the ideas of state and authority in Islamic law.

In Chapter One we saw that the Qur'ān contemplates the law's fulfillment, not only through individual obedience, but also at large, in a community defined by its adherence to the law. Mankind, charged to be God's vicegerent, is obliged to enact God's revealed order -- "commanding" others to do right, "forbidding" them to do wrong, judging among them "by what God has sent down," joined with a community "holding fast to the bond of God," and obeying God, the Prophet and "those in authority."

All these passages remind us of something that Chapter Two systematically understated -- that truth in Islamic law not only demands the conscientious obedience of the individual, but also fixes an ultimate moral claim on the exercise of power and domination and on collective human life.

Implicit in the first of the passages cited above -- that on "iron" -- is a profound challenge to two perennial habits of mind in thinking about the legitimacy of state power, one skeptical, one idealistic. First, the Qur'ānic spirit challenges the skeptic's or realist's sense that power determines truth: that ultimately it is might that makes right, that relations of domination and subordination pervert, or even define, moral truth, overtly or in all the various

subtle ways now the preoccupation of political and social theory. The Qur'ān, in contrast, proclaims that truth overcomes power: while the Qur'ān recognizes human weakness -- that humans, on the one hand, subjugate others to their own self-will,[1] and, on the other, blindly follow each other's authority[2] -- it throughout stirringly asserts that, in ways unseen but compelling, a divine standard of righteousness subverts and triumphs over worldly injustice. Second, and in seeming contradiction to the first point, the Qur'ān challenges the idealist's notion, that truth is independent of power: that truth prevails without the support of force, without bending power to its ends. The Qur'ān repeatedly insists on the righteous community, one that mutually commands the right and forbids the wrong, and it imposes a duty to implement God's commands at large. In stating that iron shows who will stand up for God and his Apostle, the Qur'ān is implying that in wielding and in resisting iron men particularly reveal their inner convictions of truth.[3]

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[1]See, e.g., [38:26].

[2][34:31,32], [5:103-04].

[3]Classical commentators understand "iron" more literally than I do here. Thus, e.g., 'Imād al-Dīn Abū al-Fidā' Ismā'īl Ibn Kathīr (d. 774 H., 1373 C.), *Tafsīr al-Qur'ān al-'Aẓīm*, 4 vols. (Cairo: 'Īsā al-Bābī al-Ḥalabī, n.d.), 4:314, describes it as the material from which are taken both weapons, used in *jihād* against the unbelievers, and tools, which benefit man; its revelation is as "a deterrent to those who deny the truth and persist in doing so after proof is made to them"; its use in *jihād* is to reveal who has sincere intentions toward God.

On deeper thought, the seeming contradiction between these two points dissolves. Rather, only through acknowledgement of both is the problem of an all-encompassing moral law fully posed. A moral law encompassing all of human life and consciousness can hardly shrink from the sphere of man's domination over man. It must regulate this sphere <u>not only</u> by raising a transcendent standard of justice, which will some day judge the outcomes of the exercise of power and domination, <u>but also</u> by demanding immediate, conscious implementation in every human norm and act of justice, demanding that men, as much in their relations of domination and obedience as otherwise, consciously implement the true moral law, not their own. Our initial sense of contradiction here traces to the combined effect of a number of relatively Western dualisms, which tend to separate God's world and Caesar's into a dualistic cosmology, each walled off from the other, subject to separate norms. In contrast to Muslim conceptions, our dualisms seem to issue in two complementary tendencies: first, a tendency to derive from the transcendence and separateness of God's realm, as if by reflection, a sphere of autonomy for the individual conscious will; somehow in this sphere man's will is immune from ineluctable laws such as those observable in nature; moral laws operate only on choice. The second, obverse, tendency is to materialize, and de-spiritualize, the this-worldly real, and to confine to it the operation of laws beyond men's will. As these tendencies

undergo secularization, they combine to yield a conception of a secular field for human social action, willed, free, and subject to no laws but those of objects. In such a field, relations of power and domination can appear as distinct, walled off, from the moral orders governing lives of individuals. In these and myriad other manifestations, such dualisms seem fatal to an understanding of the Qur'ān's enterprise of moral law.

Note that in this discussion we have conjoined "moral" with "law" to capture comparisons. It hardly needs remarking that in modern times the West has tended to force these two conceptions apart. Although we frequently exhibit thought patterns reflective of older ideas,[4] our tendency now seems to be to understand the law explicitly less as an expression of the "true" or "right," something innate or *a priori*, as in the natural law ideal, and increasingly as a form of compulsion outwardly determined and made binding; correspondingly, we see morality less as a order constraining us in the very nature of things, and more as inward subjective opinions or purely psychological fact. Transformations in both these terms have caused one, law, to connote something primarily outward, objective and involuntary, and the other, morality, something primarily inward, subjective and voluntary. These complementary transformations obstruct our approach to Islamic ideas of power and truth.

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[4]Cf. *droit* vs. *loi*, *Recht* vs. *Gesetz*.

In Chapter One, we found in Islamic sources indications of a powerful conception of moral law, merging truth and power. This conception we described using the metaphor of the "dilemma of will" -- a primal clash between, on the one side, man's will, and his consciousness of that will and of its freedom, and on the other side, the all-overwhelming power of a vast reality, which so often obliterates man's petty designs and fixes without him the course of his life. This dilemma is precisely an issue of power, man's petty will versus God's. The Islamic resolution to the dilemma is by a shift to knowledge and truth -- by man's learning from revelation an explicit command, assigning him a known way, by following which his consciousness and will find their place in the perfect order. But this resolution, this shift, arouses a new, sharper, dilemma -- whether to submit willingly, and as divine agent so act as to uphold the order of all nature; or instead to resist, vainly, the inexorable power. So posed, reality, or the overwhelming power of what "is," becomes imperatively moralized, an urgent "ought." Mankind in acting either contends with, or upholds, this moralized reality, either offends or obeys the divine command.

Islamically, all issues of power -- God's power over man, man's power over himself, man's power over others -- can be resolved only by knowledge of God's truth. Knowledge is an urgent necessity; on it depends whether acting one securely does justice, or instead arrogantly risks injustice, defying

the ineluctable. We have seen in qaḍā' how this result instills in the exercise of power a mortal epistemological anxiety, and bequeaths to fiqh an epistemological obsession.

We have already examined God's sovereignty over truth; in the Qur'ān God is also sovereign over power. He exerts His power directly and immediately; it is supreme, and, in an ultimate sense, solitary. As we have seen, God's sovereignty over truth requires disciplining man's mere ẓann and *hawā*, subjugating man's reason firmly to revealed law; similarly, God's sovereignty over power entails disciplining all merely humanly legitimized forms of domination, and repressing competition with His power and will. Returning to the Qur'ān, we find this clearly stated:

> Say: "O God, Lord of all dominion! Thou grantest dominion unto whom Thou willest, and takest away dominion from whom thou willest . . . . Verily, Thou has the power to will anything. [3:26]
>
> Say: "Behold, I take my stand on a clear evidence from my Sustainer. . . . Judgment [*al-ḥukm*] rests with none but God. He shall declare the truth, since He is the best of judges of truth and falsehood [*khayr al-fāṣilīn*]."
>
> . . .
>
> Say: "It is He alone who has the power to let loose upon you suffering from above you or from beneath your feet, or to confound you with mutual discord and let you taste the fear [*ba's*] of one another. . . ." [6:57,65]
>
> And they who do not judge in accordance with what God has revealed -- they, they are the evildoers [or oppressors, ẓālim]. [5:45]

To exert power without God's authority is condemned; equally blameworthy is to yield obedience and loyalty on any other ground. To do so is a bowing to false gods:

> Art thou not aware of those who claim that they believe in what has been bestowed from on high upon thee, [O Prophet,] . . . [and yet] are willing to defer to the rule [*an yataḥākamū*] of the powers of evil [*ṭāghūt*], although they were bidden to deny it . . . . [4:60][5]

Blind following of tradition is illegitimate:

> And when it is said unto them: Follow that which Allah hath revealed, they say: We follow that wherein we found our fathers. What! Even though their fathers used their reason not at all and had no guidance? [2:170]

Similarly, loyalties arising from petty group identifications, however much related to due social obligation, cannot compete with God's sovereignty.

> Now We have enjoined upon man goodness towards his parents; yet should they endeavour to make thee ascribe divinity, side by side with Me, to something of which thou hast no knowledge, obey them not . . . . [29:8]

> O you who have attained to faith! Be ever steadfast in upholding equity, bearing witness to the truth for the sake of God, even though it be against your own selves or your parents and kinsfolk. . . . [4:135]

> Then, when the trumpet is blown, no ties of kinship will on that Day prevail among them, and neither will they ask about one another. [23:101]

The Prophet condemns "factionalism" [*'aṣabiyya*] in a similar vein:

> "O Messenger of God, what is *'aṣabiyya*?" He said, "That you aid your people to do evil [*ẓulm*]."[6]

In all these provisions is a rigorous binding of legitimate power to utter truth.

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[5]Abū al-Ḥasan 'Alī b. Aḥmad al-Wāḥidī al-Nīsābūrī (d. 468 H., 1074 C.), *Asbāb al-nuzūl* (Beirut: Dār al-Kutub al-'Ilmiyya, 1400 H., 1980 C.), 106-09, recounts various stories that this verse was revealed concerning hypocrite Muslims who invoked judges other than the Prophet.

[6]Abū Dāwūd (Adab 5119).

The Qur'ān limits its warrant for state power to this standard. Indeed, the Qur'ān never addresses the state directly, but refers only to the moral community, the umma. Provisions in the Qur'ān of constitutional relevance are extremely few, and highly general. The question of worldly authority is most clearly treated in the following verse, to which we shall often return:

> O you who have attained to faith! Pay heed unto God, and pay heed unto the Apostle and unto those from among you who have been entrusted with authority; and if you are at variance over any matter, refer it unto God and the Apostle, if you (truly) believe in God and the Last Day. . . . [4:59]

This verse requires that obedience be owed first to God and the Prophet, and to others only consistently therewith; and that resort to divine law is enjoined in all disputes. Thus, the state has no sovereignty independent of God's, and has authority only in fulfillment of God's order.

In the Qur'ān, then, even at the level of ultimate material or political power, the legitimacy of power and of obedience depend entirely on acting in agreement with revealed truth. This means that those who assume power over others face great moral risks. First, they face the challenge of any actor, to know what God's transcendent command is as to a proposed action. Second, being in power they may be tempted to subject the rights and property of others to their own ends. But there is a third and much more fundamental danger. This is that their deeds, however well intentioned, irreparably alter the moral world of others. Arising from a

mere imperfect grasp of truth, they forge themselves into hard moral reality; through mere subjective willing, they alter the objective world, trifling with a reality where God's will alone rules. All such acts are oppression unless known to agree with God's command:

> But nay -- they who are bent on evildoing [oppression, ẓulm] follow but their own desires [ahwā'], without having any knowledge [*'ilm*] . . . . [30:29]
>
> O David! Behold We have made thee a prophet and thus Our vicegerent on earth; judge, then, between men with justice [lit., the truth, *al-ḥaqq*], and do not follow vain desire [*hawā*] lest it lead thee astray from the path of God . . . . [38:26]

Here again, truth and power, seemingly immiscible, explosive, are forced together, to issue in conscientious action.

Though we observed this quandary in the qāḍī, it is not unique to him, or even to the jurist in his roles also as scholar or muftī. It is general: the Prophet declared that everyone is in some respect responsible for others and their rights.

> Each of you is a shepherd [*rā'ī*], and each of you is responsible for his flock [*ra'iyya*]. The leader of the people is a shepherd, and he is responsible for his flock. The man is a shepherd over those of his house, and he is responsible for them. The woman is a shepherdess in the house of her husband, and she is responsible for her flock. The son is a shepherd over the property of his father, and he is responsible for his flock. The slave is a shepherd over the property of his master, and he is responsible for his flock. So, each of you is a shepherd, and each of you is responsible for his flock.[7]

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[7]al-Bukhārī 1:160 (Jum'a), 4:233 (Aḥkām); Muslim (Imāra 20, 21); Abū Dāwūd (Kharāj 2928); al-Tirmidhī (Jihād 1705).

Here the Prophet suggests that religious responsibility arises from one's power over others as much as from one's power over oneself.

The risks of authority increase as one's power increases, since with power one's impact on the rights of others expands. We have already observed how, on such an analysis, the risk of the qāḍī was held greater than the muftī. The ruler, then, having the most power to do good or to do evil, faces the most risk: he gains the greatest reward for acting justly, and the greatest punishment if instead he does injustice.

> The dearest of people to God on the Day of Judgment, and seated the closest to Him, is a just ruler; and the most hateful of people to God and seated the furthest from him, is an unjust ruler.[8]

Aḥādīth reporting Companions' scruples in this respect abound. In particular, stories of 'Umar b. al-Khaṭṭāb portray his extreme concern for the welfare of all under his care, coupled with chagrin and anxiety over his recompense in the Hereafter. For example, he says,

> If a mangy sheep were to be left by the side of a ditch and not rubbed with ointment, I would fear lest I be questioned about it on the Day of Resurrection.[9]

Stories tell of his roaming streets of Medina at night, seeking those whose misery it was his personal burden to ease.

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[8]al-Tirmidhī (Aḥkām 1329) ("*ḥasan gharīb*").

[9]Quoted in Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī (d. 505 H., 1111 C.), *Ghazālī's Book of Counsel for Kings*, F.R.C. Bagley, trans. (London: Oxford University Press, 1971), 18.

It is not mere moral fastidiousness that is the point of these stories; rather it is stark anxiety to succeed in upholding God's order in fact. The ruler remains under obligation not merely to aspire to, but rather to attain, justice, just as the qāḍī, as we observed earlier, must achieve God's true judgment though the dalīl may be hopelessly indeterminate and obscure. Abū Dharr, a Companion of exalted piety but meek and retiring disposition, once asked the Prophet for a post of responsibility. The latter said:

> O Abū Dharr, you are weak, and [this task] is a trust [*amāna*], and on the Day of Resurrection it is a disgrace and a remorse except to one who takes it up properly and discharges his obligation as to it.[10]

If power is legitimate only if exercised in conformity with God's truth, then, if that truth is not known to a certainty, may power be exercised? We encountered above, in a statement by Ibn Taymiyya,[11] the assertion that, aside from a judge's decision in a concrete case, the only binding legal rules in the legal system are matters known to a certainty from revelation; all else is a realm of freedom from compulsion. Power itself is constrained by the same epistemological limits. Again, apart from judgments in concrete cases, it is only where God's will is known, and indeterminacy is transcended, that all men are obliged either to acknowledge and submit. It is only because of their

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[10]Muslim (Imāra 16).

[11]See p. 231 above. [j2b p. 205].

knowledge that it is just to compel their obedience. When the Qur'ān enjoins the community to order the "right" and forbid the "wrong," the words "right" and "wrong" translate "***al-ma'rūf***," meaning "good action," but also, more literally, "the recognized," or "known,"[12] and its opposite "***al-munkar***," the "disavowed," "unrecognized." Although the Qur'ān declares that

> There shall be no compulsion in matters of faith [*dīn*]. Distinct has now become the right way from error. . . . [2:256]

this verse must be interpreted consistently with many other provisions of the Qur'ān and sunna that require the compelling of actions when these are enjoined by clear divine command.[13]

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[12]In this word and its context here a shading toward community values is also present, i.e., that which all "recognize" to be right. See Edward William Lane *An Arabic-English Lexicon*, 8 vols. (London: Williams & Norgate, 1893), 5:2014. Indeed, *'urf*, the same word in noun form, is later used for legal custom.

[13]Abū Bakr Aḥmad b. 'Alī al-Rāzī al-Jaṣṣāṣ (d. 370 H., 981 C.), *Aḥkām al-qur'ān*, 3 vols. (Istanbul: Maṭba'at al-Awqāf al-Islāmiyya, 1335; reprint ed., Beirut: Dār al-Kitāb al-'Arabī, n.d.), 1:452-53, indicates the very narrow interpretation the verse is classically given. See generally Rudolph Peters, trans. and ed., *Jihad in Mediaeval and Modern Islam* (Leiden: E.J. Brill 1977). Traditionally, the application of this verse seems to encompass not freedom of belief generally, but at most conversion to, or entry into, Islam, based on a recognition, natural enough, that belief cannot be coerced. As to Muslims, who have embraced faith, and with it obligations indisputably established from the Qur'ān and sunna, this verse does not prevent compulsion on obligations so known, as most clearly in the penalty for apostasy. It is nowadays given a much broader construction by defenders of freedom of belief in Islam. See Peters, *Jihad*, 37; Muḥammad 'Abduh, 3 *Tafsīr al-Manār* 30-31.

Yet perfect knowledge of God's command is unreachable, and eludes mankind as transcendental, and so also perfect justice is unattainable. Truth and power converge only in the unseen. Even the Prophet refers his own claims to power and to truth back to utterly transcendent standards, to God's own sublime power and truth:

> Say: "Behold, I take my stand on a clear evidence from my Sustainer. . . . Judgment [*al-ḥukm*] rests with none but God. He shall declare the truth, since He is the best of judge of truth and falsehood [*khayr al-fāṣilīn*]."
>
> Say: "If that which you so hastily demand were in my power, everything would indeed have been decided between me and you. But God knows best as to who is doing wrong."
>
> For, with Him are the keys to the unseen: none knows them but He. And He knows all that is on land and in the sea: and not a leaf falls but He knows it . . . [6:57-59]

2. Emerging from the World-view of the 'Ulamā'

Chapter Two nearly in its entirety was an exploration of the quandary of a qāḍī, that he is obliged to fix moral rights of the parties, on the claim of God's true judgment, when most often he cannot know that judgment to a certainty. The name for the 'ulamā''s answer to that quandary was ijtihād -- the potent alchemy that fuses revealed knowledge with the raw stuff of legal action, issuing in a divinely sanctioned moral decision for the instance.

In this Chapter, we follow out this very quandary, but now in a context far broader than that of judging between two parties. We consider the issue of material power, authority

and the state, and how the Islamic law seeks to bring these under the divine sovereignty, now not merely over truth but over power.

Our context broadens from Chapter Two also in that we there studied only the 'ulamā' themselves, and moved securely within their world-view and institutions. We ignored many obvious complications -- such as that the 'ulamā''s system was dependent on other social forces for its operation, or that the 'ulamā' inevitably had to compete with other social groups, materially and ideologically, for influence and authority.[14] Now we must be prepared to step outside the 'ulamā' perspective, and consider also other groups influential in the Islamic state.[15]

Overcoming the power of their vision, we must recall that the 'ulamā''s approach to legal truth had some odd aspects, certainly in contrast with what the modern West has come to see as legal reality. The 'ulamā' were professional jurists, often private scholars, distant from the tasks of governing.

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[14]See p. 245 above.

[15]Among these groups loom large (a) occupational identifications, such as landowners, artisans and merchants; (b) rural/urban divisions; (c) governmental professions, especially bureaucrat and soldier. 'Ulamā' could be born into any of these groups, and continue to belong to them. But 'ulamā' as a class themselves were virtually always urban, and often were landowners or merchants. Here we can only signal the obvious importance of these various groupings and relations in affecting the law's content and weighting 'ulamā' influence, and otherwise omit their discussion. As explained below, our concern will rather be with two groupings, ruler and 'ulamā', that have pride of place in the explicit legal system, and with their roles in that legal system.

Their work is a discipline of piety, learning and intellect, rooted in the revelation as textual, and issuing in more texts, the fiqh. Their answers are highly idealizing, in that they strain to transcend the merely human and contingent, ẓann and hawā, to ground all legal results as securely as possible in the transcendental. This they hope to do purely through knowledge, meaning largely a verbal knowledge amassed by the intellect. The 'ulamā' think it right to contemplate revealed texts, and turn from the grit of everyday necessity or the clash of opposed interests. They see the fiqh as consisting of religious doctrine, not court decisions or the legislation of the state. They look, for the root enforcement of their strictures, to pious consciences, either of those subject to a rule or of those who enforce it; and they concentrate on laying for these consciences a clear path to God's will in its purest, most certain, form. They resist worldly institutions or outer constraints blinding the conscience's free choice between well and ill. In Chapter Two, we investigated many of these striking characteristics of the 'ulamā' legal ideal under the headings of meta-ordering, instance-law and microcosmic interpretation. (We shall henceforth use the terms "microcosmic" versus "macrocosmic" to refer collectively to the various roughly parallel contrasts and oppositions that we have gathered together, and to each of the two sets of collected poles of these oppositions.)

We are entitled to ask what sort of legal system would unfold were the microcosmic ideal made its sole basis. No doubt, such a system would be inspiring in being so painstakingly religiously ethical in its direction. But its peculiar features would be many, of which we mention only a few. First, of all those subject to the legal system, who could hope to attain to the arduous religious, moral and intellectual consummation that is its ideal? Only the mujtahids among the 'ulamā'. All others must accept their moral law from a mujtahid, and thus participate in the law's ethical vigor only derivatively, or to the extent that they acquire 'ulamā' skills. Second, where would the law for every instantaneous decision be found? Only in ijtihād, meaning, for the laity, that on every concrete issue one of the 'ulamā' must be consulted, or at least his book. Third, the system would show no uniformity of law. The 'ulamā' would differ among themselves, possibly each of them as muftī or qāḍī applying a different rule to the same case. Fourth, note that concern for the general welfare would attract only piecemeal attention from the system's lawmakers, the 'ulamā'. Utility professedly enters their system only in microcosmic decisions, and at lower orders of truth-value, as a make-weight among textual dalīls. Fifth and more generally, the 'ulamā''s ethically driven instance-law method is not conducive to dealing with many sorts of legislation. How well would such a system accommodate some of the most ordinary traits of

legislation -- such as it being general, useful in the mass, prospective in effect, applicable across the board, and approximate in its moral effect in specific cases? How would these traits fare subjected to the 'ulamā''s textualist method? Similarly, how well would ordinary administrative decision-making proceed? Sixth and finally, what class of society would have the most extensive power in society? Clearly, with so much dependent on truths determined textually, heavy responsibilities in the political sphere would fall on the scholarly arbiters of these truths.

We are already aware from the last Chapter that the 'ulamā' hardly intend all these implausible consequences, however much they may seem to call for them by their explicit ideals. As we observed, even in their own work, and in matters under their control, the 'ulamā', though maintaining the supremacy of microcosmic ideals at the higher levels of doctrine, found ways to accommodate, at the level of practice and at lower levels of truth, values of pan-ordering, rule-law and macrocosmic interpretation. The clearest example of this practice is the doctrine of school taqlīd in the application of the law. Even in the Saudi legal system, which so ardently rejects taqlīd and upholds the microcosmic ideal, we observed strong pressures toward macrocosmic interpretation, and noted how Saudi 'ulamā' subtly accommodate those pressures, and this in the sharī'a courts, their own domain.

But it hardly seems possible to us that, even with such concessions, the 'ulamā' system could encompass all needs of a functioning legal system. Are there not many demands a society legitimately makes of its legal system that would not be met by the program as we have discussed it so far? Above all, does this system seem likely to be able to control raw power, and the will of the ruler, and to direct these to its ends?

3. Macrocosmic Ideals in the Qur'ān

To broaden our field of vision beyond that of the 'ulamā', and to understand the Islamic ideal of the state, it is necessary to recall that Islam harbors not only ideals of transcendent truth developed microcosmically by the 'ulamā', but also many vital macrocosmic ideals, ideals resounding in the realm of worldly power and social action. Let us return to the Qur'ān and sunna for indications of these ideals.

A first such indication is that the Qur'ān continually addresses itself to nations, communities and peoples [umma, *qarya, qawm*], and to individuals as members of communities. With the community, indeed, the sharī'a itself is associated:

> Unto every [community] of you have We appointed a law [*shir'a*] and way of life . . . . [5:48]

The Qur'ān often points to intricate relationships between the moralities of the individual and of the group. Believers are enjoined to cleave unto one another to create a

moral community. The moral fate of that community is represented as the collectively determined by the mutual interaction of individuals. On the Judgment Day,

> [T]hose who had been weak will say unto those who had gloried in their arrogance: "Nay, [what kept us from the truth was your] devising of false arguments, night and day, when you persuaded [lit. commanded] us to blaspheme against God and to claim that there are powers that could rival Him!" [34:33; see 34:31-4]
>
> When it is Our will to destroy a community, We command those who have lost themselves entirely in the pursuit of pleasures; so they act sinfully, and the sentence passed on the community takes effect, and We destroy it utterly. [17:16*]
>
> But, alas, among those generations [whom We destroyed] before your time there were no people endowed with any virtue -- who would speak out against [lit., prohibit] the corruption on earth -- except the few of them whom We saved . . . . [11:116]
>
> [God is well aware of] those who, when We firmly establish them on the earth, remain constant in prayer, and give in charity, and enjoin the doing of what is right and forbid the doing of what is wrong . . . . [22:41]
>
> Verily, God does not change [a people's] condition unless they change their inner selves . . . . [13:11][16]

Correspondingly, the Qur'ān speaks about the success or failure of societies as the result of their morality:

> You [the Muslim nation] are indeed the best community [umma] that has ever been brought forth for (the good of) mankind: you enjoin the doing of what is right and forbid the doing of what is wrong, and you believe in God. [3:110]

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[16] [3:103-4]. Note a verse about apostasy: "O you who have attained to faith! If you [the singular is used] ever abandon your faith, God will in time bring forth (in your stead) people whom He loves and who love Him . . . ." [5:54].

> And how many a township have We destroyed because it had been immersed in evildoing -- and now they lie deserted, with their roofs caved in! [22:45]

Certain acts are proscribed with reference to their effect on the collectivity. The Qur'ān enjoins criminal penalties for theft, slander and adultery, as a "deterrent" for others.[17] It frequently condemns those who "spread corruption in the earth."

> Corruption has appeared on land and in the sea as an outcome of what men's hands have wrought: and so He will let them taste some of their doings, so that they might return [to the right path].
>
> Say: "Go all over the earth, and behold what happened in the end to those who lived before: most of them were wont to ascribe divine qualities to things or beings other than God." [30:41-42]

The state is to punish in particularly severe fashion those guilty of corrupting the earth:

> The recompense of those who make war on God and His Apostle and spread corruption on earth shall but be that they shall be slain, or crucified, or that their hands and feet be cut off on opposite sides, or that they shall be banished from the earth: Such shall be their ignominy in this world. But in the life to come, awesome suffering awaits them -- save for such as repent ere you become more powerful than they. [5:33-34]

In general, the Qur'ān condemns complacency in the face of social irreligion, immorality and injustice, and continually advocates ardent struggle in God's way -- though it come to warfare:

> Say: "If your fathers and your sons and your brothers and your spouses and your clan, and the worldly goods which you have acquired, and the commerce whereof you fear a decline, and the dwellings in which you take

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[17] [5:38-9].

> pleasure are dearer to you than God and His Apostle and struggle in His cause, then wait until God makes manifest His will; and God does not grace iniquitous folk with His guidance. [9:24]
>
> Those who have attained to faith fight in the cause of God, whereas those who are bent on denying the truth fight in the cause of the powers of evil [*ṭāghūt*]. . . . [4:76]

The Qur'ān sounds moral values that can only be achieved by society as a whole, such as distributive justice. While it exhorts individuals to take action to aid the poor, the orphaned, the enslaved, it describes the claims of the disadvantaged as "acknowledged rights." It praises

> [T]hose who consciously turn towards God in prayer,
>
> who incessantly persevere in their prayer;
> and in whose possessions there is a due share acknowledged [*ḥaqq ma`lūm*]
> for such as ask and such as are deprived,
> and who accept as true the Day of Judgment . . . . [70:22-25][18]

The Qur'ān enjoins on the state that it act toward the same ends. It fixes the uses of state revenues:

> The charitable offerings [*ṣadaqāt*] are for the poor, the needy, and those employed therein [i.e., in gathering the offerings], those whose hearts are to be won over [i.e., persons to be won to Islām by gifts], for [manumission from] bondage, and for those who are burdened with debts, and for [struggle] in the way of God, and for the wayfarer: an ordinance from God . . . . [9:60][19]

Finally, the Qur'ān asserts -- though only tersely -- vigorous political ideals, such as in its praise for those

> whose rule is consultation [*shūrā*] among themselves . . . ;

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[18]See also [51:19].

[19]See also [59:7].

and who, whenever tyranny afflicts them, defend themselves. [42:36-39][20]

The ideals here sounded then resound in the sunna, and in the accounts of the lives of the earliest caliphs. Reports from these would corroborate, but unduly extend, our account.

4. 'Ulamā' and Ruler; Microcosmic and Macrocosmic Sovereignty

After this inspiring litany of ideals from the Qur'ān, each so macrocosmic in context and concern, we must ask again, now with a new edge, whether a legal system extrapolated from the 'ulamā' ideal of law would be capable of fulfilling the legal needs of Islamic societies? This question will be before us throughout this Chapter. For now let us cite a fact not easily demonstrated here, but often remarked by students of Islamic law, that the fiqh's strengths and notable successes as explicit law and legal system were attained in none of the areas of concern just signalled as macrocosmic -- such as moral solidarity, political theory, socio-economic justice, taxation, or criminal law.[21]

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[20]See also [3:159].

[21]See, e.g., Joseph Schacht, *An Introduction to Islamic Law* (London: Oxford University Press, 1964), 112. This is not to say that Islamic societies' successes in these fields, attained not only through explicit fiqh doctrine, but also by other means of inculcating religious ideals, do not compare favorably with those of other societies.

If we follow out to their fullest implications those ideals which tend to be neglected by the 'ulamā' system, those of pan-ordering, rule-law and macrocosmic interpretation, they lead us to the plane of action of ruler and state.[22] Here we engage, at last, that most prominent of the actors in the legal system beside the 'ulamā', namely, the state power, or, to use a term more vivid, and accurate in almost all Islamic contexts, the ruler. Obviously, the ruler is the natural protagonist of a great many interests that the 'ulamā' system

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[22]We thus pass over forms of social or communal ordering, with all their great significance for the Islamic moral project. This is necessary due to limited space.

This topic is treated Islamically under the heading of *hisba*, or the ordering of the good and the prohibiting of the evil [*al-amr bi-al-ma'rūf wa-al-nahy 'an al-munkar*]. The classical 'ulamā's treatment of this Qur'ānic ideal, the first stage of the macrocosmic, parallels their treatment of the state. First, in a manner similar to the issue of rebellion against rulers, examined below, they chose to minimize the positive and institutional realization of the ideal. Again, the most ancient cause for reticence was Khārijī excesses. See Ann K.S. Lambton, *State and Government in Medieval Islam -- An Introduction to the Study of Islamic Political Theory: The Jurists* (Oxford: Oxford University Press, 1981), 24, 27, 32, 310-11. Second, what institutionalization there was again employed *fard kifāya* (see p. 449 below) to collect the *hisba* duty into the conscience of a single person, here an official of the state, called the *muḥtasib* (who was also the inspector of markets). Third, the classical solution exhibits a tendency to hierarchization and transcendentalization. This appears from the important ḥadīth:

> One of you who sees an evil act, let him change it with his hand; if he cannot, then with his tongue; if he cannot, then with his heart -- this is the weakest degree of faith.

Muslim (Īmān, 74); Tirmidhī (Fitan, 2172); Nasā'ī 7:111-12 (Īmān). See, generally, F. Gabrieli et al., "Ḥisba," *Encyclopedia of Islam*, 2d ed.; Ibn Taymiyya, *Public Duties in Islam: The Institution of the Ḥisba*, trans. Muhtar Holland (London: The Islamic Foundation, 1982) (translation of *al-Ḥisba*).

neglects. He is the natural counterpart to the 'ulamā' in the complex relations between the poles of these various legal ideals and aspirations that we have traced.

We must, therefore, as a vital step in emerging from the 'ulamā''s sphere of thought and action, add to the list of our oppositions and contrasts another, and the first to be not purely doctrinal or legal in origin: an opposition between the two chief classes or elite groups influential in the legal system, namely, the 'ulamā' and the ruler (or ruling institution).

Certainly from any Western perspective, bringing the state into the study of the legal system is long overdue. The highly hypothetical air to this Chapter so far is due to our disingenuously taking literally the 'ulamā' legislative program, as we learned it from the Chapter Two, and extrapolating from it a theory of the legal system as a whole. Classical Islamic constitutional doctrines, as we shall see, have quite a different starting point, and acknowledge that the ruler, or the state, has a central role in the legal system's fulfillment of Qur'ānic ideals. The 'ulamā''s system of fiqh, however well it attains to truth on its own standard, renounced -- indeed, it never dreamt otherwise -- any hope to wield, or even positively control, material power. The 'ulamā' understood that they could hope only to be a constituent part of a larger fulfillment in which the ruler and his power played a vital role. They were even aware,

though they would rarely admit, that in the Qur'ān, and therefore undeniably part of sharī'a, were certain legal ideals, macrocosmic in tendency, that tended to support the legitimacy and legal authority of the ruler, yet did not lend themselves to development by the 'ulamā' in the fiqh. Indeed, despite their constant efforts, the fiqh they wrote never did extend to all of legal life. They began from the specifically legal texts of the Qur'ān and sunna, which, given these sources' religious purpose, concern the aspects of human life most central to the microcosmic religiosity, particularly, ritual and family law, and provide only the most general guidance as to the macrocosm and its affairs, such as constitutional rules. Correspondingly, we find fiqh provisions to be most extensive and detailed as to religious duties, like purity, prayer, and pilgrimage; next most in family status, including inheritance; next in contractual relations; next in criminal law; next public law, including taxes; and finally constitutional law. Following a suggestion of Herbert Liebesny,[23] imagine these areas as concentric circles, religious ritual occupying the center. The 'ulamā' worked from the center outward. All the while they did their work, by default the outer rings were regulated by rulers, and this state of things was never reversed.

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[23]Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases & Materials* (Albany: State University of New York Press, 1975), 56.

Certainly, then, as admitted on all sides, cooperation between ruler and 'ulamā' is necessary to the sharī'a's fulfillment. Is it therefore the case that the cooperation has been complete, and amicable? To the contrary, as we shall see, 'ulamā' and ruler relations have been notoriously an arena of contention. Certainly, the struggle between ruler and 'ulamā' can be represented as two elite groups contending over control of the legal system. But their struggle over power is -- and we here make an intellectual move that is at once modern and Islamic -- simultaneously the struggle between two visions of the legitimacy, or the truth, of power.

In what follows our chief preoccupation will be to understand the lines along which these two essential players in the explicit legal system -- the ruler and the 'ulamā' -- struggled in relations of competition and cooperation.[24] It turns out that we already have at hand the tools to map out these lines of struggle -- these tools are the various oppositions and contrasts that we have accumulated in order to chart the 'ulamā''s internal vision of legal truth. In other words, the tensions we have found within the fiqh seem to have a reflexive relationship with its outward struggles (and accommodations) with the ruler and with the ideals and principles of law he represents. Let us therefore place

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[24]This approach, focused on the explicit legal system, admittedly addresses only tangentially the more demanding issue of how, even in combination, the ideological programs of these two elite groups may have left other Islamic interests and ideals ill served.

alongside the oppositions we have already accumulated one more, under which we shall collect observations as to the legitimacy of power: the terms "microcosmic sovereignty," and "macrocosmic sovereignty." These terms will identify the positions on worldly power of the 'ulamā' and the ruler, respectively.

An obstacle confronts our investigation, at least as to the Islamic past. This obstacle is but the first indication, among many we shall encounter in this Chapter, of the grandeur of the intellectual and cultural edifice built by the 'ulamā'. This obstacle is that, since the 'ulamā' classically held a near-monopoly over all literary expressions of the law,[25] concerning not only doctrine but often even practice, we find the macrocosmic in the Islamic legal system far more difficult to appraise than the microcosmic. As to the doctrine, macrocosmic ideals survive now only in doctrinal forms that are clear capitulations to their microcosmic opponents. As to the practice, historical accounts reflect macrocosmic ideals in operation often only negatively, or by reflection, for example in bitter complaints arising when practice was too independent of the 'ulamā' or followed rules divergent from the fiqh.

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[25]Many would argue that even the aḥādīth collections have been sieved through the 'ulamā''s perspective. This claim does not depend on assertions of pervasive forgery: relators of aḥādīth were rejected on grounds of heterodoxy, inevitably narrowing the field of discordant aḥādīth; also, the authenticity of aḥādīth was in part tested by evaluation of the *matn*.

In reading the 'ulamā''s fiqh statements and expositions, we must henceforth bear in mind that they are the special statement of one group of participants in the legal system. 'Ulamā' were obliged to construct these writings with an eye to their effect upon the operation of the larger system. However purely doctrinally stated the 'ulamā''s positions may have been, a great many other considerations, no less matters of legitimate 'ulamā' concern, may have consciously gone into their formulation.

5. Comparative Excursus: A Broadened Reality Architecture

We have claimed that we cannot comprehend the Islamic legal system without stepping outside of the 'ulamā' perspective; this claim has been based on facts as observed in Saudi Arabia, explicit 'ulamā' acknowledgements, and plain legal common sense. However obvious the point may now seem, it needs to be underlined, since it has been so often overlooked in Western comparative legal studies of Islamic law. Many such studies seem to equate the Islamic law, indeed the sharī'a itself, with the written fiqh of the 'ulamā' texts. This is natural, in that we look for law answering to the description of "law" in our own system. But if we take this step, we flatten out all the hierarchical tensions that we have identified in the fiqh -- as recognized and maintained by the 'ulamā' themselves -- between theory and practice,

doctrine and action, morality and enforcement, ideal and reality. We miss all the vivid institutionalization which we have found implicit in fiqh theory. This mistake is at the root also of other missed emphases in past accounts of the fiqh: notably assertions of the utter immutability of the sharī'a, of the rigid authority of taqlīd and ijmā', of vast discrepancies between legal practice and sharī'a norms, and of stark, areligious secularism in medieval public law.[26]

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[26]These are constant themes of orientalist treatments of Islamic law. My study falls within a trend, developing from a new and more careful examination of actual practice, that brings into question these past conclusions. (An early example of this trend is Noel Coulson's article "Law and Religion in Contemporary Islam," *Hastings Law Journal* 29:1447-1457 (1978).) I cannot here draw the full lessons available from comparing my results with those of earlier and present-day studies; this footnote must suffice.

Other studies in this trend are cast at a more legal doctrinal level and use historical evidence. See as to the Geniza evidence on thirteenth century commercial practice, Abraham L. Udovitch, "Theory and Practice of Islamic Law: Some Evidence from the Geniza," *Studia Islamica* 32 (1971): 291-303; idem, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1975); as to Ottoman-era courts, see the authorities cited in the next Part (which could be compared with studies of North Africa and India).

In its various accounts of Saudi legal practice, this study offers hard evidence indicating greater conformity between legal practice and the sharī'a than is ordinarily assumed to exist. This evidence can, however, be readily discounted on the claim that Wahhābism is extraordinary in the emphasis it gives to legal rectitude. Schacht, *Introduction*, 86. A similar discount is taken as to another traditional legal system on which we have extensive evidence: the Ottoman. Ibid., 89-93.

But besides hard evidence, the Saudi material also offers a new angle of approach. The cogency, consistency, authenticity, and, oftentimes, naturalness, of the Saudi arrangements by which practice is brought into accord with theory, and vice versa, give grounds to reassess the Islamicity of the medieval legal practice. This is particularly true as to the criminal law (see the next Part, particularly n. ?), an area of law where it has been held as

At this point we can appreciate the challenges inherent of the comparative method sketched in the Introduction. If the preceding errors stem from using Western templates, and if we now openly take leave also of the available explicit Islamic models of sharī'a, then, it seems, we are abandoning all available standard means to represent the legal realities with which we deal. We sense, in a rather vertiginous moment, how this comparative method tends, because it seeks to confront the totality of legal experience in both systems, to break the mold of either's internal vision of truth, and to evade the conscious reality grounding of either.

So far our method has progressed by alteration between express Islamic doctrines and certain practices relatively closely keyed to those doctrines. The closeness between the

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beyond question that practice was largely oblivious of sharī'a.

The general judgment against the Islamicity of the practice relies heavily for evidence on 'ulamā' complaints of deviations from "sharī'a" owing to local customs, injustice of rulers, immorality of qāḍīs, and heedlessness of the populace. See, e.g., C. Snouck Hurgronje, *Selected Works of C. Snouck Hurgronje*, ed. G.-H. Bousquet and J. Schacht (Leiden: E.J. Brill, 1957), 290-95. But from such complaints, which were in part motivated by 'ulamā' polemic and political objectives, one moves too hastily to declare -- as Schacht and Coulson have done particularly -- a bifurcation of the law into the real, practical and "legal" versus the ideal, impractical and "moral." See, e.g., Schacht, *Introduction*, 1, 112, 200-01; Coulson, "Law and Religion," 1449; idem, *History*, 126; idem, "Doctrine," 220, 225-26. Such judgments face a heavy burden of proof as prejudicial; we must note and beware the mild but unmistakeable tone of *schadenfreude* accompanying judgments on Islam's efforts to avoid the rift.

In sum, the material I expose here should encourage us to make this sort of judgment more subtly.

two has allowed us so far to construct with confidence a picture, or hypothetical architecture, of the Islamic legal reality; but this was, as it were, an experiment in highly controlled conditions. Now we find that the fit between explicit doctrine and practice is becoming far looser. As a result, our task is becoming far more challenging.

Needed now is a manner of description of the Islamic reality architecture, an intellectual infrastructure, that allows us to broaden our representations beyond 'ulamā' conceptions of sovereignty to include those of other groups within the legal system, without delivering ourselves up to purely Western models as the alternative.

Is such an infrastructure extant in Islamic sources? Once again, we turn to the Qur'ān. Recall that the Qur'ān declares that power is legitimate only if coinciding with God's will as validly known; one must rule "in accordance with what is bestowed from on high" [*bimā anzala allāh*]. As we shall soon see, the 'ulamā' have developed theories of sovereignty satisfying this requirement microcosmically. (In one form, theory posits a mujtahid ruler who struggles to attain to God's will, for each atomic instance of power's exercise, by textualist elaboration from the revelation.) But let us also recall that in the Qur'ān not only texts but, for example, in a verse quoted above, "the balance" and "iron" are called "bestowed from on high." This suggests that the Qur'ān is consistent not only with a textualist approach to

knowledge, in the sense of seeking legal knowledge from the revelation in the form of verbal laws verbally derived, but also with other means to, and forms of, knowledge of God's will. Why are not the Qur'ān's provision for ***shūrā*** or consultation, or its command to obey those in authority, or its appeals to man's native standards of morality, such as the command to "do justice," or its general commands, such as to aid the disinherited, equally touchstones of the divine will?[27] If such as these can be seen to yield a method to know God's will with results no less objective and consistent than those of uṣūl al-fiqh, should not then knowledge deriving under such standards also legitimate power?[28]

This raises the issue discussed previously under the heading of the "constitutive" function of the revelation[29] -- the idea that the verbal revelation is capable not only of laying down explicit laws, but also of instituting methods, procedures, by which men gain legal knowledge possessed of a delegated divine authority. The science of uṣūl al-fiqh by its very existence is an 'ulamā' admission that revelation

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[27]Muṭlab 'Abd Allāh al-Nafīsa, "Law and Social Change in Muslim Countries: The Concept of Islamic Law Held by the Hanbali School and the Saudi Arabian Legal System" (Cambridge, Ma.: Ph.D. diss., Harvard Law School, 1975), 43-44. Dr. Nafīsa draws a distinction between "substantive" and "procedural" texts of the Qur'ān and sunna.

[28]One certainly can argue that the textual authority for such avenues to legal truth is stronger than that for either ijmā' or qiyās.

[29]See Chapter One, n. 39.

does indeed perform constitutive functions -- witness the roots ijmā' and qiyās. But throughout uṣūl al-fiqh, as demonstrated in Chapter One, the 'ulamā' seek to moor all the sources of law firmly to texts, defining them instead merely as means to interpret, elaborate from, or corroborate texts. They show a marked unwillingness to make of these roots positive legal mechanisms yielding a certainty competing with the authenticated texts themselves. We showed how these tendencies unfold from the 'ulamā''s devotion to the aspiration to meta-ordering -- in particular, their exalting of the explicit divine word, diminishing the truth-value of all other sources of law,[30] and their accommodating, paradoxically, indeterminacy of legal derivation, as the medium in which their law models its transcendence.[31] Thus, a constitutive authority that went so far as to generate divine laws wholly independently of the verbal constraints of the revelation runs strongly counter to the 'ulamā' system, especially if those laws were endowed with certainty.

But if constitutive authorities are conceivable, then we must ask -- just as we asked whether microcosmic sovereignty could exist alone -- whether the Qur'ān would be consistent with an exclusively macrocosmic sovereignty. Such a sovereignty would by definition abandon the ideals of both inner-directedness and instance-law as we have described them:

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[30]See p. 62 above.

[31]See p. 103 above.

it would be bound compulsorily by wholly world-existing criteria of truth, and it would deal in general truths not imagining, or straining after, a truth perfect in the moral instance. Such a sovereignty seems inconceivable under the Qur'ān's banner. Rather, at every moment of tension between the microcosmic and macrocosmic in law, the Qur'ān seems to revert to the first of each pair: it returns, indeed, to the individual, whose fate is single, whose every act or intention is referred to a Hereafter, to be judged by an all-knowing God; it refers truth and reality to the transcendental or unseen.[32] The Qur'ān seems to require that every act of power, whether in command or submission, must be tried atomically against all available knowledge of God's will. Each action must fuse with knowledge in the crucible of moral conscience, itself fired by an ardent seeking of God's perfect and transcendent command.

Inspired by this Qur'ānic call, the 'ulamā' have chosen to champion microcosmic ideals. As we have seen, they have succeeded in carrying their microcosmic ideal of law extraordinarily far, into both doctrine and practice. Yet the

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[32]Fazlur Rahman (whose work *Major Themes of the Qur'ān* (Minneapolis: Bibliotheca Islamica, 1980), particularly the chapter "Man and Society," was helpful in preparing this Part) perhaps disagrees, stating that it is a "purely academic" question whether "man or society" is primary in the Qur'ān. Ibid., 37. But in the Qur'ān only the community [*umma*] can be seen as competing with the individual as addressee of law. And the Qur'ān defines the *umma* no more concretely than as the collectivity of those who believe in Muḥammad's message, and never states explicit laws of which it is the subject, or erects the *umma* into explicit legal institution.

existence of vivid macrocosmic norms in the Qur'ān causes us to ask, to what extent are 'ulamā' positions we have identified -- such as their textualist grasp of scripture; their epistemological obsession; their exalting of indeterminacy; their insistence on absolute, atemporal truth; their resistance to positive legal institutions; their disdain for rules general in application, utility-driven and morally approximate -- determined by the microcosmic tendency of the Qur'ān itself? To what extent, rather, are these positions the contingent product of their very utility to the 'ulamā', who gain through them enhanced social authority and position?[33]

To the 'ulamā', the texts tantalized with the offer of a God-endowed paradigm pointing into transcendence. They promised access to truth unconditioned by physical or social contingency, free and open to all, instilling in each individual mind an immanent touchstone of truth. Others, however, would be keenly aware -- and such a realization is common enough nowadays[34] -- that texts are not in fact so unconditioned, and carry much social baggage. Such persons

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[33]Clearly, raising such issues is radical, since it reopens decisions made in the earliest days of Islamic law. See Chapter One. Accordingly, when such issues are raised Islamically, within the tradition, it is by "modernists," and not "traditional" 'ulamā'.

[34]We at times seem to think we discovered this fact, making poor work of our predecessors, Islamically found in plenty, from Ibn Khaldūn to poets to Sūfīs, none unaware of the traces of subjectivity and self-interest in the pious interpretation of sacred texts.

may sense how approaching these texts too textually, and accepting too uncritically the meanings upheld by the political and religious order, simultaneously further the interests of the 'ulamā' class, and support a constellation of political power in which the 'ulamā' take part. They would also be aware how these political groupings stand to lose from the texts' reinterpretation or demystification.

As we shall see, the 'ulamā' vision of microcosmic sovereignty saps institutionalization of law-making or of power, and, of course, vehemently denies that any legislative authority resides in any human individual or group. But at the same time it is functionally, implicitly, obliged to see to its own institutionalization, to its incarnation, as it were, in an elite class, those capable of the learned manipulation of texts. Thereby it also relies, but implicitly, covertly, on macrocosmic forms. Should not these macrocosmic forms be tested against other macrocosmic possibilities, the touchstone being the Qur'ān itself?

Let us sum up the foregoing using the image of reality architectures. We have stated that the Qur'ān is inconsistent with a wholly macrocosmic view of law, and reverts in the end to the microcosmic as touchstone; if correct, this means that any Islamic legal system must have a strong innerness of proportion, a pronounced "vertical" tendency. But this

requirement is still highly general,[35] and could be met by various possible means to incite individual moral responsibility, and, in particular, it could be consistent with various and extensive constitutive interpretations. The Qur'ān itself seems to leave many possibilities open. The 'ulamā''s own response to the Qur'ān is single-minded concentration on the microcosmic, starving other objectives of the legal system of extensions in the legal architecture, even when they could have been made structural, architectonic, supports to an edifice still microcosmic overall. I am thinking particularly of doctrines like shūrā. Moreover, and even more importantly, the 'ulamā''s interpretation relies heavily on a strongly textualist construction of the microcosmic ideal, with the result that even the most inner, microcosmic reaches of their favored architecture have a certain specialization, narrowness. Since their system can hardly dispense with "horizontal" extensions, or macrocosmic supports, the 'ulamā' admit them, but struggle to bring them under the shadow of their overall textualist ideal construction, and, as much as possible, to confine their extension within a single class, themselves. Here the examples are obvious -- taqlīd, school discipline, the waqf, the madrasa -- all dealt with in ways intended not to dilute

[35]The inner-/outer-directed, and instance-/rule-law oppositions (and therefore the terms "microcosmic" and "macrocosmic" based on them) were defined in a manner allowing extensions broader than as applied here. The same is true, though less obviously, of meta-/pan-ordering.

the fiqh's transcendent, textualist nature or the 'ulamā''s monopoly over its institutionalisation.

If the reasoning of this section is sound, then a number of urgent issues are raised, urgent whether viewed from an internal Islamic or from an external non-Muslim perspective. To understand this, let us state a few of these issues in both Islamic and non-Islamic terms.

Islamically, was the classical 'ulamā' construction of legal reality determined by the Qur'ān? Even if it was, was it so for all time? If neither of these questions can be answered definitively, the question remains, how ought the sharī'a be found? If not solely by uṣūl al-fiqh, how is truth about God's sovereignty to be known? How is power to be disciplined by truth, if not only or chiefly by the 'ulamā' and by fiqh? Ultimately, it would seem the answer to such questions must lie not in a choice between microcosmic or macrocosmic sovereignties, but rather in an inquiry into how, both actually and ideally, they trade with each other in a Qur'ānic enterprise in which the common currency is knowledge of God's will.[36]

Stated non-Islamically, the immediate issue is to understand how, as revealed by relations of competition and

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[36]This follows from the propositions that under divine sovereignty ultimate truth and ultimate power unite; that the this-worldly test of divine sovereignty is therefore epistemological; that Islamically epistemology comes to rest ultimately on the Qur'ān; and that, lastly, as we have seen, the indicators to God's will mentioned in the Qur'ān sound in both macrocosmic and microcosmic realms.

cooperation between ruler and 'ulamā' and between microcosmic and macrocosmic sovereignty, and as mediated by the Qur'ān and Islamic ideals, various constitutional powers -- such as those of law-making or law-application -- are allocated in both actual and theoretical Islamic legal systems. To accomplish this we have the rich record of fourteen centuries of Muslim legal history.[37]

To the extent we pursue comparisons with the West, other deeper issues tend to open up. Traditional Islamic and modern Western legal systems seem to occupy extremes on a spectrum of sovereignties -- one strongly microcosmic and one strongly macrocosmic. For each system the opposite principle seems often to be in incognizant darkness, like the dark side of a moon. Are both sovereignties present in all human societies? What innate relationships do they have? What ethical, legal, political or social advantages and disadvantages attend the predominance of one or the other?

In the discussion to follow we cannot follow out all these broad historical and sociological issues. Our purpose remains only to lay groundwork for an inquiry into the workings of one Islamic legal system, that of Saudi Arabia, and to achieve a first-order comparison of that system with systems of the modern West.

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[37]Many Muslims nowadays see little reason to study Islamic political and legal history after the era of the first four caliphs. This, I would submit, seems a vital error even religiously.

6. Plan of the Chapter

The immense issues raised in the previous section cannot be explored here except in outline. The pace of this Chapter must therefore be very different from that of Chapter Two. I propose to adopt two distinct methods: first, to use a broad brush, and move very quickly, even skimmingly; second, to use a fine brush, and examine two concrete case-studies in detail.

The plan for this Chapter is as follows. The remainder of this Part, in broad brush, gives, first, a basic introduction to the classical theory and practice of Islamic states, and second, a brief summary of the vast transformations these states underwent under Western domination from the 18th C. onward.

The stage thus set, we move to the modern Saudi state, taking up two case studies to be examined in detail. These case studies, drawn from two particularly vexing problems confronting the Saudi legal system, enable us to explore and deepen our developing ideas by testing them against close-grained complexes of theory and practice. Thus, Part II, after briefly introducing Islamic criminal law, examines a recent transformation in Saudi criminal legal doctrine and practice. Part III examines the controversy, the most fundamental and far-reaching of any now confronting the Saudi legal system, on whether to codify the laws. Part IV is a summation.

B. HISTORY AND THEORY OF THE ISLAMIC STATE

1. The Classical Fiqh Doctrine of the Imāmate[38]

Fiqh law discusses ultimate worldly sovereignty under the heading of the imāmate, or institution of the ***imām***, or "leader" (lit., "exemplar"), used for the ruler of the umma, properly the caliph [khalīfa].[39]

Imāmate doctrines developed continually over time, and are usefully discussed here according to seven rough historical periods:

(i) the four Righteous Caliphs (10-40 H., 632-661 C.)

(ii) the classical centralized caliphates, the Umayyad and the 'Abbāsid (through 3rd H./9th C. century)

(iii) the decline of the 'Abbāsid empire, and the period of propagation of classical Islamic constitutional law theory (4th and 5th H./10th and 11th C. century)

(iv) the final decline and extinction of the 'Abbāsid house (to 7th H./13th C. century)

(v) the post-caliphal period until the rise of the Ottoman and Mughal Empires (to 9th H./15th C. century)

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[38]Still useful, and the best available summary in English of Islamic constitutional thought, is H.A.R. Gibb's influential article, "Constitutional Organization," in Majid Khadduri and Herbert J. Liebesny, eds., Law in the Middle East, only 1 vol. issued (Washington, DC: Middle East Institute, 1955), 1:3-27. See also Lambton, State; W. Montgomery Watt, Islamic Political Thought: The Basic Concepts (Edinburgh: Edinburgh University Press, 1968), 40-41.

[39]"Imām" has many meanings. It applies to the leader of group prayer. In Shī'ī doctrine it refers to the divinely guided rulers of the Community descended from the Prophet.

(vi) the Ottoman (and Mughal[40]) empires (to 12th H./18th C. century)

(vii) the Saudi-Wahhābī states (1734 C.-present).

That I use this simple historical progression should not cause one to read what follows as either a history of a millennium of power in Islam,[41] a comprehensive survey of Islamic political thought, or a set of original hypotheses about this complex history. Rather, I employ the historical sequence almost as parable or illustration. Also, an outline of Islamic legal history is needed to understand certain conceptions -- both traditional and my own -- used in the detailed Saudi Arabian case-studies. Our preoccupations throughout are limited: our interest is to review a few basic points about sovereignty in each period, and then to speculate about them. Sovereignty is explored in two respects:

(i) the nature of doctrinal and institutional <u>constraints on power</u> of the ruler, as the possessor of ultimate material force; and

(ii) the <u>authority to legislate</u>[42] and <u>to adjudicate</u>.

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[40]We shall discuss only the Ottoman Empire.

[41]Even the historical interpretations I employ will be observed to vary according to need between those of Muslims and non-Muslim historians.

[42]It will be understood that my use of the term "legislation" means no offense to the principle that God alone legislates. The term refers rather to the this-worldly personnel and procedures of "law-finding," by which God's law is found and declared.

As to sovereignty in both these aspects, we shall provide some information not only as to theory, but also as to practice, or as to the *de facto* status of sovereignty.

a. The four Righteous Caliphs (10-40 H./632-661 C.): a harmony between truth and power

In Chapter One the history of the first few centuries of the caliphate was briefly sketched.[43] Here let us postpone to the period of their formulation the explicit doctrines by which this period is usually described, and look instead at how this period tends to appear in the aḥādīth (which often clash intriguingly with later doctrine).

What was the early caliphs' authority? Although their title meant "successor to the Prophet," it seems that it was never thought that they possessed any extraordinary access to religious-legal truth, or were in any sense theocratic rulers or popes. They did not succeed to the Prophet's infallibility or his access to revelation: God's revelation, and the sharī'a, were sealed by the Prophet's death. By virtue of their office they had no authority to fix orthodoxy, declare religious truth, or settle doctrinal disputes. A basic principle, attributed to the Prophet[44] and included in the

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[43]See p. 118 above.

[44]"*Lā ṭā'ata fī ma'ṣiya.*" al-Bukhārī 4:253 (Aḥād); Muslim (Imāra 40-41).

first Caliph Abū Bakr's accession speech,[45] is that of "No obedience in disobedience [to God, i.e., in sin, *ma'ṣiya*]," meaning that worldly authority cannot be invoked against the dictates of the divine law.

The Caliph 'Umar reportedly explained his status as like that of any other, except heavier in burden.[46] A caliph, and indeed any lesser functionary, has no legal immunity in the exercise of his office, and may be sued for breach of the law.[47]

The most religious, in our sense, of the caliph's functions was to lead the prayers -- a privilege which caliphs from Umayyad times would delegate to others. His other religious functions were merely the temporal aspects of the

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[45]Ibn Taymiyya, *al-Ḥisba fī al-Islām*, Sayyid b. Abī Sa'da, ed. (Kuwait: Dār al-Arqam, 1403 H., 1983 C.), 117.

[46]Dr. 'Abd al-'Āl 'Aṭwa, interview with author, High Judicial Institute, Riyadh, Feb. 5, 1984. I have been unable to find the source of the quotation.

[47]The ruler is personally obligated to compensate any wrongdoing, as for example in suffering retribution in kind for administering a wrongful beating. Ibn Taymiyya (d. 728 H., 1328 C.), *al-Siyāsa al-shar'iyya fī iṣlāḥ al-rā'ī wa-al-ra'iyya* (Cairo: Dār al-Sha'b, 1971), 173-4. Lawbooks discuss when a judge is to be punished retributively for sentencing another based on witnesses that turn out to be unqualified. The law of Saudi Arabia allows such suits, but when against judges or governors such actions require prior permission from the Supreme Judicial Council or the King respectively before filing. Muḥammad Sa'd al-Rasheed, "Criminal Procedure in Saudi Arabian Judicial Institutions" (Ph.D. diss., University of Durham, 1973), 93; Kingdom of Saudi Arabia, *Niẓām al-qaḍā'*, Royal Order No. M/64, 14 Rajab 1395 (July 22, 1975) (Riyadh: Maṭābi' al-Hukūma, 1396 H., 1976 C.), (hereafter cited as *Judiciary Regulation*), Secs. 4, 71-84.

state's responsibility to uphold religion: such as providing for mosques, arranging canonical mass prayers on major feast days, and punishing those adjudged guilty of neglecting ritual duties or spreading beliefs falsified by revelation.[48]

Thus, even for the Righteous Caliphs, caliphal authority in religion is a far cry from papal or ecclesiastical authority over religious truth. Thus the idea, too common among non-Muslims, that the caliph, or even the ruler of a Muslim nation, is an absolute leader in both secular and religious spheres (in our senses) is wholly mistaken. Islam lacks any such religious authority at all.

Although the caliphs thus made no claim on God's sovereignty, still as the Prophet's "successors" they inherited his status as head of state and commander in chief. By his assuming a supreme authority, the Prophet broke the mold of Arab tribal rule based on tradition and consent. Similarly, the Qur'ān's introduction of the umma based on religion superseded tribal identities. But transformations so set in motion were far from complete in the era of the early caliphs. Old patterns continued to be important, and restrained the power of the state.

As to our second aspect of sovereignty, legislation and adjudication, under the press of events and the challenge of

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[48]See, *e.g.*, Abū al-Ma'ālī 'Abd al-Malik Ibn 'Abd Allāh al-Juwaynī (Imām al-Ḥaramayn) (d. 478 H., 1085 C.), *Ghiyāth al-umam fī iltiyāth al-ẓulam*, ed. Muṣṭafā Ḥilmī and Fu'ād 'Abd al-Mun'im (Alexandria: Dār al-Da'wa, 1979), 133-177.

developing a vast new imperial state, the early caliphs inevitably did order measures with broad legislative effect, often with scant or no support at all in the revealed sources. As they became masters over civilizations far more advanced than that of pre-Islamic Arabia, these caliphs naturally accepted and put to use the laws, practices and customs of their new subjects. Their governors and judges, working when the fiqh law was only in germ, exercised broad discretion to achieve substantial justice and practical results. All such decisions seem to have been taken with few qualms, and without distinction between religious matters and military, financial or political ones. The vast body of rulings so resulting inevitably became part of the material from which the corpus of the fiqh emerged.

Consider the following reported decisions of the earliest caliphs. 'Umar developed virtually from scratch a system, called the *dīwān*, by which were allocated and dispensed the immense spoils of war. 'Uthmān, the third Caliph, spurred by fear of division in the Muslim community, declared as canonical one of several variant texts of the Qur'ān, and ordered the destruction of all other copies. Other decisions appear even to dare conflict with the Qur'ān and sunna. The Qur'ān ([9:60]) dictated payments from the alms tax to those "whose hearts are to be won over" [*al-mu'allafatu qulūbuhum*], chiefly Arab tribal leaders whose allegiance had to be bought. But 'Umar suspended these payments, on the ground that Islam,

now strong, did not need to buy support. An established part of the punishment for fornication is exile for one year. 'Umar suspended this penalty when an exiled fornicator defected to the enemy. Under the Prophet and Abū Bakr, apparently three divorces pronounced in a single sitting were treated as a single divorce, if the husband made certain claims about his intent. 'Umar deliberately changed this rule, because people in his time had come to take the matter lightly.[49]

The caliphs seem not to have taken these steps with thought of adding to the divine law. They seem rather to have been seeking its implementation or fulfillment -- guiding themselves by the Prophet's "sunna" understood not as a textual legal standard, but as a living, continuing tradition of endeavor to fulfill God's revealed commands.[50] In making decisions, the caliphs are reported to have asked Companions whether they knew any applicable text of the Qur'ān or

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[49]On triple divorce, see Ibn al-Qayyim, *Zād al-ma'ād fī hudā khayr al-'ibād*, ed. Ṭāhā 'Abd al-Ra'ūf Ṭāhā, 4 vols. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1390 H., 1970 C.), 4:54; idem, *al-Ṭuruq al-ḥukmiyya fī al-siyāsa al-shar'iyya aw al-firāsa al-mardiyya fī aḥkām al-siyāsa al-shar'iyya*, ed. Muḥammad al-Fiqī (Cairo: Maṭba'at al-Sunna al-Muḥammadiyya, 1373 H., 1953 C.), 16-17. See, for additional such actions by 'Umar, Henri Laoust, *Essai sur les doctrines sociales et politiques de Taki-d-Din Ahmad b. Taimiya* (Cairo: Imprimerie de l'Institut Francais d'Archéologie Orientale, 1939), 238; Subḥī Maḥmaṣānī, *Falsafat al-tashri fi al-Islam: The Philosophy of Jurisprudence in Islam*, trans. Farhat J. Ziadeh (Leiden: E.J. Brill 1961), 110-114.

[50]This distinction was discussed in p. 88 above.

recollected deed or speech of the Prophet. If none were known, they would, after consulting others (fulfilling the Qur'ānic command and the Prophet's example that rule is by consultation or shūrā), willingly proceed by their own lights. Recall the spirit of 'Umar's instructions to his qāḍī, quoted in Chapter Two:[51]

> Use your understanding in matters that cause hesitation and perplexity in your heart in which there is no [verse of the] Qur'ān or sunna. Learn the similarities and the analogies, then compare matters after that. Then adopt the most pleasing of them to God, and the one closest to the truth in your view.

Caliphs reportedly claimed no precedence for their own legal determinations, as against judgments of their own subordinates or even private adjudicators; exceptions seem to concern matters requiring centralized, or unitary, decision.

The following cases illustrate 'Umar's manner of deciding. He became distressed over the inflated amounts current as marriage portions to women; he proposed to fix a limit. In a public discussion of his proposal a woman stood and cited the verse of the Qur'ān, "But if you desire to give up a wife and to take another in her stead, do not take away anything of what you have given the first one, [even were it a treasure]," whereupon 'Umar withdrew the proposal.[52] The

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[51]See p. 143 above.

[52][4:20]. Ibn Taymiyya, *Majmū'at fatāwā Shaykh al-Islām Aḥmad Ibn Taymiyya*, comp. 'Abd al-Raḥmān b. Qāsim al-'Āṣimī, 35 vols. (Riyadh: Kingdom of Saudi Arabia, n.d.), 35:385.

Prophet had never fixed an exact punishment for wine-drinking; Companions recalled the approximate numbers of lashes given under his supervision. 'Umar put the question to the Companions, and eighty lashes were suggested, in analogy to the punishment for slander in the Qur'ān.[53] 'Umar condemned a woman to be punished for adultery, proven by her pregnancy. The Companion Mu'ādh pointed out that he must postpone the punishment until after the birth of the child, to avoid harming the innocent fetus. 'Umar later said, "If it had not been for Mu'ādh, 'Umar would have perished."[54] We recited previously the story of 'Umar's refusal to reverse a judgment by two other Companions, on the ground that there was on the matter no revealed text, and in matters of mere opinion all are equal.[55] These various reports, whatever doubts as to authenticity may be entertained due to their great relevance to later political and doctrinal disputes, gain plausibility when seen as the merger of intense devotion to the Qur'ān and emulation of the Prophet with the preexisting individualistic, decentralized and democratic spirit of Arab tribal society;[56]

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[53]See p. 99, 274 above. See Abū Muḥammad 'Abd Allāh b. Aḥmad b. Muḥammad Muwaffaq al-Dīn Ibn Qudāma (d. 620 H., 1223 C.), *al-Mughnī wa-yalīhi al-sharḥ al-kabīr*, 12 vols. (1972; repr. Beirut: Dār al-Kitāb al-'Arabī, 1403 H., 1983 C.), 10:329.

[54]Quoted in Zakī al-Dīn Sha'bān, *Uṣul al-fiqh al-islāmī*, 2d ed. (Beirut: Maṭābi' Dār al-Kutub, 1971), 96-97.

[55]See p. 99, 274 above.

[56]See, e.g., Watt, *Islamic Political Thought*, 40-41.

they recommend themselves most when out of harmony with later doctrinal positions.[57]

In sum, in this early caliphal sovereignty, we seem to see both microcosmic and macrocosmic principles equally at work. A more eloquent statement of the microcosmic interpretive ideal than 'Umar's instructions to his qāḍī cannot be found, nor a clearer example of macrocosmic law-making than his determinations altering or suspending Qur'ānic rules for reasons of a changed circumstance among his people. Here the two ideals seem relatively harmoniously merged, in a balanced relationship of truth and power. Yet the merger was far from perfect even then; indeed, three of the first four caliphs died from assassination.

b. The classical caliphal empires (through 3rd H./9th C. century): macrocosmic sovereignty predominant

The developments since the Righteous Caliphs separated what had been joined. During the next century the Islamic umma suffered three civil wars, in which always the central issue was doctrinal -- the legitimacy of rulers. The sect of the Khawārij, the "Secessionists," who emerged in the succession of the fourth Caliph 'Alī, typifies the dilemma, in

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[57]The most plausible by this standard are the macrocosmic indications. Recall the apparent late provenance of microcosmic-tending accounts, such as 'Umar's letter to his qāḍī.

that it insisted on sinlessness in their leader, whom they freely elected and deposed. To them, if a ruler sins he becomes an apostate and unqualified by definition, and those who continue to follow him sin and become apostates in turn.[58] Such doctrines forced this sect into violent rebellion against the majority, and caused its own following to splinter into warring bands. The Sunnī majority chose other more moderate theological solutions to the dilemma, and itself split, though not violently, among these.

The result of such traumas was for the majority a bitter lesson about hopes for pious rulership. With Mu'āwiya (41-60 H., 661-680 C.) and the 'Umayyad dynasty he founded, the umma found itself ruled by caliphs modelling themselves as much on Arab kings as on Abū Bakr or 'Umar. The pious had to choose between this state of affairs and political chaos, and their theological formulations reflected their qualms. Many of them turned all the more fervently to religious learning, and in this atmosphere achieved the first great contributions to ḥadīth collection and systematic fiqh. Many Umayyad rulers and judges, though pressingly engaged in creating a practical legal system, showed concern to remain within the "sunnas," or normative traditions descending from the time of the Prophet, and willingly drew from the wisdom and learning of the new

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[58]G. Levi Della Vida, "Khārijites," *Encyclopedia of Islam*, 2d ed.

sciences. Among Umayyad judges were famous pious lawyers,[59] whose rulings are still influential precedents.

In the third civil war (ended 132 H., 750 C.), the 'Abbāsid contenders to the caliphate revolution, sounding messianic themes about their line of descent from the Prophet, attacked the rival Umayyad line as illegitimate and impious. But once in power, the 'Abbāsids disappointed their idealistic followers, turning on many of them. They established a capital at Baghdad (145 H., 762 C.) and instituted an imperial absolutism recalling the glories of Persian monarchy. As mentioned in Chapter One, the 'ulamā', by now having gained more realistic expectations of the reliance to be placed on the person of their rulers, chose to come to terms with the 'Abbāsids. They decided to support 'Abbāsid legitimacy in return for the grant of a monopoly of key religious functions. The 'ulamā' ceased to be merely a diffuse opposition and took shape as a class advising rulers and holding state offices, including in particular that of qāḍī. Abū Yūsuf (d. 182 H., 798 C.), the famed jurist, first disciple of Abū Ḥanīfa (d. 150 H., 767 C.), and one of the progenitors of the Ḥanafī school, was the chief qāḍī to Caliph Hārūn al-Rashīd (170-193 H., 786-809 C.). A great many 'ulamā', of course, disdained the duties of office --

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[59]Emile Tyan, *Histoire de l'organisation judiciare en pays d'islam*, 2d ed. (Leiden: E.J. Brill, 1960), 75-76, on the historical implausibility of traditional accounts of the most famous Umayyad judge, Shurayḥ.

reportedly even Abū Ḥanīfa himself -- for reasons we have seen. Many continued in noble opposition: Aḥmad Ibn Ḥanbal (d. 241 H., 855 C.), founder of the Ḥanbalī school, withstood the Caliph al-Ma'mūn's (198-218 H., 813-833 C.) inquisition over a key tenet of rationalist dogma (the createdness of the Qur'ān) endorsed by the Caliph. At stake in that event, though it explicitly concerned only a metaphysical issue, was an 'Abbāsid attempt to push its absolutism further towards theocracy.[60]

We know little about how the relationships of ruler and 'ulamā' changed upon their undertaking this new cooperation. By the time of the 'Abbāsid empire, the fiqh was reaching the pinnacle of its creativity, showing already a high sophistication, as in the hands of Abū Ḥanīfa. The chief challenge it faced was its multifariousness, since it was prey to the disparate opinions of individual scholars -- who even differed broadly as to what were to be the authoritative sources of the law. What standardization had occurred ran only locally. We can easily imagine that strong compromises had to be made to permit this highly creative and idealistic system to serve as the law of the state, particularly if, as also agreed, its administrators were to be the pious scholars who developed it.

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[60]See Lambton, *State*, 40; Watt, 82-89 (the inquisition at a turning point in a struggle between the "autocratic" bloc and the "constitutional" bloc).

As for the rulers, the imāmate itself was in its Golden Age, pursuing its Persianate absolutism. Like the Umayyads before them, 'Abbāsid rulers seem to have seen the scholars and their sciences as a resource on which to draw, one perspective on truth, while they themselves played the central roles in the umma's destiny. They and their subordinates in governing did indeed exercise considerable administrative, fiscal, and penal law-making and adjudicatory powers. Even the 'ulamā' willingly recognized that in these fields the caliphs possessed extensive powers of legislation and adjudication, especially since the fiqh had not yet had opportunity to develop on them an extensive jurisprudence. In particular, there continued to be, as there always had been, courts and tribunals with power stemming directly from the ruler that existed alongside the courts manned by the scholars of the *sharī'a*.

An indication of the state of the legal system, and of the relationship between the fiqh scholars and the absolutist ruler, is given in an episode at the very beginning of the 'Abbāsid period. Ibn al-Muqaffa' (d. c. 140 H., 757 C.), a Persian convert to Islam, literary figure, translator of Persian works, and former minister to 'Umayyad caliphs, was an advisor to the Caliph al-Manṣūr (136 -158 H., 754-775 C.).[61]

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[61] 'Abd Allāh Ibn al-Muqaffa' was executed, though not on the ground of his theological or general political views at all. See F. Gabrieli, "Ibn al-Muqaffa'," *Encyclopedia of Islam*, 2d ed.

In a treatise addressed to the Caliph, he deplored the state of the legal system. He observed that the diversity of opinions among the fuqahā' was extreme, and rights to "life, sexual rights and property" would be adjudicated differently from one town to the next; and each scholar meanwhile would defend his own view vigorously, denouncing all others, even without a proof from the Qur'ān or sunna. He proposed:

> If the Commander of the Faithful were to decide to command that these cases and practices [*sunan*] be submitted to him in a writing, and with them submitted the sunnas or qiyāses which each group asserts as an argument, and then the Commander of the Faithful were to inquire into this, and enforce as to each case his opinion [*ra'y*] with which God were to inspire [*yulhim*] him, and he determine upon, and to forbid judgment [qaḍā'] not in conformity therewith, and were to inscribe this in a comprehensive, authoritative book, then [in that event] we would hope that God would make these disparate judgments, which are affected by error, a single and correct rule, and we would hope that the unification of practice would lead to an unanimity of action in accordance with the opinion of the Commander of the Faithful and his word [*an yakūna ijtimā'u al-siyari qurbatan li-ijmā'i al-amri bi-ra'yi amīri al-mu'minīna wa-'alā lisānih*] . . . .[62]

This proposal was never implemented. Yet it shows well the danger that the 'Abbāsid spirit of absolutism, indeed, near-theocracy, posed to the ijtihād spirit of pious fiqh scholars and judges.

Similarly, quaint stories are told that the Imām Mālik b. Anas (d. 179 H., 795 C.) was approached by the 'Abbāsid Caliphs al-Manṣūr, al-Mahdī (158-169 H., 775-785 C.) and Hārūn

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[62] 'Abd Allāh Ibn al-Muqaffa', *Treatise of the Companions*, in Muḥammad Kurd 'Alī, ed., *Rasā'il al-Bulaghā'*, 4th ed. (Cairo, 1374 H., 1954 C.), 126-27. See also Charles Pellat, trans., *Ibn al-Muqaffa* (Paris: Maisonneuve et Larose, 1976).

al-Rashīd with the request that he agree to unification of the Muslim nation upon a single law, or upon his book *al-Muwaṭṭa'*, which Hārūn wished hung in the Ka'ba. Mālik's answer is reported in various versions, among which are the following:

> Do not do this, because the people have previous opinions, and have heard aḥādīth and narrations. Each group of them has adopted what they have previously practiced and believed in, from the differences of [their] people and others. Turning them from what they believe is harsh. . . .
> People have gathered and learned things which you have not heard of.
>
> The Companions of the Messenger of God (S) differed in the furū' [or derived rules of law] and spread to the horizons, and each deems himself correct . . . .[63]

A very different spirit is felt in Abū Yūsuf's book of advice on public law to Hārūn al-Rashīd, written thirty years or more after Ibn al-Muqaffa''s proposal. The book's coverage is slim and not comprehensive, leaving perforce broad areas of public law to the discretion of the caliph. Yet it shows a member of the 'ulamā' confidently instructing the Caliph on the law to follow, drawing upon a settled, already highly sophisticated, Ḥanafī law. On some issues Abū Yūsuf chose not to resolve a difference of opinion, and said to the Caliph, "Adopt any of these views you wish. I hope this [breadth of

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[63]Quoted in Bakr b. 'Abd Allāh Abū Zayd, *al-Taqnīn wa-al-ilzām: 'ard wa-munāqasha* (Riyadh: Maṭābi' Dār al-Hilāl, 1402 H., 1982 C.), 15-17. Two other versions, even more ambiguous about the propriety of the idea, appear in Abū Muḥammad 'Abd Allāh b. Muslim Ibn Qutayba (d. 276 H., 889 C.), *al-Imāma wa-al-siyāsa* (Cairo: Mu'assasat al-Ḥalabī, n.d.), 2:142, 150.

choice] is facilitating for you."[64] In such early uses of Ḥanafī jurisprudence as the basis for state legislation, we sense the beginnings of school taqlīd, leading eventually, as suggested in the last Chapter, to the "closing of the door of ijtihād." Also, in this period took place the major events of the debate between the people of ḥadīth and people of opinion, the tendency to methodological unification around al-Shāfi'ī's system, and the emergence of classical schools of law, all discussed in Chapter One.

The central significance of this era, then, seems to lie in the success of the 'ulamā' -- during the era of the caliphate's greatest authority -- in developing an extensive, practicable law persuasively claiming divine authority, and winning for their product -- despite its primordially microcosmic nature -- an active, central and secure place in the legal system of an empire. Fiqh in its new role offered promise of being a means to restrain the power of rulers, and to secure for the 'ulamā' central roles in adjudication and legislation. The full consequences of these advances were yet to be felt.

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[64]Ya'qūb b. Ibrāhīm Abū Yūsuf (al-Qāḍī) (d. 182 H., 798 C.), *Kitāb al-kharāj*, 5th printing (Cairo: al-Maṭba'a al-Salafiyya, 1396 H.), 181; see also 169. Reports exist that Abū Yūsuf constrained his qāḍīs to follow the Ḥanafī school. Prof. 'Aṭwa, interview, Mar. 25, 1985.

c. The classical theory of the caliphate (to 5th H./11th C. century): microcosmic sovereignty proclaimed[65]

It seems that the 'ulamā' elaborated an explicit fiqh constitutional law doctrine only in the 4th/10th century,[66] when the 'Abbāsid caliphate was already far in decline. By this time it was commonplace for upstart governors to seize independent authority; indeed, the authority of the caliphs was at times reduced to the merely ceremonial, while sulṭāns exercised all real power. The most famous book of public law, by the Shāfi'ī jurist al-Māwardī (d. 450 H., 1058 C.),[67] was written in Baghdad,[68] when Baghdad and the caliphs were subjected to Shī'ī rulers, the Būyids, and elsewhere also Shī'ī dynasties were dominant.[69]

The striking thing about these writings is their effort, despite the paucity and indeterminacy of relevant revealed texts, and the contested and variegated nature of the imāmate's history, to assert a comprehensive fiqh theory of

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[65]The original inspiration for the thoughts in this section came from Marshall G.S. Hodgson, The Venture of Islam (Chicago: University of Chicago Press, 1974), vol. 2, The Expansion of Islam in the Middle Periods, esp. 46-52, 109-125, 342-362.

[66]Gibb, "Constitutional Organization," 1:7.

[67]Abū al-Ḥasan 'Alī b. Muḥammad al-Māwardī, hereafter "al-Māwardī."

[68]Laoust dates the book within the last thirteen years or so of al-Māwardī's lifetime. See Lambton, *State*, 83.

[69]One must be aware of the role in these writings of polemic against competing Shī'ī doctrines.

the state. This effort succeeds insofar as the theory here announced becomes the authoritative doctrine of the imāmate. By this theory, in effect, the part sets out to consume the whole; the 'ulamā''s microcosmic method here strives to swallow up the macrocosm. The theory may well represent an effort to build on the fiqh's stunning ideological successes, at a time when the imāmate itself was showing its weaknesses.[70]

Let us examine this theory with regard to the two issues of sovereignty identified above, taking them up in this case separately: one, the scope of power of the ruler; and two, legislative and adjudicative authority. For both subjects, we

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[70]This point is better shown by al-Juwaynī (d. 478 H., 1085 C.) than by al-Māwardī, whom the former criticizes for pandering to the Buyids (al-Juwaynī, *Ghiyāth*, editors' introduction, 28). Wael B. Hallaq, "Caliphs, Jurists and the Saljūqs in the Political Thought of Juwaynī," *Muslim World* 74 (1984): 26-41. al-Juwaynī was writing at a time when it was meaningful to hope for restoration of a powerful Sunnī imāmate. It seems that, for constraint of this emerging power, Juwaynī sets his hopes on the 'ulamā', and shows himself ready to accept all sorts of reductions in the qualifications and status of the imāmate in return for a new -- and indeed highly glorified, even utopian -- role for the 'ulamā' in power and society. He even speaks of the "mujtahid of the time" acting in the role of the Prophet, while the rulers of the time should act as did kings in the Prophet's time. al-Juwaynī, *Ghiyāth*, 275, 280-83. As we shall see several times below, in overall temper Juwaynī seems much closer to Ibn Taymiyya than to Abū Ḥāmid Muḥammad al-Ghazālī (d. 505 H., 1111 C.) (hereafter "al-Ghazālī"), al-Juwaynī's own student or to al-Māwardī, and may have influenced Ibn Taymiyya. (Ibn Taymiyya cites *Ghiyāth* in a short treatise, "Risālat al-Maẓālim al-Mushtaraka," in al-Sayyid Muḥammad Badr al-Dīn Abū Firās al-Na'sānī, ed., *Majmū'at al-Rasā'il* (Cairo: Maṭba'at al-Ḥussayniyya, 1323 H., 1910 C.), 25-34.)

shall consider separately first the theory, and then the practice.

i. Legitimacy and restraints on power

(A) Doctrine

We shall discuss two points about the classical theory of the imāmate: (1) that, after idealizing the means and criteria for selection of a ruler, it strikingly endorses an absolutist conception of the caliphate; and (2) that, even in considering the case (common enough) where a ruler turns out not to meet the qualifications of office, it does not relinquish its absolutist conception, and declines to place in such a ruler's way any positive, institutionalized restraints, such as might remove him or reduce his powers. Why did the 'ulamā' follow this course? Strikingly, and this is the significance of these points to us, in both these characteristics the classical theory can be shown to be in accord with the microcosmic and textualist nature of the 'ulamā' program.

To a degree paradoxical in view of the suggestion that this theory builds from fiqh's ideological strength, the classical public law exalts the powers and responsibilities of the imāmate. Oddly, the 'ulamā' showed themselves willing to distort the early precedents of caliphal rule, so strikingly democratic and egalitarian, to elaborate a political and constitutional theory that explicitly centered all power in the imām.

An illustration of this point, on a matter of particular concern to us, is the issue of qāḍī jurisdiction. In Chapter Two we portrayed the qāḍī as independent of the ruler, although we admitted that, since the qāḍī's judgments must be enforced, the ruler is an essential partner in the enterprise of judging. al-Māwardī's constitutional theory puts the matter far differently. The head of state is to him no mere accessory to judgment, but is the very root and source of qaḍā'. This is because the ruler's obligation is to establish sharī'a rule, and qaḍā' is simply means to that end. Only through the ruler can the obligation, general to all consciences, to see to the sharī'a's fulfillment be wedded to state coercion. The ruler is therefore the chief qāḍī, at least if he is qualified to act as qāḍī, and all others act only as his delegates. By an act of delegation of his personal responsibility, called ***wilāya***, the ruler determines, in his sole discretion, who is to wield power as qāḍī. He may remove judges at will. He has authority to allocate jurisdictions among qāḍīs, for example, by geographic area or subject matter. The pattern is the same for all other public functions.

Why did the theory derive from the early precedents this sort of personal absolutism? Although the chief causes no doubt lie elsewhere, such as competition with Shī'ism, hopes for restoration of the 'Abbāsid house, and the unavailability of any political models other than monarchy, let us also note

the aid it lends -- however paradoxical this may seem at first -- to the microcosmic project of the 'ulamā' and their fiqh.

Fiqh is the attempt to explain all life by moral duties, and therefore it is eager to define and regulate institutions -- even public law ones -- morally. It willingly conceives of all obligations as obligations of conscience owed purely to God; so viewed they are readily incorporated within the fiqh's microcosmic system.

The theory achieves this incorporation by a fundamental invention, that works to translate social and state functions into individual ones; this is the *farḍ 'ayn -- farḍ kifāya* distinction.[71] Obligations incumbent on each individual, such as prayer five times daily, or on a particular individual, such as to pay his debt or transfer sold property, are called ***farḍ 'ayn***, meaning simply "individual obligation." ***Farḍ kifāya***, meaning "obligation of sufficiency," is, on the other hand, a communal responsibility, such as the duties to establish prayer, as by providing employees for mosques, to establish courts to adjudicate disputes, or to levy troops for war. In farḍ kifāya the obligation falls on all of the individuals of the community until the duty is fulfilled by one or more of their number. If a particular duty can be met only by persons with certain qualifications, such as the

[71]Shihāb al-Dīn Abū al-'Abbās Aḥmad b. Idrīs al-Qarāfī (d. 684 H., 1285 C.), *al-Furūq*, 4 vols. (Beirut: Dār al-Ma'rifa, n.d.), 1:116-18.

office of qāḍī, the duty falls on each of those persons until a sufficient number of them fulfill it. This formulation is a striking move in the microcosmic project: it gives legal shape to communal responsibilities without the need to enact any corporate institutions themselves subjects of the legal obligations or rights; these institutions could distort or deflect the vigor of the individual religious relationship to God.

Applying this mechanism to the imām results in a doctrinal statement of total personal power. Since the imām holds ultimate material power, all obligations of the state come to a point as his farḍ 'ayn, and thus burden his individual conscience. All farḍ kifāya at the level of the umma are translated to farḍ 'ayn of the imām, immediately upon his appointment, and revert to the umma only if he fails to perform them.[72] Hence the imām must answer personally to God Himself for all responsibilities of state. This is the reason for the 'ulamā''s emphasis on the aḥādīth warning the ruler that God will call him to account for his trust, and that, if he fails the trial, he faces eternal punishment. Of course, the imām may appoint agents or delegates for his duties, by wilāya. The contract of wilāya shifts the burden of active

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[72]Thus, authors discuss how communities would fulfill the tasks of the furūḍ kifāya if there were no imām. al-Juwaynī, *Ghiyāth*, 279. An example would be the appointment of a qāḍī. Emile Tyan, "Judicial Organization," in Majid Khadduri and Herbert J. Liebesny, eds., *Law in the Middle East*, only 1 vol. issued (Washington, DC: Middle East Institute, 1955), 1:243.

fulfillment to the consciences of his appointees, but the latter hold office only at the imām's will, and he remains personally responsible overall.

Having translated general, shared or state duties into starkly individual ones, the 'ulamā' then became able to bring to bear their carefully crafted theory of ijtihād -- which served so well as the answer to the dilemmas of truth and power in the functions of qāḍī and muftī. As will be explained below, the 'ulamā' included among the qualifications of an imām that he be a mujtahid; this is indeed by far the most onerous of the prerequisites of the office. The doctrine visualized that the imām would forge in his solitary conscience out of the indications of God's textual revelation the true religious-legal ruling for every instance -- whether that instance is a judgment between individuals or an administrative command governing an empire. By ijtihād, and uṣūl al-fiqh, again justice and power are to be united through the prism of learned conscience -- here that conscience belonging to a ruler who possesses supreme worldly power. No blind, amoral restraint of contingency, worldly institution or competing vision of truth or authority invades to deform this consummation.

All this reflects the first of our two points about the classical theory, that it established absolutism. The second point is that the doctrine carries this absolutism a further step, by providing no positive political institutions to

constrain a ruler's behavior or to remove him from power, even should his conscience turn to evil, or he otherwise fail of the prerequisites of office. In fact, the doctrine seems systematically to avoid imposing any constraint on the ruler beside what he finds in his conscience.

Yet in the Qur'ān and sunna are found rich resources to justify restraining the exercise of power for evil. Two of these sources emerge from the Qur'ān's macrocosmic ideals, as we reviewed them above. Let us examine these alternatives, and ask why the classical doctrine neglects developing either as a meaningfully forceful constraint on power.

The first potential constraint is to argue that the Qur'ānic ordering of the right and forbidding of the wrong, its challenge of "iron," its condemnation of obedience in sin, should apply particularly to the supreme worldly power. Against an unjust supreme authority, such Qur'ānic injunctions seem to demand rebellion. Islamic history early confronted the issue of rebellion during catastrophic civil wars. In these wars the umma's high hopes for caliphal righteousness were dashed; after trying rebellion, they found it to be even worse. The extremist Khawārij sect's violent, and fissiparous, career confirmed the wisdom of the majority's choice. Moreover, the concept of rebellion against the unrighteous posed insoluble problems: who beside God would judge when the imām left the straight and narrow? Or when his sinfulness is beyond repentance? What guarantee could there

be that a new imām would be better than the last?[73] Rebellion tended to bog down in bloodshed and chaos an issue that, being God's transcendent judgment, could usually not be determined in any case.

The Qur'ān,[74] but particularly the sunna, can also be read to enjoin restraint. A number of aḥādīth require obedience to the ruler, even if the latter is unrighteous.

> [Talking of evil Muslim rulers to come, the Prophet was asked:] "Shall we not rebel against them?" He said, "No, as long as they uphold prayer among you [*mā aqāmū fīkum al-ṣalāh*] . . . . Rather, let one over whom a leader takes authority, and who observes [the latter] commit a disobedience to God [i.e., sin], disapprove what is disobedience to God, and not remove [his] hand from obedience.[75]
>
> Render unto [caliphs] their due. Verily, God holds them responsible for what he put in their charge.[76]
>
> Do not slander those in charge. If they do good, they have the reward and your duty is to give thanks. If they do evil, then theirs is the burden, and your duty is patience. They are but an affliction brought by God upon whomsoever He wishes. Do not receive the vengeance of God with disquiet and anger. Receive it with calm and supplication.[77]

From these aḥādīth and from its early experiences the umma drew a profound lesson, thereafter included in catechisms as a prime tenet of the faith -- that the religious obligations

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[73]Hodgson, *Venture*, 2:120.

[74][42:36-43] of the Qur'ān gives a subtle setting for this injunction.

[75]Muslim (Imāra 67, cf. 66). There are many versions. One (see ibid., 64-65), states, "No, as long as they pray."

[76]Muslim (Imārāt 46); Ibn Māja (Jihād, 2871).

[77]Abū Yūsuf, *Kharāj*, 11.

to obey one's ruler and not divide the community override any duty to resist wrong by violence against a ruler. From one profession of faith:

> We hold against rebellion against our imāms and rulers, even if they are oppressors, and we do not invoke God against them, nor withdraw a hand from obedience to them. We hold that obedience to them is part of obedience to God Mighty and Exalted as a religious obligation [*farīḍa*], as long as they do not command sinful action [*ma'ṣiya*]. We pray for their well-being and dispensation.[78]

Rebellion was abandoned as a frightfully costly, and ineffective and misguided, means to a moral order.

The Islamic theologians associated this debate with another one, that of when a Muslim can be declared an infidel. In a community where the ultimate doctrinal authority was God's revelation, two opposed dangers were presented: one, violent differences of opinion in the community; and the other, that, in order to avoid such clashes, a human agency fix doctrine. The majority's solution to both problems was another tenet of the faith: that all who pray to Mecca (or utter the attestation of faith) are Muslims, though they may sin; infidelity is shown only when one adopts, and does not repent from, a position falsified irrefutably by a proof from revelation. Hence such sayings of the Prophet as the

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[78]Ṣadr al-Dīn 'Alī b. Muḥammad Ibn Abī al-'Izz (d. 746 H., 1389-90 C.), *Sharḥ al-Ṭaḥāwiyya fī al-'aqīda al-salafiyya* (commentary on work by Aḥmad b. Muḥammad al-Ṭaḥāwī (d. 321 H., 933 C.)), ed. Aḥmad Muḥammad Shākir (Cairo: Maktabat Anas b. Mālik, 1400 H., 1980 C.), 324-328.

following: "If a man says to his brother, "O infidel!," one of them has taken that [epithet] back [to himself]."[79]

In regard to both problems, we observe a common tendency of the fiqh, noted already in the last Chapter, that, whenever demands are pressed for a categorical statement in God's name, fiqh shifts the question into a frame both non-positive and anti-institutional, preserving the sharī'a's transcendence. Thus, in these constitutional doctrines, the 'ulamā' claim no certainty other than that vouchsafed by the texts, and demonstrate their resistance to positive legal institutions.

The second potential source of constraints on the ruler is the traces left in the Qur'ān and the sunna of pre-Islamic Arab democracy and egalitarianism. These we touched upon in discussing the macrocosmic ideals of the Qur'ān. Here again, however, the theory turned decisively against the creation of any corporate or communal institutions, and denied each of the ancient constraints any politically binding shape. They survive solely as moral duties falling on individuals. Thus, as elaborated by the fiqh theory these constraints are chiefly three. First, citizens are exhorted to give their ruler their good counsel or advice [*naṣīḥa*]:

> The best jihād is when one speaks truth in the presence of a wrong-doing sulṭān.[80]

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[79]Ibid., 261-2. Muslim (Īmān 97).

[80]Abū Dāwūd (Malāḥim 4344); al-Tirmidhī (Fitan 2174); Ibn Māja (Fitan 4011-12).

> [The Prophet said,] Religion is good counsel [*naṣīḥa*]. We said, Of whom, O Prophet of God? He said, Of God, of His Book, of His Prophet, and of the leaders [*imāms*] of the Muslims and their mass [*'āmma*].[81]

Second, rulers are exhorted to rule by shūrā or consultation. They should seek good company, and pious advisers, particularly the 'ulamā'. But no consequence attends a ruler's failure to seek shūrā, or to abide by its conclusion. Third is a set of doctrines supporting the ideal that rule is by consent of the governed -- strikingly suggesting a number of basic political conceptions that in the West emerged only much later. The law provides that an imām obtains his office not through divine right or privilege of birth, but only by (i) his qualifications for office; (ii) his selection as qualified by influential people of the community; and (iii) the ***bay'a***, an oath of loyalty offered by subjects or by electors from among them on condition of the ruler's undertaking to uphold the sharī'a. The qualifications the imām must meet -- which seem not that demanding -- were that he be a male Muslim of a character at least as upright as that of an acceptable witness, that he be physically sound, that he possess the religious knowledge of a mujtahid, that he be of good judgment and skilled in matters of state, and that he be of the Prophet's tribe, Quraysh.[82] An imām who subsequently

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[81]al-Bukhārī 1:20 (Īmān); Muslim (Īmān 87); al-Nasā'ī 7:157 (Bay'a).

[82]Gibb, "Constitution," 1:9, citing al-Baghdādī (d. 428 H., 1037 C.). See Lambton, *State*, 76, 79-80, 89, 105-6, 141, 168-9, citing various authors.

failed of these qualifications, or breached the undertakings of the bay'a, was no longer validly a tenant of the office, and should resign or be removed.[83]

But, for the critical matter of enforcement, doctrine makes no provision; expositions of public law pass over in silence how a ruler is to be deposed.[84] This leaves the matter to be decided by necessity. The position is, in effect, that if it is possible to remove an unjust ruler without insubordination, rebellion and civil war, it ought to be done. But in practical terms, this usually occurs only when some other powerful person has already engineered an overthrow for his own purposes. In such cases, it is the

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[83]Hodgson, *Venture*, 2:119-120; Lambton, *State*, 77, 80, 94-5, 105, 146. Note that the issues arising when an imām becomes unqualified are usually stated in terms of his state as "*fāsiq*" or evildoer, implying that he has remained a Muslim. But are there acts so serious that they implicate not just the piety of the ruler, but his status as a Muslim? For if the ruler is not a Muslim, then he must be deposed, and the aḥādīth restraining rebellion do not apply. The strife with the Khārijites was precisely over their failing to draw a distinction at all between a ruler's sin and his loss of faith. The majority view demands for infidelity not only to act against a proven divine-law tenet, but also to consciously deny the truth of that tenet. Thus, a famous *salafī* statement of faith declares that a ruler's mere failure to uphold divine law does not imply his infidelity. Ibn Abī al-'Izz, *Sharḥ al-Ṭaḥāwiyya*, 266-70, 324-5, 327-28.

[84]See Lambton, *State*, 76, 79-80, 89, 105-6, 141, 168-9, citing various authors. As to al-Juwaynī, see Hallaq, "Caliphs," 35.

'ulamā' who issue the formal determination, by fatwā, of the old ruler's deposition and the new one's installation.[85]

We find then that neither potential positive constraint on ruler by the ruled -- rebellion or a binding voice in government -- survived in the 'ulamā' theory. This seems, once again, a clear encouragement to absolutism, and a fatal abdication from the sharī'a's call to bend power to the good. Did the Qur'ān not assert that truth needs the support of power, as well as power the support of truth? Why does the fiqh seem intent on withholding the challenge of iron, precisely where iron is most potently wielded? Is this lapse not clear proof of complicity, of a power-sharing arrangement, between ruler and 'ulamā'?

Yet note how natural these results are as support for a microcosmic sovereignty. To the 'ulamā', to subject the ultimate political/religious authority to forceful correction by another authority was a contradiction in terms. This was so for several reasons. One was political, a paucity of alternatives: they identified political authority with ultimate military power, and could little imagine other, or constitutional, forms of sovereignty. But the second reason was religious. Some political institution must be ultimate,

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[85]As to the Ottomans, Gibb and Bowen, *Islamic Society*, 1:85. The Wahhābīs continued the practice. See Michael J. Crawford, "Civil War, Foreign Intervention, and the Question of Political Legitimacy: A Nineteenth Century Sa'ūdī Qāḍī's Dilemma," *International Journal of Middle East Studies*, 14 (1982): 227-248. The most recent such event was in 1964, the deposition of King Sa'ūd in favor of King Faysal.

in the sense that it is subject to God's power but not human power. Then, two principles -- that God alone is sovereign, and that man's knowledge of His will is comprised solely in fixed texts, not in human beings -- entail that no such worldly power has authority to speak for God theocratically. God's power is itself active, forceful, overwhelming; though operating ultimately by means moral, unseen, in the bāṭin, it needs no forcible epitome of itself.[86] In a strenuously transcendental religious order, if human powers or institutions are endowed with final doctrinal authority, this denies God's sovereignty, and defeats transcendence.[87] It is as if at the extremes of material power a choice is starkly posed: does the system resist wrong and encourage right by means microcosmic or macrocosmic, transcendent or secular, conscientious or forceful? The 'ulamā' made their choice clear.

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[86]Recall that no option of separate realms, supernatural and natural, is available; power and truth -- worldly and other-worldly -- are at issue.

[87]Ibid. A useful analogy is Western legal systems upholding the rule of law by means of constitutionalism. The power of the constitution, a mere piece of paper, over tyrants with armies is achieved not by creating an all-powerful political authority to uphold the constitution, but rather by breaking up the powers of government among diverse entities as part of a whole regulated by the constitution and laws. No single authority can speak finally and coercively in the name of the constitution and the law. In the Islamic system, by contrast, the constitution and laws, being God-made not man-made, transcend not only each political entity separately, but all human institutions, including the state.

The 'ulamā' painted the issue in all-or-nothing terms: either absolutist rule (in one form or another) or rebellion and civil war. To us there appear to be middle solutions, but we benefit from a modern political imagination and more favorable political and technological conditions. Possible middle solutions would balance, under the single aegis of the Qur'ān, microcosmic and macrocosmic ideals, as we discussed in the Introduction to this Part. For example, ideals of popular consent and participation, backed only ultimately by the threat of rebellion, might conceivably have mitigated the narrowness of, but not toppled, an essentially microcosmic doctrine.

(B) Practice

If we shift from the doctrinal perspective to the political one of *de facto* power, we find the 'ulamā' busily engaged in a totally different program -- all of it absent from their explicit doctrine.

One practical effect of the 'ulamā''s program of microcosmic sovereignty is its strengthening of their *de facto* constitutional role as the sole authoritative interpreters of the law, vis-a-vis the absolute ruler as well as the lay public. By now the principles of school adherence and discipline were fully functional, giving the 'ulamā' control over large areas of the law. Recall also that since the 'Abbāsids the 'ulamā' had gained a monopoly over most of the religious functions of the state, including key functions in

the legal system. Thus, for example, although a qāḍī must be appointed by the imām, and can always be dismissed by him, yet the 'ulamā' monopoly assured that whosoever was appointed would be one of themselves.

This still portrays the constitutional and political importance of the 'ulamā' in too narrow terms. At this same period, the 'ulamā' were molding to their interests new social and cultural institutions, through which they would strengthen their broader influence in society. Of these new institutions the most important were the ***madrasa***, or the 'ulamā''s professional institution of learning, which emerged in the tenth century,[88] and the ***waqf***, pious endowments regulated under the rules of fiqh,[89] which supported 'ulamā' institutions including the madrasas. Equipped with these institutions, an 'ulamā' class gradually secured for itself enhanced status as a powerful social elite. It was able to arrange the means to control its own legitimation, that of divine 'ilm, or knowledge; to command an important source of material support, the waqfs;[90] and to recruit its own members,

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[88]Hodgson, *Venture*, 2:47-49; J. Pedersen and G. Makdisi, "Madrasa," *Encyclopedia of Islam*, 2d ed., pt. 4.

[89]Henry Cattan, "The Law of Waqf," in Majid Khadduri and Herbert J. Liebesny, eds., *Law in the Middle East*, only 1 vol. issued (Washington, DC: Middle East Institute, 1955), 1:203-222.

[90]Social activity at the level of the state was often performed not under state auspices, but privately through awqāf, including, for example, public works such as bridges or water supplies.

drawn from all ranks of society. The 'ulamā''s constituency was the masses themselves, whose intimate religious, familial and social concerns they advised, whose interests they mediated with the rulers, and whose feelings they channelled, whether in their counsel to princes or in riots in the streets.[91] An 'ālim became influential not only by scholarly attainments or the respect of his peers, or even by the power of appointments received from rulers; the ultimate seal of authority was the loyalty and admiration of the people. Such an 'ālim became largely immune from the threats of rulers. And the surest way to obtain the admiration of the people was by courageously standing up to rulers, and embodying, and giving effective political force to, the religious obligation of naṣīḥa as stated in the ḥadīth cited above.

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[91]Note the statement of Snouck Hurgronje:

> Muslim life has never really been ruled by the sharī'a and escapes its control more and more. But for many centuries, the sharī'a has been the measuring-rod by which the scholars and the mass of believers have judged all aspects of life, the ideal which no-one has dared to replace by any other, and from which the Doctors of the law have derived the uncontested right of fearlessly and openly criticising abuses, without sparing even those in the highest places.

Works, 74; see also ibid., 259.

For later periods, see H.A.R. Gibb and Harold Bowen, *Islamic Society and the West: A Study of the Impact of Western Civilization on Moslem Culture in the Near East*, 2 vols. (New York: Oxford University Press, 1957), 2:110-113 (Ottomans); Afaf Lutfi al-Sayyid-Marsot,"The Ulama of Cairo in the Eighteenth and Nineteenth Centuries," in Nikki R. Keddie, ed., *Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle East since 1500* (Berkeley: University of California Press, 1972), 149-165 (Cairo).

Again, we must not forget that 'ulamā' were integrated into the local economic groupings in society, and took to heart, and represented, the interests of those groups.

Clearly, for the 'ulamā', enjoying their many-sided success, it was imperative -- and this very much in the interest of restraining the ruler and guiding affairs of state to the good -- that the explicit constitutional and public law not undermine those microcosmic ideals on which the 'ulamā''s textualist specialization is based. Any alternative, such as one more consonant with pan-ordering or rule-law and conducive to positive law-making, would *ipso facto* create institutions in competition to the 'ulamā' as the arbiters both of ruler legitimacy and of legislation. Although there were many other determinants for the 'ulamā' stances toward the momentous political events of this and later periods, the logic of such a position must have played a role.

ii. Legislation and jurisdiction

(A) Doctrine

Passing on to consider our second topic as to sovereignty, that of authority to legislate and adjudicate, what legislative role does this absolutist theory assign to the imām? How did his authority compete with that of the 'ulamā' and the qāḍīs? In Chapter Two we studied at length the 'ulamā''s theory of legislation, namely, uṣūl al-fiqh, ijtihād and school taqlīd. We there noted how, even after concessions such as school taqlīd, the ideals and purposes of macrocosmic law-making were strikingly absent from the 'ulamā''s theory of legislation. In this Chapter we have expressed doubt whether the 'ulamā' theory of legislation

could be directly applied to the ruler, since his responsibilities run to doing justice not between individual litigants, but also at large in the entire society and in the mass. We have also seen that early caliphs practiced an extensive legislation, and moreover, in doing so, seemed to have preoccupied themselves precisely with macrocosmic concerns and methods of decision. How do the 'ulamā' in their classical theory respond to these challenges?

The 'ulamā' raised several lines of defense against the implication that the early caliphs' acts reflect a legislative power independent of the 'ulamā''s own conceptions. The first line of defense was simply to deny any divergence, and assimilate the caliph's methods to their own, construing them as acts of ijtihād by revered Companions. They then assigned doctrinal proofs to these precedents, though in many cases these proofs had to be reconstructed or assumed. This step was accompanied by appropriating those very decisions into the textualist fiqh, by making them texts from which to derive further rules. This is done through the doctrine of ijmā'. Since Companions were consulted in making these decisions, and since they were free to oppose them if they found them wrong, it was concluded that such dispositions by caliphs had gained the sanction of the ijmā' of the Companions. (As an example, recall the case where the lashing for wine-drinking is decided in "council" between 'Umar and other Companions. For this an

ijmā' was later claimed.[92]) Note here a relationship of close functional similarity, and also of potential mutual substitution, that exists between the doctrines of ijmā' and of shūrā, suggesting that ijmā' is the survival of shūrā in the 'ulamā''s textualist system.

But, even after such analysis, 'ulamā' still found the caliphs' broad and flexible resort to macrocosmic considerations too obvious to ignore. A second line of defense was to admit that the caliphs' in their ijtihād did encounter cases where they found scant guidance from texts, and claim that there they resorted to one or the other of the macrocosmically-rooted dalīls (such as maṣāliḥ mursala or utility) included within uṣūl al-fiqh. We recall that the 'ulamā', with significant differences of opinion, admitted such dalīls as lower-order principles of justification, exercisable only after texts had exerted their maximum influence on a question. This position, then, still construed an imām's activities as those essentially of a mujtahid, not of a head of state. (Here then is suggested how the early broad, pragmatic, adaptive legislation of the early caliphs left its mark, and survived in highly attenuated form, in such uṣūl al-fiqh sources as custom, utility [maṣāliḥ mursala], and *istiḥsān* or individual preference.[93])

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[92]See Ibn Qudāma, *al-Mughnī*, 10:329.

[93]An important early legal method among people of opinion surviving in the Ḥanafī school. See, e.g., Schacht, *Introduction*, 60-61; R. Paret, "Istiḥsān and Istiṣlāḥ,"

But even further concessions were demanded by the record, which most 'ulamā' were willing to make. How should one understand far-reaching administrative decisions, such as 'Umar's establishing the dīwān? Or caliphal decisions not in strict conformity with the final derived rules of fiqh? For example, what if it is shown that caliphs gave judgment based on circumstantial evidence, or that 'Alī used threats to produce evidence?[94] What of 'Umar's decision to banish from Medina a beautiful youth, himself blameless, because women were infatuated with him?[95] Overwhelming testimony forced frank 'ulamā' to admit that rulers, simply because they were rulers, must enjoy a freedom of action that could not always be hemmed in by the strictures of an uṣūl al-fiqh approach. This other principle they called ***siyāsa***, meaning "policy," or "conduct of affairs."[96] But against the extensive use of this principle they fixed a third line of defense: siyāsa was not

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Encyclopedia of Islam, 2d ed.

[94]Ibn al-Qayyim, *al-Ṭuruq*, 6-7, on cutting the hand upon the evidence of possession of stolen object. 'Alī used an ordeal by which falsity is shown by passage of black blood from pricked tongue. 'Alā' al-Dīn Abū al-Ḥasan 'Alī b. Khalīl al-Ḥanafī al-Ṭarābulusī (d. 844 H., 1440 C.), *Mu'ayyin al-ḥukkām fīmā yataraddad bayn al-khaṣmayn min al-aḥkām* (Cairo: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1393 H., 1973 C.), 183. 'Alī threatened a woman with bodily search to force her to produce a document. Ibid., 172.

[95]Ibn al-Qayyim, *al-Ṭuruq*, 16.

[96]Schacht states that the principle permitting caliphal administrative legislation was accepted from "very early under the 'Abbāsids," though the term "siyāsa" appeared only later. Joseph Schacht, *An Introduction to Islamic Law* (London: Oxford University Press, 1964), 53-55.

to be a grant of independent caliphal legislative authority, but applies only when the proper uṣūl al-fiqh methods do not yield clear and certain results. In fact, the 'ulamā' only allowed the term "siyāsa" within their system after qualifying it; the siyāsa they sanctioned was only "***siyāsa shar'iyya***," meaning "siyāsa according to the sharī'a."[97]

According to the 'ulamā', siyāsa shar'iyya functions as follows. A ruler exercising siyāsa should properly be a mujtahid, and inquire, as did the early caliphs, whether a text of the Qur'ān decides an issue, and if not, then any ḥadīth, then ijmā', then qiyās. But, as we have just seen, the early caliphs' example indicated their practice of a very broad ijtihād, broader than is captured by this textual presentation. From this 'ulamā' distilled the idea that the ruler could act, in pursuit of the general maṣlaḥa, as long as he offended no clear text [*naṣṣ*[98]] of the sharī'a. This idea also accorded well with the fact that few rulers, after the

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[97]See Emile Tyan, "Méthodologie et sources du droit en Islam (Istiḥsān, Istiṣlāḥ, Siyāsa shar'iyya)," *Studia Islamica* 10 (1959):101-09. Many scholars understand this siyāsa as having no necessary relation to the ruler, but exercisable by all. It then means merely the sum of sources of law where there is no text, regardless of who exercises it. Thus, Bakr Abū Zayd defines it simply as "that as to which there is no text" [*mā lā naṣṣ fīh*]. Shaykh Abū Zayd, interview with author, Riyadh, Apr. 24, 1985. Similarly, Prof. 'Aṭwa, interview, Nov. 23, 1983. Such views reflect strong claims that 'ulamā' and 'ulamā' institutions should perform roles in siyāsa functioning. Other scholars -- notably many Ḥanafīs and Shāfi'īs -- argued that siyāsa should be performed only by rulers. Tyan, "Méthodologie," 105-106. This will be discussed at length below; e.g., p. 494 below.

[98]See p. 289 above for one formulation of this test.

earliest days, were mujtahids, and thus capable of carrying out fiqh derivations for all their actions. Such rulers need simply to consult 'ulamā' to determine whether their actions conflict with a text. Such a modus operandi depends on there existing, by division of functions, a developed broad sphere of autonomy for fiqh and the 'ulamā' into which the ruler, under this lax rule of action, would not be allowed to tread.

Such is the classical theory of rulers' legislative authority, reflected in al-Māwardī and other authors.[99] But rulers, not surprisingly, did not fully endorse this limiting version of their powers. Rulers continued to demand macrocosmic approaches, and applied them first to their problems, not last; they thought of such approaches as their specialty and preserve, while they tried to associate the microcosmic approach with the 'ulamā', and confine it to them. We have seen how the Qur'ān can be interpreted to support their macrocosmic claims. In response, 'ulamā' would often condemn rulers as oppressors, and their legislation and legal acts as Godless, contrary to sharī'a.[100]

Given that we wish to emerge from the 'ulamā' perspective, and penetrate to the greater endeavor that they share with the ruler, we must have a neutral ground on which

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[99]See the following discussion of al-Māwardī's theories.

[100]Again, we must be aware that 'ulamā' excoriations of rulers, however based in fact, also serve a certain polemic purpose.

to evaluate these opposed claims. Specifically, we must have the means to discuss the possibility of legislation legitimately within sharī'a, but not within the fiqh, i.e., not accomplished by the 'ulamā' or according to their methods. Let us use the 'ulamā''s own name -- siyāsa -- for this type of legislation, as opposed to fiqh, the 'ulamā''s principle of legislation. Thus we link each of these two principles of legislation, fiqh and siyāsa, with the corresponding pair of legislative authorities, the 'ulamā' and the ruler.

If we now proceed from legislation to adjudication, the question arises, are siyāsa laws to be adjudicated by the qāḍī? No. As noted above, from 'Abbāsid times, the two legislative principles -- fiqh and siyāsa -- gave rise to two distinct principles of adjudication, and two systems of courts. This opposition in turn we shall refer to as that between siyāsa tribunals and qāḍī courts.

al-Māwardī's theory, in its ambition to rationalize past practice and subject it to fiqh regulation, lays down explicit rules for several siyāsa tribunals or jurisdictions. We saw above that his theory posits that the imām is the root of the power to adjudicate. Accordingly, since the ruler indefeasibly has the obligation to decide disputes arising under siyāsa rules, he is entitled to delegate this power as he chooses, and thereby to create adjudicatory bodies alongside the qāḍī courts.

The most important siyāsa jurisdiction regulated by al-Māwardī, which reveals dramatically the nature of siyāsa, is that of ***maẓālim***, or "injustices." Recognized since 'Abbāsid times, this authority was an expression of the supreme ruler's inalienable responsibility to assure justice in his realm.[101] Being intrinsic to supreme power, it could be exercised only by the imām himself or his immediate delegate. By this jurisdiction any citizen could appeal directly to the imām. al-Māwardī presents the jurisdiction as concerned with injustices by the following persons: governors, government officials, or powerful persons disdainful of ordinary justice; by government functionaries who disregard applicable rules; or by qāḍīs (or *muḥtasibs*[102]) who are unable to deliver justice against powerful persons.[103] al-Māwardī describes the one who exercises this office as properly possessing

> sublime rank, effectual command, awe-inspiring persona, manifest integrity, little covetousness, and much piety, because he needs the violent impetuousity [*saṭwa*] of protectors [*al-ḥumāh*] together with the steadiness of a qāḍī.[104]

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[101]It also is the survival of a Persian tradition, as admitted by fiqh authors: see Abū al-Ḥasan 'Alī b. Muḥammad al-Māwardī (d. 450 H., 1058 C.), *al-Aḥkām al-sulṭāniyyah wa-al-wilāyāt al-dīniyyah* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1398 H., 1978 C.), 78; Nizām al-Mulk (d. 485 H., 1092 C.), *The Book of Government or Rules for Kings*, Hubert Darke, trans., 2d ed. (London: Routledge & Kegan Paul, 1978), 13-14.

[102]See n. 22 above.

[103]al-Māwardī also lists as responsibilities supervision of awqāf, payment of government stipends, and maintenance of ritual observance. al-Māwardī, *al-Aḥkām*, 80-83.

[104]al-Māwardī, *al-Aḥkām*, 77.

Tracing the history of the maẓālim, he notes that during the time of the four Righteous Caliphs such a special jurisdiction was not needed because of the piety of the people, who did not need "the power of the worldly authority [*salṭana*] added to the justice of the qāḍī."[105] al-Māwardī states that maẓālim jurisdiction extends to civil disputes of an ordinary sort, overlapping here with the jurisdiction of the qāḍī. As to these, he notes the proper practice is to refer such cases to qāḍīs and otherwise "to judge . . . only in agreement with the rulings of qāḍīs and [other] judges."[106]

Across all its jurisdiction, however, the maẓālim authority supervenes various jurisdictional and procedural limitations imposed by fiqh on the qāḍī. He lists ten respects in which this is the case:

> One, the *nāẓir al-maẓālim* [one exercising maẓālim jurisdiction] possesses veneration [*hayba*, dread] and forcefulness that qāḍīs do not have, to deter litigants from controverting and repudiating each other [*tajāḥud*] and to restrain wrongdoers from contesting and vying with each other.
>
> Second, maẓālim jurisdiction leaves the constraint of obligation [*al-wujūb*] for the latitude of permissibility [*al-jawāz*], such that the *nāẓir* has broader range and wider say.
>
> Third, he makes use of superior [means of] intimidation and investigation of causes through factual indications and apparent circumstantial evidence, all of which the judges are constrained from, so that by [these means] he is able to reveal the truth and know the false claimant from the rightful.

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[105]Ibid., 78.

[106]al-Māwardī, *al-Aḥkām*, 83.

Fourth, he recompenses with corrective punishment one who exposes his injustice . . . .

Fifth, he can practice delay by deferring the litigants in the event of uncertainty as to their case and obscurity as to their rights, in order assiduously to investigate the facts of their case [*asbābihim*] and their circumstances. This is unlike judges, who must, if requested by one of the litigants, reach a judgment without delay . . . .

Sixth, if the litigants are difficult, he can refer them to the mediation of trusted persons, so that the latter may decide the dispute between them by agreed compromise. The qāḍī cannot do this unless the litigants consent to the reference.

Seventh, he has more scope to place constraining surveillance [*mulāzama*] over the two litigants when there are evident indications of contentiousness, and to approve the imposition of personal bond (for matters in which this is feasible) to cause the litigants to do justice to each other, and leave off contentiousness and mutual denial.

Eighth, he may hear the testimonies of persons whose character is unknown [*mastūrīn*[107]] to an extent not customary to qāḍīs in [hearing] testimonies of persons whose credibility is proved [*mu'addalīn*].

Ninth, he is permitted to put witnesses to their oath when he is in doubt about them, if they do so willingly, and to ask for additional [witnesses] to overcome his doubt and hesitation. This the judge cannot do.

Tenth, he can begin by calling the witnesses and asking them what they know about the dispute of the litigants. The qāḍīs' practice is to oblige the plaintiff to bring the evidence [i.e., the witnesses] and not to hear them until after inquiring from the plaintiff.

These are the ten aspects in which occurs a difference between the exercise of the jurisdictions of maẓālim and of qaḍā' in disputes. Otherwise the two are equivalent.[108]

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[107]This is to use a term of ḥadīth specialists. Muḥammad 'Alī b. 'Alī al-Tahānawī (d. 1158 H., 1745 C.), *Kashshāf iṣṭilāḥāt al-funūn* (Calcutta: 1862), 1:638. Compare R. Dozy, *Supplément aux dictionnaires arabes* (Leiden: E.J. Brill, 1881), 1:633, "celui qui a une position honorable," citing a Mamlūk source.

[108]al-Māwardī, *al-Aḥkām*, 83-84.

The broadest of these distinctions is the second. It means, as illustrated by cases cited by al-Māwardī in subsequent pages,[109] that the *nāẓir* is not, like qāḍīs, confined to give judgments or follow procedures determined solely by what is either obligatory [*wājib*] or prohibited [*ḥarām*][110] according to sharī'a, but may also act within the realm of what would otherwise be morally and legally "indifferent" [*mubāḥ*].

A second siyāsa jurisdiction regulated by al-Māwardī is that of ***shurṭa***, the name of an old Islamic jurisdiction charged with repression of crime, including detection, investigation, trial, and execution, and various other police matters.[111] He gives a similar list of aspects in which the shurṭa authority possesses powers beyond that of the ordinary qāḍī. This list is discussed in the next Part.[112]

(B) Practice

As to the practice of both legislation and adjudication, al-Māwardī's descriptions, in their relative idealism, were, by explicit purpose and presentation, post-hoc rationalizations of the arrangements obtaining under much earlier caliphs. During his own period matters had

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[109]Ibid., 85, 91-3.

[110]The maẓālim authority cannot order what the sharī'a forbids. Ibid., 86.

[111]The use of the term "shurṭa" for this function is very early, obtaining from the first years of the Muslim conquests. Tyan, *Histoire*, 574, 577.

[112]See p. 620 below.

deteriorated, and historical accounts indicate that later practices were even more heedless of fiqh and sharī'a. Let us defer to paragraph f of this section evidence as to the breadth of jurisdiction asserted under the siyāsa standard.

d. The period of the final decline and extinction of the 'Abbāsid caliphate (to 7th H./13th C. century): microcosmic sovereignty predominant; the sharī'a state

Returning to the issue of constitutional limits on the power of the ruler, recall that the classical law renounced such limits doctrinally and sought to achieve them instead through institutional means. What were the consequences of this course? Certainly, the classical law did not reverse the decline of the legitimate caliphate, which, indeed, after many humiliations, was extinguished altogether, the immediate cause being the sack of Baghdad by the Mongols in 656 H., 1258 C. The period, it must be emphasized, was one of endemic political instability and violence. The Mongols, whose terror-inducing tactics are so well-known, were only the last, and worst, plague.

What lesson did the ulamā' draw from the fact that the classical imāmate, and the course of power generally, had become ever more corrupt, irreligious, and generally fallen from grace? Did they conclude that it was because of their surrender of any doctrinal response to tyranny other than the constraints of conscience? Did they consider finding new

forms of legal and constitutional truth that would better constrain the ruler to do justice?

It seems that these developments deflected them not at all from their course. Indeed, just as earlier they had renounced a right to rebellion, now they sought to remove any remaining doctrinal obstacles to a working legitimacy in *de facto* rulers. At a time when power usually deviated decisively from the ideal path, even that set by al-Māwardī a century or two before, one problem of legitimacy after another was presented: in each case the 'ulamā' resolved to lend the state of affairs the sanction of fiqh.

First, 'ulamā' were faced with the issue of a regional ruler who usurps his power without appointment from the caliph (this before the caliphate's extinction), and who offers the latter only a *post hoc* ritual homage.[113] al-Ghazālī, the famed theologian (d. 505 H., 1111 C.), speaks of a provincial sulṭān who gains his position not by appointment from the caliph but by force:

> An evil-doing and barbarous sultan, so long as he is supported by military force, so that he can only with difficulty be deposed and that the attempt to depose him would create unendurable civil strife, must of necessity be left in possession and obedience must be rendered to him, exactly as obedience is required to be rendered to those who are placed in command. . . . For if we were to decide that all governances [wilāya] are now null and void, all institutions of public welfare would also be absolutely null and void. How should the capital be dissipated in straining after the profit? Nay, but

[113]This position reluctantly accepted by al-Māwardī, Gibb, "Constitution," 1:18-9, and willingly by al-Juwaynī, *Ghiyāth*, 77 (intro. 30); Hallaq, "Caliphs," 32.

> governance in these days is a consequence solely of military power . . . .[114]

Next arose the issue of a caliph subject, in matters of pelf and power, to a sulṭān, but still performing certain religious functions of the state.[115] This dualistic solution attracted considerable attention during the Seljūq Sunnī revival. al-Ghazālī is credited with innovating a theory of the imāmate in which the imām (legitimacy), the sulṭān (power), and the 'ulamā' (knowledge) complement each other to fulfill the prerequisites of the imāmate.[116]

Finally, the 'ulamā' confronted the issue of the imāmate being usurped by a person wholly lacking the qualifications for office and imposed on the umma by force.[117] Even this situation the 'ulamā' were willing to consecrate; they accepted such an imām's authority, declared rebellion against him impiety, and indeed equated him, in terms of the duties owed him and the rights he possessed, with the true caliph.[118] Thus, al-Ghazālī discusses an imām's failure to meet the qualifications of office:

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[114]Gibb, "Constitution," 1:19-20.

[115]Ibid., 20-21.

[116]Lambton, *State*, 109-115.

[117]al-Juwaynī argued that an 'Abbāsid caliph, if weak, ought to be deposed in favor of a strong military ruler, even one not from Quraysh, if the latter possesses the power necessary to fulfill the sharī'a's demands on the office. Hallaq, "Caliphs," 39, 41.

[118]Prof. 'Aṭwa, interview, Jan. 22, 1984.

> Which is the better part, that we should declare that the qāḍīs are divested of their functions, that all [governmental functions] are void, that no marriages can be legally contracted, that all executive actions in all parts of the earth are null and void, and to allow that the whole creation is living in sin -- or to recognize that the imāmate is held by a valid contract, and that all executive acts and jurisdictions are valid, given the circumstances as they are and the necessity of these times?[119]

Indeed, from this period, 'ulamā' writings come close to celebrating a legitimacy deriving simply from supreme material power; in this power's very irresistibility is a token of God's will -- either His blessing in a just sulṭān, or His tribulation in an unjust one. Such discussions cited the ḥadīth "The sulṭān is the shadow of God on earth."[120]

Once again, though our modern sensibilities are alarmed by this abdication from struggle against rampant evil, we may find a certain method in the 'ulamā''s concessions. Note that, as each doctrinal step was taken, the effect is one of loosening the ties between legitimacy, on the one hand, and the person and even office of the ruler, on the other, and thereby advancing the cause of the sharī'a itself. For example, as in al-Ghazālī's statement above cited, accepting a "barbarous sulṭān" as a valid leader is possible only because the functions of government stand upon another foundation -- the sharī'a itself. Hence he can refer to the latter standard as the "capital," and to a qualified and

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[119]Gibb, "Constitution," 1:19-20; see Lambton, *State*, 110.

[120]See, e.g., al-Ghazālī's own "mirror of princes," al-Ghazālī, *Book of Counsel*, 45.

righteous ruler as mere "profit."[121] Let us call this innovation the transition from the historical imāmate to the "sharī'a state,"[122] a transformation which Ibn Taymiyya soon made even more explicit.[123]

Another example of how this sort of reasoning altered legal stances toward authority concerns the issue of qāḍī jurisdiction. Against rulers now dissociated to a degree from the sharī'a, 'ulamā' began to claim that qaḍā' is an office established not by the ruler but by the sharī'a, or that the qāḍī serves the umma, or the Muslims, not the ruler.[124] On this ground, for example, scholars argued that, while agency law permits an agent to be removed at any time, the ruler

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[121]The step of explicitly identifying the sharī'a as the primary standard was not yet necessary in Ghazālī's time, since the theory still could rely on the sulṭān's ritual oath of allegiance to the caliph of the 'Abbāsid house, although even earlier al-Juwaynī seems to have considered the step. See n. 70 above.

[122]The term may have been used first by Nadav Safran, "The Abolition of the Sharī'a Courts in Egypt," *Muslim World*, 48 (1958): 20-28, 125-135, relying heavily on Gibb, "Constitution."

[123]See, for the contrast of Ibn Taymiyya with earlier authors in this respect, Laoust, *Essai*, 296-317.

[124]Tyan, "Judicial," 239 ("As of a comparatively late period"); Tyan, *Histoire*, 155-58; see for specific examples, al-Ṭarābulusī, *Mu'ayyin*, 33; 'Alā' al-Dīn Abū al-Ḥasan 'Alī b. Sulaymān al-Mardāwī (d. 885 H., 1981 C.), *al-Inṣāf fī ma'rifat al-rājiḥ min al-khilāf 'alā madhhab al-imām al-mubajjal aḥmad b. ḥanbal*, ed. Muḥammad Ḥamid al-Fiqī, 12 vols., 2d printing (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1400 H., 1980 C.), 11:144.

could remove a qāḍī only for cause, since the rights of the people were implicated in the qāḍī's appointment.[125]

Dissociation of the imām from pristine legitimacy could not advance to the point of dismantling the theory of the canonical imāmate, since much of this theory possessed the sanctifying aura of ijmā'.[126] Instead the 'ulamā' availed of the paradoxical stratagem already mentioned, of elevating the past imāmate, thereby accentuating how far the modern rulers deviated from the ideal past. Convinced that times were growing ever more corrupt [*fasād al-zamān*] as the Prophet's age receded, the 'ulamā' retained the pristine caliphate, not as a practical institution, but as a dogmatic ideal, a utopian aspiration, a sacred link through history to the Prophet, the symbol of the umma's unity.[127] Thus, imāmate theory escaped being held to account for the failings of present political reality, while serving as a fixed point of aspiration.

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[125]Prof. 'Aṭwa, *Muḥāḍarāt fī 'ilm al-qaḍā': qism al-tanẓīm al-qaḍā'ī* (Riyadh: Mimeograph, Imam Muhammad University, n.d.),
129 (Ḥanafīs said to allow removal without fault).

[126]The caliphate of Abū Bakr is frequently cited as an example of a legal institution based on ijmā'. Attack was possible, however, on such claims of ijmā'. Indeed, Ibn Taymiyya denied ijmā' claims related to the caliphate. Laoust, *Essai*, 282-83, 285. Much of the force of ijmā' here is of the generalized, communal, atmospheric type, or that the caliphate implicates universal and long-held religious expectations and assumptions. See Chapter One, n. 97.

[127]Cf. Qur'ān, e.g., [21:92] "Verily, this community of yours is one single community . . . ."

We noticed a similar pattern of thought in our discussion of taqlīd and school discipline,[128] phenomena that also became more entrenched as the caliphate declined and political chaos increased. Taqlīd theory, too, was offered only as a falling from truth because of corrupted times.

It is worth digressing briefly to compare these two transformations in political and legal theory, singling out the common characteristics. First, recall that taqlīd doctrine had the purpose of serving several essentially macrocosmic objectives of the legal system -- legal predictability and uniformity, discipline, and hierarchical control over legal change. Second, note -- a vitally important point -- that taqlīd doctrine contemplates that these ends would be met by the 'ulamā', not the state. Third, note that the doctrine sought to achieve its goals in a way that preserved intact, albeit at the level of purest theory, the firmly transcendental, microcosmic ideals of uṣūl al-fiqh. Thereby the doctrine maintained the ideal sharī'a in meaningful relation to the actual legal system while still transcending it; it guided the society macrocosmically while remaining accessible intimately and microcosmically to the pious individual. While providing a practical and knowable law, it left open, indeterminate, the issue of ultimate truth. Clearly operable here is meta-ordering's instinct to raise up steep hierarchies of truth-values. Fourth, the doctrine

[128]See p. 157 above.

operated in part by locating its ideal vision in idealized historical events, in particular by exaggerating the religious status of the earliest authorities of the schools.

The 'ulamā''s acquiescence in the decay from their ideal constitutional theory exhibits exact parallels to each of these characteristics of taqlīd doctrine. First, the theory fulfills a state objective -- here an effective legitimacy as Islamic order, quelling impulses to rebellion. Second, the theory gives the 'ulamā' -- not the ruler -- significant control over this legitimacy. This is because the theory, while granting a concessive legitimacy to the ruler and disapproving rebellion, yet allows the 'ulamā' to decide when to revert higher up the scale of orders of justification, where the theory is powerful to de-legitimize. Third, note that again the accommodation is to preserve a theory that is microcosmically moral and transcendental. Fourth, again the theory proceeds by locating its ideals in a glorified stage of the Islamic past -- here the early caliphate.

What is the explanation for these parallels (and others)? Quite obviously, the 'ulamā' were working to create a state system dependent, for its order and cohesiveness, less on the ruler or any other worldly authority, and more on the fiqh as administered by the 'ulamā'. Qur'ānically, the caliphate is clearly no end in itself, but only a means to fulfilling God's commands and creating a divine order on earth. The caliphate was no longer serving the purpose. In a time of political

chaos, the ulamā' set about to minimize the role of the ruler, by starving him of true legitimacy, marginalizing his functions, obstructing his institutions, and in the end reducing him to the lowest level of justification, that of sheer military force.[129]

To turn from doctrine to practice, recall how we earlier observed ulamā' initiatives to create, under the cover of microcosmic doctrine, macrocosmic institutions consolidating their authority. These initiatives continued apace in the period we are discussing, and are relevant to both aspects of sovereignty we are addressing, restraint on the ruler, and legislation and adjudication. Marshall Hodgson brilliantly describes the complex social structure of the Muslim societies of the years from approximately 950 C. through 1500 C., and of the roles of sharī'a and 'ulamā' in that order. During this time an international civilization, linked together by the universalizing sharī'a, administered by 'ulamā', was able to flourish despite chaos at the local political level.[130] This order survived largely by shifting functions of the state into

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[129]In this spirit the fiqh at times can deal with the ruler as an arbitrary, external force of evil, intruding on the order of human relations like tempest or disease. Hence, a trustee of a deposit is excused of its loss in the event the sulṭān usurps the deposit by threats of torture, beating and imprisonment. 'Abd al-Razzāq Aḥmad al-Sanhūrī, *Maṣādir al-ḥaqq fī al-fiqh al-islāmī*, 6 vols. (Cairo: Jāmi'at al-Duwal al-'Arabiyya, Ma'had al-Dirāsāt al-'Arabiyya al-'Āliya, 1954-59; reprint ed., Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 177-180.

[130]Hodgson, *Venture*, vol. 2.

private or communal hands, and by advancing the independence and prestige of the 'ulamā' and the fiqh.[131] In this society, in Hodgson's words, "the role of the state was as far reduced, especially in the basic sphere of law, as it ever has been in citied high culture."[132] The history of this period therefore substantiates our analysis of a transition in legitimacy favoring the 'ulamā' and their institutions at the cost of the ruler.

We may now stand back to appreciate in stark outline a profound tendency of the ulamā''s efforts in constitutional doctrine and practice over the centuries of our review. Whether fully deliberate or not, the outcome of their efforts was to replace the one-time functioning institution of the imāmate with an ideal. This ideal is, like so many of their legal ideas, one that <u>in doctrine</u> is firmly microcosmic -- transcendent, indeterminate and inaccessible, rooted in the individual conscience, resistant of positive expression or institutionalization -- but which <u>in practice</u> -- at lower levels of truth, compelled by necessity, approximate and mundane -- augments the portion of macrocosmic power and authority wielded by the 'ulamā' and the fiqh. Note that the

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[131]'Ulamā' of the time prided themselves on their withdrawal from the state and power. Lambton, *State*, 314-5. Pious traditions to this effect are related in Abū 'Umar Yūsuf b. 'Abd Allāh al-Qurtubī Ibn 'Abd al-Barr (d. 463 H., 1071 C.), *Jāmi' bayān al-'ilm wa-faḍlih wa-mā yanbaghī fī riwāyatih wa-ḥamlih*, 2 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1397 H., 1978 C.), 1:163-186.

[132]Hodgson, *Venture*, 2:350.

ulamā''s achievement was mostly at the cost of the ruler, and of the stability and prestige of the state.

In this period there emerges clearly into the open an antinomy, a clear separation, between the ruler and the ulamā', between the fiqh and siyāsa. If one approaches this antinomy carefully, making the bifurcation as we have above, one may locate here an Islamic counterpart to Western experiences of the separation, even opposition, of church and state.

For the remainder of this book, a primary topic of study will be the profound tension discovered here -- of competition and cooperation, contradiction and complementarity, opposition and interdependence -- between the rulers, called *umarā'* [sing., *amīr*, lit. "commander"], and the 'ulamā', and simultaneously between the theories of justification of which each group is the carrier.[133] Equipped with our new perspective, and looking back across the past of Islamic constitutional doctrine to the Qur'ān, we realize that this competition is primordial, innate, in the Islamic political venture. As long as truth is assumed to derive from revealed texts, and this derivation is the 'ulamā''s monopoly, they will claim to dispense legitimacy based on textual truth, and

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[133]It seems little is known about the application of sharī'a and the allocation of legislative and adjudicative jurisdictions between rulers and qādīs during this period. See Halil Inalcik, "Ḳānūn" and Lambton, "Maḥkama," *Encyclopedia of Islam*, 2d ed. Tyan, *Histoire*, gives some scattered information.

they, as we have seen, found ways to translate that monopoly into positive political and social authority. But the ruler possesses a monopoly of force, and this attracts to him an indefeasible, wholly primordial, legitimacy of his own, this legitimacy indeed recognized in the religion (and also outside the religion, though this latter is condemned in the Qur'ān). Locked into their separate tasks, neither of the parties could do without the other.

e. Comparative excursus: the relationship of truth and power as microcosm and macrocosm

In the opposition between 'ulamā' and rulers, in its stark form after the elimination of the caliphate, we sense a fundamental vector, or tension, resonating with all the various oppositions, contrasts, we have accumulated throughout. We sense that aligned with each of these oppositions is the opposition with which we began this Chapter -- one indisputably fraught with universal human meaning -- that between truth and power.

However much the poles of each of these oppositions may unite in the ideal, in the real world they separate, drawing apart, but not overcoming a mutual attraction born of their origins. None of these oppositions has presented us with a stark opposite, a straight-line polarity, but instead more of an organic relationship within a whole. We have modeled these oppositions several times using the concept of perpendicular coordinates defining a plane. Let us consider whether

additional illumination is possible from modeling them instead in the relation of microcosm and macrocosm.

Our use of the pair microcosm and macrocosm derives in part from another pair, that of individual human being and human society. In both pairs, the opposed poles exhibit a relationship that is organic, intimate, indissoluble, part to whole, whole to part. Consider how at times each one of the poles of these pairs will stand as symbol for the other; at times they are complements, contraries or mirror images; at times they almost collapse into each other.

Is there advantage, then, in considering truth and power to be related as microcosm and macrocosm? Does not Islam portray God's power as congruent, and ultimately identical, to God's truth? It portrays God's power, which enacts the world outwardly, as ultimately at one with His truth, which, known through revelation, is approached inwardly, in the inner-transcendent recesses of man's conscience. The Qur'ān seems to cycle between utter power in the outward, natural macrocosm, and utter truth in the inner-transcendent microcosm, to culminate in the utter power and truth of Judgment Day. The Qur'ān suggests a parallel dialectical alternation in the willed, artificial order of human life: it points alternately to assertions of power in the macrocosm of community and to claims of truth in the microcosm of the individual, and then commands their ideal unification.

To speculate more generally about the application of a microcosm/macrocosm model, let us provoke some questions with which to test such a model's utility as we proceed. When is it useful to imagine macrocosmic phenomena -- social, general, outwardly-expanding -- as mimicked, replicated or modelled microcosmically -- individual, concrete, inwardly-expanding? And vice versa? Does not the tension, the poignancy, of our inquiries into truth and power seem to stem from some felt sense of organic relationship between truth and power? Does not truth exert palpable power, though palpable only inwardly, subtly, in its fashioning, and enforcing, the realities of thought and conscience? And does not power somehow offer an outward form of truth, in its irresistably forming reality, in its very undeniability?

Is there a clue here why a vision of truth or legitimacy subsisting only within humans seems to incarnate itself automatically in outward, forceful, social forms, for example, in connections between conviction and coercion so innate as to be often invisible; and why outward power similarly seems obliged to structure inward within human consciences a model of itself, or it fails?

Is this, further, a clue why each pole of our various oppositions, taken to an extreme, tries to turn into its opposite? Thus, here the 'ulamā', despite their conquest of the domain of explicit truth, fail to garner all truth to themselves; the very stringency of their effort to do so

causes them to yield material power to the ruler, who then, in turn, power being essential to the Islamic macrocosm, reaps an indefeasible legitimacy. Similarly, the ruler here eagerly asserts his monopoly of externally coercive power, brooking no positive check whether from doctrine or from arms, heedless of his legitimacy; from that very situation, truth gains its urgency, and power springs up among the the defenders of truth, the 'ulamā', taking form as their social and legal influence, and then further incarnating in their elite class and worldly institutions.

Let us bear in mind these subtle connections as we proceed.

f. Prologue to the Great Empires (through 9th H./15th C. century): Ibn Taymiyya, siyāsa shar'iyya and preparation for a synthesis

As we have already observed, the 'ulamā''s relationship with the rulers has continually changed in conceptualization and practical content over the centuries. The course of this relationship, in all its complexities, is a prominent unfinished task of Islamic historiography.

In this development it seems a point came when the 'ulamā' acknowledged that their doctrinal and institutional enterprise in constitutional law had outlived its usefulness, that the fiqh had become too narrow and unrealistic, and that the ruler and siyāsa principles deserved a new accommodation.

The idea that Muslim society demands, alongside the fiqh, siyāsa power and even siyāsa laws and tribunals had gained impetus under the Seljuqs, and strengthened further by the influence, in states succeeding the Mongol invasions, of the Mongol dynastic law, the *yasa*. Siyāsa shar'iyya was the heading under which such thoughts were advanced. Ibn Taymiyya was perhaps the most famous exponent of siyāsa theory, and for him it served as a vital part of a much larger attempt at revivification of the fiqh.

Ibn Taymiyya strenuously worked to reorient the relationship of 'ulamā' and rulers, renouncing the idea that the 'ulamā' should withdraw from the practical domain of the sharī'a because of disdain for the state of the world, while the rulers left in charge ever worsened:

> If the sulṭān is isolated from the religion or the religion from the sulṭān, then the state of the people is corrupted. . . .
>
> When the desire for wealth and honor overcomes many of those in power, and they withdraw from the true faith in their responsibilities, many of the people conclude that positions of command are incompatible with true faith and the perfection of religion. Then some of them become overcome by religion, and turn from [even] those [uses of power] needed to complete the religion. Others of them perceive [religion's] need for such functions, and undertake them, abandoning the religion because of their conviction that it is incompatible with these [duties]. Religion occupies for such the place of pity and lowliness, and not high position and glory. Thus, many of the people of the two religions are overcome by inability to complete the religion and anxiety because of the trials that have beset them in establishing it; then their way is considered weak and lowly by those who perceive that their welfare and the welfare of others cannot be achieved through it. . . . Verily the establishment of religion is by the Book of guidance and by victorious iron, as God has mentioned. Everyone must exercise ijtihād to unite the Qur'ān and iron for God's

> sake and to seek what is within his power, asking therein the aid of God. Then the world will serve the religion.[134]

In multiple contexts, Ibn Taymiyya argued that the dry textualism, the over-scrupulous method, of the fiqh had led to its stultification and its removal from life, forcing events into the hands of corrupt rulers, whose practice would thereby never be redeemed.

Until Ibn Taymiyya, to constrain rulers to uphold sharī'a, 'ulamā' had relied heavily upon fiqh's lofty scruples, and the effect of these to starve rulers in the people's eyes ever further of legitimacy. Now, convinced that rulers needed legitimacy for renewal and that 'ulamā' needed greater access to power to do good, or that power and truth needed to be reunited for the benefit of each, Ibn Taymiyya made open retreats from idealistic constitutional provisions. Ibn Taymiyya accepted the past 'ulamā' tendency to lend sanction to rulers meeting fewer and fewer of the requirements of classical theory, but now innovated in making these retreats not mere grudging concessions to necessity but frank and willing doctrine. For example, first, he admitted that, since the period of Righteous Caliphs, the imāmate itself had never meant more than rulership *de facto;* second, there was no point in demanding more exacting qualifications in the imām than the good character of a witness; and third, requiring only one imāmate at a single time is not necessary to

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[134]Ibn Taymiyya, *al-Siyāsa*, 189-191.

symbolize the unity of the umma; multiple, regional imāmates are possible, since the sharī'a provides the symbol of unity.[135] His advances here were never accepted; the majority of 'ulamā' until today do not acknowledge these points.[136]

To compensate for his willing lowering of doctrinal standards, Ibn Taymiyya required a substitute principle of restraint, one more positively operative, and formulated in more explicit terms. He proposed a condominium of power, a cooperation [*ta'āwun*] between rulers and 'ulamā'.[137] Interpreting the phrase "those from among you who have been entrusted with authority" [*ulū al-amr*] in the Qur'ānic verse enjoining obedience to God, the Prophet and those in authority, he states:

> [T]hose in command [*ulū al-amr*] are of two types: the scholars ['ulamā'] and the rulers [*umarā'*]. If they are sound, the people are sound, but if they are corrupt, the people are corrupt.[138]

In interpreting the term as embracing both 'ulamā' and rulers, Ibn Taymiyya differs with many earlier scholars, including al-Māwardī, who interpreted the term as meaning either the

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[135]Laoust, *Essai*, 278-283, 288-296.

[136]Prof. 'Aṭwa maintained that Laoust's claim as to these positions of Ibn Taymiyya is false, and that the latter held to the unitary and obligatory caliphate. Prof. 'Aṭwa, interview, Jan. 22, 1984.

[137]Laoust, *Essai*, 293-4. Though the 'ulamā' are primary, all the community has the obligation to contribute. Ibid., 293-6, 301-2.

[138]Ibn Taymiyya, *al-Ḥisba*, 117.

'ulamā' or the rulers, but not both.[139] He chided as abandoning their duty 'ulamā' too fastidious to risk their piety among the temptations of power; while some 'ulamā' by association with rulers do no doubt seek power and pelf, the actions of all shall be judged by their intention.[140] God does not demand more than mankind is capable of.[141] Reducing evil is a good, and drawing difficult balances between evil [*mafsada*] and good [*maṣlaḥa*], and between degrees of evil, and degrees of good, is an indispensable part of enforcing the sharī'a,[142] requiring one at times to do something forbidden by sharī'a in order to avoid a greater evil.[143] He talked often of the Muslims achieving the tasks before them through their complementary strengths; thus, in filling an army command, one who is evil-living but strong should be chosen

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[139]'Abd al-Raḥmān 'Abd al-'Azīz al-Qāsim, *al-Islām wa-taqnīn al-aḥkām; da'wa mukhliṣa li-taqnīn aḥkām al-sharī'a al-islāmiyya*, 2d ed. (Riyadh: by the author, 1397 H., 1977 C.), 58-64.

[140]Ibn Taymiyya, *al-Siyāsa*, 63-64, 67-76.

[141]The point is a constant touchstone. See, e.g., ibid., 183-84.

[142]Ibid., 63-64.

[143]Ibn Taymiyya, "Maẓālim," 334-6. An example is paying one's share of a tax unlawfully imposed on your community, since otherwise you are forcing others to pay more than their share.

over one pious but weak, while the reverse rule should be followed in choosing a clerk.[144]

Ibn Taymiyya agrees with the old wisdom forbidding rebellion against rulers. Indeed, Ibn al-Qayyim makes this prohibition even more unconditional by restating the old teaching even as to rulers pejoratively called "kings" [*mulūk*], and declaring that revolt is the "source of all evil."[145] But Ibn Taymiyya coupled this teaching with others buttressing his conception of legitimacy founded on the sharī'a, to be effectuated by the influence of the 'ulamā'. For example, he interprets the Qur'ān as requiring obedience to rulers, if they are just, in all matters not known to constitute disobedience to God, and, if they are unjust, in matters known to constitute obedience to God.[146] Ibn Taymiyya spoke emphatically of the obligation on all to give advice [*naṣīḥa*] to rulers.[147]

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[144]Ibn Taymiyya, *al-Siyāsa*, 27-28, quoting Ibn Ḥanbal. He also spoke of appointing more than one person to a task, or linking functions, so that the inadequacies of one are made up by another's strengths. Ibid., 31.

[145]Ibn al-Qayyim, *I'lām al-muwaqqi'īn 'an rabb al-'ālamīn*, ed. Ṭāhā 'Abd al-Ra'ūf Sa'd, 4 vols. (Beirut: Dār al-Jīl, 1973), 3:4.

[146]Ibn Taymiyya, al-Siyāsa, 16; al-Nafīsa, "Law," 123, citing Ibn Taymiyya, Majmū'at, 28:170; Ibn al-Qayyim, I'lām, 1:48-51.

[147]See, e.g., Ibn Taymiyya, *al-Siyāsa*, 16.

Passing to the issue of siyāsa legislation, Ibn Taymiyya[148] advocated a reunification, in the spirit of the earliest Muslims, of both fiqh and siyasa. Thus, he would firmly declare that siyāsa too, and not fiqh alone, was part of the divine sharī'a. In giving a definition of sharī'a as meaning the Qur'ān and the sunna, he stated that within this sharī'a comes

> the [tenets of theology,] the siyāsa of rulers and treasurers [*wulāt al-māl*], the judgment of the judge [*ḥākim*], the chieftainship [*mashyakha*] of the shaykhs,[149] the ḥisba authority,[150] and others, since all of these persons are obliged to rule by the revealed sharī'a.[151]

Ibn Taymiyya sought to advance the utility or welfare [*maṣlaḥa*] of the Muslims as a vigorous component of ijtihād: he asserted as a fundamental principle that utility could never fail to agree with ijtihād from texts, unless some error in appreciation either of utility or of the texts had occurred.

Thus, Ibn al-Qayyim criticizes those who would hold that "there is no siyāsa but what the sharī'a enunciates," as rendering the sharī'a

> deficient, ineffective to meet the interests [maṣāliḥ] of mankind. . . . [T]his is a . . . deficiency in their knowledge of the reality of the sharī'a, and of the harmonization between it and the world of fact. When

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[148]At least as interpreted by Ibn al-Qayyim, his student.

[149]Tyan, *Histoire*, 347: "le chef de la corporation des [shaykhs] attachés aux divers services du culte."

[150]Reading *wilāya* for *wulāh*.

[151]Ibn al-Qayyim, *al-Ṭuruq*, 100.

> those in authority see this, and that the people's affairs will not be put right without something added to what this group understands of the sharī'a, then they create for themselves siyāsa laws [*qawānīn siyāsiyya*] by which the interests [maṣālih] of men are ordered. There arises from [this] great evil, and vast corruption . . . .[152]

Ibn al-Qayyim then is blaming those 'ulamā' whose excessive scruples led them to deny the world of fact, and to withdraw from their duty to cooperate with, and restrain, power, as responsible for undue legislative claims of rulers under title of siyāsa.

On the premise of an effectively implemented sharī'a-state legitimacy, Ibn Taymiyya is willing to concede validity to any action of a ruler meeting the conditions of siyāsa shar'iyya, in essence, that the action (i) offend no revealed text or ijmā'; (ii) on balance advance general utility. We should note how this is in many ways the inverse of the professed textual-logical method of the fiqh, where legality was premised not on mere absence of contradiction with texts, but on a close harmony with those texts developed by analogy, and where utility was assigned but a subsidiary role, in choosing among possible analogies. Thus siyāsa is in many ways an inverted complement to fiqh.

As to the adjudication, and the jurisdiction to enforce siyāsa laws, Ibn Taymiyya readily acknowledged the permissibility of siyāsa tribunals. He announced that, notwithstanding past fiqh attempts to regulate the

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[152]Ibn al-Qayyim, *I'lām*, 4:372.

jurisdiction of these tribunals meticulously and to distinguish them from the courts of qāḍīs, there is nothing fixed about their arrangements. He writes:

> The general and the specific public offices [*wilāyāt*], and the powers gained [*mā yastafīduh*] by one assuming an office, are subject to [various] expressions and circumstances and to custom. None of this has any fixed content in the sharī'a, for what is within the command of war in one place and time may fall within the office of qāḍī in another place and time, and the reverse. . . . All of these offices are at root a sharī'a office and [are] religious positions.[153]

To shift to the practice, particularly as to adjudication and legislation, Ibn Taymiyya offers a long description of siyāsa authority in criminal matters in his own time:

> [T]he military command [*wilāyat al-ḥarb*] in the custom of this time in these Syrian and Egyptian lands has the jurisdiction to carry out [*iqāma*] those prescribed penalties [*ḥudūd*[154]] involving physical destruction, such as cutting the hand of the thief, the punishment of the brigand, and so forth. Also, it may include punishments in which there is no destruction, such as lashing the thief.[155] It includes judgments in quarrels, fights, and accusations for which there is no written or testamentary proof.[156] Correspondingly, the office of qāḍī has jurisdiction in matters where there is written or testamentary proof, in documenting legal rights [*ithbāt al-ḥuqūq*] and giving judgments in such cases, in supervising trustees of charitable trusts and guardians of orphans, and in other well-known matters. In other

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[153]Ibn Taymiyya, *al-Ḥisba*, 15-16; Ibn Taymiyya, *Majmū'at*, 35:389.

[154]For this category of crime, see p. 596 below. Note here that *ḥudūd* crimes, according to the fiqh, demand virtual certainty of proof.

[155]This is a discretionary or *ta'zīr* penalty. See 608 below, associating this type of crime with siyāsa.

[156]Cf. Tyan, "Méthodologie," 107, stating that the jurisdiction (of the Mamluk *ḥājib*) that Ibn Taymiyya is describing was a brief episode.

> countries, such as the lands of the West [*maghrib*], the military commander has no right to adjudicate anything, but only executes what he is commanded by the one holding the office of qaḍā. This [latter] practice is closer to the old sunna. . . .[157]

Another account, somewhat later, of siyāsa jurisdictions is given by Ibn Khaldūn (d. 808 H., 1406 C.). After describing maẓālim jurisdiction, following al-Māwardī, he mentions the criminal law tribunals:

> Investigation of crimes and carrying out [*iqāma*] the prescribed punishments [*ḥudūd*] was in the 'Abbāsid state, the Umayyad state in Spain and the Faṭimid ['Ubaydī] state in Egypt and the West [*maghrib*] entrusted to the master of the shurṭa [or police]. The shurṭa is another religious function, among the sharī'a functions in these dynasties.[158] Its jurisdiction was somewhat broader than [that prescribed by] the rules for the jurisdiction of the qāḍī [*qaḍā'*]. This is because it allowed a certain place in reaching judgment to suspicion, imposed deterrent penalities before crimes were proved [fully by sharī'a rules], carried out the proved prescribed punishments [*yuqīm al-ḥudūd al-thābita*] where appropriate, issued judgments of retaliation for wounds and deaths, and carried out [*yuqīm*] discretionary [*ta'zīr*] penalties and chastisements on those who would not give up committing crime.
>
> Then the functions [of maẓālim and shurṭa] were neglected in those dynasties in which the caliphate was neglected.
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> The maẓālim jurisdiction reverted to the sulṭān whether he possessed a delegation therefor from the Caliph or not.

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[157]Ibn Taymiyya, *al-Ḥisba*, 16. Cf. Tyan, "Méthodologie," 105-6; Lambton, "Maḥkama," *Encyclopedia of Islam*, 2d ed., 15, quoting from Ibn Baṭṭuṭa's travels of 1325-1354 C., describing a Turkish amīr of Khwārazm who would have his qāḍī come daily to the audience hall, and opposite him would sit an amīr with retinue. All disputes would be brought, and justly decided -- if within the religious law by the qāḍī, and otherwise by the amīr.

[158]Tyan notes that in Spain and perhaps elsewhere the shurṭa "often" was linked to religious functions like leading the Friday prayer and administering waqfs. Tyan, *Histoire*, 585.

> The shurṭa function was separated into two divisions. One of them is the function relating to suspicion of crime, imposing [*iqāma*] the punishments [*ḥudūd*] for these [crimes], and carrying out [*mubāshara*] amputation and death for retaliation [*qiṣāṣ*] when obligatory. In these dynasties a judge [*ḥākim*] was set up for this purpose, judging such acts according to siyāsa without referring to [*dūna murāja'a*] the sharī'a rules [*al-aḥkām al-shar'iyya*]. He is called sometimes *wālī* and sometimes shurṭa. [The second division of the shurṭa jurisdiction is] that of discretionary [*ta'zīr*] penalties and of the carrying out [*iqāma*] of prescribed penalties [*ḥudūd*] in crimes proven in accordance with the sharī'a. These were joined with the qāḍī's jurisdiction as mentioned above. They became part of the function of his office, and this has been the settled practice up to this age.[159]

Notable in this passage is Ibn Khaldūn's identifying an early vigorous *shurṭa* jurisdiction, which exercised powers exceeding those allowed by fiqh criminal procedure, as a "religious" and "sharī'a" function, i.e., as a religiously legitimate part of the state's adjudicatory and enforcement apparatus, as legitimate as the qāḍī courts. Moreover, Ibn Khaldūn associates the bifurcation of this shurṭa with the weakening of the caliphate, and with it the religious justification of rule. As the ruler loses religious legitimacy, the part of its jurisdiction which is consistent with fiqh is assumed by the qāḍīs; the other part becomes corrupted, and ignores sharī'a rules [*aḥkām*].

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[159]Abū Zayd 'Abd al-Raḥmān b. Muḥammad Ibn Khaldūn (d. 808 H., 1467 C.), *Muqaddimat Ibn Khaldūn* (Beirut: Dār al-Qalam, 1984), 222 (see also 251-52), consulting translation by Franz Rosenthal, *al-Muqaddimah* (Princeton: Princeton University Press, 1967), 168-80 (see also 207-08). This description and Ibn Taymiyya's seem to agree as to Egypt, but Ibn Khaldūn does not mention the state of affairs Ibn Taymiyya ascribes to the Maghrib.

We shall return to both of these descriptions in the next Part, in reference to the criminal law.

g. The Great Empires (to 12th H./18th C. century): implementing the synthesis

Relying for its legitimacy on a stern Sunnī theory of upholding the sharī'a, inherited from its ancestors the Seljuqs, the Ottoman Empire[160] achieved a unique success, in Islamic historical terms, in the breadth and certainty of its application of the sharī'a.[161] This achievement traces to its success in compromising between the opposed principles of 'ulamā' and umarā', fiqh and siyāsa, all to the advantage of the stability of the regime. This success in turn seems owed to refinements in both principles over the recent centuries: as to siyāsa, new conceptions gained from Turkic and Mongol patterns of statecraft; and as to fiqh, the new outlook toward siyāsa pioneered by Ibn Taymiyya and others after him, advanced under the name "siyāsa shar'iyya."

The Ottoman system distinguished itself, from at least the fifteenth century, by its insistence on including the 'ulamā' within the state apparatus, and on requiring them to enforce its laws, not only fiqh-based laws, but also a great many siyāsa laws. The class of 'ulamā', which had previously controlled its own qualifications and prestige, was fully

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[160]We discuss here solely the Ottoman Empire, not the Mughal, with the justification that it is the Ottoman Empire that directly influenced Saudi Arabia and the rest of the Arab world.

[161]Hamilton A. R. Gibb and Harold Bowen, *Islamic Society and the West: A Study of the Impact of Western Civilization on Moslem Culture in the Near East*, 2 vols. (New York: Oxford University Press, 1957), 1:35; Schacht, *Introduction*, 89.

bureaucratized, the state laying down a firm hierarchy of authority and levels of advancement,[162] both for muftīs and qāḍīs.[163] At the head of the hierarchy was a muftī,[164] the Shaykh al-Islām, who possessed official authority to issue legal opinions. This dignitary issued fatwās, *suo motu*, passing, with either approval or denunciation, on the consistency of the Sultan's siyāsa-based decrees with sharī'a. Indeed, 16th C. shaykhs al-islām even studied, and issued opinions about, substantive siyāsa laws. As to the

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[162]Richard C. Repp, "Some Observations on the Development of the Ottoman Learned Hierarchy," in Nikki R. Keddie, ed., *Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle East since 1500* (Berkeley: University of California Press, 1972), 17-32. The hierarchy was itself instituted by a law [*qānūn*] of the ruler, dated to the time of Sultan Mehmed II (1451-1481). Richard C. Repp, "Qānūn and Sharī'a in the Ottoman Context," in Aziz al-Azmeh, ed., *Islamic Law: Social and Historical Contexts* (New York: Routledge, 1988), 126, 130, n.13.

[163]Richard C. Repp, *Muftī of Istanbul: A Study in the Development of the Ottoman Learned Hierarchy* (London: Ithaca Press, 1986); Gibb and Bowen, *Islamic Society*, 2:81-113. As to muftīs, the hierarchy applied chiefly to Ottoman 'ulamā' dependent on Istanbul for positions. There remained, indefeasibly, particularly in the provinces, a private 'ulamā' class, with privately consulted muftīs. Local muftīs were offered positions in the Ottoman legal system in order to supply local sharī'a legitimacy, and to adapt Ottoman law to local exigencies. The legitimacy, and the usefulness, of these 'ulamā' derived at root not from Ottoman appointments but from local prestige. Gibb and Bowen, *Islamic Society*, 1:135-38.

[164]This diverges from practice of earlier states, in which the head of the state religious functionaries was a qāḍī, with one degree or another of authority over qāḍīs. The reasons for this innovation may partly lie in the fact that the Ottoman 'ulamā' ceded the Sulṭān much of their own power to decide fiqh rules, making the advisory function of a muftī the more natural role for their head.

enforcement of siyāsa laws, the qāḍīs were the Sultan's agents for assuring conformity to his siyāsa decrees by not only the ordinary citizen but also by the Sultan's own military and political subordinates. In criminal law specifically, it is notable that the Ottomans instituted no shurṭa-like criminal tribunals at all,[165] and relied on the qāḍī courts as sole ordinary criminal courts.[166]

The success of the synthesis was not even throughout Ottoman history. In general, however, the system seems to move steadily in the direction of increasing reliance upon 'ulamā' and increasing conformity, at least outwardly and technically, with fiqh-based theories of legitimacy. In terms of the degree of harmonization between fiqh and siyāsa, accordingly, the trend seems one of increase, peak and then decline, as the system emerges from a fiqh-siyāsa dichotomy associated with its Seljuqid and Turkic roots, achieves

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[165]Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V.L. Ménage (Oxford: Oxford University Press, 1973), 179, 216-224. Note that all quotations from this work alter the spelling of transcribed words to conform to the system of this book.

[166]Ibid. The chief exception to this is as to crimes tried by the imperial *dīwān*, headed by the Grand Vizier, by other *dīwāns* of the latter, and, in congruent fashion, by *dīwāns* of governors in the provinces. Such *dīwāns* constituted a sort of high court, and included as members high-ranking 'ulamā'. As to Istanbul, see ibid., 224-26; Gibb and Bowen, *Islamic Society*, 2:87; as to Egypt, see ibid., 1:202, 2:129; Galal H. El-Nahal, *The Judicial Administration of Ottoman Egypt in the Seventeenth Century* (Minneapolis: Bibliotheca Islamica, 1979), 33-35.

accommodation, and then begins to tilt in favor of 'ulamā' control and 'ulamā' doctrines.[167]

The peak of the synthesis is traditionally associated with the reign of the Sultan Sulaymān I (926-974 H., 1520-1566 C.), known in the West as "the Magnificent" and among Muslims as "al-Qānūnī" (the "giver of laws [*qānūn*]"). Let us consider two practices for which this period is famous, which both concern the competition between ruler and 'ulamā' as to legislation. In considering them we shall mention also several aspects of the competition between the parties as to adjudication.

i. The Ottoman qānūn

The first such practice is that of sultanic law-giving, or qānūn-making. As his honorific implies, Sulaymān is famous for making laws [sing., *qānūn*] alongside the sharī'a, i.e., siyāsa laws laying down abstractly stated rules generally applied throughout the legal system. Certainly, ruler-originated laws, more or less published, stable, comprehensive and general in scope, had earlier existed, notably in clearly siyāsa matters demanding general treatments, such as tax or feudal laws. With the Ottomans, however, particularly with Sulaymān, such laws took on far greater scope and importance, and extended to criminal law, and thus into an area of close

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[167]This is the conclusion in Heyd, *Criminal Law*, followed by Repp, "Qānūn," especially 131-32.

interaction with the fiqh. These qānūns, as well as many laws and decrees of lesser rank and generality, were sent to qāḍīs throughout the Empire, with the command that they be enforced alongside the fiqh.

In Ottoman times the term "qānūn" had a number of meanings, three relevant here. The first, and the essential, meaning is any decree, binding by the ruler's order, which states a generally applicable legal rule on a particular matter; secondly, "qānūn" may refer to codes presenting numerous qānūns as an ordered single text (the more precise term is "*qānūnnāme*"); thirdly, "qānūn" is used to refer collectively to the entire body of sultanic laws or qānūns.[168]

While qānūns were in form and legal theory wholly dependent on the current Sultan's immediate will and command, yet they were respected as the cumulative wisdom and practice of the dynasty, accreting from the innumerable particular acts of will of sultans. This conception derived partly from Mongol precedents, particularly the dynastic law, the *yasa*, of the Mongols. This is suggested by the term used for the Sultan's legislative will -- the Sultan's *'urf*, a term otherwise meaning "custom."[169]

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[168]Heyd, *Criminal Law*, 167.

[169]The use of this term also reaches for sharī'a justification, in that custom ['*urf*] is, particularly by the Ḥanafīs, a legitimate fiqh source when not in conflict with the naṣṣ of the Qur'ān or sunna. See Heyd, *Criminal Law*, 182-3. To justify as "custom" new and particular exertions of the Sulṭān's will is, however, a clear displacement from uṣūl al-fiqh concepts.

Justifications offered for the qānūn and for the Sultan's 'urf were composites of ideas taken not only from fiqh but from Islamic philosophy. We mentioned all of them previously as ideas shoring up the classical Sunnī theory of the imāmate, tinged by Persian absolutist conceptions. Thus, Tursun Beg, an Ottoman scribe and office-holder of the later 15th century, was able to explain the Ottoman "'urf" as the "siyāsa" or will of the sultan laying down rational measures for maintaining the order of the "apparent" [ẓāhir], i.e., material, world, subsumed within the higher "siyāset," the sharī'a, which insures the "hidden" [bāṭin] order of both this world and the next. He gives Jengiz Khan's "conduct" as an example of rational siyāsa.[170]

Often cited as among the advantages of qānūn are two purposes, which, interestingly, evince conceptions of justice discordant with those of the fiqh and the 'ulamā'. The Ottomans often mentioned two of the major virtues of laws that are abstract, general, binding on all, and, ideally, publicized (as Ottoman codes were in their heyday[171]). First is that they help to suppress abuses of discretion by executive officers, here military subordinates of the Sultan, such as purely arbitrary actions, cruelty, brutality,

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[170]Heyd, *Criminal Law*, 169-170.

[171]Ibid., 173-74.

extortion, and corruption.[172] Secondly, the qānūns serve the ideal of equality of all subjects before the ruler, in that qānūns are to be observed by, and enforced upon, all without discrimination.[173]

But these various justifications for qānūn, all seemingly divergent from the justifications for fiqh offered by the 'ulamā', seem to have been progressively cut to the measure of the 'ulamā''s theory of siyāsa shar'iyya. The process began early, even during Sulaymān's reign. The Shaykhs al-Islām of the 16th century worked "to make most of the [qānūns] correspond with the noble sharī'a."[174] The most famous Shaykh al-Islām, the great Abū al-Su'ūd Efendi (1545-1574), who served under Sulaymān, issued frank fatwās declaring qānūn provisions illegal when these diverged impermissibly from the

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[172]Heyd, *Criminal Law*, 176-77. As discussed above, as to criminal law, historical precedent ran in favor of siyāsa, often military, jurisdictions, such as the *shurṭa*, whose adherence to sharī'a proprieties was reportedly the exception, not the rule. Compared to such, criminal jurisdiction in the hands of qāḍīs, even were it to apply purely qānūn laws, seems an accommodation greatly favoring not only the fiqh and the 'ulamā', but also justice.

[173]Heyd, *Criminal Law*, 179-80. General laws did not spring full-blown from the Sultan's pen. Rather, their generality slowly evolved, and never achieved completion. Heyd tells us, that the Ottoman qānūnnāmes were usually originally short summaries of various decrees of the sultan, the details as to names, etc., being eliminated. Ibid., 171. Even in Sulaymān's criminal code, some provisions survived as recitals, rendered without identifying details, of past decisions of sulṭāns. Ibid.

[174]Ibid., 183, quoting Kātib Celebi. In part they did this by means of fatwās declaring rules of this law in conformity or in conflict with the sharī'a.

sharī'a.[175] He declared, as a fundamental principle, that "There can be no decree of the Sultan ordering something that is illegal according to the sharī'a."[176] Gradually, the term "*shar'an*," literally, "in accord with sharī'a," came to be used to indicate conformity with applicable law, whether this law had its origin in the fiqh or in the Sultan's qānūn.[177]

Developments in the use of codes [qānūnnāme] in the criminal law show the trend toward dominance of fiqh theory and of the 'ulamā'. At first, in the 15th and early 16th centuries, there were two types of criminal code. One appears to have been the codification of ruler-dictated punishments, chiefly fines, to be added to discretionary punishments adjudicated by the qāḍīs. (As we shall see in the next Part, there are grounds by which such provisions can be argued to be in conformity with the sharī'a, and even with the fiqh, to the extent that the prescribed penalties do not supplant or contradict fiqh provisions in criminal law, but provide merely for certain additional penalties in the event of conviction.[178]) The second type of code is quite different,

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[175]Ibid., 191.

[176]Ibid., 192. Note the ambiguity of the remark -- does it state an irrebuttable presumption or a principle of review?

[177]Ibid., 187.

[178]Prof. Heyd, misled by an Orientalist dogma of the inapplicability and irrelevance of sharī'a in criminal law, greatly overemphasizes the conflict between qānūn and sharī'a in criminal law. According to fiqh theories explained in the next section, it was the ruler's responsibility to fix punishments for all crimes other than those fixed by the

providing for very severe penalties, chiefly death or amputations, for certain crimes against the public order. These penalties, going far beyond what ordinary fiqh law condoned,[179] were called *siyāset* [siyāsa] crimes, and were conceived as arising not from siyāsa shar'iyya, or siyāsa tamed according to the 'ulamā''s theories, but rather from the old independent, oppositional principle of siyāsa.[180] With Sulaymān, we find that the two types of code had been merged,[181] and many *siyāset* penalties, even some not found in prior codes, had been brought within[182] the scope of the ordinary criminal code. After Sulaymān, however, changes in the code all favored fiqh positions; amendments were made most

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Qur'ān itself, and even for the latter whenever the latter penalties could not be applied because of failure to meet certain extremely high legal prerequisites. The great bulk of the criminal code translated by Heyd is consistent with such a theory, while none of the "clear" examples of conflict with the sharī'a he cites (ibid., 180-82) is one in fact. There are, depending on the fiqh school consulted, other more arguable conflicts. See, e.g., note 179.

[179]Fiqh, even in the form of siyāsa shar'iyya doctrine, does not allow amputation except in fulfillment of a Qur'ānically prescribed penalty. Yet the qānūns provided for castration, amputation of the hand other than for theft, branding of the forehead or vulva, and slitting or cutting off the nose or ear. Ibid., 265.

[180]Ibid., 16. Significantly, these codes were not sent directly to qāḍīs but only to military officials, who were, however, to enforce them through the qāḍīs' cooperation. Ibid., 17.

[181]Ibid., 31.

[182]Cf. ibid., 193, discussing that there had always been many disparate *siyāset* penalties that were never included in codes.

commonly to undo criminal laws seen as in conflict with the fiqh.[183] As Prof. Heyd observes:

> It is noteworthy that almost all the statutes which were abrogated as being contrary to the sharī'a are regulations not found in the criminal codes prior to that of Sulaymān the Magnificent. This indicates that a generation or two after the penal qānūn had reached its widest scope in the reign of Sulaymān 'Qānūnī', the religious law began to reassert itself. It is significant that in the margin of the latest, i.e., seventeenth-century, version of the code, compiled by the clerk of a sharī'a law-court, relevant fatwās and quotations from authoritative fiqh works are added, often contradicting the qānūn regulations in the text.[184]

Before long, indeed beginning shortly after Sulaymān's reign, courts began to disregard the criminal codes.[185] This trend was accompanied by affirmations, by the state itself, of 'ulamā' and fiqh theories of legislation. Thus, in 1696, as Heyd shows us, a Sultan himself is found going so far as to renounce the principle of sultanic law-making in all matters. Declaring that no laws are needed besides the "Qur'ān and the sharī'a," Sultan Muṣṭafā II states:

> Apart from the penalties (ḥudūd) ordained by Allāh and the penalties ordained by the Prophet no penalties are to be laid down . . . . [I]n some decrees which have the character of qānūn [the term] noble sharī'a is

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[183]Ibid., 149, 265 (giving specific examples).

[184]Ibid., 150.

[185]Evidence is not clear on this point as to 17th C. Bursa, Kayseri or Cairo. Haim Gerber, "Sharia, Kanun and Custom in the Ottoman Law: The Court Records of 17th-Century Bursa," *International Journal of Turkish Studies*, 2 (1981):138; Ronald C. Jennings, "Kadi, Court, and Legal Procedure in 17th C. Ottoman Kayseri," *Studia Islamica* 48 (1978): 136-162; idem, "Limitations of the Judicial Powers of the Kadi in 17th C. Ottoman Kayseri," *Studia Islamica* 50 (1979): 151-184; El-Nahal, *Judicial Administration*, 33-34.

> followed by and connected with [the term] qānūn. . . . It is . . . highly perilous and most sinful to juxtapose the [terms] sharī'a and qānūn. Therefore in firmans and decrees all matters shall henceforth be based on the firm support of the noble sharī'a only . . . .[186]

Heyd declares that

> there can be little doubt that in the course of the seventeenth and eighteenth centuries the Ottoman Criminal Code was gradually discarded as a source of penal law, and finally completely forgotten.[187]

The defeat of the qānūns and the turn to 'ulamā' theories accompanied the growing weakness of the central power, evident in the corruption of the feudal tenures and indeed of 'ulamā' functions themselves, especially qaḍā'.[188] By the 18th century the Ottoman 'ulamā' achieved the pinnacle of their power, forming virtually a hereditary aristocracy at the center of the ruling elite of the Empire; but by the same time they had, in a grasping for power and wealth, absorbed corrupt practices greatly degrading their intellectual competence and moral strength.[189]

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[186]Heyd, *Criminal Law*, 154-5.

[187]Ibid., 155.

[188]Gibb and Bowen, *Islamic Society*, 2:121-133. As for 17th C. Kayseri, Bursa, and Cairo records show a favorable state of affairs. Gerber, "Sharia, Kanun," 147; Jennings, "Kadi"; idem, "Limitations"; El-Nahal, *Judicial Administration*, 72-73 conclude that the outcomes of cases, and the heavy reliance placed on the qāḍīs, indicate their continued discipline and relative incorruptibility.

[189]Richard Chambers, "Ottoman Ulema and the Tanzimat," in Nikki R. Keddie, ed., *Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle East since 1500* (Berkeley: University of California Press, 1972), 33-34; Uriel Heyd, "The Ottoman 'Ulemā and Westernization in the Time of Selīm III and Maḥmūd II," *Scripta Hierosolymitana, Studies in*

What was the 'ulamā' position toward qānūn during both the phases of its success and its decay? It seems that the 'ulamā' never gave up their opposition to the conception of sultanic legislation,[190] not only in its period of vigor as a principle independent of fiqh, but even in its form as a willing partner to fiqh under the influence of such as Abū al-Su'ūd. When the state was powerful, 'ulamā' resistance to sultanic codes was overwhelmed, and indeed qāḍīs were made to act as functioning cogs in the system to apply them. But with the weakening of force in the center, and the growth of their own oppositional strength, the friction exerted by 'ulamā' against the codes had effect.[191] As in a similar context previously,[192] our evidence leaves undecided the issue whether the 'ulamā''s successes in furthering their own objectives should be seen as partly causing, and not just accompanying, the access of corruption and demoralization in the ruling power.

Islamic History and Civilization 9 (1961):77-78; Repp, "Some Observations," 17-32.

[190]'Ulamā' opposition seems rarely to have been explicit, Heyd, *Criminal Law*, 202-4, but was nonetheless practical, judging from the course of events.

[191]Heyd, *Criminal Law*, 156. Heyd contradicts much of his own evidence in a statement citing only European travelers' accounts: "The general trend seems to have been a gradual decline of the qāḍī's part in the administration of penal justice." Ibid., 220. This conclusion is amply contradicted by Jennings, "Kadi"; El-Nahal, *Judicial Administration*; Gerber, "Sharia, Kanun."

[192]See p. 474 ff. above.

Published discussions of the decline of the criminal codes leave unstated exactly what body of criminal law took the place of the criminal codes. Since there continue to be references to "qānūn" together with "sharī'a" in the qāḍīs' courts,[193] it seems that it was only the innovation of comprehensive, general written codes [*qānūnnāme*] that suffered setback, rather than the basic idea that siyāsa decrees were a legitimate source of criminal law. Clearly, the experiment of code-making was not followed by reversion to the age-old practice of bifurcated jurisdictions and laws. What emerged instead was a practice almost as much a historical innovation as the codes, namely, that the ruler's siyāsa authority became, in effect, supportive to, a component part of, a criminal legal system wholly operated by 'ulamā': the sultan's *'urf* provided necessary rules and procedures supplementing the fiqh, while the overall control of the criminal legal system passed into the hands of the 'ulamā'.

In this light is to be explained a fact puzzling to Prof. Heyd. Heyd tells us that a 16th century author, Dede Efendi (d. 973 or 975 H., 1565-68 C.[194]), in a book popular among successive generations of Ottoman 'ulamā', advocates the broad application of siyāsa shar'iyya in criminal law. Heyd finds somewhat surprising that, despite the obvious congruence between the sultan's criminal qānūns and siyāsa shar'iyya,

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[193]See p. 514 below.

[194]Heyd, *Criminal Law*, 198 n. 4.

Dede Efendi does not discuss the former at all. Clearly, this is because Dede Efendi, and the 'ulamā' who later relied on his book, had the purpose not of supporting sultanic law-making at all, but instead, in a time of increasing 'ulamā' confidence, of bringing siyāsa flexibility within fiqh, and thereby justifying an increased criminal law jurisdiction in themselves. This point is shown by Dede Efendi's arguing, against the accepted Ḥanafī view, that qāḍīs, as much as siyāsa judges, ought to wield siyāsa criminal jurisdiction.[195] This book seems to fall within a genre of works on siyāsa shar'iyya, concerned primarily with criminal law, and apparently written for the purpose of advocating stronger, broader 'ulamā' jurisdiction.[196] Thus, reference to siyāsa shar'iyya at this time signals an 'ulamā' intention to shift in their own direction the balance of the Ottoman siyāsa-fiqh compromise.[197] Had they conceded the principle of sultanic criminal code-making, in development for a century,[198] they

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[195]Ibid., 200-01.

[196]Examples are al-Ṭarābulusī, *Mu'ayyin;* Burhān al-Dīn Abū al-Wafā' Ibrāhīm b. 'Alī b. Muḥammad b. Abī al-Qāsim Ibn Farḥūn (d. 799 H., 1397 C.), *Tabṣirat al-ḥukkām fī uṣūl al-aqḍiya wa-manāhij al-aḥkām,* 2 vols. (Cairo: 1301 H., 1884 C.; reprint ed., Beirut: Dār al-Kutub al-'Ilmiyya, n.d.); and even Ibn al-Qayyim, *al-Ṭuruq.*

[197]For contemporaneous 'ulamā' opposition against qānūn in general, see Heyd, *Criminal Law,* 191-92, 203-04.

[198]Repp, "Qānūn," 124, dates qānūns as in development from the time of Mehmed II (1451-1481).

could have long since easily brought the theory of siyāsa shar'iyya to bear in its favor.[199]

This trend favoring the 'ulamā' as to criminal law-making is reproduced as to criminal law adjudication. In the 15th and 16th centuries, court records indicate that qāḍīs often found the facts of an accusation, and then handed offenders over to the Sultan's "*ahl al-'urf*" (lit., "those with sultanic authority"), i.e., military or police officials, for either the Sultan or these subordinates to choose and then execute a penalty.[200] Qāḍīs at times referred cases to the sultan requesting punishment "for the sake of the public order," since punishment "according to the sharī'a" was impossible or inadequate.[201] However, it appears that, as the prestige of the codes waned, so did this *'urf* jurisdiction. Qāḍīs increasingly issued all criminal sentences, whether deriving from qānūn (in the sense of sultanic law or laws) or from fiqh; in both cases the "*ahl al-'urf*" operated under the instruction of the qāḍīs. Prof. Jennings, after extensive studies of early 17th century court records from the Anatolian

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[199]Heyd misses the profound influence siyāsa shar'iyya, in its general sense, had in persuading Ottoman 'ulamā' to take part in the overall synthesis. He raises it only toward the end of his legal discussion of the qānūn, *Criminal Law*, 198-204, and then as only some sort of alternative to the theory of qānūn, an "old Islamic theory" from which 'ulamā' "may" have found "some justification" for their acquiescence in the latter. Ibid., 198.

[200]Ibid., 254.

[201]Ibid., 254-6.

town Kayseri, reports such an all-encompassing jurisdiction in the qāḍī.[202] These results are duplicated for 17th C. Bursa by Gerber.[203] El-Nahal provides no contradictory evidence from 17th century Egypt, where he found that, although clearly some criminal matters were taken before the governor [*walī*], qāḍīs heard many criminal cases, and these included cases brought by and against the governor and other civil, military and police officials. Qāḍīs punished individuals who brought criminal matters to executive officials if illegal fines or punishments resulted.[204]

ii. Sultanic "choice" in fiqh matters

The second Ottoman legislative practice does not concern the qānūn at all, but rather operates wholly within the fiqh law. This practice also reached its peak during the reign of Sulaymān al-Qānūnī, particularly in his close collaboration with the Shaykh al-Islām Abū al-Su'ūd. The practice is that of yielding to the Sultan the power to determine the fiqh

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[202]Jennings reports that qāḍīs of Kayseri held exclusive jurisdiction over criminal matters, except against slaves (*kul*) of the sulṭān. He concludes that these courts possessed an extremely high degree of probity and independence, based on his extensive documentary research. The law qāḍīs were charged to apply was referred to usually as the "shar'" (i.e., the sharī'a), but sometimes as "shar' and qānūn." Jennings, "Kadi"; idem, "Limitations."

[203]Gerber, "Sharia, Kanun," 132.

[204]El-Nahal, *Judicial Administration*, 33-35. Qāḍīs were directly in charge of many administrative matters, and acted upon complaints of abuse of power against high administrative and military officers. Ibid., 51-68.

opinions to be applied by his qāḍīs. This authority appears in two forms: first, a command to qāḍīs to adhere to a single school of law [*madhhab*] (the Ḥanafī) in their judgments, and, indeed, to the "dominant" opinion within that school; and, second, commands to apply on particular issues fiqh opinions other than the standard Ḥanafī ones, if in the Sultan's view public welfare is served thereby.

As to the first form, the Ottoman state is well-known for its support for the Ḥanafī school, whose embrace of taqlīd and renunciation of ijtihād were indispensable to the bureaucratization of the 'ulamā'. The point here is that, among the Ottomans, the practice of taqlīd was not left for the 'ulamā' to police, but rather cemented by a universal command of the Sultan, that his courts apply solely the prevalent Ḥanafī view.[205] This was to adopt a practice long denounced by all the four schools as invalid.[206] The available fiqh arguments to justify it are primarily three. First -- and this is a chief reason for the spread of the

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[205]Salīm I at the beginning of the 16th C. declared the Ḥanafī school official by firmān, requiring all judges, and all muftīs from the Shaykh al-Islām down, to be bound to the Ḥanafī school, while leaving the people free to follow their own school as to *'ibādāt*. Halil Inalcik, "Ḳānūn," 559. Ṣubḥī Maḥmaṣānī, Muqaddima fī iḥyā' 'ulūm al-sharī'a (Beirut: Dār al-'Ilm li-al-Malāyīn, 1962), 104-05. Ibn 'Ābidīn mentions this, adding that a qāḍī judging by another view is considered removed from office as to that judgment, and his judgment will be reversed. Muḥammad Amīn b. 'Umar Ibn 'Ābidīn (d. 1252 H., 1836 C.), "Sharḥ al-manẓūma al-musammāh bi-'uqūd rasm al-muftī," in idem, *Majmū'at rasā'il Ibn 'Ābidīn* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 51-52.

[206]al-Māwardī, *al-Aḥkām*, 68.

idea of the "closing of the door of ijtihād" in Ottoman times -- the qāḍīs are not mujtahids in any case; therefore, as a practical matter, their consciences are not abused but rather saved by requiring adherence to predetermined views. Second, according to the classical public law, qāḍīs are delegates of the imām and wield his judicial powers; therefore they can be constrained by conditions he puts upon them when entrusting them with judicial office.[207] Third, the Qur'ān requires obedience to Sultan in the verse "Obey God and obey the Apostle and those among you who have been entrusted with authority."[208] These arguments, of course, all have counter-arguments, and we shall return to the dispute on these points in Part III of this Chapter.

The sultan's authority, once accepted in this basic matter, quite logically included a narrower form of the same practice, that of ordering, as to particular points of law, variation from the rules otherwise dictated by school

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[207]The traditional theory specifically denied that this control could extend to the law qāḍīs chose to apply, such commands being invalid, the qāḍī remaining free to apply his ijtihād. However, the old theory had allowed the ruler validly to withdraw a qāḍī's jurisdiction as to some particular issue -- such as retaliation against a woman for murdering a man. On that issue, the judge could not judge one way or the other. al-al-Māwardī, *al-Aḥkām*, 68. This loophole the late Ottoman Ḥanafīs exploited, expressing the Sultan's command as an automatic withdrawal of jurisdiction from the qāḍī if he judges contrary to the command. See n. 205 above.

[208][4:59].

taqlīd.[209] This practice is best exemplified in a famous text, for long after relied upon, in which Abū al-Su'ūd submitted to Sultan Sulaymān a number of requests to legislate deviations from the accepted Ḥanafī law in a number of particular areas, in favor of minority Ḥanafī positions or even the views of other fiqh schools,[210] because "the order of religion and State" would be thereby served.[211] In such cases, the Shaykh al-Islām suggested his preference, but added that "the command belongs to your Majesty."[212] Clearly, behind this is a theory that, if all 'ulamā' are capable merely of rigid and mechanical taqlīd,[213] then only on grounds of siyāsa can fiqh rules be altered. In this is a linking of siyāsa with all that suffers change with times, places and customs, and an association of fiqh, as handed down by Ḥanafī forebears, with unchanging perfection. The root conception of ijtihād, as the conscientious search for God's law in the instance, is here so far set to one side as to admit freedom

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[209]For a full discussion of this practice, see Part III of this Chapter below.

[210]The principle was even applied to obtain permission to employ the Ḥanafī uṣūl al-fiqh method of *istiḥsān*, or the choice for reasons of utility of a rule other than that dictated by strict qiyās or analogy. Heyd, *Criminal Law*, 186.

[211]Ibid., 183-87.

[212]Ibid., 186, citing an early 18th century fatwā.

[213]Cf. the treatment of taqlīd by the Ḥanafī Ibn 'Ābidīn (d. 1069 H., 1836 C.) discussed in Chapter Two, p. 159 above.

and creativity only to siyāsa and the state, in the sphere of the public and general.

Like the sultan's qānūn, this second form seems also to have suffered decline after Sulaymān's reign.[214] Even the text of Abū al-Su'ūd's questions to the Sultan seems to have been altered in later copies, to appear as straightforward fatwās of the Shaykh, not dependent on the sultan's will.[215] This reflects a later practice, whereby the Shaykh al-Islām and high qāḍīs[216] in the hierarchy would exercise such authority independently of the sultan, issuing fatwās that inferiors in the hierarchy would treat in practice as authoritative, though in theory not binding.[217] Reflected here once again is a trend over the centuries of Ottoman reign favoring the 'ulamā''s share in legislation and adjudication over those of the sultan's.

We shall return to both of these practices -- qānūn and Sultanic "choice -- in our discussion of the Saudi debate over codification in Part Three below.

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[214]It is reiterated, however, as the basis for the later modernizing codification of fiqh, the *Majalla*, see p. 534 below, which mentions the principle in Art. 1801.

[215]Repp, "Qānūn," 136-39.

[216]Heyd, *Criminal Law*, 187 re high qāḍīs in the hierarchy directly, or by their advice, exercising the Sultan's authority.

[217]Repp, "Qānūn," 138-39.

iii. Some observations

In the outcome of the Ottoman synthesis between fiqh and siyāsa we see continued a trend already observed across earlier historical periods reviewed -- of the gradual, spiralling[218] advance of 'ulamā' theories of justification over those of the ruler, of fiqh norms over siyāsa ones. In this case, fiqh reasserts itself even after, as it seemed, the two antitheses achieved synthesis during Sulaymān's reign. We find the 'ulamā' reappearing, deprived of none of their old powers, and now also possessed of unprecedented powers throughout the state apparatus, including some at its very top. To the cohesiveness of these 'ulamā' institutions must be credited much of the continuity and stability of the Ottoman system long after the center's economic and administrative decline had occurred.

But did the 'ulamā' enjoy such gains without paying a price? Returning to the centrality of the microcosmic vision in fiqh as observed throughout this book, we must ask how much that vision is dependent upon the non-public, independent character of 'ulamā' institutions, which, as we saw, provided, though invisibly to theory, the needed macrocosmic

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[218] "Spiralling" is used to suggest cyclical retreat and then advance as new empires commence, vaunting prestige, religious or otherwise, largely independent of the 'ulamā', and then grow more dependent on the latter as that prestige wanes. The relation of such an observation to Ibn Khaldūn's philosophy of history, particularly its treatment of law, requires study. See Mahdi, *Ibn Khaldūn's Philosophy*, esp. 193-216, 232-253.

infrastructure for the fiqh. When the Ottoman 'ulamā' became unambiguously part of the state, and availed themselves readily of state power, was the fiqh doctrine's microcosmic impulse not stifled? Was the conception of the fiqh not itself altered? Rigid taqlīd, bureaucratization and routinization of qāḍī function, and habituation to qānūn -- all macrocosmic legal phenomena -- seem to have caused a transformation in the ancient edifice of fiqh doctrine, however veiled by the trappings of new and heady access to power. The evidence for this transformation comes in Section 2 below.

h. The Saudi-Wahhābī States (1734 C.-present) : Ibn Taymiyya's theories enacted

We shall not rehearse here the history of the three Saudi states, the last being that led by 'Abd al-'Azīz b. 'Abd al-Raḥmān (d. 1953), the founder in 1932 of the modern Kingdom of Saudi Arabia. In this section we expose only certain fundamental Wahhābī constitutional conceptions, as captured in early defining moments of Wahhābī history, particularly as these concern the relationship between the 'ulamā' and the ruler. We shall then compare these with the Ottoman conceptions just reviewed. Then, under another heading in this section, we return to observe, for modern Saudi Arabia, how these Wahhābī conceptions have actually been implemented,

and how they have fared after many modernizing transformations of the legal system.

The Wahhābī movement is one of the last important Islamic religious movements which was substantially uninfluenced by Western ideas. It deserves close study, as an internal movement of reaction against many of the intellectual and religious habits long prevailing in the Ottoman Empire and elsewhere in the Islamic world.

With the Wahhābī states of Arabia we encounter the first full-fledged attempt to enact Ibn Taymiyya's program, in both politics and law. Ibn Taymiyya was the predominant influence on the ideas of Shaykh Ibn 'Abd al-Wahhāb (d. 1206 H., 1791 C.), whose conscious intent was to reform Islam, beginning in his homeland of Najd, on the basis of Ibn Taymiyya's philosophy. Returning to Najd after study in Mecca, Medina, Baṣra and elsewhere, Ibn 'Abd al-Wahhāb, in a dramatic realization of Ibn Taymiyya's theory, set himself to find a ruler willing to make a compact with him to achieve a righteous state. His 1158 H., 1745 C. compact of mutual respect and cooperation with Ibn Sa'ūd (1159-1179 H., 1746-1765 C.), the ruler of Dar'iyya, a small town in Arabia, still is the basis for Saudi Arabian legitimacy.

> The reformer promised the ruler that if he held fast to the doctrine of God's Oneness, he would win dominion over lands and men. The ruler swore allegiance to the

reformer in the cause of Islam and declared his readiness to undertake the jihad.[219]

Thus a frank alliance of religion and the sword, between "the Shaykh" and "the Amīr."[220] Their division of responsibility was handed down, after their deaths, to their descendants, the Āl al-Shaykh (the "family of the Shaykh")[221]

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[219]George Rentz, "Wahhabism and Saudi Arabia," in *The Arabian Peninsula: Society and Politics*, Derek Hopwood, ed. (London: George Allen and Unwin Ltd., 1972), 56.

[220]The first two Sa'ūdī rulers were referred to as "Amīr," meaning "commander," "prince." 'Abd Allāh Ṣāliḥ al-'Uthaymīn, "Muḥammad Ibn-'Abd-al-Wahhāb: The Man and His Works" (Ph.D. diss., University of Edinburgh, 1972), 276. After them, the term "imām" came into use for the ruler, and retrospectively even the first rulers are so referred to. Use of the term "imām," implying as it does that the holder of the office is legitimate under the fiqh theory of the "*imāma*," was proper given Wahhābī endorsement of Ibn Taymiyya's lenient positions as to religious suitability for that office. In King 'Abd al-'Azīz's day the term was used far less frequently, replaced by "*malik*" or "King." The replacement is puzzling in some ways, since the term "malik" is religiously offensive, a pejorative used for rulers holding power on the basis of heredity or other illegitimate grounds -- and used to distinguish Mu'āwiya and his successors from the four Righteous Caliphs. The Qur'ān itself, though quoting the Queen of Sheba, deprecates the title: "Verily, whenever kings [*mulūk*] enter a country they corrupt it, and turn the noblest of its people into the most abject. And this is the way they (always) behave" [27:34]. It seems 'Abd al-'Azīz chose "king" as his title for several reasons, one that, outside the Wahhābī environment, to call oneself "imām" was to be seen as claiming a near-caliphal legitimacy, and another, that "king" was easily intelligible to England and the Western powers.

[221]'Ulamā' prestige and influence was never confined to the Shaykh's descendants, however, other learned men playing a role. In general, the importance of belonging to the Āl al-Shaykh seems to have continually decreased among the 'ulamā'. For names of Āl al-Shaykh involved in government, see Alexander Bligh, "The Saudi Religious Elite (Ulama) as Participant in the Political System of The Kingdom," *International Journal of Middle East Studies* 17 (1985): 37-50 (use with caution). With the resignation of Shaykh Ibrāhīm b. Muḥammad in 1989 as Minister of Justice, no member of the Āl

and the Āl Sa'ūd. During his lifetime Shaykh Ibn 'Abd al-Wahhāb had a disproportionate share of power in both material and spiritual matters, often intruding on the traditional jurisdictions of an Islamic ruler, for example, receiving and allocating revenues, appointing governors, and initiating acts of war and peace; indeed, he seems to have had in general the final say in state affairs.[222] The balance shifted after his death in favor of the ruler.

Ibn Taymiyya's principle of condominium of power between 'ulamā' and ruler was explicit and conscious among the Wahhābīs from the beginning. For example, on hearing that Ibn Sa'ūd had been criticized publicly for irreligious acts, Shaykh Ibn 'Abd al-Wahhāb wrote a letter of rebuke to the complainants:

> We have heard reports that there has occurred between the people of the religion and the Amīr a certain roughness. This is something that makes religion incorrect. Religion is love for God's sake, and anger for God's sake. If the Amīr ["commander," "leader," or "prince"; here Ibn Sa'ūd] does not make his retinue men of religion, then his retinue will be men of evil. The men of religion have a duty to join people to their Amīr, and to overlook his error. This is required of the men of religion, who overlook the failings of their Amīr, just as the Amīr overlooks their failings, and makes them his advisors and those of his council. There shall not be heard concerning them any talk of enmity. You will not see either -- the men of religion or the Amīr --

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al-Shaykh held a key position in the religious legal establishment, until the appointment in 1992 of H.E. 'Abd Allāh b. Muḥammad Āl al-Shaykh, a young sharī'a professor, as Minister of Justice. Membership in the Āl Sa'ūd, on the other hand, remains a critical determinant in the ruling establishment.

[222]al-'Uthaymīn, "Ibn-'Abd-al-Wahhāb," 145-47.

> worshipping God unless with his partner. As for you, put your reliance in God, and ask God's aid in the removal of deficiency, mutual love, and unification of views, for the enemy exults if he sees each speaking ill of his fellow, for the reason that he wishes the return of the False.[223]

Indeed, the Wahhābīs accepted, in its entirety, Ibn Taymiyya's vision of the true Muslim society as based on, in Laoust's phrase, a "solidarité normative," by which both religious and temporal success is achieved through the cooperation of all. Each is under obligation to guide his fellow to good, through the duty of ordering the good and forbidding the evil. This duty indeed sums up the purpose and justification of the state.[224] Rulers and ruled owe each

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[223] 'Abd al-Raḥmān al-Qaḥṭānī al-Najdī Bin Qāsim, *al-Durar al-saniyya fī al-ajwiba al-najdiyya* (Riyadh: Dār al-Iftā', 1385 H., 1965 C.), 7:239. This spirit remains axiomatic even much later. In 1928, King 'Abd al-'Azīz declared, in a speech to a convention of 'ulamā' and tribal leaders held during the Ikhwān rebellion against his rule:

> Anything approved by the [sharī'a] I will accept and anything it forbids I will abandon. Now, you . . . mention what you have heard people say in criticism of your ruler . . . . You, ['ulamā',] [e]xplain the proper duties of the ruler to his people and those of the people to their ruler . . ., the things in which the ruler has to be obeyed and those in which he is to be disobeyed. . . . . As regards that on which there might be a difference between you, ['ulamā',] I will follow in its case the way of the ancestors, that is to say I will accept concerning it what is nearer to the proof of the book of God, the tradition of the Prophet or the sayings of one of the more learned ['ulamā'] . . . .

Quoted by Christine Moss Helms, *The Cohesion of Saudi Arabia: Evolution of Political Identity* (London: Croom Helm, 1981), 254-55.

[224] As with Ibn Taymiyya, the Wahhābīs found the niceties of the Sunnī doctrine of the caliphate to be impractical idealisms. Laoust writes:

> Le califat électif et [Qurayshite] ne pouvait logiquement séduire une doctrine qui s'est toujours opposée en droit

other reciprocal correction; as for the ruler, he is obliged to seek, and his subjects to offer, religious advice [*naṣīḥa*].[225] The perfect egalitarianism of these principles is mitigated, however, by another basic principle, equally emphasized by both Ibn Taymiyya and the Wahhābīs as essential to the moral order: strict adherence to the classical principle of obedience to the ruler, even if he is a sinner, as long as he does not order disobedience to the sharī'a.[226] This duty must modulate the exercise of *naṣīḥa*. Thus, a treatise by several Wahhābī 'ulamā' states:

> As for those sins and deviations of the leadership which do not entail disbelief or departure from Islam, it is obligatory to offer [leaders] advice [*naṣīḥa*] in the manner provided for by sharī'a, with gentleness and following the example of the pious forebears, and without pillorying them in meetings and gatherings of the people. Belief that [such criticism] is the repudiation of evil-doing [of a type and degree that] requires repudiation in public is an glaring error and a manifest ignorance. One who holds such a view does not know the corruption in religion and in this world that results from it.[227]

> à la dictature d'une caste, d'un clergé ou d'un souverain-pontife et pour qui l'État, simple *wilāya*, n'avait d'autre caractéristique que de mettre au service de la Loi la force de contrainte la plus efficace.

Laoust, *Essai*, 526-27.

[225]Ibid., 527.

[226]Ibid., 527.

[227]Bin Qāsim, *al-Durar*, 7:290 (the authors are contemporaries of King 'Abd al-'Azīz). Another example is afforded in the 1345 H., 1927 C. fatwā against King 'Abd al-'Azīz's practice of taking customs duties, which the 'ulamā' termed "*maks*" or non-fiqh-sanctioned taxes. The 'ulamā' announced: "As for *maks* taxes, if any of them exist, let them be abolished at once. If the King abandons them, then that is obligatory. If he refuses, the splitting of the staff of obedience of the Muslims, and departure from his obedience,

Henri Laoust has written that "Du néo-ḥanbalisme d'ibn Taimīya, le Wahhābisme semble avoir toujours retenu les principes les plus favorables au pouvoir de l'imām."[228] This can be shown by the Wahhābīs' emphasis on the principle of obedience to the imām, their support for the principle of imāmate by force,[229] their acceptance of multiplicity in imāms,[230] and their grant to the imām of discretion, in furtherance of public welfare, to impose criminal penalties [*ta'zīr*] up to death.[231]

Laoust's conclusion does not convey, however, that these positions of the 'ulamā' correspond to a political order in which they themselves possessed, and maintained, powers extraordinary when compared with past Islamic regimes. The breadth of authority accorded the ruler reflects their own security within the system, that their own functions within

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would not be permitted on that ground." Muḥammad 'Abd al-Jawād Muḥammad, *al-Taṭawwur al-tashrī'ī fī al-Mamlaka al-'Arabiyya al-Sa'ūdiyya* (Cairo: Maṭba'at Jāmi'at al-Qāhira, 1397 H., 1977 C.), 43. On *maks*, see Ibn Taymiyya, *al-Siyāsa*, 56.

[228]Laoust, *Essai*, 528.

[229]Bin Qāsim, *al-Durar*, 7:239 (Shaykh Ibn 'Abd al-Wahhāb relates that the leaders of all the legal schools are agreed on the principle that "whoever gains power by force over a city or country has the legal status of the [legitimate] imām in all things").

[230]Ibid.

[231]Laoust, *Essai*, 528.

the state insured that they would influence, and benefit from, the ruler's powers.[232]

As we have seen in the last Chapter, the Wahhābī fiqh spirit, inspired by Ibn Taymiyya, vigorously advocated the ijtihād of qāḍīs, as well as of muftīs and other 'ulamā', and rejected any submission of the independent fiqh conscience to the opinion of any man "whosoever he may be" [*kā'inan man kān*]. We now begin to appreciate the political and constitutional implications of the various positions we there encountered.

These vigorously microcosmic and meta-ordered positions bespeak a vigorous and independent role for the 'ulamā', but by their very vigor define an equally vital role for the ruler in complementary macrocosmic dimensions. The Wahhābīs willingly acknowledged the indispensability of broad siyāsa authority in the ruler, whose legitimacy, based so frankly on

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[232]Michael J. Crawford, "Civil War, Foreign Intervention, and the Question of Political Legitimacy: A Nineteenth Century Sa'ūdī Qāḍī's Dilemma," *International Journal of Middle East Studies*, 14 (1982): 227-248, gives a vivid description of a Wahhābī 'ālim's intimate dealings with ultimate power in the Wahhābī state. He describes how Shaykh 'Abd al-Laṭīf b. 'Abd al-Rahmān (d. 1876 C., 1293 H.), a great-grandson of Shaykh Ibn 'Abd al-Wahhāb, dealt with a bloody succession crisis in the Saudi imāmate. Throughout the crisis the shaykh consciously guided himself by Ibn Taymiyya's political teachings. He showed himself far more concerned with the sharī'a's implementation and the welfare of his flock than with the identity of the ruler, and in the end would support whoever wielded power. A son of this scholar, 'Abd al-Allāh, at one time even went over to support the Saudi family's arch-rivals, the Rashīdīs of Ḥā'il. King 'Abd al-'Azīz forgave him, and asked for his daughter in marriage; King Faisal was born of the union. Bligh, "Elite," 45.

the fact of power, they were eager to protect from the objections of excessive scruple. Ibn Taymiyya's characteristic combination of a stringently transcendentalizing vision of fiqh, with a willing, pragmatic acknowledgement of the divine law's dependence on crude force and its bearers, marks Wahhābī-Saudi thinking indelibly. We shall examine in Parts II and III of this Chapter how this conception works out in practice.

Let us preliminarily, however, ask how this conception of 'ulamā'-ruler cooperation compares with the model of the Ottoman legal system just reviewed. Two obvious lines of comparison seem to lead to contradictory conclusions. In one comparison, the Ottoman and the Wahhābī legal systems seem highly similar, in that both explicitly endorse a condominium of power between the 'ulamā' and the ruler, frankly acknowledge a broad scope for legitimate action by the ruler, and allocate to the 'ulamā' important, central functions within the system. As we have seen, the Ottoman 'ulamā' were no strangers to Ibn Taymiyya's constitutional theories. This important and fundamental similarity between the systems may trace to the general influence of Ibn Taymiyya's thought, or, more likely, to the trend of Islamic legal history that has favored his views.

But a second line of comparison shows great dissimilarity. From early in the formation of his thought, Ibn 'Abd al-Wahhāb took vehement positions in opposition to

blind taqlīd and to the closing of the door of ijtihād. As we have seen, Wahhābīs characteristically give great emphasis to the ijtihād endeavor, at least as to qāḍīs and 'ulamā' generally. Wahhābī piety vehemently rejects sterile formalism and rigidity as to the sharī'a, and seeks to make the latter central to a living, individual, microcosmic piety, and no mere template for a macrocosmic, almost secular, legal system. (This position is the other side to the coin of the Wahhābī rejection of most of Ṣūfī religiosity, since it was Ṣufism which in Ottoman times had claimed, to the detriment of the law, much of the felt, and individual, religiosity of the people.) All these Wahhābī positions were intended, and understood by contemporaries, as stark rejections of the prevailing Ottoman-sponsored legal theory and practice; some of the most virulent anti-Wahhābī polemics focused on just this point.

These two comparisons situate the key difference between the two systems in the fact that the Wahhābī 'ulamā', by accentuating the microcosmic nature of their law and of their specialization, create for themselves a legal authority independent of and in their view superior to the legal authority of the ruler, but at the same time by their own admission complementary to it. As to the matters we are here discussing, *viz.*, the jurisdiction to legislate and adjudicate, we find that Wahhābī 'ulamā' and ruler often are in competition, though the 'ulamā' have the upper hand. In

the Ottoman case, by contrast, it seems that, partly because of the already highly macrocosmic tendencies of the Ḥanafī 'ulamā''s outlook, the latter agreed to become part of, and lend their prestige and legitimacy to, a single, coordinated legal system headed by the ruler. In return they received a large portion of the power, prestige, and wealth of state service. Again, in matters of adjudication and legislation, Ottoman 'ulamā' certainly play the key roles, but avowing the while that that they do so on terms set by the sulṭān; there is less competition and more an agreed sharing of the pie. In sum, in both the Wahhābī and Ottoman cases the relationship of ruler and 'ulamā' is one of both competition and cooperation; yet, comparing the cases in purely institutional terms, we find that among the Wahhābīs competition is explicit and cooperation implicit; in the Ottoman case it is the reverse.

2. Transformations in Islamic States' Legal Systems under Western Influence (19th C. to Present)

The story that unfolds throughout the Middle East from the 19th C. onward is one of total dismantling of existing Islamic legal systems as described in previous sections, and their replacement by legal systems modeled on those of Europe. Only a few countries -- essentially those of the Arabian Peninsula -- evade this fate, in varying degrees.

We need not describe this dismantling here at length. Writings on the "secularization" of Middle Eastern societies

cover many aspects of this process,[233] including the replacement of sharī'a laws by state legislation, and the abolition of sharī'a courts, the nationalization of the *awqāf* which supported 'ulamā' institutions, and the extension of state control over education. Yet no study has adequately focused on the legal system as such, and portrayed this momentous transformation, with regard to the actors, institutions, interests and motives involved in it, and how it unfolded in both theory and practice.

In 1798 Napoleon occupied Egypt. This was merely one, particularly vivid, humiliation, in a long series of humiliations suffered by a world so recently assured of its supremacy, but now confronting an astonishingly powerful enemy. Thinking that its losses must be a mere matter of military technology, Muslim states at first worked to learn Western military techniques. But even this meant Frankish advisers and teachers, a new education for the military, observers sent to Europe, European mechanical innovations.

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[233]See especially David Crecelius, "Non-Ideological Responses of the Egyptian Ulema to Modernization," Nikki R. Keddie, ed., *Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle East since 1500* (Berkeley: University of California Press, 1972), 167-210; idem, "The Course of Secularization in Modern Egypt," in Donald E. Smith, ed., *Religion and Political Modernization* (New Haven: Yale University Press, 1974), 67-94; Aharon Layish, "Contributions of the Modernists to the Secularization of Islamic Law," *Middle East Studies*, XIV (1978): 263-277; Carter V. Findley, *Bureaucratic Reform in the Ottoman Empire: The Sublime Porte, 1789-1922* (Princeton, NJ: Princeton University Press, 1980); Niyazi Berkes, The Development of Secularism in Turkey (Montreal: McGill University Press, 1964).

These initial changes could nonetheless be accepted without extensive cultural dislocation; in sharī'a terms they were merely practical measures to strengthen the siyāsa arm of the state. But such measures led to ever more changes, with ever greater cultural impact, as the exposure to the West grew beyond the military to the economic, political, legal and cultural. Moreover, the pressure of the Western powers infringed ever more on Muslim sovereignty, weakening independence of action.

In both the Ottoman Empire and in Egypt, which under Muḥammad 'Alī (1805-1848 C.) became virtually autonomous, these changes were wrought by autocratic rulers. Western technology and methods of state organization demanded, and contributed to, new powers in the hands of rulers, which in turn enabled the latter to abandon its alliances with traditional elites, and even work to destroy them. Among these elites were the 'ulamā'. As their institutions and powers were one by one reduced or eliminated, the 'ulamā''s social relevance was reduced merely to preserving unchanged the old religious traditions; 'ulamā' views became increasingly irrelevant to the realities of power, wealth and national development.

Thus, in the Ottoman world, in 1839 the Sulṭān inaugurated the period of the Tanẓīmāt, or a program of decrees initiating far-reaching changes in the Ottoman legal system. Among these changes were the adoption, on the order

of the ruler, of laws borrowed from the West. These laws were at first in areas where there was little fiqh regulation, in matters like novel commercial transactions, such as commercial paper and insurance, or on which Western pressure was strongly felt, such as the treatment of foreign nationals, or the torture of accuseds and corporal punishment. To apply these new rules, special [*niẓāmiyya*] courts were needed, the judges of which were trained in a secular legal fashion, and not in sharī'a at all. Laws of procedure were altered to accord with Western ideas, removing religious aspects such as the decisive reliance on accredited witnesses and on the oath.

On the heels of such innovations came others even more far-reaching, as areas of law regulated by fiqh were brought under Western law. After some attempts to develop an Islamic penal law, the Ottomans adopted a French code in 1858.[234]

When the turn of the civil code came, however, pride in Islamic and national legal identity roused itself. The government decided to forego French laws and conmissioned a committee to create a civil code built up from rulings of the Ḥanafī school, arranged in numbered sections. In a mere seven years of work, and these interrupted, this committee developed

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[234]This code specifically stated it was merely a codification within the ta'zīr authority of the ruler, not infringing either the sharī'a 'uqūbāt, meaning no doubt the Qur'ānically fixed penalties of the *ḥudūd*, or personal rights, like those to retaliation and blood-money. Berkes, *Secularism*, 164. The latter rights at least continued to be enforced in sharī'a courts, leading to occasional clashes of outcome. Ibid.

the *Majallat al-Aḥkām al-'Adliyya*.[235] As issued in 1876, the Majalla covered only obligations and some matters of procedure; remaining portions, covering matters of personal status, were never completed; moreover, the code did not aspire to the exhaustiveness and tight logical consistency of a European civil code. Yet it was very influential. While abolished in Turkey in 1926 under Atatürk, it long remained the law elsewhere: in Jordan until 1976, in Lebanon until 1932, in Syria until 1949, in Iraq until 1953,[236] and in Kuwait until 1980. Also it inspired further attempts to codify Islamic laws, but none of these was enacted officially.[237] Egypt never bothered with an Islamic civil code, but adopted the Code Napoleon, with few changes, for its National Courts in 1883.

Codication of the fiqh turned out to be a rear-guard action, a small dike against a flood of Western laws. At the

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[235]In Ottoman Turkish transliteration: Mejelle-i Aḥkām-i 'Adliyye. Berkes, *Secularism*, 169-172; Siddik Sami Onar, "Majalla," in Majid Khadduri and Herbert J. Liebesny, eds., *Law in the Middle East*, only 1 vol. issued (Washington, DC: Middle East Institute, 1955), 1:292-308. For an English translation of the *Majalla*, see C.A. Hooper, trans., *The Civil Law of Palestine and Trans-Jordan* (Jerusalem: Azriel Printing Works, 1933).

[236]Schacht, *Introduction*, 93; Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases & Materials* (Albany: State University of New York Press, 1975), 91-93, 100, 109.

[237]Several codes were authored by Muḥammad Qadrī Pasha (d. 1889 C.) in Egypt, in personal status and waqf, which remain today highly influential. See Liebesny, *Law*, 112, on the "Code Morand," developed for Algeria, but never enacted.

end of a mere half century of legal development, rulers had reduced the role of the uncodified sharī'a law solely to matters of personal status, meaning the law of the family, inheritance, gift, and waqf, and had confined the jurisdiction of the sharī'a courts the same way. After World War I Ataturk took Turkey much further, making Turkey unique among Muslim countries: as part of his thorough secularization of the country,[238] he declared sharī'a law entirely abolished, and adopted Swiss and other European codes even in family law.

But even elsewhere the family law could not remain unreformed, as an independent preserve of the 'ulamā' and their fiqh. The 1917 Ottoman Law of Family Rights breached the sanctity of family law, imposing reforms by statute. Many similar laws followed throughout the Muslim world. The legislators of these reforms offered for them a number of justifications. First, and most commonly, they offered the idea -- important among the Ottomans, as we saw -- that a ruler, by dint of his siyāsa powers, could make a choice according to utility, from among various schools' rulings,[239] and then impose that choice as law. Reformers even advocated that various schools' rules be "patched" [*talfīq*] together to

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[238]At the same time he disestablished Islam and abolished the caliphate.

[239]Laws may even incorporate the views of individual scholars that had never been endorsed by one of the four schools, which was to adopt a considerably broader idea of ijmā' than was customary in late Ottoman times. J.N.D. Anderson, *Law Reform in the Muslim World* (London: Athlone Press, 1976), 58-65.

make up even more suitable rules, and this without any concern for the uṣūl al-fiqh sources, or theoretical compatibility, of the various component rules.[240] The second, and next most common, strategem was to use measures in form purely administrative (and therefore siyāsa in justification), but having the desired substantive effect. For example, reformers wished to curb the marriage of minors, but could not do so by fiqh means, since a precedent existed from the Prophet himself; accordingly, they passed laws (i) requiring registration of marriages, (ii) denying registration to child marriages, and (iii) forbidding judges to hear any claim based on an unregistered marriage.[241] Third, if neither of the above two strategems were adequate, reformers boldly adopted a new ijtihād to justify a law. For example, Qur'ān and sunna had always been interpreted as allowing husbands the unfettered, independent right to contract additional marriages up to four. Arguing that this unequal power favoring the husband, and its frequent abuse, weakened and corrupted the family, reformers advocated the prohibition of polygamy

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[240]This "patching" paid no respect to the often very divergent theoretical frameworks behind the various schools' views. Anderson, *Law Reform*, 47-58. This view was endorsed by no less than 'Abduh himself. Layish, "Contributions of the Modernists," 263-4.

[241]Many reforms were intended to improve the lot of women, for instance, by restricting unilateral male divorce and polygamy, liberalizing divorce at the instance of the wife, and raising the age limits for the wife's right of custody.

altogether,[242] or at least court review and approval of the husband's intent.[243] Support for this was found in verses of the Qur'ān which historically had been treated either as inapposite[244] or as enforceable only in the husband's conscience, not in the courts.[245] The question arises: does this last strategem, unlike the first two, exceed the traditional siyāsa powers of the sovereign, wresting from the 'ulamā' new powers for the state? It seems it does not: to have done so, reformers would have had to claim that the legislator was a legitimate, and moreover imperative, interpreter of fiqh, requiring, at a minimum, that he have the knowledge of a mujtahid. Given the weak Islamic political legitimacy of the rulers and states in question, the reformers could only rest on the traditional (Ottoman) idea -- actually identical to that supporting the first strategem above -- that a ruler, in siyāsa mode, could select, and apply, a fiqh position, even were it the view of a minority, or even of a single scholar.[246]

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[242]Concerning Qāsim Amīn's proposal in 1900, see Anderson, *Law Reform*, 61. Independent Tunisia, under Bourguiba, alone has taken this step.

[243]Such a proposal was nearly adopted in Egypt in 1929, and was adopted later in several modern family law codes, including Iraq. Anderson, *Law Reform*, 61-64.

[244][4:35].

[245][4:3]; [4:129].

[246]Anderson and Coulson exaggerate the relevance of such reforms to "Islamic law" (read "fiqh") because of inadequate emphasis, first, on the siyāsa-fiqh dialectic *within* "Islamic

Even after many such reforms, family law still remained based upon, as residual law, the old, usually Ḥanafī, fiqh. Beginning in the fifties, however, a number of countries adopted comprehensive family law codes, codifying even the traditional law. At about the same time, many of these countries, including Egypt, unified their national courts, abolishing the separate sharī'a courts entirely.

In sum, most legal systems of the modern Middle East have become effectively modernized, in most of the senses usually associated with legal modernization. Law presents itself as uniform, general, universal, impersonal, and secular.[247] This is formally true; but is it true in the substance of the law applied, or in the legal life of the people? It is

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law" (read "sharī'a"), within which it is the first term that potentially lends the reforms legitimacy; and second, on the weak to non-existent Islamicity of modern state practice, even in its legitimate courts, potentially rendering it, not only not fiqh, but not siyāsa in the sense we use it here, i.e., it would be a siyāsa wholly outside Islam because secular. Layish, "Contributions of the Modernists," very perceptively criticizes the former scholars for assuming the reforms to be Islamic; he as much as they, however, neglects my first point.

The writings of Muḥammad 'Abduh, and his disciple, Rashīd Riḍā, lent much of the legitimacy to the methods of reform described here. To these pioneers Hourani and Layish attribute much of the blame for the secular trends that followed. For example, Sanhūrī, the Francophile scholar and advocate of the secular development of Islamic law, drew inspiration from 'Abduh. But it should be noted that, as the premises for all such doctrinal proposals, 'Abduh advocated many other programmatic, institutional reforms, all having the object of regaining for the 'ulamā' and for their fiqh the central roles in the development of the law and the legal system. See Layish, "Contributions of the Modernists."

[247]Marc Galanter, in Myron Weiner, ed., *Modernization: The Dynamics of Growth* (New York: Basic Books, 1966), 153-163.

certainly questionable how far these transformations have penetrated the consciousness, or more so, the conscience, of the masses. Although law in the Western mold has been enforced in most areas for 150 years, there are many indications that citizens yet do not regard these laws and this legal system as sanctioned by, or harmonious with, their religion, or as justified by norms of legitimacy that they themselves would approve and uphold.[248] Everywhere, though in degrees varying from country to country, there is strong popular sentiment to reject these laws as colonial implants and to "return" to the sharī'a.

As for the 'ulamā', what was their reaction to all these developments? While many 'ulamā' opposed these steps of modernization as innovations, and all of them no doubt mourned their own decline from power, yet their opposition to these steps, as each was proposed, seems strangely ineffectual, even muted; some of their number even lent the measures aid and support. Historians speculate on why the 'ulamā' were so ineffective in preventing, or even much protesting, the destruction of so great a portion of their own livelihood and way of life.[249]

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[248]See Tariq Al-Bishri, "La Question Juridique entre sharī'a islamique et droit positif," *CEDEJ Dossier* 3 (1985):179-207.

[249]See Crecelius, "Non-Ideological Responses"; Heyd, "Ottoman 'Ulemā"; Chambers, "Ottoman Ulema."

A number of answers have been offered to this puzzle. One is simply overwhelming Western power, so great that concessions to it were made readily, whatever the religious cost. A second answer is the impressive extent to which ruling elites were won over to Western secularism and secular values such as nationalism, with the result that 'ulamā' and their protests went unheeded, were pointless. A third is that the 'ulamā' were devoted to the sharī'a as a religious ideal to be fully realized only in the idealized past or a mythical future; therefore, if the sharī'a receives due acknowledgement as ideal from citizens and ruler, its critical religious objectives are fulfilled, and actual legal practice is a secondary consideration.[250] Fourth is the corruption of the Ottoman 'ulamā' hierarchy, it being so thoroughly identified with the ruling establishment as to put the state's interests above anything else.[251] Fifth and finally is that the 'ulamā', realizing that effort to stop these changes was futile, struggled instead to confine them in a world apart, to erect a wall between them and a preserve -- largely in ritual and the family -- of traditional Islam and its fiqh, though this course cost the 'ulamā' the loss of much real power, and greater secularization than would otherwise have been the case.[252]

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[250]Cf. Anderson, *Law Reform*, 35-36.

[251]Heyd, "Ottoman 'Ulemā"; Chambers, "Ottoman Ulema."

[252]Crecelius, "Non-Ideological Responses."

While each of these explanations has some validity, vital to understanding any of them is to bring to bear what we have learned so far, to consider how, in terms of their own world-view, the 'ulamā' must have conceived of these changes. Consider the channels through which these changes came. They came as rulers' law, issued under the siyāsa power, for siyāsa purposes, with siyāsa justifications, employing siyāsa procedures and methods. Given what has preceded, we can understand how the 'ulamā' may have seen these changes as highly regrettable, even dangerous, with respect to their long-term competition with the ruler, but not, in qualitative terms, unprecedented. As long as the measures were confined securely in the siyāsa realm, 'ulamā' may have felt it inconceivable that changes could undermine the ultimate sanctity of sharī'a itself or, concomitantly, the 'ulamā''s ultimate role in society.[253] As we have seen,[254] Ottoman-era 'ulamā' had long since known how to accommodate the fiqh to purposes of the state while keeping the sharī'a aloof: they legalized actions at levels of justification far below that of

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[253]This is so even when it is claimed that some new ijtihād supported the measure -- for example, in granting divorced women alimony, i.e., financial support beyond the maintenance owed them during the waiting period ['*idda*] after divorce, on the basis of a Qur'ānic injunction to give divorced women a "consolatory gift." Even in such a case, in Islamic constitutional terms, the measure was simply the ruler's adopting the particular opinion held by an innovative jurist, and his imposing it, by the force of his siyāsa powers, on his courts.

[254]See discussion of the "closing of the door of ijtihād," p. 155 above.

ijtihād from revealed sources, on grounds such as the duty of obedience to the ruler, utility, local custom, the deficiencies of learning in times corrupted, or, simply, necessity. These same mechanisms were employed now, the only difference being one of degree. It seems this outlook, fatefully combined with their prideful ignorance of the West, caused the 'ulamā' to delay opposition until it was too late.

That this was, and often still is, the 'ulamā''s outlook is supported by the fact that when, at any time up to the present, a reforming ruler or government should attempt to make changes in the law at higher levels of justification, directly impinging on the sharī'a, influential 'ulamā' raise an outcry, and often can cause the measure's repeal. During the Tanẓīmāt, the 'ulamā' accepted quite readily, even supported, vast changes in the state apparatus, and even the enactment of a number of codes on matters typically within the siyāsa realm. But when the codification effort arrived at the law of obligations, the idea of preserving Islamic law in this area by codifying it -- the effort later adopted as the *Majalla* -- was opposed most strongly not by secularists preferring French law, but rather by the 'ulamā' themselves.[255] Clearly, the threat posed by the principle of state legislation in this area, traditionally determined by

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[255]Berkes, *Secularism*, 169. The leader of the effort to preserve sharī'a here, Muṣṭafā Jawdat Pasha, had to renounce status as an 'ālim to participate in the reform movement. Ibid., 165.

'ulamā' through their methods and institutions, was more serious to them than the alternative threat, the intrusion of a wholly alien legislation, which could claim no legitimacy beyond the ruler's fiat.[256] More recently, 'ulamā' protested vigorously (though in the end unsuccessfully) when in 1956 President Bourguiba prohibited polygamy in Tunisia, not merely by the indirect, siyāsa-justifiable, methods of penalizing husbands who conclude a second marriage or of prohibiting courts to hear claims based on second marriages, but by declaring polygamous marriages void *per se*.[257] A similar outcome in Iraq was reversed after an 'ulamā'-led popular outcry.[258] If we examine the most recent family law statutes in the Arab world, those of Egypt, Kuwait and Algeria, it seems the line the 'ulamā' have drawn is holding: all three are laws which, as to reforms adopted, and more so as to the juristic methods used, are certainly no bolder, and perhaps less, than laws of even decades ago.[259]

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[256]As, for example, happened soon, in 1883, in Egypt, where not the Majalla but a largely French national civil code was adopted.

[257]Anderson, *Law Reform*, 64.

[258]Ibid.

[259]See Fauzi M. Najjar, "Egypt's Laws of Personal Status," *Arab Studies Quarterly* 10 (1988): 319-344; Hadjira Dennouni, "Les Dispositions du Code Algérien de la famille," *Annuaire de l'Afrique du Nord*, 23 (1987):711-726; Tahir Mahmood, "The New Code of Personal Status of the State of Kuwait 1984: An Appraisal," *Islamic and Comparative Law Quarterly*, 8 (1988): 123-134.

Thus it does seem that 'ulamā' have succeeded until today in preserving a notion of the sharī'a -- however distant from practical, positive-legal application -- which effortlessly transcends modern laws and legal systems, mocking the latter's claims to trifle with its provisions or methods. The sentiment of devotion to a sharī'a invincible and God-given -- above the reach of any modern state law or legal institution to taint -- is a pillar of many so-called fundamentalist movements. Among radical groups committed to a immediate abandonment of positive law and return to the sharī'a, this sentiment overwhelms all else. Sadat's assassin Islāmbūlī believed Sadat an infidel tyrant, and therefore justly killed, on the ground that he did not apply sharī'a, and did so wilfully; the proof is the verse:

> [T]hey who do not judge in the light of what God has bestowed form on high -- it is they, they who are the infidels. [5:44]

Reports at the time indicated that Islāmbūlī found wholly unproblematic how to restore sharī'a in modern-day Egypt. Such a position reflects the tenacity among Muslim masses of the classical 'ulamā' vision of sharī'a.

But at the same time other trends in Muslim countries indicate that this vision has indeed lost vital ground, due to long accommodation to law as a secular state function. One is the idea, near axiomatic for many moderate Islamic thinkers, that a return to sharī'a can and should be accomplished, in states with long-secularized, West-deriving

legal systems, by simply amending here and there the existing constitution and statutes. Or that modern sharī'a rules should be determined once and for all by convening a council of mujtahids, appointed by the governments of Muslim countries, to deliberate and adopt fiqh rulings, which would then be ijmā' and binding on all Muslim citizens and governments. Or, even allowing for the differences between Sunnī and Shī'ī public law, the practice of the Islamic Republic of Iran, in enacting the Islamic state through constitutional and legal institutions, or in treating the fatwās of its Ayatollah Khomeini as supreme legal judgments, unappealable if not divinely infallible.[260] All these instances bespeak an acceptance, widespread and ingrained, of Islamic law as positivized, as an instrument of the state, and, most important, as secularized, in the special sense not of being non-religious in content or intent, but of being predominantly macrocosmic, cut from the ultimate roots of Islamic law in individual consciences, with all their concreteness, particularity and multifariousness.

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[260]See Daniel Pipes, *The Rushdie Affair* (New York: Birch Lane Press, 1990), 92, quoting Khomeini from the Iranian newspaper *Keyhan*, "For Islam, the requirements of government supersede every tenet, including even those of prayer, fasting and pilgrimage to Mecca."

3. Transformations in the Modern Saudi Arabian Legal System (the Third Wahhābī State, 1902 to Present)

a. The Emergence of Saudi Arabia as a nation-state

As a poverty-stricken desert backwater, Najd, in the central Arabian peninsula, largely evaded the attention of colonial powers throughout the 19th C. The Ottoman and Egyptian powers would also have willingly ignored it. But when the Wahhābīs caused trouble outside Najd, by raiding the holy Shī'ite shrine cities in Iraq in 1801, and taking the Holy Cities of the Ḥijāz in 1806, the Ottomans were compelled to intervene, sending in an Egyptian force which retook the Holy Cities and, after seven years of struggle, crushed the Wahhābī state at its capital in 1818. Even after this, however, Ottoman sovereignty in Najd was fleeting, renewed episodically over twenty years, with Saudi authority always filling its absences. In legal terms, the Ottomans left few traces in the region, which continued to apply a combination of fiqh, chiefly Ḥanbalī, tribal customary law, and local ruler's fiat.

The region of the Ḥijāz, because of the Holy Places and the Pilgrimage, was far more cosmopolitan and open to contemporary trends. Though under Ottoman suzerainty until 1916, the Sharīfs of Mecca enjoyed a great deal of autonomy. As we shall see, most of the Ottoman modernizations of the

Tanẓīmāt were never applied to the Ḥijāz, since the region had less commercial or strategic significance, and since secularization was inappropriate in the Holy Cities. To the east of Najd, the region of al-Aḥsā' (or al-Ḥasā) was also somewhat more worldly-wise than Najd, participating to a degree in the trade of the Gulf. Yet, since the bulk of that trade flowed through the better ports of Bahrain and Kuwait, the region retained manners closely allying it with the culture of the interior.

It was thus in a realm largely islanded off from Western influence that the third Wahhābī state emerged. In 1902 the young 'Abd al-'Azīz, leaving exile in Kuwait, took his famous bold foray into Najd to conquer Riyadh, and began new campaigns to regain the lost realm of his fathers. By 1926 he had succeeded admirably, uniting all of the territory that is now Saudi Arabia. As his power increased, however, he encountered an outside world far different from that with which his ancestors treated, in respect to the degree of Western involvement and influence, chiefly of the British who now ruled not only India and Egypt, but controlled surrounding areas of Iraq and Transjordan. 'Abd al-'Azīz's astuteness in realizing the new order, and in playing the greater powers off toward his own ends, contributed much to his success. Indeed, the modern conditions which the Wahhābī state encountered in

the end vouchsafed it a permanence -- as a modern nation-state -- that it could never attain in the past.[261]

The new state's transition into the modern world began with the Wahhābī conquest of the Ḥijāz in 1925. 'Abd al-'Azīz had learned from the past that, if he were to keep the Ḥijāz, and indeed avoid being wholly crushed by more powerful outsiders, he must act in a fashion the outer world found responsible. First, he knew that he must satisfy the Muslim world that Wahhābī rule would not threaten good order in the Holy Cities and the Pilgrimage -- as it had a century before. Accordingly, he restrained his troops from excesses, and took great pains to project a statesmanship that would please and reassure the Muslim world. Secondly, he knew his state faced new challenges in the highly internationalized, post World-War-I Middle East. In assuming the mantle of nation-state, the Wahhābī domain had to behave according to new West-dictated rules of international order -- for example, reining in the cross-border raiding of fervent Wahhābī Ikhwān troops. 'Abd al-'Azīz succeeded in both these respects, and in just a few years was able to consolidate his rule by announcing the creation in 1932 of the Kingdom of Saudi Arabia, assuming a new, frankly secular title of "King." But his success was earned only by bloodshed; he had to put down a rebellion of his Ikhwān warriors by military means. Only then did he get free hand to make the innovations that he was obliged to make.

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[261]See, generally, Helms, *Cohesion*.

Because of the circumstances of the country's creation, the years immediately following the conquest of the Ḥijāz are critical in legal and constitutional terms. King 'Abd al-'Azīz faced great difficulties in incorporating the legally relatively sophisticated Ḥijāz into his traditionalist Wahhābī state. On the one hand, he had to accommodate international, Muslim and local Ḥijāzī opinion, while, on the other, he could not be seen by his Wahhābī followers to be swallowing down the very evils that had justified a holy war to cleanse the Holy Cities. This difficulty dominated 'Abd al-'Azīz's legal initiatives for the years from 1926 through 1930.

In brief outline, the way in which 'Abd al-'Azīz chose to solve his problem was by creating a separate, self-contained constitutional and legal regime for the Ḥijāz, while leaving the conservative interior to its old ways. Immediately after the conquest he set up a constitution, termed "Basic Law," intended to reassure world and Ḥijāzī opinion as to his intentions, and which among other things, allowed for a Consultative Council for the representation of local views.[262] He then "acceded" to the Ḥijāzīs' wishes for a number of relatively modern laws and courts. All these were, indeed, more modern than had prevailed under the prior local regime, and all of them necessitated forms of

[262]Text of the Basic Law is given in Soliman A. Solaim, "Constitutional and Judicial Organization in Saudi Arabia" (Ph.D. diss., The Johns Hopkins University, 1970), 172-183. The Ḥijāzī Consultative Council survived until 1992, but for years it had been powerless, maintained as a mere relic.

legislation which to his Wahhābī followers were unprecedented at best, and ungodly at worst. Probably the latter tolerated these innovations only as arising from the special political situation following the conquest, and as no doubt temporary. In this way 'Abd al-'Azīz was able to introduce new institutions, gain experience with them, and allow his conservative Najdī 'ulamā' a chance to become familiar with them. Indeed, some which they found unobjectionable he generalized across the whole country. But, somewhat surprisingly, King 'Abd al-'Azīz delayed for a long time -- almost three decades, until just before his death -- the critical step of unifying the constitutional and legal system of the country.[263] Even when it was done, not all of the institutions pioneered in the Ḥijāz survived.[264] The legal system today is one still somewhere in the middle -- in many ways less modern than the system initially adopted for Ḥijāz, yet still modernized to an extent that would have been unthinkable in Najd thirty or forty years ago. Not until 1992 did the country as a whole obtain a Basic Law and a Consultative Council.

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[263]Summer Huyette, *The Political Adaptation of Saudi Arabia* (Boulder, CO: Westview, 1985), 57-61.

[264]The Ḥijāzī constitutional arrangements did survive, but in form only, and only still limited to the Ḥijāz.

b. _Siyāsa law and tribunals established by 'Abd al-'Azīz

With this general background, let us return to our concern over the jurisdictions to legislate and to adjudicate. What specific institutions in these respects were innovated for the Ḥijāz, and how have these survived in the contemporary legal system? We need to examine the emergence of the practices of, first, extensive law-making by the King on his siyāsa authority (these laws called ***niẓām*** [pl. ***anẓima***], lit. "regulation"; the term "qānūn" is consciously avoided), and, second, creating special courts, alongside the sharī'a courts, to apply these laws. These practices have led, in the contemporary legal system, to a degree of duality in the legal system, in that there are now both fiqh-based and siyāsa-based systems of laws and courts.

It would be helpful in understanding these developments to know the nature of the legal system in the Ḥijāz prior to the Wahhābī conquest. This is a surprisingly obscure question. For the Ottoman era, ending in 1916, the basic sharī'a legal system is known, it consisting of an Ottoman appointed Ḥanafī chief qāḍī, assisted by deputies from the other three Sunnī schools. While Ḥanafī law was applied in official matters, and in the courts in the chief cities, in other matters other schools were applied according to the affiliation of the litigants; most Ḥijāzīs belonged to the

Shāfi'ī school.[265] As to the Ottoman modern and secular laws from the Tanẓīmāt, only a few of these seem to have been applied in Ḥijāz. Jedda, the seaport and the more active commercial center, saw more application than did the Holy Cities, relatively immune from such foreign intrusions.[266] Thus, perhaps new secular [*niẓāmiyya*] courts, and certainly a commercial court, existed in Jedda, but not in Mecca or Medina.[267]

Whatever application was given these laws by the Ottomans, that application was reduced, or even temporarily cancelled, by Sharif Ḥusayn when in 1916 he declared the Arab Revolt against the Ottomans. Indeed, the Sharif partly justified his move as preserving the Ḥijāz from the application of certain non-Islamic Ottoman laws.[268] His action led, according to Saudi accounts, to a strong

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[265]Sa'ūd b. Sa'd Āl Durayb, *al-Tanẓīm al-qaḍā'ī fī al-mamlaka al-'arabiyya al-sa'ūdiyya* (Riyadh: Maṭābi' Ḥanīfa, 1403 H., 1983 C.), 302.

[266]The special status of the Holy Cities may account for several authors' views that no reforms were applied in the Ḥijāz at all. See ibid.

[267]Durayb denies they existed at all. Ibid., 302. 'Abd al-Jawād Muḥammad says they did exist, but were abolished later by Sharīf Ḥusayn. Muḥammad, *al-Taṭawwur*, 129.

[268]T.E. Lawrence, *Seven Pillars of Wisdom*, 2d deluxe ed. (Garden City, NY: Garden City Publishing Co., 1938), 68-69, relates that in 1915 the Sharif abolished the "Turkish civil code" in Jedda, apparently the *Majalla*. The Ottoman land law was cited by Ḥusayn as a justification for the revolt. Muḥammad, *al-Taṭawwur*, 41; Āl Durayb, *al-Tanẓīm*, 303.

resurgence of the customary legal systems of the tribes, whose support the Sharīf was seeking.

By the time of the Saudi conquest of Ḥijāz, in any case, it is clear that some Ottoman qānūns did apply, since their continuation became a point of difficulty for King 'Abd al-'Azīz.[269] In 1345 H., 1927 C. the King noted, in a royal decree, that the "rules of the Ottoman qānūn continue to be applied until now, because we have not issued our Will abrogating them," and consented to the proposal of the Ḥijāzī leadership that the rules be continued for the time being.[270] They seem to have continued as long as 1349 (1930). A convocation of 'ulamā', brought together by the King on 8 Ṣafar 1349 (July 4, 1930), to cement support in his favor against the rebelling Ikhwān, demanded that he cancel all manmade laws:

> As for the laws [*qawānīn*], if any exist in al-Ḥijāz, then they shall be cancelled at once, and judgments be made only by the Immaculate Sharī'a.[271]

Efforts were under way, even before the convocation, to replace Ottoman laws with Saudi ones, the King now issuing

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[269]Meanwhile in Turkey Ataturk had abolished the caliphate, disestablished Islam, and, just one month after the Wahhābī conquest of the Ḥijāz, replaced not only the *Majalla* but the Islamic family laws with the Swiss Civil Code. Bernard Lewis, *The Emergence of Modern Turkey*, 2d ed. (New York: Oxford University Press, 1968), 272.

[270]*Irāda Saniyya* No. 1166, 27 Dhū al-Qa'da 1345 (June 27, 1927), reprinted in Institute of Public Administration, *Majmū'at al-nuẓum, Qism al-qaḍā' al-shar'ī* (Riyadh, n.d.), 5.

[271]Al Durayb, *al-Tanẓīm*, 306.

"decree-laws" or ***niẓām*** through the exercise of his siyāsa legislative power. The early decree-laws were not such as to offend fiqh sensibilities, judging by their titles; they seemed to have the purpose of laying down the basic structure of the Ḥijāzī government, the most substantive such matter being to set up the structure of the sharī'a courts.

After the Ikhwān were finally pacified in 1930, however, the King assumed greater powers of law-making. This is obvious in the issuance, in 1931, of a "Regulation of the Commercial Court,"[272] composed of over 600 articles, drawn from earlier Ottoman qānūns which in turn had French precedents.[273] This law deals with a number of aspects of modern commercial practice, including rules of maritime commerce, companies, commercial paper and bankruptcy. The boldness of such a law lies in that the subjects it treats, though concerning mostly legal institutions novel to the medieval fiqh, still by no means fall outside the traditional concerns or even the rules of that fiqh. Indeed, the new institutions implicate certain moral concerns fundamental to the sharī'a, such as the prohibitions of interest, unlawful enrichment, and commercial uncertainty.

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[272]*Umm al-qurā*, No. 347, 22 Rabī' al-Awwal 1350 (Aug. 7, 1931).

[273]Muḥammad, *al-Taṭawwur*, 67-8. For the laws the latter refers to, see George Young, *Corps de droit Ottoman* (Oxford: Clarendon Press, 1906), 1:224-238; 7:55-154.

I have no evidence of opposition to this law by the 'ulamā', other than the telling report that the sharī'a courts refused to apply it.[274] Their refusal was, however, largely moot, since the law assigned its application to a "commercial court." Apparently, the King had earlier, in 1926, "created" a commercial council in Jedda -- probably merely sanctioning the continuance of an Ottoman-style commercial tribunal.[275] In any case, the new law formally established this court and regularized its administration, even laying down for it rules of procedure. It provided that the court was to consist of seven members, six of whom were to be merchants of good religion and character and only one a "*shar'ī*" member, i.e., a judge trained in the fiqh.[276] Decisions were to be by a majority. Again, however, this law applied only in the Ḥijāz; elsewhere in the Kingdom commercial matters continued to be ruled by usual fiqh rules, and administered by the sharī'a courts.

Many other anẓima followed as King 'Abd al-'Azīz laid the foundations of a modern state. Examples are laws regulating

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[274]Muḥammad, *al-Taṭawwur*, 117.

[275]al-Rasheed, "Criminal," 64; Fu'ād Hamza, *al-Bilād al-'arabiyya al-sa'ūdiyya* (Riyadh: Maktaba al-Naṣr al-Ḥadītha, 1968), 203.

[276]Kingdom of Saudi Arabia, *Niẓām al-maḥkama al-tijāriyya*, Royal Decree No.32, 15 Muharram 1350 (June 1, 1931) (Jidda: Chamber Of Commerce, n.d.), Sec. 432. Compare the highly similar Ottoman law, Young, *Corps*, 1:227-8, which, however, makes no mention of a "shar'ī" member.

government collections,[277] nationality,[278] firearms,[279] and motor vehicles.[280] For all such purposes, the King had no recourse other than use of "regulations," allowing him to create the needed legal institutions in one stroke. Obviously, he could not await the development of these institutions, or parallels, by the 'ulamā' through meticulous ijtihād, they being, in any case, unsympathetic to the whole enterprise. As we recall, he had ready to hand a plausible, 'ulamā'-conceded justification for all these regulations: first, as to legislation, the doctrine of siyāsa shar'iyya, that he may lay down rules demanded by public welfare, as long as these rules do not conflict with the sharī'a; and second, as to jurisdiction, the fundamental public law tenet that the imām alone decides who fulfills the function of judging and determines the jurisdiction of each of them. As the King and the 'ulamā' were well aware, however, it is one thing to endorse such powers in the ruler when the place of the sharī'a as the overall and general law is secure, and any legislation by the ruler is merely corrective and supplementary as to points of detail; and quite another when the legislation in question is potentially vast in scope, encroaching on matters

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[277]Royal Will by Letter of the Supreme Dīwān, No. 41/3/2 (12 Rabī' al-Thānī 1359, 19 May 1940).

[278]Royal Order 17/3/2, 19 Muḥarram 1358 (Mar. 10. 1939).

[279]Royal Order 1/4/3, 13 Rajab 1354, Oct. 10, 1935.

[280]Amendments to an earlier Regulation of Vehicles issued by Royal Order No. 13125 (10/11/1361 H, 18 Nov. 1942).

already regulated by fiqh, and -- perhaps most important -- drawing on sources altogether foreign from, and hostile to, the sharī'a. It is this latter conception of siyāsa law-making that the 'ulamā' continue to oppose in condemning "man-made" laws. It is also what lends sober truth to the frank colloquial distinction between the anẓima and the "sharī'a" law, and between the regulatory tribunals and the "sharī'a" courts.

There are some indications that, after assuming control of the Ḥijāz, 'Abd al-'Azīz may have hoped to gain the sort of broad powers of legislation that other rulers in the region had exercised for at least a half century, and to move toward governmental control of the legal system. This is strongly suggested by the multiple borrowings, even if only terminological ones, between the emerging Ḥijāzī niẓām-based legal system and the Ottoman tanẓīmāt in the mid-19th C. Thus, the Official Gazette in 1926 stated that the King was thinking of fixing a code of laws composed of rules taken from all the four schools, and that he was entrusting to a committee the task of preparing such a code; this initiative was expressly compared with the Ottoman *Majalla*.[281] But it

[281] *Umm al-Qurā*, No. 141, 28 Ṣafar 1346 [August 26, 1927]. The announcement stated that the King "had decreed" the supreme judicial council to undertake the drafting of the code. The committee was to gather weekly with other distinguished 'ulamā' to examine one by one the various points of difference among the schools and choose the view with the strongest *dalīl*; the committee would then order all courts to follow its choice. In this way the contents of the eventual code would gradually emerge.

seems any such ideas were stifled by 'ulamā' opposition; thus, of the codification proposal nothing more was heard.[282] Also, when one reviews the anẓima immediately following this pronouncement, one finds that nearly all fall within areas plausibly administrative in nature, or within the traditional areas of ruler regulation. For nearly forty years, at least until the Companies Regulation of 1965, the commercial law remains the high water mark of law-making within the realm of the fiqh.

This situation persisted until the fifties, when, as his death approached, 'Abd al-'Azīz took long delayed steps toward the legal unification and rationalization of the Kingdom, represented most importantly in the creation of the Council of Ministers. From the fifties the new Council issued a flurry of important, lengthy, modernizing anẓima, these becoming necessary as the Kingdom's new source of wealth, oil, intensified its dealings with the West. In 1962, the Prime Minister, Crown Prince Fayṣal, also proposed codification of the law. In his famous 1962 Ten Points Declaration, Point Eight provided:

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[282]But one Meccan scholar, Aḥmad b. 'Abd Allāh al-Qārī (d. 1359 H., 1940 C.), responded to the challenge, by writing a superb codification of the Ḥanbalī law of obligations modeled on the Ottoman *Majalla,* and called the *Majallat al-aḥkām al-shar'iyya* (ed. 'Abd al-Wahhāb Ibrāhīm Abū Sulaymān and Muḥammad Aḥmad Ibrāhīm 'Alī (Jidda: Tihama Publications, 1401 H., 1981 C.)). This text -- surprisingly in view of its surpassing convenience as a summary and guide to key Ḥanbalī books -- was not allowed to be published by the 'ulamā' until recently, and even then the Ministry of Justice ordered no copies.

> Regulations for economic, commercial and social development will be issued gradually. These will, before long, constitute a complete body of laws that will make for progress and greater activity and attract capital. Independent bodies to sanction the various regulations will be set up.[283]

In 1964 a new Commercial Paper Regulation[284] (of 120 articles) superseded the relevant provisions of the 1930 commercial law; in 1965 a Companies Regulation (of 233 articles) enabled the formation of various new types of modern corporations and companies, including limited liability companies, all designed on Western models (though borrowed more directly from Egypt); in 1969 the Labor Regulation (of 211 articles)[285] regulated the labor relationship extensively, on models borrowed from a number of countries; and there were dozens of lesser anẓima. Clearly, once again, when rapid change was needed, resort to the 'ulamā' and their fiqh was impractical and necessity required borrowings from modern laws. In 1973, King Faysal asked the Senior 'Ulamā' for a fatwā on codification, but none issued.[286]

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[283]King Faisal b. 'Abd al-'Azīz, "Ministerial Statement of 6 November 1962 by Prime Minister Amir Faysal of Saudi Arabia," *Middle East Journal* 17 (1963):161-162.

[284]Royal Order No. 38, 11/10/1383 H., Feb. 24, 1964.

[285]There is at least one earlier version, issued by High Order, dated 25 Dhū al-Qa'da 1366, Oct. 10, 1947.

[286]'Abd al-Raḥmān 'Abd al-'Azīz al-Qāsim, *al-Islām wa-taqnīn al-aḥkām, da'wa mukhliṣa li-taqnīn aḥkām al-sharī'a al-islāmiyya*, 2d ed. (Riyadh: by the author, 1397 H., 1977 C.), introduction to 2d ed.

Such was the situation as to siyāsa legislation. As to the siyāsa adjudication, the jurisdiction of the Commercial Court, was, like the Law of that court, the high water mark of siyāsa initiatives for decades. No doubt, besides the Commercial Court, King 'Abd al-'Azīz was obliged to create special *ad hoc* committees on many matters which the 'ulamā' refused to handle, such as tobacco and customs.[287] But none of these bodies attained the formal status of the Commercial Court, and it appears that the King was satisfied to deal with such matters in this more or less irregular fashion.

With the fifties, however, with the extensive new siyāsa legislation, siyāsa jurisdictions greatly expanded.[288] The centerpiece of the expansion was the establishment in 1955 of an administrative court as the instrument to rationalize the Government's administrative and regulatory experience. The new court, called the "Board of Grievances" [*dīwān al-maẓālim*], represents a signal adaptation of old sharī'a precedents and Saudi traditions. From the beginning of his reign, King 'Abd al-'Azīz had upheld the old tradition of the "grievances" [maẓālim] jurisdiction, mentioned above,[289] by making himself available to hear any complaint against any act

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[287]al-Rasheed, *Criminal*, 33. Recall the early *fatwā*, referred to above, directed against customs as non-sharī'a taxes.

[288]Appendix A describes the centralization and rationalization of the sharī'a court system in the 50s.

[289]See p. 470 above.

or any official of his government. The 1955 niẓām drew from this long practice, from nine-centuries-old works of Islamic public law, and also no doubt from the models of the French and Egyptian Conseils d'État, to lay the foundation of the new court.[290] The Board's evolution was carried further in an extensive new niẓām in 1982.[291]

Because the Board has an impeccable sharī'a pedigree, and is an expression of the King's personal authority, it has considerable prestige. Yet, both the King and the Board's President have been careful not to infringe on sharī'a jurisdictions. Although classical Islamic public law allows it to hear cases also heard by sharī'a courts, and as well to try complaints against the decisions of qāḍīs, the Board has been always careful to decline jurisdiction of any fiqh matter.[292] The latest regulation of the Board makes this restriction explicit.[293]

The Board of Grievances is charged not only with suits against the government and appeals from administrative decisions, but also with certain judicial tasks, such as the

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[290]Royal Decree No. M/2/13/8759, 17 Ramaḍān 1374 H. (May 8, 1955).

[291]Kingdom of Saudi Arabia, *Niẓām dīwān al-maẓālim*, Royal Decree No. M/51, 17 Rajab 1402 (May 10, 1982) (hereafter cited as *1982 Grievances Regulation*).

[292]al-Rasheed, *Criminal*, 71; Alison Lerrick and Q. Javed Mian, *Saudi Business and Labor Law: Its Interpretation and Application*, 2d ed. (London: Graham & Trotman, 1987), 234.

[293]*1982 Grievances Regulation*, Art. 9.

enforcement of foreign judgments, which the sharī'a courts would not deign to handle, or at least handle acceptably to the authorities, and which were originally dealt with by *ad hoc* tribunals constituted by the King. In 1982 several siyāsa tribunals' functions were transferred to the Board, including civil service disciplinary actions and jurisdiction over forgery and bribery. As to the latter, the Explanatory Memorandum to the 1982 Regulation states that such a jurisdiction, since it concerns a purely private-sector matter, is only temporary, until "the arrangements are made needed for the [sharī'a] courts to decide them in accordance with the [*Judiciary Regulation*]."[294] As will be explained immediately below, in 1987 the Board gained the chief commercial law jurisdiction, under similar provisions that this jurisdiction be "temporary."

The Board of Grievances is only the most substantive and prestigious of the new siyāsa tribunals. Most of the major new anẓima created specialized tribunals (called in Arabic "*lajna*" or "*hay'a*," not "*maḥkama*" or "court") to apply their rules. Thus, the Labor Regulation provided for special labor courts, called the "Labor Commissions."[295] The Traffic Regulation delegates authority to an administrative judge.[296]

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[294]Explanatory Memorandum, *1982 Grievances Regulation*.

[295]Lerrick and Mian, *Business and Labor*, 316-9.

[296]Kingdom of Saudi Arabia, *Niẓām al-murūr [*Traffic Regulation*]*, Royal Decree No. M/49, 6 Dhū al-Qa'da 1391, Dec. 23, 1971 (Mecca: Government Press, n.d.), Sec. 193.

The customs laws set up Customs Committees.[297] The Ministry of Commerce established a Commission for Commercial Paper Disputes to apply the Regulation on Commercial Paper.[298]

c. Comparison of roles of fiqh and siyāsa in legislation and adjudication in contemporary Saudi Arabia

Such has been the development of the siyāsa authority to the present. Let us pause here to take careful stock how, after these seven decades of development, this authority has fared in Saudi Arabia -- as to legislation and adjudication -- in comparison to fiqh. Has the trend of development been, as elsewhere in the Middle East, in the siyāsa's favor, pointing to the continual reduction, to merely family status law, of the fiqh and the qāḍī? Let us draw up the account under five headings. First we compare the two systems in terms of (i) constitutional authority; (ii) share of applicable law; and (iii) share of jurisdiction; we then (iv) illustrate our findings by a case-study in the history of commercial law and adjudication; and finally (v) examine the impact of the *Fundamental Regulation* of 1992 on these questions.

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[297]Lerrick and Mian, *Business and Labor*, 230-31.

[298]Lerrick and Mian, *Business and Labor*, 224-6.

i. Relative constitutional position

First, let us assess the constitutional status of the anẓima system; has it risen to a level to rival the sharī'a? The 1958 Regulation of the Council of Ministers establishes and regulates a constitutional process for the siyāsa legislative power, called in it the "regulatory [*tanẓīmiyya*] authority."[299] The Regulation requires that any niẓām be issued only "by royal decree prepared after approval of the Council of Ministers" (thus foreclosing any law-making by the King independently).[300] All anẓima are effective only after publication in the Official Gazette.[301]

Around the Council of Ministers have evolved conceptions of administrative law, which are being increasingly rationalized using Western-style legal forms. For example, there has developed, though the practice is still somewhat unsystematic, a conception of a hierarchy, descending from the anẓima, of regulations, decrees and various orders, these associated with a corresponding hierarchy of administrative authorities, descending from the King. A specialized legal scholarship has emerged,[302] fed by legal learning imported

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[299]Royal Decree No. 38 of 22/10/1377 (11/5/1958), Sections 18-24.

[300]Ibid., Sec. 19.

[301]Ibid., Sec. 24.

[302]See, e.g., M. Ṣādiq, *Taṭawwur al-ḥukm wa-al-idāra fī al-Mamlaka al-'Arabiyya al-Sa'ūdiyya* (Riyadh: Institute of Public Administration, 1965).

from other Arab countries. Education in the *siyāsa* legal system has become an established part of the curriculum of the universities. While no schools of qānūn exist to rival the colleges of fiqh, there are "legal sections" within "Departments of Administrative Sciences," which spend a good part of their curriculum also on sharī'a law. In 1961 the government created the Institute of Public Administration ("IPA"), in which the *siyāsa* legal system of the Kingdom is one of the main subjects of teaching and scholarship. Graduates of fiqh colleges often come to the IPA for one or more years of graduate study. The IPA library maintains archives of laws, regulations, circulars, etc., issued by the *siyāsa* system.

No doubt these various developments are impressive. Especially since the parallel sharī'a institutions are, in true classical fashion, non-positive, and enshrined in tradition and not legal documents, to the West-trained observer and participant it is the siyāsa system that looms largest, seemingly having the legislative field nearly to itself; indeed, from this perspective it seems poised to take over the whole. But the siyāsa legal system inevitably has, in Saudi constitutional terms, dependent status; law proper is only the "sharī'a," and all else subordinate and supplementary rule-making. The classical distinction between fiqh and siyāsa has been maintained; indeed, in modern times that distinction all the more emphasizes the authenticity and

legitimacy of the fiqh side. Thus, one rarely encounters in Saudi Arabia any idea that these siyāsa laws involve, or even less *develop*, the fiqh.[303] The 'ulamā', their law and their institutions stand noticeably alooī; scholars of the two fields are distinct: "qānūnīyūn" and "'ulamā'."

Meanwhile, the fiqh has retained its privileged position. It remains the common law, in the sense that it applies in absence of siyāsa laws and completes their usually fragmentary and piecemeal provisions. Unlike the situation in Anglo-American law, however, here the common-law is seen to overrule statute, not the reverse; this is not only true as to constitutional-level fundamental principles of sharī'a, but even -- and much more unpredictably -- as to more specific or prosaic rules. Participants in siyāsa systems, even judges, have been known to vary from formal requirements of niẓām to follow more prestigious rules of fiqh, while only very rarely do qāḍīs do the opposite.

It should be noted that, although no 'ulamā' institution has any formal role whatever in the preparation or issuance of anẓima, consultation with 'ulamā' does occur in the process of

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[303]See, e.g., Kingdom of Saudi Arabia, *Niẓām al-sharikāt* [Companies Regulation], Royal Decree No. M/6, 22 Rabī' al-Awwal 1385 (July 15, 1965), 6th printing (Riyadh: Maṭābi' al-Hukūma al-Amniyya, 1981 H., 1401 C.), Explanatory Memorandum. While acknowledging the closely analogous fiqh laws on partnership, new forms of partnerships and corporations are justified only as required by utility and as not contradicting fundamental sharī'a principles.

legislation, in order to avoid clashes with the sharī'a.[304] As we recall, the doctrine of siyāsa shar'iyya on which this form of legislation depends requires that any measure be compelled by needs of public welfare and not contradict any indisputable holding [*naṣṣ*] of the sharī'a. There are several ways in which an 'ulamā' review of the legislation's validity under this standard can be obtained. One is that the King has among his retinue 'ulamā', some of them retired from other positions.[305] Second, the King meets with high 'ulamā' once a week, and either party then could raise issues as to a proposed law.[306] Third, if a formal answer is needed on a point of law, the King can submit a request for a fatwā to the Board of Senior 'Ulamā'. Fourth, on the Council of Ministers is the Minister of Justice, who, though he in no way represents the 'ulamā', is one of them, and is undoubtedly more interested, and capable of investigating, any issue of conflict than are other Council members. On such issues, however, Council procedures allow him no formal role beyond casting his own vote. Thus, through one or the other of these means, 'ulamā' do influence legislation. On any issue

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[304]Muṭlab 'Abd Allāh Nafīsa, "Law and Social Change in Muslim Countries: The Concept of Islamic Law Held by the Hanbali School and the Saudi Arabian Legal System" (Cambridge, Ma.: Ph.D. diss., Harvard Law School, 1975), 110.

[305]H.E. Dr. Muḥammad b. Ibrāhīm Ibn Jubayr, interview with author, Board of Grievances, Riyadh, May 15, 1985.

[306]Some say that this meeting has only ceremonial significance.

intimately involving the 'ulamā', it is safe to say that their views are sought and are highly influential.

Several 'ulamā' explained to me their general stance toward the issue of whether novel rules of law, introduced by anẓima, are in conflict with the sharī'a.[307] They stated that, unless there is a clear and literal contradiction with a text, they presume a law to be a valid siyāsa measure -- this according to the principle favored by the Ḥanbalīs, that in matters of worldly concern [*mu'āmalāt*], all is permissible unless a text of the Qur'ān or sunna renders it impermissible.[308] Then, in their roles as qāḍīs and religious advisers of the people, they await experience with the new law. If the law thereafter gives rise to difficulties and controversy, either in litigation or in questions and concerns raised to muftīs,[309] they then review the law, this time with the benefit of experience with its application. At that point

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[307]Dr. al-Faryān, interview with author, Ministry of Justice, Riyadh, Oct. 15, 1984; Shaykh Ibn Jubayr, written answers to my questions, Feb. 2, 1988; Shaykh Abū Zayd, interview, Riyadh, Apr. 24, 1985.

[308]This is the principle of "freedom from constraint," termed *al-ibāḥah*, or *al-barā'a al-aṣliyya*.

[309]The muftīs are able to perform a sort of religious ombudsman role in that they hear all the religious anxieties of the people. I observed the operation of this in practice, when anxieties about one government agency's policies on loan charges provoked a complaint by the Grand Muftī to the government. Dr. Muhammad al-Husseiny, Legal Advisor, Saudi Industrial Development Fund, interview with author, Riyadh, Jan. 14, 1986.

they demand amendments or retraction of the law by the Government.

ii. Relative share of applicable law

The second issue to address is to compare the two systems, fiqh and siyāsa, as to the relative shares of the applicable law which they control. We find that the scope of the siyāsa laws is relatively restricted. None of the anẓima is in itself very extensive, and their total number is in the low hundreds. Their bulk on a shelf measures more conveniently in inches than in feet. Subjects covered by new laws are marked by at least one (and usually more) of the following characteristics: (a) novelty to the fiqh; (b) an administrative nature; or (c) the fixing of certain criminal punishments [*ta'zīr*] which fiqh assigns the ruler power to decide (this category is discussed in the next section). There have been few substantial additions to their number since the sixties,[310] despite the manifold increases in the Kingdom's modernization activities since the 1972 oil price increases. No doubt, once again, to the outsider the anẓima may loom large and the fiqh small; but this is because the anẓima form, so to speak, the outward-facing, or modernizing, sector of the legal system. Anẓima regulate most of the explicit relations with foreign investors, contractors and employees, and the aspects of Saudi life involved in this

[310]A most important decree, on civil procedure, was formally promulgated in 1987, but the 'ulamā' forced its withdrawal only one year later.

sector. In purely domestic matters, the application of fiqh is far broader, governing all matters of personal status, civil contract, tort, property, agency, and nearly all crimes apart from those enforcing the anẓima proper.

iii. Relative share of jurisdiction

The third and final issue is to consider the allocation between the two systems of adjudication. Here we find reflected in the courts the superior constitutional position of the sharī'a discussed above. Thus, the sharī'a courts remain the courts of general jurisdiction, ceding authority only by exception, when the King, in exercise of his power to make judicial appointments, allocates part of the total jurisdiction to a specialized delegate, in the form of a particular regulatory authority. Despite the permissibility, conceded even by the 'ulamā',[311] of such allocations, yet, in a parallel to situations noted above as to the laws themselves, the stronger constitutional legitimacy of the sharī'a legal system at times gains for it an authority and autonomy anomalous in terms of these formal allocations.

This point is demonstrated by three otherwise surprising aspects of the practice. The first of these is that, as is well known, qāḍīs have traditionally refused to apply anẓima in the cases that they decide: if they consider a case

[311]This authority was unequivocally reiterated by Shaykh al-Laḥaydān, saying that the allocations of wilāya by "place and type" must be followed by the qāḍī. Shaykh al-Laḥaydān, written responses to author's questions, Nov. 28, 1984.

properly subject to a niẓām, they refer it to a siyāsa authority; otherwise, they apply their own law, the fiqh, to the case. The thinking behind this emerges from comments to me by Shaykh al-Laḥaydān. He characterized all anẓima as concerned with one (or usually a mixture) of two things: the ruler's authority to fix certain criminal penalties [*ta'zīr*] or administrative [*idārī*] matters. Since siyāsa tribunals therefore deal with executive and not judicial matters, they are not truly judicial [*qaḍā'*]. The commercial tribunals, on the other hand, since they treat with matters properly judicial, must, and do, apply only sharī'a.[312] He gave the example of the Traffic Regulation; if a case concerns the misdemeanor of driving on the wrong side of the road, the penalty may be fixed by niẓām and decided by a siyāsa authority; but if the question is one of retribution [*qiṣāṣ, arsh*], compensation [*diya*] or criminal guilt, then the sharī'a courts must take charge.[313] Shaykh al-Muhannā stated that the sharī'a courts apply, to whatever comes before them, only the Qur'ān and the sunna. Anẓima concern the various ministries

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[312]Ibid., Apr. 30, 1985. The Labor Regulation, despite its potentially encroaching on issues of contract and tort law, is treated as administrative apparently on the ground that it statutorily fixes terms of the labor contract, nearly all favorable to the employee, to which parties then agree in knowledge of the law. Dr. Nafīsa, interview, May 25-26, 1986.

[313]This is the solution adopted in Saudi Arabia, *Traffic Regulation*, Secs. 178, 205.

of the Government and their business.[314] In this context I heard cited a maxim: "The seeker of sharī'a is not turned away."[315]

Another indicator of the sharī'a court's superior constitutional rank is that, despite categorical royal orders assigning exclusive jurisdiction to various siyāsa tribunals, sharī'a courts still possess the authority to try any case brought before them. Bringing suit in Saudi Arabia begins usually with the filing of a complaint in one or another agency of the Ministry of Interior,[316] which then refers the complainant to the right agency or court, in accordance with the prevailing anẓima and royal orders. But these agencies sometimes refer cases, even in contradiction to grants of exclusive jurisdiction, to the sharī'a courts instead of to siyāsa authorities.[317] In any event, a 1961 royal order

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[314]Court of Shaykh Sulaymān b. 'Abd Allāh al-Muhannā, interviews with author, Great Shari'a Court of Riyadh [*al-Maḥkama al-Kubrā bi-al-Riyāḍ*], Mar. 20, 1983.

[315]"*Ṭālib al-shar' lā yuradd.*" Ibrāhim al-Wuhaybī, Member, Committee for the Settlement of Commercial Disputes [*Hay'at Ḥasm al-Munāza'āt al-Tijāriyya*], interview with author, Riyadh Branch, Nov. 3, 1985.

[316]These are, for civil matters, either the local Governate or the offices for "Civil Claims," which assist complainants in contacting their opponents, obtaining acknowledgement and payment or settlement if possible, and finally refer the case to the appropriate court. Kingdom of Saudi Arabia, Minister of Interior, *Lā'iḥat al-ijrā'āt allatī tutba' bi-idārāt al-ḥuqūq al-madaniyya 'inda al-muṭālabah bi-ḥuqūq khāṣṣa*, Decision No. 20, 2 Muḥarram 1406, Sep. 16, 1985.

[317]Wuhaybī interview, March 11, 1985. He referred to the Governates, and said this was allowed according to an unwritten order of the King, perhaps thinking of the order

permits the sharī'a courts to take jurisdiction of any case a party brings directly to them, with the exception of criminal cases requiring prior investigation.[318] The sharī'a courts have often expressed their position that they have the right to try any case. An early instance is a pronouncement by the President of the Judiciary:

> We have been informed that some judges have been in the habit of returning certain cases to the Labor and other offices under the pretext that they fall under the jurisdiction of certain authorities. It is recognized that the Sharī'a . . . is completely equipped to solve disputes, to end litigations and to clarify every issue. The submitting [of cases] to those authorities implies recognition of the man-made laws and the regulations repugnant to the provisions of the pure Sharī'a.[319]

A decision of the Supreme Judicial Board, approved by royal order, declares that in cases where both a sharī'a court and a siyāsa tribunal have taken jurisdiction over a single matter, the case must not be withdrawn from the sharī'a court "even were" the latter to have no jurisdiction; in fact, the correct course is for the siyāsa authority to refer the case

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cited in n. 318 below. Perhaps the Governate so acts at the request of one of the parties.

[318]Royal Order No. 23512 (25 Dhū al-Qa'da 1380 H., May 10, 1961). The report appears in the Ministry of Interior law guide, Ministry of Interior, Kingdom of Saudi Arabia, *Murshid li-al-ijrā'āt al-jinā'iyya* (Riyadh: Ministry of Interior, n.d.), 20, 220.

[319]Quoted, without date, in Solaim, "Constitutional and Judicial Organization," 168, citing 'Abd al-Karīm al-Huqayl, *'Alāqāt al-muwāṭin bi-al-dawā'ir al-shar'iyya* (Beirut: Mu'assasat al-Ma'ārif, 1967), 189-90.

to the sharī'a court for it to issue a single judgment.[320] In 1970 the Minister of Interior asked whether measures could be taken against an individual who lost before the commercial tribunal and then took his case before the sharī'a court. The King declined to answer the question.[321]

A number of 'ulamā', pressing the clear constitutional privilege of their own courts, have long advocated the abolition of the siyāsa courts -- except the fiqh-sanctioned Board of Grievances -- and the unification of such jurisdictions within the sharī'a courts. Among their arguments is, in essence, that, if the siyāsa courts apply something other than the sharī'a, they are unconstitutional, and if they do not, why are they needed? More complexly, they argue that the siyāsa courts lack the prestige, stability, and guarantees of independence that the sharī'a courts enjoy, and reliance on them is therefore harmful.[322]

The momentous decision to bring the siyāsa jurisdictions within the sharī'a court system has indeed been adopted. In

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[320]Royal Order No. 13002, 4 Jumādā al-Ūlā 1395 H., May 14, 1975, appearing in Ministry of Interior, *Murshid*, 226.

[321]al-Rasheed, *Criminal*, 68. Art. 29 of the *Judiciary Regulation* creates a committee to resolve conflicts of jurisdiction between various adjudicatory bodies (this is the first mention, in any niẓām concerning the sharī'a courts, to siyāsa tribunals). In 1985, Shaykh al-Laḥaydān told me that the committee had never met. Shaykh al-Laḥaydān, written responses, Feb. 27, 1985.

[322]Al Durayb, *al-Tanẓīm*, 535-537. See Appendix A (on independence of courts). Thus some have complained that siyāsa tribunal judgments are unstable and unsatisfactory with regard to appeals and enforcement.

1981 a binding royal decree, passed by the Council of Ministers and issued by the King, commanded this unification. Now in 1992 the *Fundamental Regulation* has given this decision a unique finality and solemnity.

The 1981 decision was never implemented, however, because of uncertainty on another vital issue -- the very issue which originally required the creation of siyāsa courts, and which has perpetuated their use until now: what law shall be applied by the sharī'a courts on matters the subject of siyāsa decrees? Shall it be the 'ulamā''s independent law, the fiqh, or shall it be the King's, the anẓima? As we shall see, not even the *Fundamental Regulation* has resolved this issue.

iv. Case study: the history of commercial law adjudication

An interesting case-study of the relationship of the two court systems, and of the systems of law that they administer, is provided by the history of commercial law adjudication. The Ḥijāz Commercial Court, instituted in 1926, was mentioned above.[323] How did this court fare with the unification of the government beginning in the mid-fifties? It was abolished in 1955, no doubt because of Najdī disapproval of a traditional fiqh jurisdiction wielded by a court of merchants. The jurisdiction was instead assumed, for the entire country, by the sharī'a courts. Soon, however, reportedly after a sharī'a court mishandled a maritime matter, it was felt

[323]See p. 556 above.

necessary to establish new specialized commercial tribunals for the whole country. In 1965 two such were established, which in 1967 were combined to create the "Commissions for the Settlement of Commercial Disputes," located one each in Riyadh, Dammām and Jedda, under the authority of the Ministry of Commerce. At first each of these Commissions was composed of three "specialists," or experts in modern commercial law (called, in every-day parlance, "qānūnī"); in 1968 the composition was changed to two "sharī'a" experts and two "legal" experts, and finally in 1969 to two "sharī'a" judges, appointed by the Ministry of Justice, and one "legal" expert, delegated from the Ministry of Commerce. To allow qāḍīs of the regular sharī'a court cadre to serve, the Commissions met in the evenings, part-time.[324] In this way, the Commissions passed into the control of sharī'a court qāḍīs, the reverse of the situation in the original Commercial Court.

Thus, despite the flood of modernizing laws in the sixties, the 'ulamā' had succeeded in keeping commercial and contract law as a preserve of the fiqh, and thus had the opportunity to develop -- through court practice -- fiqh rulings that would be in step with the development of the Kingdom.

I attended sessions of the commercial commissions, in 1985 in the Riyadh commission for a period of several months,

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[324]al-Rasheed, *Criminal*, 64-5; Muḥammad, *al-Taṭawwur*, 119-122.

and in 1987 in the Jedda commission for several days; in both Jedda and Riyadh I had several days also to read reports of decisions. The two commissions were very different. The Riyadh one was controlled by its two qāḍī members, while in Jedda the two qāḍī members followed the initiatives of the Ministry of Commerce legal expert member, a particularly forceful and independent-minded individual. While both commissions applied fiqh and applicable anẓima, the Jedda branch applied those fiqh views which were, from the commercial perspective, the most progressive and beneficial, including some which could claim only very innovative sharī'a justifications.[325] Perhaps more importantly, the Jedda commission used innovative fiqh procedures, finding ways to force cases to progress expeditiously, to conduct discovery in business records, and to use reports of accountant experts to facilitate admission of documents and speed the trial. In contrast, the Riyadh commission, in my observation, applied traditional Ḥanbalī positions unflinchingly, and urged reconciliation [*ṣulḥ*] to ease over the rough spots in its law and procedure. It suffered extreme delays, six months between hearings the norm. The Dammām commission apparently was similar to that of Riyadh.

Because of delays building, particularly in the Riyadh and Dammām branches, and the overburdening of all these

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[325]The best known example is this court's position partially enforcing contractual interest in bank loans. See p. 261 above.

tribunals by the requirement that they meet part-time in evenings, businessmen urgently demanded reforms. In 1981 the Council of Ministers ordered that the commercial, labor and traffic courts be consolidated into a specialized bench within the sharī'a court system, meeting full-time, which would decide cases according to "the anẓima and instructions issued by the [King], and that which does not conflict with any text of the Qur'ān, the sunna or the ijmā'."[326] The order formed an inter-ministerial committee to determine and recommend additional regulatory steps needed for the execution of the Council's order, which was commanded to complete its work within one year. Surprisingly, nothing came of this order of the Council, apparently because terms could not be worked out with the 'ulamā'. Discussions with individuals involved suggest that the 'ulamā' rejected the orders because of their unwillingness to admit specialization within qāḍī ranks, and, more importantly, because the order required qāḍīs to apply relevant anẓima, as the commissions had previously.[327]

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[326]Order of Council of Ministers No. 167 (14 Ramaḍān 1401 H., July 15, 1981).

[327]Dr. Nafīsa, interview with author, Riyadh, Nov. 17, 1982; H.E. Dr. Soliman A. Solaim, interview with author, Ministry of Commerce, Riyadh, May 14 and 27, 1985. Through 1985 and 1986, regulations for the various specialized courts, and specialized benches in appeal courts, were prepared, circulated, and approached final approval. But during the same period the 'ulamā' began to equivocate on their earlier agreement to apply niẓāms, and also did nothing to revise their teaching curriculum, as required by the order. Dr. Nafisa, interview, May 25-26, 1985, May 25-27, 1986.

Finally, when the impasse over these issues had continued intolerably, in 1987 the government and the 'ulamā' reached agreement on the abolition of the commissions, and a "temporary" transfer of commercial cases to the Board of Grievances. Presumably, the expectation behind this move is that, through further education and through experience on the Board, a group of qāḍīs will emerge who will be capable of handling modern commercial cases to the satisfaction of both sides of the dispute. This is clearly a make-shift solution, since it represents one more, unexpected, deviation from the Board's otherwise linear development into a modern administrative court.

Overall, this episode demonstrates the degree to which the 'ulamā' remain unwilling to apply siyāsa legislation, to the extent that, just to avoid any such obligation, they refused the offer of a jurisdiction they had long fought for.

Another major change in the commercial jurisdiction also occurred in 1987. This reform also illustrates the resistance of the 'ulamā' to applying laws other than fiqh, this time concerning the specific legal issue of interest on bank loans. The sharī'a courts, and the commercial tribunals with them, refuse to enforce interest on loans; we discussed this question briefly in Chapter Two.[328] Since this outcome was adversely affecting banks in a time of economic downturn, many felt that the government must find a solution. The 'ulamā',

[328]See p. 260 above.

standing by fiqh's condemnation of any form of benefit on loans, refused to consider any compromises, to the point that the government gave up on finding any judicial solution at all. It found instead an "administrative" one, creating a "committee" within the central bank, staffed by legal experts, to deal with all "banking disputes."[329] This committee cannot issue judgments, but has power to suggest settlements of disputes, which, if then not accepted by the debtors, are enforced by administrative penalties -- such as black-listing the debtor from government contracts and from bank loans, and barring him from travel abroad. The chief defect in this mechanism is that debtors willing to undergo the administrative penalties can always resort to the sharī'a courts. This example indicates particularly clearly how paltry are the Government's options for legal and judicial reform in the face of a firm principle of sharī'a law.[330]

As this history of commercial law adjudication shows clearly, the siyāsa methods and justifications for law reform utilized by 19th C. Muslim rulers to usher in Western-style legal modernity have been unable in Saudi Arabia to wrest the field of legal and constitutional legitimacy from the fiqh and the 'ulamā'. Indeed, they have been incapable of shifting

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[329]See Saudi Arabian Monetary Agency Circular 3-8675, 22 Dhū al-Qa'da 1407 (July 18, 1987), issued pursuant to royal decree.

[330]Frank E. Vogel, "Banking Disputes in Saudi Arabia: An Analysis of Decision 822," *Middle East Executive Reports*, April 1986.

significantly at all the explicit theory of the legal system.[331] The hope that King 'Abd al-'Azīz apparently entertained in 1926, of modernizing the legal system through such methods, has proved futile. Future progress is conditional on the willing and creative involvement of the 'ulamā' and their fiqh.[332]

This lesson brings us back to the inevitability, under any traditional conception of Islamic legal system, of

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[331]As noted above, arguably in no Muslim country have such measures succeeded in implicating sharī'a at all, or in severing the intimate relation between the sharī'a, on the one hand, and the 'ulamā' and their fiqh on the other. See p. 545 above.

[332]Recognizing this, participants in the system who favor modernization know that their goals are conditioned on a change in the attitudes of the 'ulamā' themselves. Soliman Solaim, the Minister of Commerce, writing a doctoral dissertation more than twenty years ago, complained that

> Existing committees, commissions and tribunals seem very much like stopgap measures to cope with . . . new legislation which the 'ulama seem unable or unwilling to handle. There exists today a communication gap between the 'ulama on the one hand and the technocrats on the other. . . . There are, however, signs that this gap may be narrowing [listing some advances in judicial education]. Solaim, "Constitutional, 169-170.

When I asked Dr. Solaim in 1985 about this statement and whether improvement had occurred in the intervening years, he admitted that little had. He cited one recent hopeful development, the drafting of an arbitration regulation, *Nizām al-Taḥkīm,* Royal Order No. M/46, 12 Rajab 1403 (Apr. 24, 1983), with willing cooperation between leading 'ulamā' and technocrats, which then won the adherence of the sharī'a courts. Dr. Solaim, interview, May 14, 1985. In response to similar questions, Dr. al-Nafīsa pointed, as did Dr. Solaim in 1970, to the importance of educating future 'ulamā' about modern legal conceptions, through new institutions like the Institute of Public Administration. The order declaring the unification of the court system required education of 'ulamā' in the anzima. Council of Ministers Order No. 167, 14 Ramaḍān 1401 (July 15, 1981).

conceptualizing change as a creative dialectic between the two sets of principles -- fiqh and 'ulamā' on the one hand, and siyāsa and ruler on the other. Successful legal development in Saudi Arabia awaits solutions taken at this level of the problem.

v. The 1992 Fundamental Regulation

The Iraqi invasion of Kuwait in 1990 and the resulting Persian Gulf War subjected Saudi Arabia to extraordinary political pressures, both internal and external. The strong feelings these events aroused broke down the traditions that confine the expression of political opposition to private channels. Ferment precipitated several momentous events, including a demonstration by women driving their own cars,[333] and a number of formally private, but widely publicized, petitions to the King urging reforms in the government.

Two petitions in particular attracted attention. One was signed by a group mostly of businessmen and technocrats, and another, and the most important to us, by hundreds of 'ulamā', including Shaykh Bin Bāz and many other leaders, professors and religious functionaries. We shall confine ourselves here to points on legislation and adjudication, and return to other points later in this Chapter.

The central demand of both petitions is that the King implement the long-standing project of a consultative council. This idea has a long history. Since the time of King Sa'ūd,

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[333]*Los Angeles Times*, Nov. 10, 1990.

generally at times of political crisis, Saudi rulers have several times announced the imminent issuance of a basic law or constitution, frequently mentioning also the formation of a consultative council; neither ever materialized.[334] But with each promise these projects drew closer to realization; indeed, King Khālid ordered a hall built to house the new council. With the Gulf War pressure toward both ideas greatly mounted, people being shocked that a decision so momentous as to associate the Kingdom with the US in war against a sister Arab country could be taken by the King and a few of his family.

The second petition exposes the striking fact of the degree to which this demand for the adoption of a formal (and modern) mechanism for consultation has taken root, not only among the technocratic and business classes who, as often noted, stand outside the traditional avenues of access to the King, but among the 'ulamā', who in Wahhābī theory are the consultants of the King par excellence. Indeed, the war aroused an entire new, vigorous political opposition grouping -- one of radical 'ulamā', who, from an otherwise ultra-conservative stance, denounce many of the same abuses in Saudi government, such as corruption, inefficiency, and

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[334]These promises were made in 1960 (by King Sa'ūd during power struggle with Crown Prince Faysal), 1962 (by Crown Prince Faysal during crisis with Yemen -- see King Faisal, "Ministerial Statement"), 1979 (during seizure of Mecca mosque by religious dissidents). Dilip Hiro, *The Nation*, Apr. 13, 1992.

inaccessibility, as their modernizing technocratic rivals. These 'ulamā', gaining a strong following among the religiously trained youth, even criticize revered senior 'ulamā', including Shaykh Bin Bāz, as too compliant to the regime. Pressure from this group no doubt prodded the signers. It is too early to tell whether this radical wing will continue as a significant political movement, or is merely another of the periodical manifestations of the enduring puritanical rigor of Wahhābism, in the tradition of the 1979 Mecca incident.

Thus, the demand for shūrā had become universal enough to bring even the 'ulamā' most associated with the regime to sign this note of protest. They took the occasion also to vent demands even closer to the 'ulamā''s heart, protective of their role in the legal system generally. One demanded the review, by "competent sharī'a committees," of all niẓāms and other regulations, to assure their compatibility with the rulings of the sharī'a. Another sought the unification of the judicial institutions, meaning presumably bringing the siyāsa tribunals within the sharī'a courts, with a guarantee of "complete and actual independence."

In November 1990 King Fahd announced his intention to issue a basic law and to create the consultative council. This time the promises bore fruit in the promulgation of a

Fundamental Regulation[335] and a *Regulation of the Consultative Council*.[336]

The new consultative council turns out to have very circumscribed powers. Its members, appointed by the King,[337] have power to query ministers and initiate and review legislation, but have no veto over the King's will. Indeed, the creation of the Council could be said to have reduced the separation of the legislative from the executive power, since formerly, according to the Regulation of the Council of Ministers, the King could pass no law without that Council's assent. Now, since two Councils review laws, it is provided that if the two disagree, the King decides as he wishes.[338] Whether the Council turns out to be more than a mere symbol or rubber-stamp depends on the appointments the King makes to it. In any event, trends indicate that 'ulamā' will form a substantial contingent of the members.

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[335]Kingdom of Saudi Arabia, *al-Niẓām al-Asāsī*, Royal Order No. 90/A, 27 Sha'bān 1412 (Mar. 1, 1992) (hereafter cited as *Fundamental Regulation*).

[336]Kingdom of Saudi Arabia, *Niẓām Majlis al-Shūrā*, Royal Order No. 91/A, 27 Sha'bān 1412, Mar. 1, 1992 (hereafter cited as *Consultative Council Regulation*).

[337]In an interview in the Kuwaiti newspaper *al-Siyāsa*, March 28, 1992, the King declared that "the democratic system predominant in the world is not a suitable system for the peoples in our region. . . . We have our Islamic . . . system. Free elections are not within this . . . system, which is based on consultation and openness between the ruler and his subjects." Middle East Watch, *Empty Reforms: Saudi Arabia's New Basic Laws* (New York: Human Rights Watch, 1992), 2.

[338]Article 18, *Consultative Council Regulation*.

Passing to the *Fundamental Regulation*, we find that it underlines how the 'ulamā' still possess the power to dispose constitutional and legal reform. The Regulation could hardly state more forcefully the principle that the constitution and supreme law of the Kingdom is the sharī'a.

> The constitution of [the Kingdom] is the Book of God Most High and the sunna of His Prophet (S).[339]

> Rule in the Kingdom of Saudi Arabia draws its authority [*sulṭa*] from the Book of God Most High and the sunna of His Prophet. They are sovereign [*ḥākimān*] over this Regulation and all anẓima of the state.[340]

> The basis of rule in the Kingdom of Saudi Arabia is justice, consultation and equality, in accordance with the Islamic sharī'a.[341]

Nothing in these provisions could arouse the slightest complaint from Saudi 'ulamā', however traditionalist.

The Regulation further announces the principle that the King's power be fully bounded by sharī'a, expressing this with the term siyāsa shar'iyya.

> The King shall govern the nation [*siyāsat al-umma*] by siyāsa shar'iyya [*siyāsatan shar'iyyatan*] in accordance with the rules of Islam [*aḥkām al-islām*].[342]

The Regulation recognizes that the latter authority includes a vital legislative role, that anẓima issued under the King's siyāsa authority are essential and integral to sharī'a rule.

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[339]*Fundamental Regulation*, Art. 1.

[340]Ibid., Art. 7.

[341]Ibid., Art. 8..

[342]Ibid., Art. 55.

> [The regulatory authority, i.e., the King at the suggestion of either or both of the Council of Ministers or the Consultative Council] shall lay down anẓima and regulations [*lawā'iḥ*] to attain utility and to alleviate harm [*mafsada*] in the affairs of the state in accordance [*wafqan*] with the general rules [*qawā'id*] of the Islamic sharī'a.[343]

Thus far, again, nothing said is likely to arouse the slightest opposition among Saudi 'ulamā'. In a further step, however, the Regulation does diverge from certain extreme views of 'ulamā', in mentioning as included in the application of "the rules [*aḥkām*] of the Islamic sharī'a" both "proofs from [*mā dalla 'alayhi*] the Book and the sunna" and "anẓima issued by the ruler not contradictory to the Book and the sunna."[344]

Beyond these general doctrinal positions, the Regulation takes steps to alter in practice the borderline between fiqh and siyāsa as to law and as to courts. First, it firmly adopts the position which, as we saw, the King had earlier ordered without effect -- that of unification of the siyāsa courts (other than the Board of Grievances) within the sharī'a system.

> Without prejudice to the provisions of Article 53 [concerning the Board of Grievances], the courts shall have jurisdiction to decide all disputes and crimes.[345]

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[343]Ibid., Art. 66.

[344]Ibid., Art. 48.

[345]Ibid., Art. 49. Art. 53 states simply that a niẓām shall determine the jurisdiction of the Board.

Then, on the most vital outstanding issue, the law to be adopted by qāḍīs in matters previously heard by siyāsa tribunals, the Regulation declares, as in part quoted above:

> The courts shall apply to cases brought before them the rules [*aḥkām*] of the Islamic sharī'a in accordance with [*wafqan*] the probative indications of [*mā dalla 'alayhi*] the Book and the sunna and anẓima issued by the ruler not contradictory to the Book and the sunna.[346]

In this form of words is something for both sides of the debate. No doubt, the clearest gain is for those who demand that the courts apply the anẓima; here such a position is adopted explicitly. But those 'ulamā' who wish to preserve interpretive independence in the qāḍī, disdainful of conflicting rules in the anẓima, can still find the basis here for argument. First, the references to "rules" of the sharī'a and to "the probative indications of the Book and the sunna" -- reinforced by the constitutional primacy of the Book and sunna so clear elsewhere in the Regulation -- clearly suggests the idea that the qāḍī determine by his (relative) ijtihād the proper ruling for each unique case. Second, this power could be construed to permit the qāḍī to determine -- in the abstract or even case-by-case -- whether an anẓima rule is or is not "contradictory to the Book and the sunna." Finally, a qāḍī may feel the ijtihād suggested here entitles him even to differ otherwise with the anẓima, based on his ijtihād and not on outright conflict. The threat of just such an interpretation, reproducing the 'ulamā''s microcosmic method

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[346]Ibid., Art. 48. [Emphasis added.]

and thereby defeating much of the purpose of anẓima, derailed earlier attempts at the expansion of sharī'a court jurisdictions. Essentially, this dispute resolves into the question which of the two forms of law-making, judicial ijtihād or ruler's siyāsa, should take priority (and in which areas of law) in deciding cases not clearly determined by indisputable holdings [*naṣṣ*] of the Qur'ān, sunna or ijmā'. We shall return to this dispute in Part III of this Chapter, on codification.

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In what follows we examine, in detail, two case-studies of recent developments in the Saudi legal system illustrative of the issues raised in this Part.

PART TWO

SIYĀSA AND FIQH IN SAUDI ARABIAN CRIMINAL LAW

In this Part and the next we take up two case-studies in contemporary Saudi Arabia, which permit us to observe, in the grit of concrete events, dynamic changes in the relationships between the 'ulamā' and the ruler and between the two principles of legislation, fiqh and siyāsa, that each represents. The subject of this Part Two is a recent major development in the law of Saudi Arabia within the field of criminal law and jurisdiction.[347]

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[347]Human rights organizations have drawn international attention to the Saudi criminal law. See, e.g., Amnesty International, USA, "Saudi Arabia: Detention without Trial of

The criminal law is an ideal context in which to explore the relationships between 'ulamā' and ruler, fiqh and siyāsa. In the criminal law the 'ulamā' and the ruler enter inescapably and urgently into relations of cooperation and competition. The sketch of the history of the Islamic state in the previous Part bore out the centrality of the criminal law in this struggle between the two parties and their respective principles of legislation.

Consider the arguments each side would make in advocating for itself wider jurisdiction in criminal law. The 'ulamā' have a number of arguments to show that, of all areas of law, the criminal law depends particularly heavily on knowledge of the divine truth, knowable solely from the texts, and through the 'ulamā''s expertise. A first argument is simply that the Qur'ān and sunna contain a number of explicit texts on criminal law and procedure. Only the 'ulamā' can be trusted to assure the full implementation of these texts.

A second argument is that criminal law enforcement demands an extraordinary certainty of legal knowledge. This is for three related reasons. One is that God has declared the rights of individuals, such as freedom, property and life, sacred. Therefore, the state may infringe these rights only

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Suspected Political Prisoners," January 1990; Middle East Watch, *Empty Reforms*; Minnesota Lawyers International Human Rights Committee, Shame in the House of Saud: Contempt for Human Rights in the Kingdom of Saudi Arabia (Minneapolis: Minnesota Lawyers International Human Rights Committee, 1992).

on warrant of God's command; to do otherwise is *ẓulm* or oppression. Second, if God is sovereign, crime is synonymous with disobedience to God's command, or sin -- which, as other Islamic principles establish,[348] is knowable only from the texts. Third, criminal enforcement is a vital part of the Qur'ānic duty to order the good and forbid the evil. In fact, it is the extreme case of enjoining and forbidding, in that by it the community most forcefully enunciates its approvals and denunciations. The duty to order the good and forbid evil can be exercised only within the bounds of divine laws known to a certainty.[349]

A third and last argument supporting 'ulamā' jurisdiction in criminal matters is that, if criminal law is considered to have the objective of protecting communal security and well-being, then this objective is sought not in itself, but ultimately to foster the religiosity and moral rectitude of individuals. Such matters properly concern the 'ulamā', who as religious leaders are close to the people and intimately involved in their moral careers.

On the other hand, consider the matter from the perspective of the ruler. First, does not criminal law naturally associate with state power, in its most material,

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[348]See, e.g., [16:114].

[349]Sin, *ma'ṣiya*, which is the basis for action both in *ḥisba* and in discretionary punishments, *ta'zīr*, exists only in contravening a prohibition proved to a certainty in the sharī'a.

forceful sense? Criminal law, indeed, marshals military force against citizens. In whose hands besides the supreme ruler could possibly be left such a responsibility? Besides, what ruler could relinquish it, since it is so critical to the preservation of state power? Secondly, the ruler possesses the best vantage point from which to administer the criminal law. Certainly, from his perspective he is best able to survey the overall welfare of the community, including its moral welfare, and to observe fair and equitable treatment among criminals as to punishment. Thirdly, no ruler may alienate criminal jurisdiction, since, as the 'ulamā''s own theory holds, God has imposed the entire moral burden of doing justice uniquely on the ruler's conscience, and criminal law is a particularly weighty aspect of justice.

We begin by a general introduction to Islamic criminal law, giving at the same time basic information about the criminal legal system in Saudi Arabia.

A. INTRODUCTION TO ISLAMIC AND SAUDI CRIMINAL LAW

1. Ḥudūd vs. Ta'zīr: A Distinction to Parallel Fiqh vs. Ṣiyāsa, 'Ulamā' vs. Ruler

In Islamic criminal law, there are two types of crime which can be fundamentally distinguished along the lines of the distinctions we have been developing throughout this book. They are the immediate product of the operation in the

criminal law of the distinctions between fiqh and siyāsa and between the 'ulamā' and the ruler.

There are three main categories of crime in the fiqh of criminal law, the categories identified by type of punishment. The first, and most detailed, is that of those few crimes on which the Qur'ān and Sunna lay down specific penalties. These are called the *ḥudūd* crimes.

The second category is that of ***qiṣāṣ***, meaning retaliation, or "an eye for an eye," applied to crimes of killing or causing of bodily harm. Here the penalty is either retaliation in kind, or its substitute, payment of indemnity, depending on many factors, including intention and forgiveness or composition by the victims. This category is distinguished from the *ḥudūd* on the ground that these offenses, though serious sins, are treated not as crimes punished by the state but as civil wrongs prosecuted by the victim or his heirs. We will set this category to one side.[350]

The third category is called *ta'zīr*. This is a catch-all category covering all other sinful acts, which, by its flexibility and its open avowal of siyāsa principles, reflects fiqh recognition of the role of siyāsa in criminal law.

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[350]We do so not because we think they are "civil" and not "criminal," but because they present less vivid boundary problems between ruler and 'ulamā'.

2. The Ḥudūd Crimes

The two types of crime needed for our purposes are those of the *ḥudūd* and *ta'zīr*. The *ḥudūd* crimes associate naturally with the pole of the 'ulamā' and their microcosmic tendencies. These are the crimes whose penalties are known, by means of indisputable proofs, from the Qur'ān or the Sunna. The term "*ḥudūd*" (singular *ḥadd*) means "fixed limits," with the connotation that they are limits set by God for society in the form of particularly emphatic, knowable, and explicit prohibitions. Because enshrined in revelation, these prohibitions are secured forever from transgression, from erosion by the quibbles of man's reason, or from vicissitudes of time or circumstance.

Fiqh shows in every detail its desire to secure for the ḥudūd a firmly transcendental reference-point. In what follows note how, again and again, microcosmic considerations predominate. Note how the doctrines surrounding these punishments are aptly chosen to etch deep within believers, and with each enforcement vividly to mark again, an utter certitude of divine disapproval of these acts, and their immense, though unseen, moral cost. There is, in particular, the characteristically microcosmic concern to demonstrate, to as great a certitude as possible, that each actual, concrete verdict and sentence of ḥadd is God's judgment -- objective, immutable, and transcendent -- and not man's.

Yet, since these at the same time are to function as parts of a criminal justice system effective even for the non-religious, observe that their microcosmic formulation is mitigated with macrocosmic considerations.

The ḥudūd are usually enumerated as the following crimes: adultery,[351] theft, wine-drinking, wrongful imputation of adultery, brigandage, apostasy and rebellion. All of these crimes are recognized as valid and applicable in Saudi Arabia. With the exception of apostasy and rebellion, which would rarely occur, I encountered in Saudi Arabia prosecutions for all of them.

The best way to introduce these crimes is by once again citing from texts of the Qur'ān and Sunna. Two verses in the Qur'ān lay down the penalties for theft and adultery:

> Now as for the man who steals and the woman who steals, cut off the hand of either of them in requital for what they have wrought, as a deterrent ordained by God: for God is almighty, wise. But as for him who repents after having thus done wrong, and makes amends, behold, God will accept his repentance: verily, God is much-forgiving, a dispenser of grace.[352]

> As for the adulteress and the adulterer -- flog each of them with a hundred stripes, and let not compassion with them keep you from (carrying out) this law of God, if you believe in God and the Last Day; and let a group of the believers witness their chastisement.[353]

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[351]Both adultery, in the sense of violation of the marriage tie, and fornication, in the sense of intercourse by an unmarried person, are here subsumed within "adultery."

[352][5:38-39].

[353][24:2].

As to the latter verse, we must explain that, on the authority of the Sunna, this Qur'ānic penalty of flogging applies only to an adulterer (i.e., fornicator) who has never previously married, while for a person who has married, the punishment is stoning.

From these verses we may make a number of observations. First, most obviously, we note the severity of the punishments. In emphasis, the Qur'ān warns against compassion to the offender, hinting at a human propensity to consider the offense lighter than the penalty. Yet, as the verse on cutting for theft states, the penalty is a "requital for what they have wrought." Therefore, it seems the penalty has a retributive character, a righting of the wrong, this ordained by God. But in conjunction with this is mention of forgiveness of the repentant; accordingly, infliction of the penalty is an atonement for the repentant. A ḥadīth states:

> The hand of the repentant thief precedes him to heaven.[354]

Asked whether he would pray for a woman stoned as adulteress the Prophet said,

> She has repented such a repentance that if it were divided among seventy of the people of Medina it would be enough for them. Have you found better than that she sacrificed her life for God Most High?[355]

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[354]This statement appears in none of the standard six collections. Ibn Taymiyya, *al-Siyāsa*, 81, cites it without authority or even clear attribution to the Prophet.

[355]Muslim (Ḥudūd 22). See also Abū Dāwūd (Ḥudūd 4440).

Therefore, the ḥudūd are endowed with a foundation in the transcendent, the unseen; their coin runs not only in this world but in the hereafter.

The caution against compassion or leniency toward the convicted entails no favoritism in enforcement, and no pardon. The Prophet says in a report:

> O people, those before you perished because if a nobleman from among them stole, they left him, and if a weak person from among them stole, on him they carried out the ḥadd.[356]

Again, the Prophet said,

> Whoever with his intercession prevents one of the ḥudūd of God opposes God in His affair.[357]

Accordingly, in Saudi Arabia today the ruler may not pardon or mitigate ḥudūd penalties.

The quoted verses indicate that a divine purpose behind the severity is deterrence of others. Thus, cutting for theft is "a deterrence ordained by God." In the second verse it is required that the penalty be exacted before a group of believers. The penalty is exacted not just for the offender's sake, as requital for his sin, but also for the sake of society. Ḥadīth reports suggest that thereby the ḥudūd bring great benefit on society:

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[356]al-Bukhārī, 4:173 (Ḥudūd); Muslim (Ḥudūd 8,9,26); Abū Dāwūd (Ḥudūd 4373,4450); al-Tirmidhī (Ḥudūd 1430); al-Nasā'ī, 7:72-75 (Sāriq, bāb 6); Ibn Māja (Ḥudūd 2547).

[357]Abū Dāwūd (Aqḍiya, 3597).

> A ḥadd enforced in the land is better for its people than thirty mornings' rain.[358]

Thus, in modern Saudi Arabia, the ḥudūd penalties are inflicted in a public square immediately following the Friday noon prayers, before huge crowds. While no prior media announcement is made, and they may not be televised or photographed, they are solemnly announced in the news afterwards, with details of the crimes and the court judgments.

These are aspects related to the severity of the punishments. But counterbalancing these, in the Sunna are numerous injunctions showing an opposite tendency, to mitigate these punishments, not by pardon or leniency toward the convicted, but by avoiding convictions altogether. A certain resistance is set up against the implementation of the penalties, its source an instinct in the fiqh to root the punishment securely in the bāṭin, as reflected either in the offender's willingly seeking atonement or in a judicial certainty that he performed the act.

In ḥadīth reports accounts are given of the Prophet's actions in judging and sentencing in ḥudūd. First, the Prophet encouraged individuals not to turn themselves in for punishment. The Prophet is reported to have said,

> He who has committed [a ḥadd,] let him cover himself with the covering of God, and let him repent to God. For on

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[358]al-Nasā'ī, 7:75 (Ḥudūd); Ibn Māja (Ḥudūd 2537,2538).

> him who reveals to us his deed we will enforce the Book of God.[359]

The Prophet even suggested that citizens may neglect bringing to official attention acts of ḥudūd:

> Forgive the ḥudūd in what is your affair; for whatever ḥadd reaches me is obligatory.[360]

Then, even in the process of prosecution, the judge is enjoined to avoid convictions. There is a cardinal rule that the ḥudūd are to be defeated by doubts -- whether these are doubts as to the identity of the offender, as to the substance of the crime, as to the availability of excuse, or on any other ground. Two ḥadīth reports:

> Repel the ḥudūd from the Muslims whenever you can. If there is for him an escape, let him go free. It is better for the ruler [imām] to err in pardon than to err in punishment.[361]

> If the ḥadd is in doubt, repel it.[362]

This principle is clearly reflected in the scholars' work in constructing the legal meanings of these crimes. Each is narrowly defined -- for example, theft must occur by stealth, not by snatching or force; it must involve property more than a minimum value; it must not be property in which the accused has any putative claim of right -- even to the extent that

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[359]al-Ḥākim, *al-Mustadrak*, 4:244, 383.

[360]Abū Dāwūd (Ḥudūd 4376); al-Nasā'ī, 8:68-70 (Sāriq).

[361]Tirmidhī (Ḥudūd 1424); Ibn Māja (Ḥudūd, 2545) with a weak chain of transmitters; al-Bayhaqī 8:238.

[362]al-Bayhaqī, 8:238. As attributed to the Prophet, aḥādīth to this effect seem to be considered weak.

there is no cutting for theft of public property, since the accused shares in its ownership; the property must be stolen from a place of safekeeping; the time must not be one of famine, since otherwise the accused may have a moral right to take to meet his dire need; and so forth.

That doubt is to the benefit of the accused shows itself particularly in the matter of confessions. The Prophet is reported to have discouraged confessions, and scrutinized them carefully. To an adulterer he prompted, "Perhaps you kissed, or touched, or looked?"[363] To a confessing thief a story has it that he said, "Did you steal? Say no."[364] There is the famous story of one Mā'iz, who came to the Prophet to confess to adultery, but the Prophet turned him away three times. Finally, after his fourth attempt to confess, the Prophet asked others:

> "Is he mad?" He was informed that he was not mad. He said, "Has he drunk wine?" A man stood up and smelt his breath but found no smell of wine. Thereupon the Messenger of God said, "Have you committed adultery? " He said, "Yes." He commanded that he be stoned to death.[365]

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[363]Abū Dāwūd (Ḥudūd 4427). In another ḥadīth the Prophet asks a confessing thief, "Did you not imagine that you stole?" Abū Dāwūd (Ḥudūd 4380); al-Nasā'ī 8:67; Ibn Māja (Ḥudūd 2597).

[364]Not found in any of the standard six collections. Quoted in 'Alā' al-Dīn Abū Bakr b. Mas'ūd al-Kāsānī (d. 587 H., 1191 C.), *Badā'i' al-ṣanā'i' fī tartīb al-sharā'i'*, 7 vols., 2d printing (Beirut: Dār al-Kitāb al-'Arabī, 1402 H., 1982 C.), 7:61.

[365]Muslim (Ḥudūd 20).

This ḥadīth establishes the cardinal principle that confession to a ḥadd must be voluntary. This principle is practiced in Saudi Arabia, where I observed on several occasions that detailed confessions were set aside, and ḥadd convictions defeated, despite overwhelming circumstantial evidence of guilt, on the accused's mere assertion that his confessions were coerced.[366] The story also establishes a principle that, for adultery, the confession must be repeated four times.

Even beyond this, the rule is that a ḥadd confession may always be retracted, even at the time of execution. It is said that when Mā'iz felt the first stone he tried to run away, but he was pursued and killed. When later the Prophet heard of this, he lamented, "Why did you not leave him! Perhaps he would have repented, and God forgiven him."[367] Thus, in Saudi Arabia, the courts have representatives to oversee executions of ḥudūd, with authority to stop the proceedings and remand the case to the courts if the accused retracts his confession.[368]

These are provisions as to confessions. What of proof by other means, which alone is likely to allow conviction of the unrepentant, the irreligious offender? Here again the

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[366]See, e.g., p. 628 below.

[367]Abū Dāwūd (Ḥudūd 4419,4420).

[368]The Ministry of Interior recognizes this rule in its *Murshid li-al-ijrā'āt al-jinā'iyya* [Guide to Criminal Procedure], 265 (n.d.), citing two fatwās of the Supreme Judicial Council, one of which is moreover confirmed by the King.

principle applies, that the ḥudūd are avoided by doubts. In effect, proof must be of utter certainty, beyond not only a reasonable, but even an unreasonable, doubt. This is clearest in the case of adultery, where the Qur'ān itself enjoins a extraordinary level of proof.

> As for those who accuse chaste women (of adultery), and then are unable to produce four witnesses, flog them with eighty stripes . . . .[369]

This verse defines another of the ḥudūd, that of *qadhf*, or false accusation of adultery. It was interpreted to mean that if an accuser of adultery cannot produce four witnesses -- who, the law provides, must further each be male, credible, and eye-witness to the very act of penetration[370] -- then he is guilty of qadhf. One can imagine the difficulty of obtaining this proof -- to the extent that scholars claim that the offense of adultery has never been proved by witnesses. The offense of qadhf itself supports a pervasive Islamic norm against speaking ill of others, or attributing to them evil deeds without proof.

The requirement of four witnesses is only as to adultery. Other ḥudūd in the absence of confession each require at least two acceptable eyewitnesses to all the elements of the crime. This fastidiousness of proof has led to great reluctance to accept circumstantial proof in the absence of witnesses. In

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[369] [24:4].

[370] How could such persons witness an act of adultery and not prevent it?

Saudi Arabia only a minority of judges will accept this evidence, and, even if accepted, it is easily defeated.[371] For example, if an unmarried woman becomes pregnant, she may repel conviction of adultery on the simple allegation that she was raped, or awoke to find a man upon her.[372] More commonly accepted is proof of the ḥadd of wine-drinking (for which the penalty is forty lashes) by two witnesses to the smell of alcohol on the breath.[373]

Because of these requirements of avoidance of doubt, in a great many cases one accused of ḥudūd crimes must bring the penalty on himself by willing confession.[374] This must always be the case in stoning for adultery, unless the minority position allowing circumstantial evidence is accepted. But clearly many ḥudūd enforcements are not mere voluntary atonements, but real punishments. For example, an accused may well be ignorant of stratagems that would easily save him from

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[371]al-Rasheed, "Criminal," 203-04; Shaykh al-Ghuṣūn, interview, Apr. 21, 1985.

[372]Or that she impregnated herself with sperm on a bit of cotton. Shaykh al-Ghuṣūn, interview, Apr. 21, 1985. In the Jidda Summary Court [*al-Maḥkama al-Musta'jala bi-Jidda*], even making the allegation is unnecessary. Interview with Court Clerk, 'Abd al-Raḥmān ---, July 30, 1983.

[373]Clerk, Summary Court of Jidda, interview, July 30, 1983.

[374]While I did not observe confessions of serious crimes, I did often observe accuseds confessing minor ta'zīr crimes in the Musta'jala court. In most I could detect only transparent sincerity, and in only a very few indications of unwillingness or compulsion. See n. 413 below. Cf., for Ottoman practice exhibiting again strikingly high confession rates, Heyd, *Criminal Law*, 244.

the penalty. Also, whether to find doubt defeating the penalty is in the discretion of the judge. Thus, perhaps the judge will decide, in unsympathetic cases, to discount specious claims of doubt.

Here one observes the resurgence of macrocosmic concerns -- to insure that the ḥudūd remain real deterrents. Reasoning characteristic of this sort of juncture -- reasoning in which tacit macrocosmic concerns show themselves despite explicit microcosmic doctrine -- appears in the following quotation, from Ibn Qudāma's *al-Mughnī*, a Ḥanbalī legal text highly authoritative in Saudi Arabia. Ibn Qudāma is discussing whether a thief should be acquitted of the ḥadd on the ground of a highly improbable claim to ownership of the stolen object. The author favors deflecting the ḥadd, noting that this will not definitely lead to defeat of the utility of the ḥadd, since

> most thieves do not know this [stratagem], and are not informed of it. The only ones who have this knowledge are the legal scholars, who usually do not steal . . .[375]

Thus, rules supporting the transcendent quality of the penalties -- by assuring certainty of guilt -- are weighed in the practical balance of social circumstance.

Out of concern for the high standard of certainty required, Saudi procedural law requires that any conviction

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[375]Ibn Qudāma, *al-Mughnī*, 10:301.

carrying a penalty of death[376] or amputation must be tried by a three-judge panel, and appeal is mandatory, not only to Board of Review, the regular appellate court, but also to the Supreme Judicial Council.[377] After the Council, the King reviews the conviction before ordering the execution.[378]

As to the rarity of the ḥudūd, for Saudi Arabia I counted, over a period of eleven years, from May 1981 through April 1992,[379] a total of four executions by stoning[380] and forty-five cuttings for theft. This means an approximate average, over this period, of one stoning every three years, and four hand-cuttings every year.[381] Official statistics of ḥadd crimes are not available, but almost certainly current levels exceed historical averages; the ordinary perception of Saudis is that their country is experiencing a crime wave, and that ḥudūd were historically extremely rare. Of course, of all criminal cases only an extremely small proportion meet the

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[376]This includes therefore also retaliation, or *qiṣāṣ*, for murder.

[377]*Judiciary Regulation*, Secs. 8, 13, 23.

[378]This is an old precedent. Thus a report from 'Umar, that he once narrowly prevented people from stoning a woman to death unjustly, whereupon he wrote to the governors of the military cities that no one be killed without his approval [*dūnahu*]. Abū Yūsuf, *Kharāj*, 165-66.

[379]Ending on April 18.

[380]*al-Jazîra*, 9/2/1402, Dec. 5, 1981, p. 5 [81-Z-1]; *al-Jazîra*, 20/3/1404, Dec. 24, 1983, p. 4 [83-Z-1]; *al-Jazîra*, 14/4/1405, Jan. 5, 1985, p. 5 [85-Z-1]; *al-Jazîra*, 24/8/1406, May 3, 1986, p. 5 [86-Z-1].

[381]See Appendix C.

onerous requirements for ḥadd conviction. In the Muslim year 1403 (October 18, 1982 to October 6, 1983), for example, while there were 4,925 convictions for theft (the most common crime, at 31 percent of all crimes committed), only two hands were cut. In that same year, out of 659 convictions for adultery, sodomy and sexual assault, no stoning at all was inflicted.[382]

3. The Ta'zīr Crimes

With this much on the ḥudūd, let us shift to the category of *ta'zīr*, lit., "moral correction," "chastisement." In law the least developed of the categories, it is the most extensive of them in application: ta'zīr covers all crimes for which no penalty is fixed by the fiqh. The theory of ta'zīr is easily summarized: crime for ta'zīr purposes is defined as either an act that is a sin (*ma'ṣiya*), meaning something definitively forbidden in the sharī'a, or an act declared

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[382]Kingdom of Saudi Arabia Ministry of Interior, *al-Kitāb al-iḥṣā'ī al-tāsi' [Ninth Statistical Book]* (Riyadh: Ministry of Interior, 1403 H., 1983 C.), 30-31. Saudi Arabia has long been recognized to have an extremely low crime rate. A criminologist has attempted to compare crime rates in the US State of Ohio with those in Saudi Arabia. Badr-el-din Ali, "Islamic Law and Crime: The Case of Saudi Arabia," International Journal of Comparative and Applied Criminal Justice 9 (1985): 45-57. He found that the ratio between them in the occurrence of serious crimes was in excess of 33:1.

punishable by the ruler as harmful to the interests of society.

The standard ta'zīr penalty is lashing, but also included are scolding, public humiliation, cuffing, imprisonment, and, according to some scholars, fines.[383] All of these are accepted as valid in Saudi Arabia. Lashing in ta'zīr is not severe corporal punishment -- though causing bruises, it must not break the skin; the lasher's arm should not be extended, only cocked; the lash must be of moderate size; lashing is excluded if entailing risk of permanent injury or death.

Fixing the penalty in ta'zīr crimes is left to the discretion of the ruler, or by delegation from him, of the judge, to be tailored to suit the interests of the offender and society. Authority resides in the ruler since he is seen to bear the moral burden of all public functions; since among these is the responsibility for justice in his domain, he therefore holds an inalienable, ultimate authority in criminal matters -- to advance justice both for the individual accused

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[383]Ibn Taymiyya permitted fines as ta'zīr. Ibn Taymiyya, *al-Hisba*, 53-63. This was followed by the Wahhābī states from early times, al-'Uthaymīn, "Ibn-'Abd-al-Wahhāb," 150. There has always been, and remains, difference of opinion on the point. Shaykh al-Laḥaydān, written responses, Apr. 6, 1987; 'Abd al-'Azīz 'Āmir, *al-Ta'zīr fī al-sharī'a al-islāmiyya*, 5th printing (Cairo: Dār al-Fikr al-'Arabī, 1396 H., 1976 C.), 396-405. Other Ḥanbalī books appear to forbid it. Ibn Qudāma, *al-Mughnī* 10:348; Manṣūr b. Yūnus b. Ṣalāḥ al-Dīn b. Idrīs al-Bahūtī (d. 1051 H., 1641 C.), *Sharḥ muntahā al-irādāt*, 3 vols. (Beirut: Dār al-Fikr, n.d.), 3:362. The danger is that corrupt rulers will see in fines a means to wealth, and replace with them the Islamically prescribed penalties.

and for the society at large.[384] Thus, in Saudi Arabia, the King has the power to review all ta'zīr sentences, and pardon, commute, and even augment them.

The purpose of ta'zīr penalties is wholly utilitarian, but of course with religious utility weighed with the secular: the utilities considered are the moral correction of the offender and deterrence of similar crimes. Therefore, three points are considered in fixing penalty: the seriousness of the crime, the character of the offender, and the social need for deterrence.

There is an important dispute between the schools about the maximum corporal penalty in ta'zīr. For the Ḥanafī school the general limit is ten lashes;[385] others require the ta'zīr to be less than the ḥadd for any crime; others that it be less than the ḥadd for the type of crime. The late Ḥanbalī books adopt the same position as the Ḥanafīs on the ground of a particular ḥadīth, but simultaneously recognize greater limits under siyāsa:

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[384]The rights of the victim are also part of justice, but handled not through ta'zīr but the victim's civil action against the offender, which includes retaliation or *qiṣāṣ* if applicable.

[385]Paradoxically, this opinion is held by the school most widely adopted officially by past Islamic empires. The explanation of the paradox must lie in the willingness of the those who adopt this school to cede criminal law to siyāsa. The Ottoman judicial establishment followed other views, endorsing much higher numbers of strokes. Heyd, *Criminal Law*, 273-74. Note that even on the former view other forms of ta'zīr besides lashes could be added to a sentence of 10 lashes. 'Āmir, *Ta'zīr*, 472.

> The sulṭān has the right to follow siyāsa. This is definitively accepted among us. Siyāsa does not depend on what the sharī'a literally provides.[386]

For all the schools, however, there are certain specified crimes subject to the death penalty,[387] such as sorcery, propagandizing for heresy, or spying (by a Muslim) for infidels. Some crimes, such as sodomy, are sometimes defined as ḥadd and sometimes as ta'zīr, depending on the author. Ibn Taymiyya, going further than the Ḥanbalī school itself, seems to have generalized from these instances the permissibility of a ta'zīr death penalty for anyone who, despite repeated ḥadd penalties, does not desist from crime, or those from whose evil society can be saved only by their death.[388] This view is accepted by the Wahhābīs, but is interpreted by the majority of Saudi qāḍīs as a penalty only for the imām to wield, not them. As we shall see presently, they traditionally deferred decisions on ta'zīr death penalties to the King.[389]

Ta'zīr, evidently, falls within the category of siyāsa, having all the earmarks -- it is based in utility, highly discretionary, elusive of doctrinal formulation, tied to

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[386]al-Bahūtī, *Sharḥ muntahā*, 3:361.

[387]'Āmir, *Ta'zīr*, 301-327.

[388]Ibn Taymiyya, *Majmū'at*, 24:206; 35:347, 404; idem, *al-Siyāsa*, 135-37; 'Āmir, *Ta'zīr*, 306-07; Laoust, *Essai*, 528.

[389]But Shaykh Bakr Abū Zayd said that as a qāḍī he had sentenced a recidivist to death. Interview, Apr. 29, 1985.

social and temporal circumstance, and born of the power to rule.

Clearly, there is a strong contrast between the detail of the ḥudūd provisions and the general grant of discretion in ta'zīr. What then of all the admirable protections of the rights of accuseds, observed in the case of the ḥudūd, and there so scrupulously preserved by the 'ulamā'? These protections carry over in ta'zīr, but as religious utilities, interests, not as strict rules, meaning they are weighed with other utilities.

4. Punishments Siyāsatan

The 'ulamā' definitely and explicitly associated with the ruler's authority one category of severe punishment, "punishment ***siyāsatan***," meaning "punishment on siyāsa grounds." This term applies to punishments imposed by the ruler which do not fall within the limits of ta'zīr given above -- for example, lashing greater than the maximum ta'zīr, amputations, mutilations, and, on most views, death.[390] The 'ulamā''s use of the term "siyāsa" here implies their view that the legitimacy of such penalties rests entirely on the ruler's invocation of siyāsa, that is, on the propriety of his determination in the particular case that fiqh strictures should be overcome by the general utility. It also implies

[390]See Chapter 3 above, p. 527.

that punishment is imposed without formal proof and trial before the qāḍī; this is indeed to make another emphatic statement that a severer penalty is solely the ruler's responsibility. (Where the qāḍī or other judge tries and sentences the accused within the limits of fiqh rules and procedures, the penalty would be called "ta'zīr.") The most serious siyāsa penalty is, of course, death, and in this form alone does the practice survive in modern Saudi Arabia.[391]

It seems the source of this practice is the view, found within the Ḥanafī and Shāfi'ī school, which permits a ruler, before a matter has been brought to a qāḍī or other judge for formal trial and conviction, to punish even more severely than the ḥadd, and to kill if appropriate, one who repeatedly commits certain serious crimes undeterred by prior punishments. Prior to conviction this power is the ruler's only; thereafter, both ruler and qāḍī apply the same rules.[392]

In Saudi Arabia during at least the last few decades, punishments siyāsatan have been limited to sentences of death, and these when the offender's guilt is beyond any doubt, and

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[391]King 'Abd al-'Azīz, and no doubt his predecessors and subordinates, indulged in siyāsa penalties. Somewhere I read a report that 'Abd al-'Azīz amputated the hands of young men who were the subjects of a tribal ritual of circumcision, which ritual, because customary and not Islamic, was strictly forbidden. It was not said what 'ulamā' thought of this transaction.

[392]'Āmir, *Ta'zīr*, 305, 477, citing, among other authorities, al-Māwardī in a passage quoted below, n. 620. Compare Ibn Taymiyya's view, p. 496 above.

his act such that King determines execution is required in the public interest. Public interest is shown when the crime is of a heinous nature, and therefore demands a prompt, harsh punishment, or when the offender, usually because he is a confirmed recidivist, can only be prevented by death from harming society. Execution siyāsatan, in this sense, has been a long-time practice of Saudi Arabian kings. They decree sentences without any formal trial, although usually after obtaining the approval of the 'ulamā'.

This practice derives perhaps directly from Ottoman precedent, which has been described as follows:

> As to the procedure for imposing punishment siyāsaten, the seventeenth-century Ottoman historian Hezārfenn Ḥuseyn strongly urged the Sultan to obey the religious law and not to order any execution 'without a judicial sentence having been [passed] in accordance with the sharī'a.' And indeed, in many cases this rule was observed: after establishing the guilt of the accused, the cadi issued a [formal finding] in which he left the decision on the proper penalty to 'the authorities' . . ., i.e., the Sultan or the Grand Vizier. Very frequently, however, any suspect . . . was punished (and more particularly executed) siyāsaten without having been tried in [any court]. This was done especially when the accused was caught *flagrante delicto* or when nothing could be legally proved against him. In many cases the Sultan or the Grand Vizier first asked for a fatwā legalizing such punishment, but they often considered it unnecessary to obtain the consent of the 'ulamā'.[393]

Illustrative examples from Saudi Arabia (others follow) are the execution by firing squad, within days of complaint, of three members of a Saudi security force who exploited their

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[393]Heyd, Criminal Law, 192-93. The extent to which this practice, and others he discusses, conflict with the sharī'a is usually exaggerated by Prof. Heyd.

authority to abduct and rape a Filipino man[394] and the execution of a man who killed his wife and children.[395] In the former case, conviction of the adultery (to which sodomy is assimilated) can be seen as too slow and uncertain a remedy,[396] and in the latter case there is no applicable fiqh penalty at all, since fiqh denies a right to retaliation against parents.

The strongest theoretical support for punishment siyāsatan is a verse of the Qur'ān:

> The recompense of those who make war on God and His Apostle and spread corruption on earth shall but be that they shall be slain, or crucified, or that their hands and feet be cut off on opposite sides, or that they shall be banished from the earth: Such shall be their ignominy in this world. But in the life to come, awesome suffering awaits them -- save for such as repent ere you become more powerful than they.[397]

This verse, in its reference to "war on God and His Apostle" is also the basis for the fiqh ḥadd crime of ***ḥirāba*** or *muḥāraba*, lit. "the waging of war," which fiqh narrowly defines as highway robbery or brigandage, and precisely regulates. The verse also refers to "corrupters of the

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[394]This particularly striking example I learned of from an Irish employee of the company for which the victim worked.

[395]I was given this example, represented as an actual case, by Prof. 'Aṭwa. Prof. 'Aṭwa, interview, Nov. 2, 1983.

[396]This punishment would be too light if the offender had never been married.

[397][5:33-34] (emphasis added). In this instance the translation follows Muḥammad M. Pickthall, *The Meaning of the Glorious Qur'an: Text and Explanatory Translation* (Mecca: Muslim World League, 1977).

earth," however, and this phrase is interpreted to support punishments siyāsatan, on the argument that the ruler possesses a residual power to punish up to death all who cause harm to the Muslim community, and thus "corrupt the earth." Therefore, this single verse is the basis for two crimes, traditionally kept separate -- one defined in fiqh, narrow, closely regulated, and applied by the 'ulamā', and the other based in siyāsa, broad, undefined, unregulated by fiqh, and applied by the ruler.[398]

5. Execution for Murder Ghīlatan

Another category of crime, which occurs in our case-study below, is treated by scholars similarly to the crime of ḥirāba. This is punishment for killing ***ghīlatan***, lit., "surreptitiously." Legally, the term appears to alternate between the concepts of surreptitious, premeditated killing, and of killing with the motive of taking property. Some scholars argue that it should include also killing connected with assaults on sexual honor. Scholars differ whether killing ghīlatan should constitute a separate category: some,

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[398]Oddly, it seems the precise list of penalties, including crucifixion and cutting of hand and foot, is associated only with the ḥadd of ḥirāba, while only death is associated with "corruption."

among them the Mālikī school and Ibn Taymiyya,[399] hold it should be treated identically with ḥirāba; others, including the majority of the Ḥanbalī school, say it is no different from murder, and punishable only by qiṣāṣ. If it is distinguished from ordinary murder, then the heirs lose the power to forgive the murderer or accept blood-money in lieu of retaliation; therefore, distinguishing killing *ghīlatan* advances the public interest in punishing murder over the heirs' private interests. Traditional practice in Saudi Arabia differs here with Ibn Taymiyya, and follows the majority Ḥanbalī view.

6. Jurisdiction and Procedure in Ḥudūd and Ta'zīr

Since ta'zīr is so evidently a siyāsa-based category, it is no surprise that the jurisdiction over ta'zīr crimes is ceded, even by the 'ulamā', to the ruler.

As to the ḥudūd crimes, one would expect that, being so copiously regulated by fiqh, they would belong to the qāḍī's jurisdiction. Fiqh treatises on qaḍā' and public law frequently draw that conclusion. Thus, for example, al-Māwardī, in his classical treatise on public law, lists "upholding the ḥudūd" [*iqāmat al-ḥudūd*] as an implied term in

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[399]Lajnat al-Buḥūth al-'Ilmiyya, al-Riyāsa al-'Āmma li-idārāt al-Buḥūth al-'Ilmiyya wa-al-Iftā', "Ḥukm al-tas'īr," *Majallat al-Buḥūth al-Islāmiyya*, no. 6 (1403 Ḥ., 1983 C.):74, citing Ibn Taymiyya.

any unrestricted grant of jurisdiction to a qāḍī. Two problems affect all such listings, however; the jurisdiction may not be exclusive, and authors are nearly always imprecise as to which or all of many component parts of "upholding the ḥudūd" are being referred to, among them investigation, trial, verdict of guilt, sentencing and execution. Thus, elsewhere al-Māwardī recognizes that two bundles of roles in "upholding the ḥudūd," let us call them "judgment" (viz., determining issues of fact and of law as to guilt), and "enforcement" (viz., verdict, sentencing and execution), may be fulfilled by the ruler (usually through the shurṭa function referred to above), as well as by the qāḍī. Thus, as to enforcement, he states that while a provincial governor properly has no power to try disputed facts or resolve disputed issues of fiqh, yet, if these uncertainties are absent or have already been resolved by a judge [*ḥākim*], then

> [t]he governor has a greater right than the judge to execute [*istīfā'*, lit. "fulfill"] [a ḥadd penalty], because [doing so] falls within the principles [*qawānīn*] of siyāsa and the requirements of preserving and defending the religious community, and because the pursuit of utility [*maṣāliḥ*] is confided to governors, who are delegated the responsibility to seek it, in distinction to judges, who are charged with [*mursadīn*] the determination of disputes between litigants.[400]

Yet, al-Māwardī also declares, as we shall see presently, that amīrs and judges of the shurṭa also possess powers of judgment, in that they may legitimately <u>try</u> criminal cases, indeed with powers of prosecution greater than those of qāḍīs.

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[400]al-Māwardī, *al-Aḥkām*, 32.

It seems most Ḥanafī[401] and Shāfi'ī scholars have views similar to al-Māwardī's. Other 'ulamā' argue that ḥudūd -- seemingly in both phases, judgment and enforcement -- ought to be the judge's concern, as distinct from the ruler. This is the position of other important scholars, including the Mālikī Ibn al-Ḥājib (d. 646 H., 1249 C.) and the Shāfi'ī Ibn 'Abd al-Salām (d. 660 H., 1262 C.), who argued that the application of the ḥudūd is for the caliphs, and after them their heirs the qāḍīs.[402] This ruling corresponds with the practice in the Mālikī Maghreb, where often qāḍīs held the entirety of the criminal jurisdiction.[403] Although Ibn Taymiyya, as quoted in the last part, approved of this Mālikī position as "closer to the old sunna," he himself held a middle view, that the choice between various agents in criminal law is an issue settled not by sharī'a at all, but merely by custom.[404] These are the theories; we read above Ibn Taymiyya's and Ibn Khaldūn's accounts of varying divisions of the jurisdictions in practice.[405]

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[401]The notable exception is 'Alā' al-Dīn Abū al-Ḥasan 'Alī al-Ṭarābulusī (d. 844 H., 1440 C.), who moreover argued that his views were supported by the Ḥanafī fiqh in his *Mu'ayyin*, passim.

[402]Ibn Farḥūn, *Tabṣirat* 1:12-13.

[403]On Ibn Taymiyya's testimony, see p. 496 above.

[404]Ibid. This view was adopted by the Mālikī Ibn Farḥūn, *Tabṣirat*, 13.

[405]See pp. 496 and 497 above. Looking back at these two descriptions, we note in them an extraordinary, and we suspect studied, ambivalence in their language, considering the vital

If the fiqh recognizes a certain natural prerogative of the ruler even in the ḥudūd, then does fiqh require the ruler to observe, equally with qāḍīs, its demanding prerequisites to conviction of ḥudūd? Briefly, the answer is yes, as to matters of the substance of the crimes and their proof, but no with regard to many procedural questions.[406] The full answer is given in an extremely important passage (here quoted in full) from al-Māwardī's text, giving the differences between siyāsa and fiqh jurisdictions in criminal law:

> Crimes [*jarā'im*] are things forbidden in the sharī'a which God represses by a ḥadd or ta'zīr. These [crimes] possess upon suspicion the condition of presumed innocence, as required by religious policy.[407] They

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importance of the matter. Thus, Ibn Taymiyya leaves unstated whether the qāḍī exercises a ḥudūd jurisdiction, alongside the military ruler, at least when testimentary proof is relied upon. Ibn Khaldūn is vague on whether the pristine shurṭa of early days itself tried, or legitimately tried, issues of fact; while strongly suggesting that the corrupted shurṭa of his day is wholly unconcerned with the proprieties of proof by sharī'a, he equivocates on whether its sentences still qualify as "ḥudūd." Both descriptions probably reflect a practice where the bulk of cases were decided after circumstantial evidence led to confessions, often forced by beating, and where testimentary proof, as one would expect, was rarely available. Both descriptions also may choose to equivocate due to the existence of mixed cases -- the occasional qāḍī who exercises as well the shurṭa authority (Tyan, *Histoire*, 608), or the *walī al-shurṭa* who possesses the knowledge of a qāḍī (ibid., re shurṭa officials being promoted to qāḍī) or acts with counsel from muftīs or qāḍīs (ibid., 214-18).

[406]Ibn Khaldūn seems to be saying this in the phrase "*inna al-tuhama allatī ta'ridu fī al-jarā'imi lā naẓara li-al-shar'i illā fī istīfā'i ḥudūdihā wa-li-al-siyāsati al-naẓaru fī istīfā'i mūjibātihā.*" Quoted in Tyan, *Histoire*, 605.

[407]"*[Li-al-jarā'imi] 'inda al-tuhmati hālu al-istibrā'i taqtaḍīhi al-siyāsatu al-dīniyya.*" Tyan, misled by his steady interpretation of sharī'a and siyāsa are poles apart -- "le droit strict" vs. "l'arbitraire" -- and of the qāḍī and the

possess upon their being proved and shown valid the state of requiring fulfillment, as dictated by the laws of the sharī'a.

As for their condition after suspicion and before their proof and validity, then the question of the jurisdiction of them is to be considered. If [the official possessed of jurisdiction] is a judge [*ḥākim*], and he is brought a man accused of theft [*sariqa*] or adultery [*zinā*], suspicion of the crime can have no significance for him. He is not allowed to imprison him in order to investigate or clear [him]. Also he cannot convict him by reason of forced confession. In *sariqa* he cannot hear the complaint against him unless it is raised by an adversary claiming a right to what he stole and observing the accused's confession or denial. If he is accused of *zinā* the claim against him is not heard until he mentions the woman with whom he committed adultery, and he describes what he did with her, which must be such as constitutes a *zinā* requiring the ḥadd. If he confesses, he punishes him with the ḥadd in accordance with his confession; if he denies, and there is a *bayyina* [i.e., testimony], he hears [the testimony] against him; if there is no [*bayyina*], he requires of him the oath in the rights of men [e.g., property claims in *sariqa*, or lashing in ta'zīr for slander] but not in the rights of God [penalties, whether ḥudūd or ta'zīr, for the sins themselves] if the adversary requests the oath.

If the person possessed of jurisdiction before whom the accused is brought is a governor [*amīr*] or [an officer of the shurṭa[408]] he has rights to use means of investigation and exoneration with regard to this accused which the qāḍīs and judges [*ḥākim*] do not have. There are nine areas in which the rules of the two jurisdictions differ.

One of these is that it is not [*sic*] permitted to the governor that he hear of the commission of crime by the accused from the agents of his governate, without there first being a complaint filed [by a private

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shurṭa processes as equally foreign to each other, cannot understand this phrase, and understands it as, "l'instruction du procés devant la [shurta] est régie par les principes de la siyāsa." Tyan, *Histoire*, 605.

[408]al-Māwardī does not use the term "*shurṭa*" but "*awlād* [read as *wulāt*] *al-aḥdāth wa-al-ma'āwin*." Tyan explains these terms as very old alternative designations of officers of shurṭa. Tyan, *Histoire*, 575.

citizen].[409] He may resort to their statements in learning of the state of the accused: is he from the suspicious element [*ahl al-rayb*, lit., people of suspicion]? is he known for committing this type of crime or not? If they clear him from such as this, the suspicion is lightened and reduced, and his release is hastened, and he is not dealt with harshly. If they say he commits such crimes, and they know him for similar [crimes], the suspicion is aggravated and strengthened, and means of investigation such as we will mention are used in the [case]. This is not the right of the qāḍīs.

The second is that the governor has the right to observe circumstantial evidence and the characteristics [*awṣāf*] of the accused as to the strength or weakness of the accusation. If the accusation is of *zinā*, and the accused is compliant to women, gay and charming, the accusation is strengthened. If he is the opposite, it is weakened. If the accusation is of *sariqa*, and the accused is a vagrant, or his body shows signs of a beating, or he had with him when apprehended a tool for piercing, the accusation is strengthened. If he is the opposite, it is weakened. This also is not a right of the qāḍīs.

Third, the governor has the right to jail the accused at once, for investigation [of guilt] or innocence. There are various opinions on the length of this imprisonment. 'Abd Allāh al-Zubayrī the Shāfi'ī mentions that his imprisonment for exoneration and investigation is fixed at a maximum of one month. Others say, it is not fixed, but depends on the opinion of the imām and his ijtihād. This is the more likely. The qāḍīs have no right to imprison anyone except for an obligatory right.

Fourth, it is permitted to the governor in cases where the suspicion is strong, that he beat the accused in the [less painful] manner of ta'zīr, not the manner of ḥadd, to compel him to be truthful about his state concerning that which he is arraigned for and accused of. If he confesses while being beaten, the reason for his being beaten is considered. If he is beaten to confess, then his confession under beating has no legal significance. If he is beaten to confirm his state, and he confesses under beating, his beating is ended and the repetition of his confession is sought. If he repeats it, he is held to the second confession, not the first. If he limits himself to the first confession and does not repeat it, [the governor] is not prevented from acting in

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[409]al-Māwardī elsewhere states that a qāḍī has an equal right to do so, noting the dissent of Abū Ḥanīfa. al-Māwardī, *al-Aḥkām*, 70-71.

accordance with the first confession -- even if we disapprove of it.

Fifth, it is permitted to the governor concerning one who repetitively commits crimes and is not repressed by the ḥudūd, that he imprison him for life, if the people are harmed by his crimes. He must provide for his food and clothing from the public treasury, [since the purpose is] to prevent people from being harmed by him. This qāḍīs have no right to do.

Sixth, it is permitted to the governor to require the accused to take the oath, in order to clear himself, and to make him weigh gravely the investigation of his state, in cases of suspicion regarding the rights both of God and of man. He [the governor] is not prevented from requiring oaths entailing divorce, manumission or charitable acts, like oaths by God in the oath of allegiance [*bay'a*] to the ruler. . . .

Seventh, the governor has the right to force criminals to repent [*tawba*], and to threaten them as needed to lead them to repent voluntarily. [Governors] are not prevented from threatening them with death in a case where death is not obligatory, since it is a threat to intimidate, which falls outside the category of lying and in the domain of ta'zīr and discipline [*adab*]. It is not permitted that he realize his threat to kill and kill in a case where killing is not obligatory.

Eighth, it is not [*sic*] permitted to the governor that he hear the testimony of non-Muslims, or those whom the qāḍīs cannot hear, when their number is great.

Ninth, the governor may take jurisdiction of fights, even when there is no loss or ḥadd. If on neither of them is a trace of the fight, he may hear the statement of the one who first brought the claim. If one of them bears a trace of the fight, some say that he begins by listening to his claim, and ignores who came first. Most *fuqahā'* say that he hears the statement of the first of them to claim. The one who began the fight committed the greater crime, and receives the harsher chastisement. It is permitted to discriminate between them in chastisement . . . . If he believes it appropriate, in repressing the lower classes, to make them known and publicly announce their crimes, he may do so.

These are the areas in which there occurs a difference in crimes between the jurisdiction of the governors and the qāḍīs, in the matter of exoneration, and before proof of the ḥadd. This is because of the specialization of the governor in policy [siyāsa], and of the judge in the legal rules [*aḥkām*].

> After the proof of the crimes, the state of the governors and the qāḍīs are equal with regard to carrying out the ḥudūd. . . .[410]

Since this statement applies at once to both ḥudūd and ta'zīr crimes, we must analyze its consequences separately as to each. As to the ḥudūd, note that the siyāsa authority is expected, as much as is the qāḍī, to uphold all the rules imposing high standards of proof for ḥudūd. (Indeed, the following section of al-Māwardī's book recites these rules.) The leniency in the siyāsa procedure sanctioned here affects ḥudūd proof chiefly in allowing the authority to consider circumstantial evidence of guilt, which then, if strong, permits him to threaten or beat the accused to get him to "confirm his state." (After allowing this result, al-Māwardī still maintains, in the next section of the book, the rule requiring execution to be suspended at once upon retraction of the confession.[411])

With respect to ta'zīr, on the other hand, the potential breadth of the statement is far greater, since, as noted above, the procedural safeguards surrounding ḥudūd apply only indirectly to the ta'zīr, and the statement itself shows additional flexibility as to ta'zīr. The net result is that, here in procedure as earlier in law, the scheme of ta'zīr

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[410]al-Māwardī, *al-Aḥkām*, 219-221.

[411]Ibid., 224.

crimes, in its flexibility and unstructured quality, contrasts strongly with that of ḥudūd.

What is the allocation of criminal jurisdictions in Saudi Arabia? As in the Ottoman legal system, it is the qāḍī courts that try most ta'zīr crimes. As the 'ulamā' themselves admit, however, the basis for this jurisdiction is an implied delegation from the ruler resting on long Saudi tradition and custom. Thus, while residually or presumptively ta'zīr crimes are tried in the qāḍī courts, jurisdiction can be ousted by a specific provision by the ruler, and is, as we have seen, for crimes fixed by regulation.

A fortiori the qāḍīs also have jurisdiction to try all ḥudūd. Though as we have seen, technically the sharī'a courts possess this authority also by delegation from tradition and custom, yet the tradition is here far firmer, virtually a claim of right. Indeed I observed a judge repeat a ḥadd punishment of lashes, after the penalty had already been exacted by a governor, on the ground that only sharī'a courts could impose this penalty.[412]

Thus, the Saudi qāḍī courts combine in one authority the

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[412]Court records, Court of Shaykh Aḥmad b. 'Alī al-'Umarī, Chief Judge, Summary Court of Jidda [*al-Maḥkama al-Musta'jala bi-Jidda*], July 1983. The case was confirmed on appeal.

power to exercise both ḥudūd and ta'zīr, and in their hands, the two show their complementarity. Ḥudūd crimes have severe penalties, but are extremely difficult to prove, and most fastidiously handled. The ta'zīr punishments are lighter, but proof is flexible, and procedure not so fastidious. Since the qāḍīs possess ta'zīr authority by traditional delegation from the ruler, they apply it -- substantively and procedurally -- according to the measure of his authority. Thus, the limits of ta'zīr are for them greater than the narrow limits sanctioned by Ḥanbalī fiqh. As to procedure, al-Māwardī's schema above, distinguishing procedure in fiqh and siyāsa, remains a valid description of siyāsa jurisdiction in the Saudi courts; but in Saudi Arabia, they persist only as distinctions between two procedures, both used by the sharī'a courts, and not between two separate jurisdictions.[413]

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[413]To take an important example, consider use of beating to extract confessions, discussed by al-Māwardī above, p. 622. al-Māwardī's statement remains a close guide to Saudi practice.

It has indisputably been standard practice in Islamic criminal justice systems, cf. Heyd, *Criminal Law*, 252-54, as in many medieval systems, to use beating or other forms of torture to obtain confessions. As shown by the quotation from al-Māwardī, the matter is a standard point of conflict between siyāsa and fiqh tendencies, and clearly reveals their opposed tendencies. Thus, in fiqh, a confession is invalid if not voluntary; even a confession by someone imprisoned is suspect; compare this with Ibn al-Qayyim, *Ṭuruq*, 7-8, 15, 108, advocating the siyāsa practice of inflicting pain in investigation.

Regardless of precedent, of course, continued use of torture in contemporary systems is matter for alarm. My research did not bring me into direct contact with this phenomenon.

The Saudi populace seems to think beating during investigations is a common occurrence, and particularly common

and severe among drug investigators. Human rights reports on Saudi Arabia routinely mention beating and severer forms of torture. E.g., Middle East Watch, *Empty Reforms*, 28-29.

When I inquired from Shaykh al-'Umarī (in the Musta'jala Court where the practice ought to have been evident, see n. 374 above), he emphatically declared that any coerced confession was worthless, and that the courts oppose beating to extract confessions. He had confidence in the courts' powers to prevent mistreatment. First, all confessions, before being relied upon for conviction, must be confirmed before the courts; visits to court for this purpose occur frequently during investigations, as I observed. (For example, Shaykh al-'Umarī would ask a confessing accused, "Did you drink whiskey?") This gives accuseds an opportunity, which he was sure they would readily take, to complain of compulsion. When I asked him and his clerk whether such an accused would fear further beatings after so retracting, this concern seemed to them novel, and of no consequence. Second, claims of compulsion are often made after investigation and after confirmation, since by then prisoners have learned from their peers to make this claim as a stratagem. Third, if an accused retracts a confession after its confirmation on the ground that it was coerced, it will be wholly disregarded in ḥudūd crimes. It remains, however, probative (to some degree) in ta'zīr crimes, unless he can prove the fact of coercion. Fourth, the qādī can on the spot order the punishment of any misbehaving policeman.

I believe, however, that Shaykh 'Umarī's concern was chiefly with the evil of coerced confessions that are both untruthful and no longer desired by the prisoner. I suspect that he, and others in the Saudi criminal justice system, would agree with the following propositions: (i) it is not unjust, or at least no more than a minor abuse, to "encourage" a person strongly suspected of crime to make a confession by mild beating (mild beatings are, at least until recently, used to discipline Saudi school children); and (ii) in any event, if, during or after repeating the confession in court, the accused does not try to disassociate himself from the confession, then little harm is done. Note that, in the Saudi system, like medieval systems, proof by circumstantial evidence is relatively underdeveloped, and therefore conviction, even of the most obviously guilty, may often depend on confession.

The most revealing source on this issue is probably the Ministry of Interior's *Murshid*, its handbook on criminal procedure. It counsels investigators to investigate crimes by all means and stratagems possible, and to give accuseds full chances to come around. Investigators should not accept confessions without substantiating them. But in the case of those accused of serious crimes who persist in denial despite

Two cases I observed in Saudi courts well exemplify ta'zīr as wielded by the judge. In the first, a judge was trying an Egyptian apprehended smuggling hashish into Saudi Arabia. Drug-smuggling is a ta'zīr, siyāsa-based crime, the elements of which (until 1982) were defined by a regulation issued by the King. In court it emerged that the drugs were hidden within a copy of the Qur'ān. Learning of this offense to the holy Book, the judge announced, vehemently, "That is another crime."[414]

In another case, a man was accused of sodomy, treated, by the Ḥanbalī view applied in Saudi Arabia, as a ḥadd crime punished with stoning. He made a complete detailed confession in his own handwriting, but under trial for the ḥadd he

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strong proof against them and despite warnings, procedures exist in the Regulation for the Directorate of the General Security, Sec. 72/z, to allow compulsion and infliction of pain. Before using these an investigator must prepare a report and seek permission from the Ministry.

> Although the jurists of the Islamic sharī'a permit inflicting on the accused some harshness to make him speak the truth, as al-Māwardī [in *al-Aḥkām*], Ibn Taymiyya [in *Siyāsa*], and Ibn al-Qayyim [in *Ṭuruq*] make clear, nonetheless the Ministry takes care that none of this occurs without its permission, exhaustive study of the matter by the specialists of the Ministry, existence of proofs and strong circumstantial evidence of the truth of the accusation, and the accusation being one of major crime like murder, theft, brigandage, rape, abduction, and drugs. The Ministry in Circular 16S/485, 3 Muḥarram 1396 states that anyone exceeding his authority exposes himself to responsibility.

Murshid, 64. I have no way of knowing whether these procedures are followed.

[414]Personal observation, Court of Shaykh Aḥmad b. 'Alī al-'Umarī, Chief Judge, Summary Court of Jidda [*al-Maḥkama al-Musta'jala bi-Jidda*], July 24, 1983.

retracted the confession. Accordingly, the penalty of stoning was averted. The case was referred to another court for trial as ta'zīr crime. There, on the basis of the detailed confession, the man was sentenced to one year's imprisonment, with 65 lashes to be inflicted each six months.[415]

The exception to the qāḍīs' otherwise total criminal jurisdiction is regulatory crime. As mentioned in the last Part, the King's anẓima, mostly concerned with acts novel in modern times, include many criminal provisions, as, for example, in forgery, counterfeiting, border and passport control, drugs and firearms. Regulatory penalties include only imprisonment and fines, not corporal punishments, amputation, or death, since for the latter penalties a fiqh sanction is deemed necessary.

As to adjudication of these crimes, we know from Part I of this Chapter that 'ulamā' in their sharī'a courts have refused to apply anẓima, necessitating the creation of siyāsa tribunals. Has this refusal extended also to the regulatorily fixed crimes, as to which the King's legislative authority is acknowledged? As to many areas of regulatory law, a compromise obtains, by which the qāḍīs cooperate with the regulatory authorities in trying such crimes. The compromise is a division of labor: the qāḍī determines facts and reaches the verdict of guilt, and then refers the case to executive authorities for them to determine, in accordance with the

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[415]Ibid., Aug. 3, 1983.

regulation, the penalty that applies. (Again, these penalties are only imprisonment and fines, not lashes, amputation, retaliation or blood money.) This procedure obtains, for example, in drug, traffic and firearm offenses. There remain some regulatory crimes that are both tried and sentenced by siyāsa tribunals, but even here the mainstay is the highly canonical Board of Grievances, which has either trial or appellate authority over most siyāsa criminal prosecutions.

7. Summary of the Issues

Behind this appraisal of criminal law lies a mistaken idea, that "siyāsa" is utterly and unambiguously opposed to "sharī'a." For such scholars, only the qāḍī criminal jurisdiction has sanction under the divine law, while other criminal jurisdictions are mere alien usurpations, which moreover prove the unworkability of the former. As we have seen, this reading of the law contradicts many classical texts -- starting from Ibn Khaldūn's own description of the shurṭa as a "religious" function of the caliphate. Indeed, it may be the case that, on more careful study, we shall find that over the ages, rather than criminal law showing the fiqh's progressive falling from relevance, it will exemplify instead a success of the 'ulamā', doctrinal at least, in that they brought this public-law function, once unregulated by fiqh, into the fiqh's orbit -- if not indeed by absorbing the shurṭa

jurisdiction, at least by securing recognition that the shurṭa's legitimacy, functions, procedures, judgments, and perhaps even staffing, should be evaluated by the 'ulamā''s conceptions. For example, it has been noted that over time the shurṭa adopted more and more judicial form, and at times integrated closely with the qāḍī courts in staff and functioning.[416] The relationship between fiqh and siyāsa is still, however, undecided, and poses difficulties for both sides, as our case-study will show.

In any case, from our observations in Saudi Arabia, our concern is rather that the Islamic criminal justice system is too flexible and pragmatic, and that both doctrinally and institutionally it may provide too few legal guarantees for the individual rights enshrined in the sharī'a. This concern is particularly great when the criminal tribunal is a political, siyāsa authority, and not a fiqh court, since we certainly expect that the 'ulamā' who elaborated the sharī'a's protections would be more likely than rulers to uphold them.[417]

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[416]Tyan, *Histoire*, 606.

[417]Recall that Ibn Khaldūn's statement above described the criminal authority as applying the "ḥudūd" to "crimes" "without reference to the sharī'a," while the qāḍī jurisdiction was responsible for ta'zīr and for ḥudūd "proved in accordance with the sharī'a." Historical research is needed on the extent that criminal jurisdictions diverged from sharī'a (as opposed to merely fiqh), for example, by inquiring whether standards of criminal enforcement were better in the Maghreb than in the East.

Insofar as the latter is true, note that our modern predilections incline us to approve, as does Ibn Taymiyya, of the solution obtaining in the Ottoman Empire, among the Mālikīs in the Muslim west, and nowadays in Saudi Arabia, that qāḍīs, not rulers, should exercise jurisdiction over the entirety of the criminal law.

On the other hand, let us note considerations on the other side. Do we not see in the 'ulamā''s reluctance to involve the fiqh with severe penalties -- as shown in their stringent, highly idealistic definitions of ḥudūd; their narrow limits on ta'zīr (*e.g.*, the ten lashes maximum); their exclusion of death and severe penalties from ta'zīr, while they permit these penalties to the ruler as "siyāsatan"; the disparate treatment of "war on the God and the Prophet" (narrowly defined highway robbery) versus "corruption in the earth" (broadly defined punishments siyāsatan) -- a desire to steer their transcendent fiqh clear of the crudities, brutalities, approximations, of criminal law? Unwilling to relinquish microcosmic principle to deal with criminal law as it demands -- with attention to such macrocosmic issues as changing social necessities and conditions, perhaps even equality of treatment -- did the 'ulamā' not readily cede authority? And did they not, by ceding authority, reserve the right -- by articulating their standards as idealistic and of ambiguous scope -- to disavow and condemn all abuses?

Against the background of this dualistic approach to the application of law, one glimpses the boldness of Ibn Taymiyya's program, shown in the many characteristic positions we have noted. To dissolve the dualism in criminal law compels fiqh criminal law, and with it the divine texts and their textualist interpreters, to bring their system into conformity with temporal reality, thereby facing all the challenges just named. In what follows we see how Saudi Arabia now, impelled by complex causes, seems to be following through on Ibn Taymiyya's challenge.

B. A CASE STUDY OF CRIMINAL LAW CHANGE IN SAUDI ARABIA

1. The Problem: Drugs and Violent Acts

Let us now employ our understanding of criminal law and practice, Saudi and Islamic, and the framework of three distinctions we have developed, to examine closely an evolving issue within Saudi criminal law and practice. This issue is particularly revealing because it involves changes not only in ta'zīr and siyāsa crimes, but also in several of the ḥudūd, and because it arises in conscious response to a practical dilemma confronting the legal system. Examining this issue in motion, so to speak, we shall observe certain relationships between our three distinctions.

The issue confronting the Saudi system is the increase in the frequency of certain serious crimes dealt with, under traditional Saudi fiqh, solely by either ta'zīr (by the ruler or the qāḍī) or punishments siyāsatan (by the ruler). These crimes fall into two groups: a) various forms of violent assault, often including rape, robbery and murder; and b) drug crimes, including importation, distribution and recidivist use. (A third type of crime, coming to the fore later and discussed separately below, is acts of sabotage and terrorism.)

The Saudi system has an unflinching faith in the deterrent effect of harsh punishments, that the frequency of a crime will diminish in proportion as the crime is met with severe punishments, particularly if these are promptly exacted. Therefore, when the system observed that these crimes had shown a marked increase in frequency, King Khālid[418] decided that harsher punishments were necessary.

To achieve this end, the King could have chosen to rely entirely on his own authority, and invoke siyāsa precedents. He could either punish these crimes siyāsatan, handling them independently or with the informal assistance of courts or the 'ulamā'. Alternatively, he could have issued new anẓima, as had been done long before in criminalizing the importation, dealing and use of narcotic drugs. Conceivably, under these as under existing drug regulations, the sharī'a courts could

[418]King Khālid died in 1982.

determine facts and guilt, and the executive branch the penalty.

Yet there were drawbacks to both these solutions. As to the first, relying entirely on punishments siyāsatan would amount to breach with Saudi[419] tradition, since the latter has applied only to respond to urgent public necessity case-by-case, and moreover requires that, since there is no trial, the proof of guilt be overwhelming. (Other reasons for this reluctance are discussed below.[420]) The regulatory solution would also be inappropriate, because this traditionally permits only imprisonment and fines, presumed inadequate here, and because the crimes in question concern areas of immorality that are central concerns of fiqh criminal law, including murder, theft, intoxication, and illicit sexual relations.

This problem, therefore, raises squarely the question of development of the fiqh and of the fiqh criminal legal system to meet changed circumstances. In the past these crimes would be very rare, and therefore all the more heinous, and when they did occur could be dealt with either by punishment siyāsatan or by other extraordinary means, benefiting from an intimate and immediate relation between ruler and 'ulamā'. In

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[419]The difficulty may be peculiarly Saudi, arising simply from the Saudi penchant for deference to fiqh, 'ulamā' and sharī'a courts, even in matters of public law, while in earlier regimes the ruler's discretionary siyāsa powers would, either *de facto* or *de jure*, deal with the problem. Indeed, the problem may be only modern Saudi.

[420]See p. 679 below.

modern Saudi Arabia, however, particularly since its criminal legal system has undergone an extensive rationalization, through organization and bureaucratization, options are narrowed. A forthright, general fiqh solution is demanded.

2. Fatwā No. 85 on Assault and Drug Smuggling

a. King's fatwā request

Accordingly, the King turned in 1981 to the 'ulamā', and submitted the question to the Board of Senior 'Ulamā'. In his letter referring the question, he noted the upsurge of the crimes of drug smuggling, distribution and addiction, and of abduction, and then stated:

> Nothing will put a stop to these matters except prompt, strong, deterrent penalties within the limits of the requirements of the immaculate sharī'a. [P]rolonged procedure in such matters causes the execution of the penalty to be delayed, and the crime to be forgotten.[421]

The King is signalling here that, in turning to the 'ulamā' and the fiqh for assistance, he has two chief concerns: that punishments not be lenient, and that they not be delayed.

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[421]Kingdom of Saudi Arabia, Royal Order No. 5934/2 (17 Jumādā II 1401, April 21, 1981), as paraphrased in *al-Ḥukm fī al-saṭw wa-al-ikhtiṭāf wa-al-muskirāt [*The Rule as to Assault, Abduction and Intoxicants*]* (pt. 2), *Majallat al-Buḥūth al-Islāmiyya [*Journal of (Religious) Scientific Studies*]* [the quarterly publication of al-Riyāsa al-'Amma li-Idārāt al-Buḥūth al-'Ilmiyya wa-al-Iftā' wa-al-Da'wa wa-al-Irshād (General Presidency of the Administrations of Scientific Studies, *Fatwā*, [Religious] Instruction and Preaching)], March 1985, no. 12, pp. 11-83 [hereinafter *Fatwā* (pt. 2)].

In raising these concerns, the King points to the three chief obstacles in the path of a fiqh solution. First, as to leniency, the fiqh does not include explicit definitions for the crimes in question, which therefore fall into the undifferentiated ta'zīr category, punished in the discretion of the individual qāḍī. As noted, Saudi qāḍīs ordinarily do not assume the power to impose death as a ta'zīr penalty, acknowledging this as an extraordinary penalty wielded by the ruler.[422] Second, also as to leniency, whenever Saudi judges possess discretion to sentence, as in many ta'zīr crimes, they typically hand out penalties considered, by the prosecuting authorities and even the appeals courts,[423] insufficient to suppress crime. Third, as to delay, the sharī'a court procedure is slow, tracing to procedural niceties arising from respect for trial judge independence and for the doctrinal correctness of results. In any case, no judicial process, especially one involving appeal through three levels, could compete with the swiftness of the punishment-siyāsatan procedure.

In responding to the King, the 'ulamā' decided that the fiqh and the sharī'a courts could meet the challenge. On

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[422]See p. 611 above.

[423]See, e.g., *Fatwā* (pt. 2), 82, where three scholars of the Board remark on this problem. I frequently observed cases returned from the intermediate appeals court to a trial judge with the request that he review the case and consider a harsher penalty. Court Records, Summary Court of Jidda.

September 9, 1981, the Board issued its Fatwā.[424] The Fatwā dealt separately with abduction and assault and with drug crimes.

b. Crimes of abduction and assault

The Board held that the above-quoted Qur'ānic verse 5:33-34 on the ḥadd of brigandage [ḥirāba or *muḥāraba*], which was usually narrowly interpreted as applying to acts of terrorizing, robbing and killing on the highways, should be widened, first, to cover acts of aggression even within cities, even without deadly arms, and, second, to cover offenses not only to life and property but also to sexual honor. The first result was consistent with traditional Ḥanbalī law,[425] but the other was not. The Fatwā supports the second point by referring to the Mālikī opinions mentioned above applying the ghīlatan category to killings in offenses against sexual honor.[426] Also, the Fatwā adopted a fiqh view, not adopted by any of the four schools, that the choice of penalties from among those mentioned in the verse -- all of

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[424]Decision 85, 11 Dhū al-Qa'da 1401, Sep. 9, 1981, *Fatwā* (pt. 2), 75-83. The fatwā is based on a preparatory study by the Standing Committee for Scientific Studies and *Fatwā*, Hay'at Kibār al-'Ulamā', published as "al-Ḥukm fī al-Saṭw wa-al-Ikhtiṭāf wa-al-Muskirāt" (pts. 1 & 2), *Majallat al-Buḥūth al-Islāmiyya* no. 11, pp. 13-141 (December 1984) [hereinafter *Fatwā* (pt. 1)]; *Fatwā* (pt. 2).

[425]See, e.g., al-Bahūtī, *Sharḥ muntahā*, 3:375-378, holding that acts are guilty whether among dwellings or in the desert.

[426]*Fatwā* (pt. 1), 130; *Fatwā* (pt. 2), 69.

them severe: death, crucifixion (usually[427] inflicted *after* execution), cutting of alternate hand and foot, exile (interpreted as life imprisonment) -- should be considered not a mechanical choice according to certain elements of the crime, as traditionally, but at the discretion of the judge. The Fatwā declared, however, that in the case of murder there is no option, and a death sentence is mandatory.[428]

The Fatwā's result, then, meets the first two obstacles mentioned above to the deployment of fiqh-based measures against abduction and assault. The first obstacle, that traditional fiqh rules did not easily accommodate severe punishments for these crimes, is met by allowing for inclusion of these acts within the ḥadd crime of brigandage. By this step the Fatwā sanctions as penalties for such acts any of the four severe penalties for ḥirāba. These are available, however, only in cases where the act is proved in a manner satisfying ḥadd requirements. For cases without such proof, the Fatwā opens the way to severe penalties by its approval of death as the limit for ta'zīr, and by its encouragement to trial courts to issue ta'zīr death sentences on their own

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[427]Execution by crucifixion is not ruled out, however, since we encounter the words "crucifixion until death." Letter of the Deputy Prime Minister to the Minister of Justice, No. 1894/8 (13 Sha'bān 1402, June 5, 1982). Death by crucifixion is no doubt a fiqh position. Schacht, *Introduction*, 181.

[428]The *fatwā* minority opinion opposed even this limitation on the ruler's discretionary choice of penalties. *Fatwā* (pt. 2), 82.

authority. The second obstacle, the propensity of Saudi judges to sentence more lightly than thought socially necessary, is met by the same means, since for cases where the ḥadd is proved, the judge's discretion is restricted to the four named penalties. For the other, or ta'zīr, cases, the Fatwā must content itself with emphasizing that these crimes are heinous, and deserve very heavy ta'zīr.

The third obstacle, delays due to court procedures, the Fatwā seeks to overcome by suggesting streamlining of investigatory and judicial procedure, but it does not relent from demanding three levels of appeal, "to avoid moral error [*barā'atan li-al-dhimma*] and protect against the spilling of blood."[429]

Implicitly at stake in the Fatwā is an issue besides the means to repress certain crimes. This is the issue of the criminal law jurisdiction of the sharī'a courts relative to the ruler and the executive branch. Obviously, the Fatwā's result, identifying certain acts as ḥudūd, firmly locates jurisdiction over these acts in the sharī'a courts, since, as we have seen, Saudi courts have exclusive jurisdiction over ḥudūd. By this interpretation, and by insisting on three-court review, the 'ulamā' assure themselves a broad new jurisdiction.

The 'ulamā''s interest in gaining this new jurisdiction is betrayed clearly in their treatment of a final issue.

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[429]*Fatwā* (pt. 2), 74, 78-9.

Since the ḥadd of ḥirāba as here interpreted calls for a choice among four penalties, the issue remains, whose discretion, the courts' or the ruler's, should be consulted in making the choice of remedies? Here the Board split: the majority (sixteen scholars) declared that the choice of the penalties should be made by the qāḍīs, while a minority (three scholars) asserted that under fiqh this authority belongs only to the ruler.

The reasons given for the conflicting views are instructive. The majority's reasoning is as follows:

> The majority has the opinion that the *delegates of the ruler* -- the qāḍīs -- should undertake to establish the type of the crime and issue a judgment on it. . . . [T]hey should choose [between the penalties] according to their ijtihād considering the state of the offender, the circumstances of the crime, and its consequence on the society, and what will secure the public interest of Islam and the Muslims.[430]

Note how the majority is forced to rely on the weak claim of existing delegation from the ruler.

In response, the minority makes a forceful argument:

> The general ruler has a broad authority, and carries a great responsibility. . . . God made unsusceptible of increase or decrease the ḥadd penalties for those [ḥudūd] crimes which are individual, and the effect of which falls on individuals. He laid down a strong penalty for those crimes that have a general effect, threaten with disorder the existence of society, and encourage evil persons to emerge into the open. [God] gave authority over [these latter penalties] to the ruler of the [Islamic] nation, the one charged with its welfare and responsible to preserve its security and spread justice and peace among its members. Included in this are those who commit ḥirāba and corruption . . . .

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[430]*Fatwā* (pt. 2), 77 (emphasis added).

> [W]e believe that the choice [among penalties] is only the ruler's, because of the breadth of his vision, his comprehensive religious responsibility, his knowledge of the interests of the country in general, and his capability, which the judge does not have, to evaluate political dimensions that have an impact on the future of the [Islamic] nation. He is concerned with the evildoings of criminals to an extent far greater than the judge. The 'ulamā' have distinguished between the functions of the judge and the ruler, and made clear that certain functions are properly within the jurisdiction of the general ruler. . . . All interpreters of the verse of ḥirāba who support choice [of penalties] say that the ruler is the one who chooses.[431]

The minority even held that in the case of the murderer the imām had a right of choice, choosing a penalty other than death if that should serve the public welfare.

Note that the minority has on its side, as even the majority admits, the classical Islamic constitutional theory, whereby the ruler is ultimately responsible for all adjudication and even ḥudūd enforcements. (Note, however, that the minority tries to draw a distinction between fixed ḥudūd applying to individual crimes, and ḥudūd, presumably ḥirāba and "corruption in the earth," causing general harm and flexibly administered by the ruler.)

These quotations from the debate obviously invoke our familiar distinction between fiqh and siyāsa with their relative microcosmic and macrocosmic specializations. Here the distinction surfaces as the issue, which is the more imperative in sentencing the offender, the specialization of the 'ulamā' in the individual moral dimension -- of the judge,

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[431]Ibid., 80-81.

the criminal, and of the members of pious religious community observing the events -- or the specialization of the ruler, in the external utilitarian dimension of state suppression of crime.

c. Crimes of drug distribution and smuggling

The second part of the Board's Fatwā concerns drug distribution and smuggling. These the Board did not declare ḥudūd crimes, but merely within the ta'zīr category, yet so heinous as to constitute the "spreading of corruption on earth." For a first offense, the criminal was to be punished with an "grave ta'zīr, of any or all of imprisonment, flogging or fine"; on conviction of a second offense of this type, the offender deserved whatever penalty would, in the opinion of the qāḍī, terminate the evil he did, up to death. The Fatwā also endorses Ibn Taymiyya's view, that even one simply using drugs, if a repeat offender not deterred by prior penalties (also referred to in the Fatwā as an "addict"), may be killed, if the qāḍī believes this alone will stop his evil.[432]

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[432]"As to one who takes [drugs] for use only, the sharī'a ruling is that of intoxication. If he is addicted to taking them, and the application of the ḥadd has proved of no use as to him, then the sharī'a judge [*al-ḥākim al-shar'ī*] can by ijtihād determine the ta'zīr penalty obligatory for suppression and deterence, even by killing him." The Board reiterated this holding in a decision issued two months later, in response to an request by the King for clarification as to the punishment of one who repeatedly is convicted of drug use. The King pointed to an earlier decision of the Board (No. 53, 4/4/1397, March 24, 1977), which endorsed, as to one convicted of the ḥadd three times, the adding of penalties of lashing and imprisonment in addition to the ḥadd, and to the Government's recent urgent plan to establish drug rehabilitation clinics. Perhaps behind the King's request was

Here again the Fatwā seems concerned to augment sharī'a court jurisdiction, in specifying, first, that ta'zīr penalties extend up to death, and second, that it is the judges themselves who ought to determine these severe penalties.[433] In support of these points, the Fatwā quotes approvingly from Ibn Taymiyya's opinions: for the first, his views, like that just mentioned, flexibly defining ta'zīr as whatever is needed to prevent evil; and for the second, that nothing in the sharī'a constrains whether to assign jurisdiction over ta'zīr to the ruler or to the ordinary criminal judge.

This effort to shift jurisdiction from the ruler to the courts, however, betrays the same weak point as the last branch of the opinion, that this jurisdiction was traditionally understood to belong to the ruler, and not the courts. What was being sought here was a shift of jurisdiction over death penalties siyāsatan from the King to the courts, assimilating their treatment to that of the ḥudūd.

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concern over the propriety of this result, given modern times and modern methods of treatment of addicts. Shaykh Ibn Jubayr wrote a dissent to the Decision.

The Government is likely aware of the human rights implications of killing addicts. In press accounts it has boasted of a generous and tolerant treatment program for addicts, considering them "sick people and victims." See, e.g., Reuters Library Report, Feb. 17, 1990.

[433]The point is reemphasized in the subsequent ruling, which refers to the "right of the qāḍīs to impose the penalty which he thinks best . . . ." See n. 432 above.

A striking step is being made, without special notice being taken or much justification offered.

d. Decree implementing Fatwā No. 85

Some months after receiving the Board's Fatwā, the King issued a decree[434] implementing the aspects of it concerning abduction and assault. (As to drug crimes, he did not order implementation, for unclear reasons,[435] and the matter remained under discussion until Fatwā 138 in 1987, to be discussed below.) The decree assigns to the ruler's "delegates," the judges, responsibility to find guilt and to determine the type of crime, i.e., whether it constitutes ḥirāba. As to the points of difference between the majority and minority, the King adopts language from the majority, obliging his judges to exercise ijtihād to choose a penalty. But significantly, the judges' determination is termed only a "recommendation"; the final choice of penalty he reserves for himself, for "all types of ḥirāba and corruption whose ruling

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[434]This decree was communicated by Letter of the Deputy Prime Minister to the Minister of Justice, No. 1894/8, 13 Sha'bān 1402, June 5, 1982. The latter transmitted it as an "Instruction" to the judges. Whether Saudi sharī'a court judges consider any particular royal order binding is itself no easy question. Certainly, a judge considers himself free not to obey any order he considers contrary to the Qur'ān or the Sunna. Here, however, any divergence from the order is likely not due to any such claim of contradiction, since the order implements the opinion of three senior 'ulamā', and, in any case, only narrows authority the King had previously possessed. Divergence is rather to be traced to the spirit frequently observed in the judges, of a spirit of independence and resistance to royal interference.

[435]One apparent reason is the then on-going review of a new niẓām on drug laws and offenses.

is laid down in [verse 5:33-35]," here quoting extensively from the minority opinion:

> Entrusting the choice to the judges would have consequences which would not serve the general welfare, and which would not achieve repression of those who do corruption. The choice is the imām's in all types of ḥirāba and corruption . . . .

The King also adopted the position of the minority allowing the King choice even in the case of the murderer in ḥirāba.

3. The Practice after Fatwā No. 85

a. Issues and data

The course of events following this royal order is extremely interesting, and shows, when viewed closely, the interrelation, complementary and interconnecting, of the 'ulamā' and ruler, sharī'a and siyāsa, elements in an important area of criminal law, and how each of them is undergoing change in the new environment of modern state and legal system. The story unfolds over a period of eleven years, during which, as we shall see, new theories and procedures for ḥadd and ta'zīr penalties become established.

In what follows, we concentrate on three sets of problems. These address the same over-arching question of balance of jurisdiction -- as between siyāsa and fiqh, ruler and 'ulamā' -- to which this Chapter has been devoted throughout. Again, we are concerned with jurisdiction in a dual sense -- power to legislate and power to adjudicate. Transposed into the context of our case-study, this dual

concern gives rise to three basic questions. Two of these fall under legislation: (a) the general question of the allocation of the power to legislate between the ruler or the 'ulamā': whose authority here develops the criminal law; and (b) the reflection of question (a) in the content of the legislation, i.e., what is the balance between siyāsa and fiqh elements in crimes or penalties: to what extent are criminal acts defined and prosecuted as ḥadd, as ta'zīr, or as punishment siyāsatan? The third issue arises under adjudication, and is simply the question of how the power to adjudicate is divided between the ruler and the 'ulamā'. As we proceed through our case-study, we observe on-going changes in all these dimensions. Full discussion of the first of these three issues we postpone to Part III of this Chapter, on codification. This leaves us with two explicit concerns: one legislative -- which we shall call for present purposes "substantive" -- this being the siyāsa/fiqh balance in the changing terms of the various crimes of ḥadd and ta'zīr involved; and the other adjudicative -- we shall call it here "procedural" -- this being the allocation of authority to adjudicate these crimes. The two issues are intimately related, and for this reason, and because the narrative of events is both chronological and rather dense, we shall not treat them separately.

The data on which we must rely in pursuing these issues is fragmentary and intricate. First, debate or disagreement

between the ruler and the 'ulamā' is hardly carried on in a public forum, but rather intimately at the highest levels of government. Second, information on criminal trials and sentences is lacking. While criminal trials are required to be public unless the judge believes secrecy is necessary,[436] in practice judges restrict attendance to those whose attendance is either justified by a personal interest, or is unavoidable.[437] Similarly, while court records are accurate and complete, are in theory public record, and are reviewed on appeal, in practice a judge will allow them to be examined only by someone with some demonstrable need to know; they certainly are not published in any form. The feeling is that, while the litigants' and the public's interests in securing justice must be protected, still the events of a criminal trial should not be made more public than necessary. This is for the reasons that disclosure of the events is disastrous to the reputations of all involved, even the innocent, and that publication of the facts of crimes merely incites more of the

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[436]*Judiciary Regulation*, Sec. 33. Announcement of judgments must in any case be in public.

[437]While I obtained unlimited access to one court's criminal proceedings, and to a lesser extent its records, this court was one where only lesser crimes are tried. Ḥudūd crimes are heard by three-judge courts, and to gain access to these I would have needed the permission of each of the three judges in each case. I was allowed to read court records of a few ḥadd cases, and observed the judicial confirmation of a confession of murder by arson.

same.[438] These impulses of confidentiality are set aside in part in the case of the ḥudūd, since the Qur'ān itself requires public enforcement. As mentioned above, a public announcement, issued by the Ministry of Interior, follows an execution of a ḥadd penalty, and is carried in all the newspapers and on television news. An announcement includes the name and nationality of the convict; a brief summary of the legal characterization of the crime and the evidence for conviction; usually, dates of the various court judgments, royal orders, and sometimes of the crime itself[439]; and the penalty inflicted.

By means of these announcements,[440] ḥudūd events were studied over a period of almost eleven years, from May 16, 1981 through April 18, 1992. Convictions of the ḥadd of ḥirāba, the ḥadd of ghīla, ta'zīr execution, and execution

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[438]Precisely these concerns are mentioned as the exception to the requirement of public court sessions. Ibid.

[439]Unfortunately, after April 1989 no dates are published except for the final royal order.

[440]The search was done by checking Saudi local newspapers, which are required to publish these announcements. Only the Saturday issue of each week was checked, since ḥadd penalties are nearly always enforced on Fridays. Several non-Friday announcements were noted by various means, found, and included, but no doubt several eluded my search. I double-checked my search against international news databases. For dates after my departure from Saudi Arabia, the search was by means of Library of Congress archives. In these files, six Saturday issues were missing: August 1, 1987; February 21, 1988; April 11, 1988; May 6, 1989; September 1, 1990; November 17, 1990. Therefore my statistics are likely slightly low.

siyāsatan occurring during this period total 177,[441] all of which culminate in beheading,[442] with the exception of four amputations of the alternate arm and leg[443] and two crucifixions (after beheading[444]).

The following sections discuss the course of events in practice under the Fatwā.

b. Cases from the issuance of Fatwā No. 85 to 1987

Let us return to a point four months before the date of the Fatwā, in order to sample the then pattern for executions siyāsatan carried out on the King's authority, as advised by the 'ulamā'.[445] These announcements refer to a "sharī'a ruling," to the execution of which the King "agrees." The term "ruling" [*ḥukm*], however, is ambiguous, referring possibly to an actual court judgment, a legal opinion specific to the case issued by one of the 'ulamā', or a general fiqh law.

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[441]See Appendix C showing distributions of these penalties.

[442]One was an execution by shooting. *al-Jazīra*, 13/4/1404, Dec. 17, 1983, p. 5 [83-Ḥ-4].

[443]*al-Jazīra*, 22/2/1407, Oct. 25, 1986, p. 28 [86-Ḥ-5].

[444]*al-Madīna*, 16/11/1410, June 9, 1990, p. 3 [90-Ḥ-15]; *al-Riyāḍ*, 8/6/1412, Dec. 14, 1991, p. 3 [91-Ḥ-12].

[445]*al-Jazīra*, 12/7/1401, May 16, 1981, p.23 [81-Ḥ-1]; *al-Jazīra*, 4/8/1401, June 6, 1981, p.5 [81-Ḥ-2]. (Note: cases are identified by codes, as preceding: 81 (for 1981), Ḥ (for Ḥirāba), 1 (for first case that year), and are assigned numerical Hijrī dates, day/month/year, to facilitate chronological comparison.)

After the date of the Fatwā, but before the issuance of the King's order and the official communication of the order and the Fatwā to the judges, two cases[446] reflect a process of change in the direction of the King's position soon to be announced. These announcements refer specifically to a hearing by sharī'a judges to receive evidence against the accused and record any confession. After this the announcements remark that the case "is brought before" the King with "the request" that he "agree" to the execution of the accused. Thus, from the first case:

> On transfer to the Greater Sharī'a Court of the Eastern Province [the accused, a household employee] confessed after hearing the complaint that he had killed [the mistress of the house] and her child intentionally and with malice. The [defendant's] act being considered a heinous crime, the matter is brought before the Sublime Station, requesting his agreement to execution without delay.[447]

This language leaves unclear whether it is the court or the King that actually convicts of crime, or even whether it is the court or the Ministry of Interior that refers the crime to the King. In this case a court is stated to have taken jurisdiction of the case, and therefore it is likely that the court has made the determination to which the King "agrees." The second case, however, mentions no court with jurisdiction, but only certain judges who assemble to hear and confirm the accused's confession. Such confirmations of confessions are

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[446]*al-Jazīra*, 14/3/1402, Jan. 9, 1982, p. 32 [82-Ḥ-1]; *al-Jazīra*, 5/4/1402, Jan. 3, 1982, p. 5 [82-Ḥ-2].

[447]Case 82-Ḥ-1.

a common stage in the pretrial investigation of a crime, and suggest that no formal court conviction occurred. Neither of these announcements refer to any ḥadd, but recite instead Qur'ānic verses on qiṣāṣ; the second case recites the latter plus Qur'ānic verse 5:33-34 (on ḥirāba and corruption in the earth). Since the grounds given for referring the case to the King are the grounds for traditional punishment siyāsatan (the confirmed confession, providing certainty of proof, and the heinousness of the crime), it is likely that both of these applications ought still be counted executions siyāsatan, and not judgments under the Fatwā.

After the King's order was issued and communicated to the courts on June 5, 1982, the patterns just discussed continue without important change, except that henceforth such announcements refer to the 5:33-34 verse as the justification for referral to the King. These announcements still leave ambiguous which authority it is that convicts. Six cases occurring over a period of about one and one-half years following the King's order -- the latest executed on August 30, 1983 -- follow roughly this procedure.[448] Two of the

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[448]One case, while roughly within this series, is anomalous, in representing a classical type of punishment siyāsatan, in which death siyāsatan is imposed in lieu of qiṣāṣ when the latter fails. This case arose out of a tangled episode of tribal blood-feuding. The defendant's brother, A, had previously killed B, and B's brother had refused blood-money and demanded retaliation. A's case was bound over awaiting the majority of all the other heirs of B, who thereupon would declare whether they also demand retaliation. Meanwhile, however, the defendant killed B's brother. After the defendant was found guilty of murder, two heirs of B's

cases assert that the crime is ḥirāba or is a ḥadd, but the others mention simply the heinousness of the crime. These penalties seem, once again, to be the equivalent of punishments siyāsatan, in that they meet that penalty's requirements, but with an extra patina of legitimation from references to "ḥadd." The cases themselves are easily argued to be heinous, and all of them involved indisputable guilt.[449] All the cases seem to have been handled promptly; for four, dates are given allowing calculation of durations from crime to execution, which are three days, two weeks, eight days, and three months.[450]

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brother renounced their right to retaliation. At that point the trial court acquitted of qiṣāṣ. On appeal, however, the first appellate court declared its opinion that the murderer's death was essential to restore peace and good order, and forwarded a request, through the Supreme Judicial Council, to the King that the murderer be executed. Perhaps because this case arose at the appellate level, where findings of fact and of guilt cannot be made, the case was not treated as ḥadd of ḥirāba. The term ḥadd is not used. *al-Jazīra*, 19/11/1403, Aug. 27, 1983, p. 4 [83-Ḥ-2].

[449]*al-Jazīra*, 18/10/1402, Aug. 7, 1982, p. 4 [82-Ḥ-3] (caught red-handed after killing three in course of bank robbery); *al-Jazīra*, 23/11/1402, Sep. 11, 1982, p. 5 [82-Ḥ-4] (caught immediately after killing one and wounding another in robbery); *al-Jazīra*, 5/2/1403, Nov. 20, 1982, p. 32 [82-Ḥ-5] (drug-smuggler and distributor, fights with police, and has many prior offenses); *al-Jazīra*, 24/12/1403, Oct. 1, 1983, p. 32 [83-Ḥ-3] (caught in house after burglary and murder of owner); *al-Jazīra*, 27/3/1404, Dec. 31, 1983, p. 4 [83-Ḥ-6] (a government employee kills another in a government office).

[450]Case 82-Ḥ-3; Case 82-Ḥ-4; Case 83-Ḥ-3; Case 83-Ḥ-6; Case 82-Ḥ-5 is undated. The anomalous case, n. 448 above, is the exception, five months elapsing between the first appellate court decision and the King's approval.

Yet there are interspersed among these cases four cases in which it is a sharī'a court that sentences to death, and then this decision is appealed in the normal procedure and finally the King's order. The King's approval is reported, not as "agreement" to a sentence, but as simply commanding "carrying out what has been decided under the sharī'a," exactly as is the practice for all other crimes of death or amputation. The first of these cases (executed on January 28, 1983, or about seven months after the King's order was circulated) seems clearly to be an implementation of the new Fatwā, in that it makes an explicit verdict of ḥirāba in circumstances outside the traditional crime. In it, three robbers of a store neither killed, used arms, nor inflicted serious injury, and moreover were not caught red-handed -- a borderline case for ḥirāba even under the new Fatwā.[451] Each of the other three cases offers a strong reason why it was not treated as siyāsatan. In the second case, the courts possibly kept jurisdiction because the original accusation was incest, a category of the ḥadd of adultery. On hearing evidence the judges were impressed by the debauched, unrepentant and recidivist character of the accused, though a young man.[452] Very likely they took the case out of the adultery category

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[451]*al-Jazīra*, 15/4/1403, Jan. 29, 1983, p. 4 [83-Ḥ-1].

[452]Case 83-Ḥ-4. Only twenty-five years of age, he is reported to have had nine previous convictions, for drinking, sodomy, theft and forgery. His mother testified against him, accusing him of adultery and irreligion. Murder is not mentioned. His incest victim gave birth.

because the penalty of stoning was unavailable, this either because the accused had never been married and would thus be subject at most to 100 lashes, inadequate under the circumstances, or because the accused's confession was inadequate to support the ḥadd. Instead the judges prescribed the ta'zīr death penalty:[453]

> to cut off his evil from society, to secure the general welfare, and to be an admonition to others.[454]

The third case appears to have remained in the courts since, again, the prosecution involved the ḥadd of adultery. An unfaithful wife and her paramour had conspired to murder the husband. The wife was convicted of adultery, and stoned; the paramour, who probably had never been married, was executed as ḥadd. The announcement does not specify whether the conviction was for killing ghīlatan or for ḥirāba, but the former is suggested.[455] The last case (executed on August 17, 1984, or more than two years after the Fatwā) involved killing

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[453]The use of this penalty outside drug smuggling represents an extension of the fatwā, and a notable advance in 'ulamā' jurisdiction compared to traditional patterns. Death was by shooting, for an unexplained reason.

[454]Ibid. This case is unique in prescribing death by shooting.

[455]Case 83-Z-1; *al-Jazīra*, 20/3/1404, Dec. 24, 1983, p. 4 [83-H-5]. As we shall see, death by "ḥadd" is prescribed when there is evident premeditation, a sinister motive, and the deceased was "sleeping" or otherwise was deviously or in breach of confidence caught unaware. Here the husband fired the paramour, a driver, after becoming suspicious of an affair. A day later the wife let the paramour in, and then the pair killed the husband while he was sleeping in the daytime of Ramadhan.

ghīlatan, with no mention of ḥirāba.[456] These four cases, therefore, show the qāḍīs' beginning adoption of jurisdictions made available to them in the Fatwā -- expanded ḥirāba, ta'zīr by the qāḍī, and ḥadd ghīlatan. But they, and the King, remain wedded also to the execution siyāsatan alternative.

Our observations so far bring us to August 1984. At this point there occurs a suspension in the execution of ḥirāba penalties that lasts more than nine months, to May 1985. Perhaps significantly, the Fatwā is published during this period in the journal of the issuing 'ulamā' institution.[457] Also during this period, while interviewing a member of the judicial establishment and of the 'ulamā', I learned that the Fatwā and order are "under reconsideration."[458]

After the suspension there ensues a period -- to January 1987 -- during which cases appear to fall into no single pattern or procedure for trial and sentencing. But when closely examined, particularly in their order by dates of trial, they can be seen to form three groups: first, cases decided wholly by the King, reaffirming the siyāsatan model;

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[456]*al-Jazīra*, 21/11/1404, Aug. 18, 1984, p. 4 [84-Ḥ-1]. The use of killing ghīlatan in the broader form encouraged by the fatwā overlaps with ḥirāba. Though both theories require death for murder, the latter may be more in accord with theory when the method is surreptitious. It also has the advantage of lying clearly within the sharī'a court jurisdiction.

[457]See n. 424 above.

[458]Shaykh Abū Zayd, interview, April 24, 1985. Rumors were that 'ulamā' and ruler, and 'ulamā' among themselves, continued to disagree about aspects of the Fatwā and the decree.

second, cases handled entirely by the sharī'a courts, in procedural and substantive agreement with the Fatwā -- but with long delays pending approval by the King; and third, cases, the most recent, decided by the trial court substantively according to the Fatwā, but procedurally against it, since they omit appeals and go directly to the King.

The first group, those decided by the King, includes four cases, all executed soon after the suspension ends, that make no reference at all to ḥirāba or to any other ḥadd.[459] The first, involving a murder and wounding by a household servant, mentions no court action, except, vaguely, a "sharī'a ruling."[460] It is thus similar to the earliest cases discussed above, from 1981. The remaining three cases, all enforced the same day and all abductions of boys for sodomy,[461] are clear cases of executions siyāsatan.[462]

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[459]There is a fifth case appearing to fall into this group, but actually anomalous. It involved a murder in a courtroom before a judge. In this case the court hierarchy seems to have been reluctant itself to punish with death, and fell back on the classical pattern, but is unusually noted to have formally provided the King findings [*ṣukūk*] as to the events. *al-Jazīra*, 24/8/1406, May 3, 1986, p. 5 [86-Ḥ-2].

[460]*al-Jazīra*, 6/9/1405, May 25, 1985, p. 32 [85-Ḥ-1] (mentions that his blood is "lawful").

[461]All announced in *al-Jazīra*, 10/11/1405, July 27, 1985, p. 5 [85-Ḥ-7, 85-Ḥ-8, and 85-Ḥ-9]. I asked Shaykh al-Laḥaydān about one of these cases. He refused to comment on the ground that the courts had been uninvolved in the case. Shaykh Ṣāliḥ al-Laḥaydān, interview with author, Supreme Judicial Council, Riyadh, Apr. 1, 1987.

[462]They are particularly striking in involving no violence. Very similar cases are tried as adultery. For example, during the same period, the courts issued a

Following a pattern never seen before in the announcements, they refer to no court at all, and claim as justification for the punishment only the Fatwā itself.

The second group, comprising eight cases, exhibit the pattern prescribed in the Fatwā, of court jurisdiction through three levels of courts. But almost all of these cases experienced delays relative to the next group, apparently due to long waits for the King's approval. In order by trial date, all but two of these cases are dated before the cases of the next group. The most obvious cases of delay are four cases of killing ghīlatan, for which the King's approval was delayed for nine months, six months, sixteen months, and sixteen months, respectively.[463] The remaining four cases -- all explicit convictions of ḥirāba -- appear to be crimes which traditionally would not be punished siyāsatan, since not utterly heinous.[464] Delay in approving these cases suggests

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conviction of sodomy, punished by stoning, on very similar facts. Case 86-Z-1 (trial decision 10/9/1405). See p. 628 above for such a case lightly punished by qāḍī ta'zīr when the confession was retracted. These punishments probably are in lieu of such an alternative.

[463]*al-Jazīra*, 3/8/1406, Apr. 12, 1986, p. 5 [86-Ḥ-1]; *al-Jazīra*, 17/5/1407, January 17, 1987, p. 4 [87-Ḥ-1]; *al-Jazīra*, 2/6/1407, Jan. 21, 1987, p. 4 [87-Ḥ-2]; *al-Jazīra*, 2/6/1407, Jan. 21, 1987, p. 4 [87-Ḥ-4]. This is not due to the novelty of ghīlatan execution, since some had occurred.

[464]In all no killing occurred. One involved a preplanned armed attack upon a paymaster (this case is unusual in giving no court dates, suggesting possible delay in royal approval). *al-Jazīra*, 18/10/1405, July 6, 1985, p. 32 [85-Ḥ-3]. Another is for abduction and rape, but in circumstances possibly first suggesting an elopement. *al-Jazīra*, 3/11/1405, July 20, 1985, p. 5 [85-Ḥ-6]. The two other cases are convictions for the

a continued uncertainty or uneasiness -- for whatever reason -- about the new uses of the ḥirāba penalty.

The third group includes seven cases, the most recent by trial date -- all of which, again, are explicitly convictions of ḥirāba. These reflect a fresh pattern of trial and conviction, one in which an identified lower court makes an explicit judgment that ḥirāba has occurred, but then -- in contradiction to the Fatwā's procedural prescriptions -- appeals are skipped, and the case raised directly to the King. Still, in the announcements, the King's role is represented not as "agreeing" to the execution, but merely as ordering execution of the judgment of the court. Notably, all of these cases proceed very promptly from commission to execution.[465]

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sodomy. *al-Jazīra*, 7/1/1406, Sep. 21, 1985, p. 4 [85-Ḥ-12] (rape of an adult using beating); Case 86-Ḥ-5 (multiple acts of burglary and aggression leading to punishment with amputation of arm and leg, not death).

[465]*al-Jazīra*, 27/9/1405, June 15, 1985, p. 28 [85-Ḥ-2] (burglary of jewel shop, murder manager, clear premeditation, "ḥaddan," no mention of ḥirāba); *al-Jazīra*, 25/10/1405, July 13, 1985, p. 28 [85-Ḥ-4] (abduction and rape of 5 year old, changed minds on killing her, ḥirāba found); *al-Jazīra*, 25/10/1405, July 13, 1985, p. 1 [85-Ḥ-5] (prince's manager murders him, no mention of ḥadd, may equal qiṣāṣ or ghīla); *al-Jazīra*, 22/11/1405, Aug. 9, 1985, p. 1 [85-Ḥ-10] (ta'zīr for bank burglary without violence; no mention of fasād or ḥirāba); *al-Jazīra*, 22/12/1405, Sep. 7, 1985, p. 28 [85-Ḥ-11] (fasād finding, no bodily harm, used arms to threaten, burglary, robbery, defendants included 2 security men and a third with prior offenses); *al-Jazīra*, 16/4/1406, Dec. 28, 1985, p. 4 [85-Ḥ-13] (sodomy, abduction, defendant traffic officer, ta'zīr); *al-Jazīra*, 12/11/1406, July 19, 1986, p. 28 [86-Ḥ-4] (overdrugged sodomy victim, who died, dumped body in front of house of family, defendant is officer, Ḥadd).

It seems that these cases, though "judgments," are functionally close to the siyāsatan procedure.

Let us review the practice thus far, to January 1987. Substantively, qāḍīs increasingly have deployed the three new qāḍī jurisdictions made available in the Board's Fatwā -- broadened ḥirāba, qāḍī ta'zīr death sentences, and the ḥadd for killing ghīlatan.[466] As to procedure, only five cases -- one in 1983 and four others (from the second group just mentioned, executed in 1985 and 1986) -- comply fully with the Fatwā's terms -- in requiring three levels of court review. Instead, almost five years after the Board Fatwā, practice is still clinging to the siyāsatan procedure, or to close variations of it.

c. Fatwā No. 138 and cases thereafter to 1992

After January 1987 begins a gap of five months without executions. On February 19, 1987, the Board of Senior 'Ulamā' issued Fatwā No. 138,[467] building upon and supplementing Fatwā No. 85 as to drug smuggling, and on March 10, 1987 the King ordered the new Fatwā implemented.[468] The Board in the Fatwā

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[466]Notably, the courts have not invoked the drug aspects of the fatwā without their being ordered implemented by the King. Case 82-Ḥ-5 alone concerned a drug-smuggler, who also fought a battle royal with police and had many prior offenses. Courts continued, of course, to apply preexisting regulatory punishments of imprisonment and fines.

[467]Hereafter cited as Fatwā No. 138.

[468]Royal Telegram No. 4/b/9666, 10 Rajab 1407, 10 March 1987.

> decides . . . that the punishment for the smuggler of drugs is death. This is because of the great corruption caused by smuggling of drugs and by their entry into the country. The corruption is not limited to the smuggler himself; vast harms and extreme dangers are borne by the Umma as a whole. Assimilated to the smuggler is the person who imports or receives drugs from abroad to supply distributors.

As to distributors, the Board refers to Fatwā No. 85's earlier finding as "sufficient," prescribing for the repeat offender ta'zīr punishment up to death as needed, in the qāḍī's discretion, to terminate his harmfulness. Thus, this Fatwā differs from Fatwā No. 85 in emphatically -- indeed, legislatively -- fixing death as the penalty for smuggling, and not as merely one alternative before the trial court. The legislative nature of the measure is underlined by the Board's giving it only prospective application.[469] As to procedure, the Board clearly intends that it should be the trial court of three qāḍīs which sentences, reiterating that doctrinally, according to several authors, death is included among ta'zīr penalties, implying that it should be treated like other ta'zīr in Saudi Arabia, as presumptively within sharī'a court jurisdiction. Thus, there is no mention here of the choice reverting to the ruler in "corruption" cases, as was stated (as dictum) in the decree implementing Fatwā No. 85.

After June 1987, cases begin to show a tendency away from siyāsatan models, toward the procedure of judgment followed by

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[469]Fatwā No. 138 states "These penalties must be announced by the media before their implementation, as a justification and a warning [*i'dhāran wa indhāran*]."

full appeals laid down in Fatwā No. 85 and thereafter ordered by the King. Whether the other key procedural ruling of Fatwā No. 85, that the choice of penalties is the ruler's prerogative, is being enforced cannot be determined from the reports. The implementing orders simply command "carrying out what has been decided under the sharī'a," in the same fashion as all other ḥudūd.

Cases employing the full court procedure start to accumulate from 1987 on.[470] No sooner do they do so, however, than there is a reversion to siyāsatan procedure -- the last, as it turns out, for our period of observation. In two cases in August and October 1987 qāḍīs after recording confessions referred cases to the King with requests that he "agree" to immediate executions.[471]

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[470]*al-Jazīra*, 10/10/1407, June 6, 1987, p. 20 [87-Ḥ-7] (incest rape under threat of arms, no finding of ḥirāba); *al-Jazīra*, 24/10/1407, June 20, 1987, p. 24 [87-Ḥ-9] (abducted three women and raped two, finding of ḥirāba); *al-Jazīra*, 8/11/1407, July 4, 1987, p. ? [87-Ḥ-10] (a classic highway robbery case); *al-Madīna*, 15/11/1407, July 11, 1987, p. 3 [87-Ḥ-11] (death by ta'zīr for enticing away boy and raping him to death); *al-Madīna*, 22/11/1407, July 18, 1987, p. 2 [87-Ḥ-12] (for sodomy rape); *al-Madīna*, 29/11/1407, July 25, 1987, p. 3 [87-Ḥ-13] (killing for a money motive, the trial court asking for "prompt execution with agreement of ruler").

[471]*al-Madīna*, 28/12/1407, Aug. 22, 1987, p. 1 [87-Ḥ-14] (two individuals, in possession of a large quantity of drugs for distribution, have a gun battle with police, killing a policeman); *al-Madīna*, 2/3/1408, Oct. 24, 1987, p. 3 [87-Ḥ-15] (abduction and imprisonment of woman for repeated rape, enables others to rape her). In a nearly simultaneous case the qāḍī's sentence is for "speedy death by ḥadd, with the approval of the ruler." Yet the appeal courts keep the case. [87-Ḥ-13].

In the ensuing four years, a practice seems to have become established by which three types of capital penalties -- ḥirāba, ghīla, and ta'zīr -- share the field, each covering, given its broad and imprecise definition, a broad spectrum of crimes. (A further crime, sabotage, is added later, and is discussed separately below.) The following analyzes these final four years of our observations.

Only in nine cases is there a specific finding of ḥirāba. These cases fall well within the sorts of behavior that were the object of Fatwā No. 85, i.e., violence, not necessarily with arms, within or outside cities, against life, sexual honor, or property. Thus, two of these cases involved a gang of brigands, who carried out robberies and murders. These cases qualify even as traditional "highway robbery."[472] Three other cases were for single or repeated burglary for motives of rape or robbery, using weapons in each case.[473] Another was for the robbery of a grocery, with an attempt, though without arms, to kill the proprietor.[474] Two more are for gun battles on highways, one perpetrator killing and wounding to

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[472]*al-Madīna*, 10/4/1410, Oct. 14, 1989, p. 3 [89-Ḥ-11]; Case 90-Ḥ-15.

[473]*al-Madīna*, 29/12/1410, July 21, 1990, p. 6 [90-H-16] (several rapes in homes, with weapons); *al-Riyāḍ*, 15/6/1412, Dec. 21, 1991, p. 3 [91-Ḥ-13] (threatened occupants with knives); *al-Riyāḍ*, 5/8/1412, Feb. 8, 1992, p. ? [92-Ḥ-1] (dishonored woman of house, threatened with weapons).

[474]*al-Madīna*, 27/4/1410, Nov. 25, 1989, p. 3 [89-Ḥ-20].

rob, the other resisting capture on drug charges.[475] The last case is somewhat anomalous, being a surreptitious killing in a dispute over money, seemingly a misplaced killing ghīlatan.[476]

The next category of cases appears also to be ḥirāba, but with the explicit identification only as "ḥadd." Among these are two abductions and rapes, without extensive details.[477] Other cases are more particular: killing of four in their sleep, for money[478]; a gang who abduct and rape, and rob on the highway[479]; four thieves who killed to avoid detection[480]; two who enter a house for rape, and kill the owner and his wife.[481]

The next category is murder cases which appear to fall under the category of killings ghīlatan. Only three cases

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[475]*al-Madīna*, 20/8/1410, Mar. 17, 1990, p. 12 [90-Ḥ-13] (fight with police, seized their car); Case 91-Ḥ-12 (shot at car on highway causing death and woundings, stole cash; perpetrator crucified after beheading).

[476]*al-Madīna*, 8/7/1410, Feb. 3, 1990, p. 13 [90-Ḥ-2].

[477]*al-Madīna*, 18/6/1408, Feb. 6, 1988, p. 2 [88-Ḥ-2]; *al-Madīna*, 7/13/1409, Feb. 18, 1989, p. ? [89-Ḥ-1] (has prior offenses of rape).

[478]*al-Madīna*, 14/9/1408, Apr. 30, 1988, p. 2 [88-Ḥ-4].

[479]*al-Madīna*, 1/3/1410, Sep. 30, 1989, p. 7 [89-Ḥ-9].

[480]*al-Madīna*, 1/3/1410, Sep. 30, 1989, p. 7 [89-Ḥ-10].

[481]*al-Madīna*, 16/1/1412, July 27, 1991, p. ? [91-Ḥ-10].

make explicit mention of ghīla.[482] Another seven cases approximate the requirements for ghīla execution, but mention only that the execution is "by ḥadd" without specifying ghīla.[483]

The final, and largest, category of cases is execution by ta'zīr. These number thirty-three.[484] Of these, twenty are implementations of Fatwās Nos. 85 and 138 as to drug-smuggling.[485] The remaining thirteen, unrelated to drugs, all

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[482]*al-Madīna*, 30/8/1409, Mar. 27, 1989, p. ? [89-Ḥ-2]; *al-Madīna*, 15/10/1409, May 20, 1989, p. ? [89-Ḥ-6]; *al-Madīna*, 11/11/1411, May 25, 1991, p. 1 [91-Ḥ-1].

[483][87-Ḥ-13] (qiṣāṣ case mentioning "ḥadd"); *al-Madīna*, 14/9/1408, Apr. 30, 1988, p. 2 [88-Ḥ-4] (money motive, lured victim to house); *al-Madīna*, 28/11/1409, July 1, 1989, p. 3 [89-Ḥ-7] (victim sleeping, money motive); *al-Madīna*, 20/4/1410, Nov. 18, 1989, p. 2 [89-Ḥ-18] (victim sleeping; "evil" motive); *al-Madīna*, 2/6/1410, Dec. 30, 1989, p. 11 [89-Ḥ-25] (money motive); *al-Madīna*, 9/6/1410, Jan. 6, 1990, p. 12 [90-Ḥ-1] (wife killing husband in sleep on ground she married him unwillingly and he beat her cruelly); *al-Madīna*, 8/7/1410, Feb. 3, 1990, p. 13 [90-Ḥ-3] (victim sleeping, for 17,500 SR); *al-Madīna*, 9/10/1412, Apr. 11, 1992, p. 4 [92-Ḥ-2] (premeditated).

[484]Included are four cases in which there is a finding not of ta'zīr but of "corruption in the earth," calling this a "ḥadd."

[485]*al-Madīna*, 18/6/1408, Feb. 6, 1988, p. 2 [88-Ḥ-1] (huge distributor, trial days before the fatwā issued); *al-Madīna*, 14/9/1408, Apr. 30, 1988, p. 1 [88-Ḥ-3]; *al-Madīna*, 29/4/1410, Oct. 28, 1989, p. 2 [89-Ḥ-13]; *al-Madīna*, 5/4/1410, Nov. 4, 1989, p. ? [89-Ḥ-16]; *al-Madīna*, 13/4/1410, Nov. 11, 1989, p. 2 [89-Ḥ-17]; *al-Madīna*, 11/5/1410, Dec. 16, 1989, p. 12 [89-Ḥ-21]; *al-Madīna*, 11/5/1410, Dec. 16, 1989, p. 12 [89-Ḥ-22]; *al-Madīna*, 25/5/1410, Dec. 23, 1989, p. 10 [89-Ḥ-23]; *al-Madīna*, 25/5/1410, Dec. 23, 1989, p. 10 [89-Ḥ-24]; *al-Madīna*, 15/7/1410, Feb. 10, 1990, p. 13 [90-Ḥ-6]; *al-Madīna*, 22/7/1410, Feb. 17, 1990, p. 12 [90-Ḥ-7]; *al-Madīna*, 22/7/1410, Feb. 17, 1990, p. 12 [90-Ḥ-8]; *al-Madīna*, 22/7/1410, Feb. 17, 1990, p. 12 [90-Ḥ-9]; *al-Madīna*, 22/7/1410, Feb. 17, 1990, p. 12 [90-Ḥ-10]; *al-Madīna*,

seem subsumable under either the ḥirāba of Fatwā No. 85, or traditional execution siyāsatan, or both. They include: a gang of highway robbers, who stopped cars by impersonating drug enforcement officers[486]; rapist who fired at and stabbed the victim's relatives[487]; two who abduct, rape and kill boy[488]; two burglars who raped housewife, taking pictures[489]; a gang for rape, robbery and burglary[490]; an armed multiple burglar and rapist[491]; rapist and murderer of woman[492]; attempted abductor of woman, with many prior convictions for abduction, burglary and drugs;[493] repeated abductor of children and women[494]; two abductors and rapists of a boy, who then shot and ran over their victim[495]; police officers who

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29/7/1410, Feb. 24, 1990, p. 6 [90-Ḥ-11]; *al-Madīna*, 6/8/1410, Mar. 3, 1990, p. 6 [90-Ḥ-12]; *al-Madīna*, 20/8/1410, Mar. 17, 1990, p. 12 [90-Ḥ-14]; *al-Madīna*, 18/11/1411, June 1, 1991, p. 7 [91-Ḥ-4]; *al-Madīna*, 25/11/1411, June 8, 1991, p. 4 [91-Ḥ-8]; *al-Riyāḍ*, 24/5/1412, Nov. 30, 1991, p. 2 [91-Ḥ-11].

[486]*al-Madīna*, 10/4/1410, Oct. 14, 1989, p. 3 [89-Ḥ-12].

[487]*al-Madīna*, 25/8/1409, Apr. 1, 1989, p. ? [89-Ḥ-3].

[488]*al-Madīna*, 5/4/1410, Nov. 4, 1989, p. ? [89-Ḥ-14].

[489]*al-Madīna*, 5/4/1410, Nov. 4, 1989, p. ? [89-Ḥ-15].

[490]*al-Madīna*, 27/4/1410, Nov. 25, 1989, p. 3 [89-Ḥ-19].

[491]*al-Madīna*, 8/7/1410, Feb. 3, 1990, p. 13 [90-Ḥ-4].

[492]*al-Madīna*, 15/7/1410, Feb. 10, 1990, p. 13 [90-Ḥ-5].

[493]*al-Madīna*, 18/11/1411, June 1, 1991, p. 7 [91-Ḥ-2].

[494]*al-Madīna*, 18/11/1411, June 1, 1991, p. 7 [91-Ḥ-3].

[495]*al-Madīna*, 18/11/1411, June 1, 1991, p. 7 [91-Ḥ-5].

abduct and rape boy[496]; two who abduct and rape a woman[497]; armed robbers of taxi driver, who abandon him in the desert.[498]

d. 1990 royal letter on qāḍī sentencing in ta'zīr

In all these cases of ta'zīr executions the sentence is represented as made by the qāḍī. Although such sentences seem to have supplanted executions siyāsatan, it appears many qāḍīs still desire to pass this fateful decision to the ruler. In a January 1990 letter to the Minister of Justice,[499] the King cited two resolutions of the Supreme Judicial Council, which held that in smuggling cases judges err in leaving the choice of penalty to the King, since these penalties are ta'zīr, and not the ḥadd of ḥirāba,[500] and that

> to prove guilt and then leave the matter of punishment to the ruler has no support in accepted niẓām or royal orders.

On this basis, the King informed the Minister that qāḍīs ought themselves to sentence to death in accordance with the Fatwā of the Board. Note that the quoted sentence of the letter is in conflict with implications of the royal decree implementing

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[496]*al-Madīna*, 25/11/1411, June 8, 1991, p. 4 [91-Ḥ-6].

[497]*al-Madīna*, 25/11/1411, June 8, 1991, p. 4 [91-Ḥ-7].

[498]*al-Madīna*, 25/11/1411, June 8, 1991, p. 4 [91-Ḥ-9] (one defendant has prior offenses).

[499]Royal Telegram 4/B/10710, dated 4/7/1410, January 30, 1990.

[500]The Council here confirms as the law that the King has the right to choose the penalty in ḥirāba.

Fatwā No. 85 -- which declared that the final choice is the ruler's in both corruption (the basis for the smuggling penalty and the text supporting ta'zīr execution) and ḥirāba cases.[501] This signals that the ruler has effectively ceded jurisdiction in corruption cases to the qāḍīs, and that, as to this branch of Fatwā No. 85, the majority position has won.

e. Sabotage: a special category of corruption

Finally, let us treat separately with a special category of capital ta'zīr punishment for "corruption in the earth," sabotage, which is declared punishable with death in a 1988 fatwā by the Board of Senior 'Ulamā', Fatwā No. 148.[502] This Fatwā is peculiar in not issuing at the request of the King, but *sua sponte*.[503]

As to the substance of the crimes, having noted the phenomenon of sabotage in various countries, the Board felt it necessary to consider "declaring a deterrent penalty" for saboteurs. Quoting verse 5:33-34 of the Qur'ān and aḥādīth on "corruption in the earth," the Board declared that the harmfulness of the saboteur is much greater than that of the highway robber, since the latter has private aims, and "commits aggression against a single person," while the former aims at "shaking security and demolishing the structure of the

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[501]See p. 645 above.

[502]Decision No. 148, 12 Muḥarram 1409, August 24, 1988.

[503]I do not have the royal order, if any, that ordered this fatwā implemented in the courts.

Umma, uprooting its faith, and diverting it from the Divine Path." On this basis, the Board pronounces that the saboteur[504] is a "corrupter in the earth," whose punishment is death.

As to procedure, the Board declares the need for proceedings at all three levels of court to avoid injustice and bloodshed, and "to make known how this country abides by all obligatory sharī'a procedures to prove crimes and decide penalties."

Following this Fatwā, two cases appear to apply it. In 1988 four persons confessed to Iran-fomented terrorist activities, including bombings, in the Eastern Province.[505] In the second case, in 1989, sixteen persons were condemned for bombings during the Pilgrimage.[506]

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[504]"One of whom it is proved according to sharī'a that he committed an act of sabotage and corruption in the earth which disturbs security by aggression upon person and private and public property, such as by blowing up houses, mosques, schools, hospitals, factories, bridges, storehouses of arms or water, sources of public revenue such as oil wells, or by blowing up or hijacking airplanes, etc."

[505]Case 88-Ḥ-5. As to these crimes, this Fatwā could be seen as *ex post facto* legislation, and is condemned on this ground by Middle East Watch, *Empty Reforms*, 31 (seemingly mistaking the fatwā for a "regulation"). The crime was on or before the last month of 1406, the Fatwā in the first month of 1407, and the verdict some ten days after that. Note, however, that 'ulamā' do not ordinarily have any more sympathy for such a claim than we would have for one convicted of a common-law crime. On the other hand, compare the Board's provision for prospective application for others of their recent decisions. See p. 661, 669 above.

[506]The sixteen, Kuwaitis, were convicted of setting bombs causing one death and several injuries during the July 1989 pilgrimage. The announcement of these deaths does not use the

4. Summary Observations

What overall observations can be made looking back over this course of events?

First, clearly the severity of punishments in all categories of crime has greatly increased, as indeed was intended. A crime such as abduction and rape would once have been punished as either execution siyāsatan, the ḥadd of adultery or sodomy, or ta'zīr. For the first, as in the first siyāsatan cases we cited,[507] traditionally overwhelmingly convincing proof was required -- usually catching the offender red-handed. If that proof failed, the next alternative was the ḥadd of adultery; as we saw, this could be proved only by repeated, unretracted, confessions. If these were not available, then ta'zīr in the hands of the qāḍī was usually lenient -- and very rarely death. An example is the case of abduction cited above,[508] where a sodomist, after retracting his confession, received ta'zīr imprisonment and lashes. In similar fashion, severity has increased for many cases of murder, otherwise punishable with imprisonment plus qiṣāṣ,

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term ḥadd, ḥirāba or even ta'zīr, but refers to matters such as "protection of the security of the Holy Places and punishment of those who commit heretical deeds there," and "to augment the security and protection of the pilgrims," that obligate "one whom God makes responsible for the [Ka'ba]." *al-Jazīra*, 22/2/1410, Sep. 22, 1989, p. 6 [89-Ḥ-8].

[507]See p. 650 above.

[508]See p. 628 above.

forgiveness or blood-money; of burglary, otherwise punishable either as the ḥadd of theft or as qāḍī ta'zīr; and of drug crimes, otherwise punishable either as intoxication or under the drug regulations.

Second, the new severity has led to some dramatic numbers of capital punishments. The King and 'ulamā' stated an increase in these crimes; if severe punishments do not in fact succeed in stemming the trend,[509] the numbers could become worse. Our own data, however, do not suggest a trend upward.[510] But one year, 1989, experienced the extreme number of 52 punishments of the types here discussed -- plus at least 29 qiṣāṣ executions (extraordinarily high) plus 16 saboteur executions (see the next section). These numbers -- approaching 100 -- began to receive daily attention from the international press.[511] Amnesty International, opposed to all

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[509]The Saudis claim their medicine is working. In June 1988, one year after the Fatwā announcing death penalties for drug-smuggling, Saudi officials claimed drug smuggling had decreased 40% and that "the crime rate decreased 12%" in the Hijrī year 1407, ending August 1987, associating this with the new announced drug penalties. *The Reuter Library Report*, June 26, 1988.

[510]3 in 1981 (from May 16); 6 in 1982; 8 in 1983; 1 in 1984; 20 in 1985; 7 in 1986; 16 in 1987 (0); 5 in 1988 (1); 52 in 1989 (14); 16 in 1990 (8); 19 in 1991 (3); 4 in 1992 (to April 18). Numbers in parentheses are executions under the fatwās as to drug offenses, and are incorporated in the larger figures.

[511]See, e.g., *The Reuter Library Report*, January 5, 1990. Reuters's count was "over 99" beheadings.

capital punishment, raised the issue with Saudi officials.[512]

Third, note that the definitions of all the newly endorsed categories of crime are vague and inclusive. In this they occupy a middle category between normal ta'zīr -- defined as any sin -- and the stringently defined ḥudūd such as adultery and theft. A great deal of discretion goes into determining whether ḥirāba or corruption exists in a particular case, and if it does, which penalty should be applied. This is borne out in the similarity of the facts in convictions under the various headings.

Fourth, in both theory and practice, for these categories of crime the dividing line has become blurred between ḥudūd (here ghīla and ḥirāba), on the one hand, and ta'zīr capital crimes, on the other. The definitions for them are so vague as to overlap very substantially. An abduction and rape can be either ḥirāba or ta'zīr (also adultery); a plotted murder could be any of the three (as well as qiṣāṣ). But a more fundamental problem is that both ḥadd and ta'zīr are here administered by the same authority and have the same penalty, rendering any distinction largely academic. Presumably, proof

[512]*The Reuter Library Report*, October 25, 1989.

requirements are stricter for the ḥadd,[513] but why that should be so may now seem more puzzling to the human reason.[514]

Fifth, we observe that, after long hesitation, execution siyāsatan has waned almost to the point of extinction, its application rendered unnecessary by the commodious definitions of the three categories, especially corruption and capital ta'zīr crime. But that siyāsatan patterns long persisted shows resistance among the rank-and-file qāḍīs to assuming the dire responsibility, formerly the ruler's as advised by the 'ulamā', of sentencing to death. Prodding in this direction seems to come most of all from the elite 'ulamā' of the Board and the Council.

Sixth, note that there is hardly any sign of resistance to this trend on behalf of the ruler. Although fundamental changes were occurring in the division of jurisdiction between the 'ulamā' and the King, both King Khālid and King Fahd seem to collude with the 'ulamā' about them. In historical terms, this represents the sudden surrender without a fight of

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[513]There are other differences, such as unavailability of ruler pardon in ḥadd.

[514]We may be able to detect in the cases an increasing tendency to avoid conviction of the ḥadd of ḥirāba in favor of the ta'zīr designation, now that the latter is fully operational. This is shown in the higher number of the latter (the total of cases specifically finding ḥirāba since June 1982 is only twenty-three, compared with thirty-nine for capital ta'zīr, most of them recent), and also the fact that many ta'zīr also satisfy the definition of ḥirāba. This tendency would have two causes: first, the injunction to avoid convictions of ḥadd; and second, qāḍī uneasiness about the present ḥirāba's divergence from traditional school views.

territory fought over for centuries. The only resistance demonstrated here was by King Khālid, over the relatively minor point of whether qāḍīs should decide or merely recommend one from among the four ḥirāba penalties.

Seventh, note how the arguments for each of the expansions of fiqh crimes, and for the adoption of various penalties in the orders, relied so emphatically, and almost exclusively, on arguments of temporal social utility. In several cases, utility considerations in several cases privilege community interests over individual ones, even when the latter are born of explicit texts. Examples of the trend include the 'ulamā''s boldness in adopting, because of the needs of the moment, a definition of ḥirāba few have ever approved, which is moreover vague in its coverage, in stark contrast with the epistemological rigor otherwise pervading ḥudūd[515]; the expansion, through the ghīla crime, of capital punishment for murder, overruling the heirs' options of retaliation, money or forgiveness; the sabotage Fatwā's assessing the saboteur's harmfulness as greater than that of the highway robber, because the latter affects only individuals. In all this the 'ulamā' are blurring the once clear distinction between the microcosmic purposes and proofs of fiqh criminal law and the macrocosmic concerns and methods

[515]Thus, the old doctrine that ḥudūd must be defined on the basis of indisputable text [*naṣṣ*]. Adopting the view of a tiny minority of past scholars certainly raises doubts whether this exists.

of siyāsa. Note how the practice now varies markedly from the picture painted even in the minority opinion of Fatwā No. 85, quoted above, which noted that, under fiqh doctrines, qāḍīs have jurisdiction over ḥudūd, narrowly defined and fixed in quantum, for crimes against individuals, while the ruler has the authority over other ḥudūd, harsher and more flexible, for crimes against society.

Eighth, summarizing points from all the previous items, let us note that the end result of all these developments is a large step toward the complete removal of criminal law from the sphere of the primordial. independent siyāsa principle. In overall effect, what has been created in the sharī'a courts is a fiqh criminal jurisdiction of a scope wholly new in Saudi Arabia, and probably unprecedented in Islamic history. The result takes various rules once highly distinct substantively and jurisdictionally, viz., ḥirāba, capital ta'zīr, and killing ghīlatan, and, greatly expanding each of them, unites them in a single authority. The fiqh and the 'ulamā' gain a tool-box of capital penalties, which can be flexibly used whenever, in the discretion of qāḍīs, utility so demands; all this once was the ruler's authority alone. Fiqh criminal law, with its microcosmic bent, will find it difficult to accommodate, without either dire compromise or bold innovation, the macrocosmic methods and goals of such penalties.

Finally, note the legislative role being filled by Board fatwās, and how progressively these fatwās assumed a legislative tone. No doubt, 'ulamā' through fatwās always willingly lent a hand in the ruler's criminal law jurisdiction, as in giving fatwās for execution siyāsatan; this, however, was always as to individual cases. In the recent Fatwās, however, 'ulamā' announce penalties for general classes of acts, intending them to be applied as laws by the courts. The Board itself acknowledges the legislative nature of its handiwork, by providing for its publication and prospective application. But the case-study also shows the defectiveness of the Fatwās as legislation, in that, being theoretically advice to the ruler, they are dependent on his command for implementation (as shown in the delay in implementing the drug-crime provisions of Fatwā No. 85), and that, even fortified by the King's command, they are dependent on the cooperation of the 'ulamā' generally (as shown in the five years's delay before the courts applied the procedural provisions of Fatwā No. 85). The significance for this practice for legislation in Saudi Arabia is explored in Part III below.

C. Conclusion

Our framework of three distinctions allows us to draw some lessons about Saudi criminal law as revealed in our case

study and, more tentatively, about Islamic criminal law and practice generally. To do so, let us merge these parallel distinctions into a composite -- fiqh- 'ulamā'- ḥudūd versus siyāsa-ruler-ta'zīr -- and speak of a "fiqh pole" and a "siyāsa pole."

First, all guarantees of the rights of the accused clearly originate at the fiqh pole; indeed, the fiqh sets an ideal and august standard in that respect. At the siyāsa pole one is concerned that these guarantees, though still applicable, have only relatively weak, even flimsy, doctrinal and institutional structures to support them. This is only a part of a larger trait of traditional Islamic law and constitution, set off prominently in modern times, that it does not constrain the ruler's authority by positive legal or institutional means. As already suggested, the reasons for this trait lie deep in the very nature of the Islamic legal venture as enacted medievally by the 'ulamā'.[516]

Second, we note that the fiqh pole exercises firm influence over only a small number of crimes, the ḥudūd, whose divine-law quality is maintained by their ideal character and their strict and inflexible definition. The category of crimes that responds to changing circumstance and social need is that of siyāsa. Over these crimes the 'ulamā' do not exercise an easy authority; as the fiqh itself admits, 'ulamā' hold jurisdiction here only at the sufferance of the ruler.

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[516]See p. 451 above and ff.

Thus, in our example, to provide an effective fiqh jurisdiction over crimes of abduction and assault, the Board felt obliged to redefine one of the ḥudūd crimes, going deep into the Qur'ān, the most intimate source of the religion. Even then, in claiming power to choose the penalty, and also in asserting qāḍī jurisdiction to sentence to death as ta'zīr, the 'ulamā''s positions encountered difficulty, precisely because siyāsa considerations -- macrocosmic evaluations like public utility and crime rate -- could no longer be excluded. Clearly, it will not always be possible to bend fiqh and ḥudūd jurisdictions to respond to changing social circumstance. If the trend here found is to continue, then sooner or later the 'ulamā' will need to confront frankly their adoption of siyāsa justifications -- and powers.

A third observation, however, cuts another way, and points to a profound advantage in the fiqh pole of the system. Clearly, according to traditional Islamic theory, the fiqh pole possesses the higher order of justification. The siyāsa pole possesses legitimacy, apart from the stark demands of necessity, only when the ruler's actions are supported by sharī'a. In practical terms, and in traditional systems, this means support by the 'ulamā'. Thus, a ruler who cannot draw on other sources of legitimation is constrained to respond to 'ulamā' views, even in his exercise of rights (such as ta'zīr or execution siyāsatan) assigned him by fiqh itself. The

influence and prestige of the 'ulamā' operate as the most effective constitutional check on the ruler.

Finally, let us combine the external and internal perspectives we now have to speculate on further questions. Clearly, the novelty of the outcome in Islamic terms, securing for the sharī'a courts jurisdiction over an area that traditionally, according to both doctrine and practice, belonged to the ruler -- especially when this is done with the apparent agreement of the two parties -- suggests influence from outside the system itself. One likely such influence is obvious: the modern expectation that punishments, particularly such severe ones, should follow a fair trial before an independent judicial body.[517] This sort of expectation no doubt partly forced the King's resort to the Board of Senior 'Ulamā' to meet the challenge of the new crimes, and added momentum to the change that resulted, by which the execution siyāsatan was supplanted by qāḍī trials and appeals. This outcome is of a piece with earlier innovations in the Saudi judicial system -- such as the evolution, through royal decrees and anẓima, of a modern bureaucratic system for the judiciary, which incorporated strong institutional guarantees

[517]This is hinted at in the Board of Senior 'Ulamā' decision on sabotage, see p. 669 above, giving as the reason for full court procedures the avoidance of error, etc., but also "to make known how this country binds itself by all the procedures enjoined by the sharī'a for the proof of crimes and the determination of their punishment."

of judicial independence.[518] But still we must recognize, after the preceding discussion showing the vitality of the underlying system and the tight texture of internal explanations for events, that such external factors cannot alone account for these events or predict their form or outcome. Though the system responds to modern sensibilities, yet the 'ulamā' come to endorse them only because they also converge with certain of their own age-old goals and ideals. In this case-study, the goal in question is the primordial objective, earlier called pan-ordering, that fiqh expand its reach and rule; thus, by accepting judicial bureaucratization, qāḍīs achieved long-sought guarantees of constitutional status and independence. Such transitions to modern-, Western-appearing institutional forms and procedures are hardly against the contemporary Saudi spirit, but are rather the country's universal policy, by which modernity is to be adopted without prejudice to traditional and religious ideals. When world opinion conflicts with Islamic ideals, Saudi Arabia shows itself immune to influence: for example, in its continued, indeed increased, reliance on capital punishment, amputation and lashing to suppress crime.

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[518]The evolution of judicial independence, from a prominent trait of local legal culture to formal institutional structure, culminated in the *Judiciary Regulation*. See Appendix A. Other examples of adoption of Western forms on the ground of their harmony with Islamic ideals are plentiful in modern Saudi Arabia -- such as the provision of an extensive social insurance, or the early adoption of a liberal Labor Code.

In any case, returning to our case-study, we found that changes made forced open traditional structures. One wonders, on the one hand, whether the Saudi Islamic legal system will be threatened in any vital way by these changes -- such as by secularizing, and politicizing, the heretofore aloof, untouchable moral force of fiqh criminal law. Will all the flood of executions occurring after the changes -- especially those with a political tinge -- be accepted by the people as indeed God's judgments, a result assured in medieval times by narrowly defining both the ḥudūd crimes and the 'ulamā' criminal jurisdiction?[519] Or, on the other hand, will the effects of these modern forms be only positive, in enabling the system to fulfill -- as it already does more successfully than was usually the case in the Islamic past -- those Islamic ideals of criminal justice, including the rights of accuseds, laid down so auspiciously in revealed texts thirteen centuries ago?

Here we see suggested certain tensions that may be innate in the transition of traditional Islamic legal and constitutional forms into modern times. The chief tension, stemming from our microcosmic and macrocosmic models, is whether structures of legitimacy bridging, or bypassing, the old oppositions can be found that will still achieve the purposes of the old model. While firmer protections of

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[519]Clearly, concern on this point may be the motive for the shift in the 1988-89 cases tentatively announced above, toward ta'zīr instead of ḥadd in ḥirāba cases.

constitutional and legal legitimacy may result from apparently Westernizing measures, they also may not. A literal and rationalized implementation of the old order can lend it a new ruthlessness, steamrolling protections once secured non-doctrinally, as by moral means or institutional checks -- examples from newly re-Islamizing states, such as Pakistan[520] or Sudan,[521] are numerous. Stricter legal ordering may alienate loyalties born of religious ideals and emotions other than the legal. Most importantly, a chief purpose of the old separation of truth from power, that of preserving the transcendent authority of the sharī'a, may be sacrificed, with immense repercussions on Islamic society and state -- again examples of the secularization of Islamic ideals in modern Islamic thought are not lacking.

The same tensions or dynamics operate abundantly in our next case-study -- the controversy over codification.

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[520]Asma Jahangir and Hina Jilani, *The Hudood Ordinances, A Divine Sanction? A Research Study on the Hudood Ordinances and Their Effect on the Disadvantaged Sections of Pakistani Society* (Lahore; Rhotas Books, 1990).

[521]See, e.g., Carey N. Gordon, "Islamic Legal Revolution: The Case of Sudan," 19 *The International Lawyer* 19 (1985): 793-815; Carolyn Fluehr-Lobban, "Islamization of law in the Sudan," *Legal Studies Forum* 11 (1987): 189-204.

PART III

THE CODIFICATION CONTROVERSY IN SAUDI ARABIA

A. INTRODUCTION

The second of the major case-studies we undertake, exploring the relationship of ruler and 'ulamā' in Saudi Arabia, is not, like the first case-study, a problem in the law's day-to-day application, but rather a debate about the

law's future development. It concerns the issue whether to adopt codification [*taqnīn*] of the laws, meaning to fix into written codes or statutes fiqh law as applied by the sharī'a courts.[522] This controversy began immediately after the conquest of Hijaz in 1926, and still remains very much alive. Indeed, it represents the most durable, and thorough-going and far-reaching, division of opinion within the Saudi legal system.[523]

The debate over codification is profoundly revealing for our purposes, epitomizing many of the comparative lessons we have already drawn from the Saudi legal system. Much of its significance stems from the fact that the codification project has its roots in Western legal models; we therefore find it cutting across, breaking open, the traditional categories and structures of the Islamic legal system.[524] Thus, the concept

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[522]In what follows, we consider only codification in matters infringing on the traditional subject-matters of fiqh, i.e., essentially private and individual rights, not codification in affairs the regulation of which 'ulamā' of all stripes have traditionally ceded to the ruler as clear siyāsa matters, e.g., government administration, taxation, and use of government lands.

[523]Underlying this durability is an apparent agreement of the two sides on three points. One, the status quo is unsatisfactory and unstable. Second, the legal system ought to move toward greater unity, with less division between the fiqh and siyāsa systems. Third, the ultimate system should not be the sort of ideologically dual (secular/religious) legal system that most Arab countries now have.

[524]In order to inform, and partly control, this cut across temporal, geographic and cultural lines, we should ideally juxtapose the history of codification in the West, examining the role of codification and surrounding conceptions of law in the progression through stages of secularization,

divides even 'ulamā' opinion into camps. We find that codification puts in crux oppositions in the system we have already observed: because codification epitomizes macrocosmic and particularly rule-law forms, it directly threatens fiqh's microcosmic and instance-law predilections; it arouses competition between 'ulamā' and ruler as to control of legislation and adjudication; and it foments a border war along the traditional boundary between fiqh and siyāsa.

These very characteristics of the debate make it complex, since many weighty issues -- internal and external, traditional Islamic and modern -- interact, and in complex ways. But we have already explored many of the major issues it raises; these we need only mention, showing their place in the debate. Indeed, a major purpose of this case-study is to close the circle on our presentation of these topics, showing certain close interrelationships among them, particularly as between the judicial practice explored in Chapter Two and the constitutional practice studied in Chapter Three.

In many respects this debate reminds one of controversies in the American constitutional law, such as abortion or school prayer, that, though seemingly straightforward, yes-no

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nationalization and positivization of the law, demotion of natural law and *jus gentium*, concentration of power in the sovereign organs of the nation state, and invention of positive institutions to check that power. See, e.g., Roberto Mangabeira Unger, *Law in Modern Society* (New York: The Free Press, 1977); René David and John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3d ed. (London: Stevens & Sons, 1985), 35-93.

decisions, exhibit huge complexity and intractability, since they are the clashes of two profound, mostly unarticulated, visions of past and future. In such debates, the opposing sides, like two geologic masses shearing at a fault line, provoke a vigorous clash of views, too complex to map or predict; the clash is also intractable conceptually, since, like such masses, neither of the differently aligned visions -- their systems of words, thought or dogma -- is capable of grasping the totality of the clash, or of guiding to its resolution. The two opposing systems, each unshaken in its own sphere, in a way conspire to represent the problem as a simple one, as mere friction at the boundary -- when deeper down it is a clash of worlds.

B. THE CONCEPT OF CODIFICATION -- FOUR VARIABLES

In this debate, "codification" is ordinarily understood, as one would expect, in the sense of codification in Western civil law systems, which are the model on which are built nearly all Arab legal systems. To transfer this model into the Saudi context -- while excising its secular, liberal, and democratic associations -- let us define codification as composed of the following elements: (i) modern comprehensive codes (such as civil and criminal codes and codes of procedure), incorporating matters traditionally governed by fiqh; (ii) drafted, largely drawing on traditional fiqh

sources, under the authority of the Council of Ministers, with advice from 'ulamā' including the Minister of Justice and others informally; (iii) issued upon decree of the King; and (iv) having binding effect on all, including judges. It is this conception of codification that provokes the most dispute. We shall refer to it as the "civil-law model."

But "codification" has other potential meanings, which are reflected in, and partly account for, varieties of opinion -- and confusions -- on the subject. Another conception, important in the debate, is at an opposite extreme from the civil-law model. It is that of a simple restatement or compilation of the laws, perhaps as a code of numbered sections and so forth, that does not possess, even if issued by an official body, any legislative force; a rough analogy would be the Restatements of Laws in the US, which are the work of a private organization of scholars and practitioners. For example, fiqh laws of the Kingdom might be restated (i) perhaps only as to points of difficulty or of 'ulamā' difference of opinion; (ii) by the Board of Senior 'Ulamā', or a similar entity; (iii) which would itself publish the results; (iv) which would have then the weight only of an authoritative fatwā. We shall refer to this model hereafter as the "fatwā model." As we have often seen previously,[525] the Board of Senior 'Ulamā' does issue fatwās with the intent

[525]See Section B of Part III above, p. 633 ff; also p. 311, on contractually fixed penalties for late performance.

of guiding the opinion of qāḍīs, and often of instigating changes in the fiqh as applied. However, these fatwās have so far addressed only narrow, particular points of law. Certainly, such a conception of codification -- depending on how extensively the law were thus "codified" -- would fall comfortably within Saudi 'ulamā' conceptions of their role and of the sharī'a legal system. Indeed, it shades imperceptibly into the position of 'ulamā' who oppose "codification" altogether, and favor the status quo.

Another model can be mentioned and then set aside. This is codification merely in the sense that an individual author should compose a fiqh work in the form of a code, with exhaustive coverage of its subject matter, clear logical organization, definitional clarity and consistency, numbered sections, and so forth. This we may call the "literary" model. I have found no scholar objecting to this model, though many mention it to make clear that the term "qānūn" and a code's literary form are not themselves points of controversy.

There are, besides these three models, many other possible conceptions of codification, varying across the following four variables (as signalled in the cases already cited): (i) What degree of **comprehensiveness** would the codes have? Would Saudi Arabia, as in the civil-law model, attempt to bring all law within the codes? Or would it instead, as in the Anglo-American or common-law model, change the law only

selectively and restrictively by statute, against the backdrop of a common law -- here the fiqh -- determined by scholars and judges? (ii) Who would the **drafting authority** be for the laws? In particular, must the drafters be exclusively 'ulamā'? If not, would the 'ulamā' have a formal, or merely advisory, role in the preparation of the codes? (iii) Who would be the **issuing authority** for the laws? Would it be the state legislative authorities, or some administrative, judicial, academic or private body? As we saw, siyāsa laws or anẓima now issue by decree of the King on the resolution of the Council of Ministers. (iv) However issued, what would be the laws' **binding force** on qāḍīs? Would they bind qāḍīs who claim to a degree of ijtihād? In what respects, if any, could they be overruled selectively, in a particular case, by a qāḍī's own legal opinion, or, as to a general legal rule, by some form of judicial "common law"?[526]

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[526]Other important issues arise as to codification, such as whether the fiqh, with its ethical and religious roots, may require novel techniques of codification. I did not encounter such discussions in Saudi Arabia. Some of these issues is usefully summed up by Dr. Ḥasan al-Turābī, the Sudanese thinker and now political leader, in *Tajdīd Uṣūl al-Fiqh al-Islāmī* (Khartoum, 1980): "[In modern codes] there is the defect of abstraction of legal rules. [They should] be tied back to their support in the principles of the texts, and brought into relation with the system of the sharī'a and its purposes [maqāṣid], and with the ethical factor in religion . . . . [We must] make provision for areas of flexibility for judicial and scholarly fiqh, and for a precise proportion between the laws of the sharī'a that we lay down as obligatory on the people, with judgment, punishment and reward at the level of the state; those that we propagate in the society as accepted *mores* by the impulse of *al-amr bi-al-ma'rūf wa-al-nahy 'an al-munkar* ["ordering the good and forbidding the evil"] outside the jurisdiction of the official ruling power;

C. ISLAMIC DOCTRINAL ISSUES RAISED BY CODIFICATION -- CIVIL LAW MODEL

Let us return to the civil-law model of codification, which, as stated above, is the conception that seems at the center of debate, and around which opinions most polarize. Let us review some of the arguments for and against this form of codification, arranged under the headings of the traditional Islamic legal doctrines referred to in these debates. The first section discusses a number of important historical precedents that frequently figure in doctrinal debates, and then several of the major doctrinal positions of both sides. Again, we here are mainly rehearsing events and doctrines that have been dealt with elsewhere this book, and therefore present them in abbreviated form.

1. Historical Precedents Frequently Quoted

a. Contra-codification

The most frequently heard argument from history against codification is that in Islamic legal history it is not recorded as occurring, at least prior to the Ottoman Majalla, which was adopted under Western influence and pressure. Not only that, but Islam in its golden age rejected the idea. As we saw earlier in this Chapter, Ibn al-Muqaffā''s suggestion to institute a binding single code enacted by the caliph's

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and those that we refer to educational facilities because they depend upon the character of the Muslim as affected by God's supervision of his conscience and private self. . . ."

decree, and several 'Abbāsid proposals to legislate adherence to Mālik's law book, were all defeated, the latter reportedly on the advice of Mālik himself.[527]

Against codification can moreover be arrayed all the stories which show Companions approving of qāḍī ijtihād. A particularly telling account is one, already cited in Chapter Two with regard to appeal, in which 'Umar declines to alter the judgment of another Companion, on the ground that, even as caliph, he would not revise a ruling based on opinion, since "opinion is held in common."[528]

b. Pro-codification

Arguments favoring codification are embarrassed primarily by the fact that Islamic history has known nothing closely approaching codification in the civil-law model. They cite a handful of reports of practices in part analogous to codification, the relevance or authenticity of which is disputed by the other side of the debate.

To begin with the earliest, most authoritative periods, several incidents involving 'Umar are cited to support a ruler's imposing a particular ruling upon on his qāḍīs. The clearest is a story that

> 'Umar wrote to Shurayḥ [a famous early qāḍī], "If a matter comes before you that cannot be avoided [i.e.,

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[527]See p. 441 above. Shaykh Muḥammad Abū Zahra, writing in the preface to al-Qāsim, *al-Taqnīn*, mentions that the Umayyad caliph 'Umar b. 'Abd al-'Azīz had the same intention, but nothing came of it before he died. See also ibid., 300.

[528]See p. 274 above.

> that you must decide], then look into the Book of God, and judge by it, and if there is nothing, then into the judgments of the Messenger (S), and if there is nothing, then into the judgments of the righteous ones [*al-ṣāliḥūn*] and the great givers of justice [*a'immat al-'adl*], and if there is nothing, then you choose: if you wish to exercise your opinion [*tajtahid ra'yak*], do so; if you wish to consult with me [*tu'āmiranī*], then do so. In my view, your consulting me is better for you [*lā arā mu'āmarataka iyyāya illā khayran lak*]. Farewell."[529]

Another early story, concerning the far less canonical first Umayyad caliph Mu'āwiya, represents the latter constraining the judgment of the revered early judge, Shurayḥ. On a point of inheritance law the views of the caliph and the qāḍī differed; when the latter judged such a case he would announce, "This is the judgment of the Commander of the

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[529]Abū Bakr Aḥmad b. 'Alī b. Thābit al-Khaṭīb al-Baghdādī (d. 463 H., 1071 C.), 2 vols., *Kitāb al-faqīh wa-al-mutafaqqih*, ed. Ismā'īl al-Anṣārī (Riyadh: Maṭābi' al-Qaṣīm, 1389 H., 1979 C.), 2:200. I heard on Saudi radio the defense of a master's thesis by Muḥammad b. 'Abd Allāh al-Marzūqī, a student at the Imām Muḥammad Islamic University College of Sharī'a, who, partly on the basis of this report, accepted the idea that the ruler should be able to require a qāḍī to rule by a particular view. The debate at the defense was vigorous, one of his examiners declaring, in effect, that on a matter of this sensitivity, such an interpretation of this report should not be lent acceptability. On checking later, I found that the thesis was accepted only after a delay for further revisions.

A different Ḥanafī version of this story (related from al-Sha'bī from Shurayḥ), appears in Abū Bakr Aḥmad b. 'Umar al-Shaybānī al-Khaṣṣāf (d. 261 H., 875 C.), *Kitāb adab al-qāḍī*, with commentary by Abū Bakr Aḥmad b. 'Alī al-Rāzī al-Jaṣṣāṣ (d. 370 H., 981 C.), ed. Farhat Ziadeh (Cairo: American University of Cairo, 1978), 38-9, in a form in which 'Umar gives the qāḍī, after finding no Book, no sunna, no "ijmā'" of the "people," and that "no one" prior to him had "said anything," a choice between doing his own ijtihād and "delaying" it. al-Jaṣṣāṣ states that the latter means to "consult the learned." See also Ibn 'Abd al-Barr, *Jāmi'*, 2:56.

Faithful Mu'āwiya," while in other cases he would state, "This is the judgment of God and His Prophet."[530]

'Umar perforce legislated a great deal in setting up the administrative structure of the new Empire. Thus, he established the *dīwān*, the system for distribution of wealth flowing from the conquests, made early regulations on dealings with *dhimmī* populations, land use and revenue, fixed the punishment for winedrinking, and many others. His solutions entered into the law, and were enforced by his qāḍīs. As we noted earlier, however, later fiqh represents such decisions either as ordinary administrative matters, delegated to the ruler, or, where they entrench obviously upon fiqh, as ijtihād adopted by ijmā' of the Companions.

In early 'Abbāsid times, the parallels to codification lie in the emergence of school taqlīd, which we have earlier portrayed, in the discussion of the "closing of the door of ijtihād," as an 'ulamā' response to the challenges of incorporating fiqh into the official legal system.[531] As seen previously, Abū Yūsuf (d. 182 H., 798 C.), in his book of legal instruction to the Caliph Harūn al-Rashīd, offered the latter alternative views on certain matters, permitting him to choose one for application. Authors state that Abū Yūsuf, a progenitor of the Ḥanafī school, as Chief Qāḍī bound his

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[530]As told by Muḥammad Abū Zahra, al-Qāsim, page sīn.

[531]See p. 157 and ff. above.

subordinates to apply the Ḥanafī school.[532] Other early statements show 'ulamā' requiring qāḍīs when judging to apply the opinions of a single school.[533] Such accounts suggest that freedom of ijtihād among rank-and-file qāḍīs early became the exception, while constraint was the rule. Much later, as we noted in this Chapter, the Ottoman sultans enforced such compliance by command to their judges.[534]

From early periods rulers adopted rules called "qānūn"[535] in administrative matters, such as taxation and land use. al-Māwardī's (d. 450 H., 1058 C.) book on public law acknowledges such laws.[536] Such legislation very rarely is referred to in controversies about codification, underlining that the

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[532]I have not found a citation to a traditional source.

[533]For example, a statement cited by Ibn Farḥūn (d. 799 H., 1397 C.) that the famous early Mālikī author, Saḥnūn (d. 240 H., 854 C.), required qāḍīs to judge by the views of the people of Madīna and not of Iraq, because litigants from among the followers of Mālik were seeking the former, not the latter. *Tabṣirat*, 46. al-Māwardī states that "Some legal scholars have prohibited one who belongs to a certain school to judge by any other, so that a Shāfi'ī is prohibited from judging by the view of Abū Ḥanīfa . . . ." *al-Aḥkām* , 66. See also p. 701 below.

[534]See p. 516 above, and further discussion p. 702.

[535]A standard general definition of "qānūn" is "the measure of everything" [*miqyāsu kulli shay'*]. See, e.g., Majd al-Dīn Muḥammad al-Fayrūzābādī, *al-Qāmūs al-muḥīṭ*, 4 vols. (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1371 H., 1952 C.), 4:263. A technical definition offered by Prof. Aṭwa is "general rule [*ḥukm kullī*] applicable to all its particulars, from which can be learned the [*ḥukm*] of the latter. For example, [grammatical rules]."

[536]al-Māwardī, *al-Aḥkām*, 199-218 (with regard to the "dīwān").

controversy is confined to codification impinging on traditional areas of fiqh.

Authors at times cite a development within fiqh literature, the emergence of the genre of *qawā'id* works. These works sought to induce from the welter of fiqh rules general principles, which then are used as rules of thumb guiding further analogical thought. (Note, however, that qawā'id have a lower epistemological status than the particular rules from which they derive, and even than analogies based directly on the latter; thus they have no probative precedence over those more concrete outcomes and analogies.[537]) This and other trends[538] indicate that late medieval fiqh may have been working toward rationalization of Islamic law along deeper and more general principles, in order to allow its development -- probably in new combinations with the siyāsa principle and state power -- in fresh directions less constrained by classical uṣūl al-fiqh. In any case, qawā'id rules never became binding whether in fiqh or by state power -- until the Ottoman Majalla enacted a number of them.[539]

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[537]The concept has been mentioned above, p. 270. This is unless the general rule is itself stated in the Qur'ān or ḥadīth.

[538]A perhaps related development is the interest in *maqāṣid al-sharī'a* [the purposes of the sharī'a], such as in works of Abū Isḥāq Ibrāhīm b. Mūsā b. Muḥammad al-Shāṭibī (d. 790 H., 1388 H.).

[539]Arts. 2-100.

Reference is made occasionally to late fiqh works employing the term "qawānīn" to refer to simplified resumes of fiqh rules, approaching in their conciseness the texts of modern codes.[540] These were, however, only convenient handbooks, not binding codes of law.

Finally, the historical precedent in fact the nearest to modern codes -- the Ottoman criminal codes [*qānūnnāme*] -- I have not seen mentioned in any discussion of codification. This is either because they are unknown or because they are lumped together with other Ottoman codes on siyāsa subjects.[541]

In sum, proponents of codification find themselves lacking doctrinally persuasive historical precedents. This is ironic, in that, as they are well aware, actual historical practice in eras of taqlīd was far closer to civil-law codification in its method and effects than it was to a legal theory based on ardent independence and legislative power among qāḍīs. Their dilemma is evidence of how successfully 'ulamā' have denied taqlīd and related institutional practices

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[540]Most often referred to is the book by Muḥammad b. Aḥmad Ibn Juzayy, *Qawānīn al-aḥkām al-shar'iyya*, new revised ed. (Beirut: Dār al-'Ilm li-al-Malāyīn, 1979).

[541]Thus, Bakr Abū Zayd states that from the time of Mālik and Ibn al-Muqaffā' until the *Majalla* there was no trace of the concept of codification in Islam. Abū Zayd, *al-Taqnīn*, 19. Two books advocating codification neglect to mention them. al-Qāsim, *al-Taqnīn;* Muḥammad Zakī 'Abd al-Barr, *Taqnīn al-fiqh al-islāmī (al-mabda' wal-manhaj wal-taṭbīq)* (Dār Iḥyā' al-Turāth al-Islāmī, 1407 H., 1986 C.), 60-61. Note that Ibn al-Qayyim mentioned "qawānīn siyāsiyya" or siyāsa laws, in a discussion of abuses of siyāsa power. See p. 494 above.

legitimation at the pristine levels of higher theory; these practices were rather represented as adaptations to the decay of the time. Insofar as proponents of codification now wish to argue for it at a level more refined, they are forced to patch together a case for codification from diverse sources, which are moreover usually worlds away, historically and institutionally, from the modern conception of codification.

2. The Ruler's Authority to Bind Qāḍīs

Let us now turn from the historical record to the doctrinal debate itself. In the fiqh theoretical system, the central problem of codification -- and the only one on which we shall focus -- is understood to be whether the ruler has power to dictate to his qāḍīs the law they are to apply.[542] All of the main constituents of the controversy have been prefigured elsewhere in this book. In what follows, we review briefly the arguments marshalled by both sides, citing wherever possible the actual Saudi participants in the debate, and the authorities on which these participants themselves rely. We arrange the doctrinal arguments according to whether they used "contra-codification" or "pro-codification," including as to several the rebuttals to them.

a. Contra-codification

The cornerstone of fiqh doctrinal opposition to codification is the conception of judging [qaḍā'] as at root

[542]A shorthand expression for this in Arabic is *ilzām*, or compulsion, meaning of the qāḍī to apply particular rules of law.

ijtihād. As we have seen, this conception grounds adjudication in an act of individual conscience -- in the qāḍī's striving [ijtihād], both moral and intellectual, to attain as closely as possible to God's true judgment of the concrete case before him. The act of judgment implicates immediately and ultimately the personal moral responsibility of the qāḍī before God, and properly rests only on knowledge of God's law and of the case. If any other determinant intrudes -- such as a ruler's command how to decide -- it threatens the unique fusion of the transcendent and the concrete that is the object of ijtihād -- disengaging simultaneously from both the transcendence of the law and the uniqueness of the event.

We have discussed many aspects of qaḍā' that derive from this fundamental starting point. One is the doctrine, upheld by all the four schools but the Ḥanafī, that the qāḍī must qualify as a mujtahid. We have explored the deviations from that principle allowed in practice and sanctioned at lower orders of justification -- the chief justification offered being simply that fully qualified candidates were unavailable. We have reviewed fiqh views on what obligations remain upon the qāḍī after this principle is waived. Are there degrees of ijtihād? Must the qāḍī practice at least the degree of ijtihād we called "dalīl theory," or inquiry into the proof for a ruling sufficient to attain to personal satisfaction as to its correctness? Is not a qāḍī in any event a mujtahid as

to the facts? When, and according to what procedures, may a qāḍī follow the opinions of another who is a mujtahid? Must the latter be living? How does the qāḍī choose whom to follow? Regardless of the source of truth on which he draws, may the qāḍī ever decide against his own conviction of what is true? The questions are myriad and complex.

One can arrange the answers to these questions in order according to degrees of conscientious involvement by the qāḍī in the selection of the judgment, varying from the unswerving requirement that the qāḍī be a mujtahid through to the blank claim that nowadays all scholars, qāḍīs and otherwise, must practice taqlīd of one of the four schools. For example, a qāḍī may be held to possess a lesser degree of ijtihād, requiring him to consult the views of the various schools, with their proofs, and choose the one most correct in his view; perhaps he is held to carry out this investigation only within his school, weighing views either by their proofs or by partly different internal school rules of preference; perhaps he is too ignorant for this, and ought only to obtain fatwās from various scholars and choose the view seeming to him most correct; perhaps, finally, he is accounted totally ignorant, and held simply to determine who seems the best available muftī, and to follow his views by rote. As we noted earlier, the four schools in their late development, speaking roughly and in the large, vary along a spectrum in degrees of toleration of taqlīd. One finds the Ḥanafī school most

commonly asserting the views that most limit ijtihād, and just after them the Mālikīs. These are the two schools most widespread in application. By contrast, the Shāfi'ī and Ḥanbalī schools maintain for a longer period, and as stronger positions within the schools, views demanding greater qāḍī ijtihād, both as to qualification for office and in practice. Even in these schools, however, minority views exist that require qāḍīs "of the time" not to depart from the views of the school to which they affiliate, even if these conflict with their own conviction of the better view.[543]

In Chapter Two we noted -- but postponed to this Chapter -- the point that these various positions, although they may seem merely dogmatic, are related to larger issues involving the actual division of power in the legal system. If we now transpose these debates over ijtihād directly into the context of codification, to the key issue of control by the ruler over the rulings applied by qāḍīs, we see how immediate this correlation is.

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[543]See, e.g., the very late Ḥanbalī, al-Bahūtī, *Kashshāf*, 6:295, citing two earlier Ḥanbalī works. One authority cited even would require this when the qāḍī's own conviction is to the contrary. al-Bahūtī's own view is against such positions, requiring the qāḍī, even if a muqallid, to reach his own conclusion as to the best view, and in any case never to judge against his conviction. al-Bahūtī even claims for these results ijmā'.

See for the Shāfi'īs, al-Ramlī (d. 1006 H., 1596 C.), one of the key late authorities, in *Nihāyat al-muḥtāj ilā sharḥ al-minhāj*, 8:242, where he says that "some say" that custom [*'urf*] imposes as a condition on appointment that even one qualified to practice ijtihād "in the school" cannot rule other than by the "accepted" [*mu'tamad*] school view.

If the qāḍī function is understood as at root ijtihād, and if school discipline, even, cannot interfere with the functioning of the qāḍī's conscience,[544] then, *a fortiori,* the ruler cannot interfere. Hence we find 'ulamā' -- of all four schools, even the Ḥanafī[545] -- adopting as a basic principle that the ruler, even though he is the chief qāḍī and other qāḍīs act by appointment as his delegates, cannot restrict his appointees to judge by a particular school, or to apply particular doctrines. A statement of this principle appears in the classic work on public law by the Shāfi'ī al-Māwardī. Interestingly, al-Māwardī includes in the discussion an admission that good policy -- he significantly uses the term "siyāsa" -- requires some sort of constraint on judges.

> Some legal scholars have prohibited one who belongs to a certain school to judge by any other, so that a Shāfi'ī

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[544]Recall that most scholars declare that a true mujtahid is forbidden to practice taqlīd of another 'ālim in any circumstance -- that his conscience must arrive independently at every ruling. Ibn Farḥūn, *Tabṣirat,* 1:45 (claiming ijmā' on the point). Stronger assertions, for which some also claim ijmā', are that every judge, even one not a mujtahid, must (a) consider which is the better [*rājiḥ*] view, and (b) not decide against his conviction. Ibn Taymiyya, *al-Fatāwī al-kubrā,* 624. Ibn 'Ābidīn, "Sharḥ," 51, quoting others Ḥanafīs, agrees with (a), but, as to the non-mujtahid, disagrees with (b). In both cases, for the non-mujtahid Ibn 'Ābidīn interprets the *rājiḥ* as the *rājiḥ* of the school, not the individual. He declares that when a judge departs from this view, his judgment is not even to be executed.

[545]al-Māwardī, see next note, gives the views of the Ḥanafī and Shāfi'ī school. Ibn Qudāma, the central authority of the Ḥanbalī school, claims ijmā' on the point of the invalidity of a condition restricting a judge to a single school, since "truth is not confined to a single school." *Mughnī,* 11:482. Ibn Farḥūn of the Mālikī school quotes al-Māwardī with approval. *Tabṣirat,* 16-17.

> is prohibited from judging by the view of Abū Ḥanīfa, and the Ḥanafī is prohibited from judging by the school of al-Shāfi'ī, if his ijtihād leads to [the latter holding]. This is because of the suspicion and partiality in cases and judgments attributable to such a practice. If he judges by a school from which he [is not allowed to] depart, this better prevents suspicion and is more agreeable to the litigants. Even though good policy [siyāsa] requires [*taqtaḍī*] [this result,] the rulings of the sharī'a do not obligate it [*lā tūjibuhu*], because taqlīd as to [these rulings] is prohibited, and ijtihād as to them is requisite [*mustaḥaqq*]. . . . If the one appointing [i.e., the ruler] is a Ḥanafī or a Shāfi'ī, and imposes a condition upon the one he appoints as *qāḍī*, that [the latter] not judge except by the Shāfi'ī or Ḥanafī school, [the condition is void. The act of appointment is also void, depending on the manner in which the condition is worded]. [Emphasis added.][546]

This result is reasonably obvious when qāḍīs are assumed to practice the ideal of ijtihād. Can the principle still be maintained when, as we just discussed, it is widely accepted that rank-and-file qāḍīs are not mujtahids?

Clearly, those positions that assert utter ignorance in qāḍīs and deny them meaningful participation in the choice of the ruling will have difficulty explaining why they should cling to the principle -- which derives, after all, from qāḍī ijtihād -- that the ruler should have no hand in choosing the law to be applied. As we have seen, the Ḥanafīs, who more than others accommodated taqlīd by qāḍīs, gave way on this point: by Ottoman times, if not before, the Ḥanafī learned hierarchy officially endorsed the power of the Sultan to bind all official qāḍīs and muftīs to the standard views of the

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[546]Māwardī, *al-Aḥkām*, 67-68. Note that al-Māwardī, in condemning enforced taqlīd, employs weaker or more ambivalent terms than customary, suggesting some affinity or toleration for the opposite view.

Ḥanafī school, and even ceded to him power to dictate particular rules of law.[547] The Mālikī school seems also to have yielded. The Mālikī Ibn Farḥūn (d. 799 H., 1397 C.), after asserting repeatedly and emphatically the total absence of qāḍī mujtahids in his age, states:

> Shaykh Abū Bakr al-Ṭurṭūshī said that the Qāḍī Abū al-Walīd al-Bājī informed him that the rulers in Cordova when appointing a man qāḍī used to impose the written condition that he not deviate from the view of Ibn al-Qāsim [chief disciple of Imām Mālik] where the latter has one. Shaykh Abū Bakr said that this is great ignorance, because the truth is not in anything definite. Shaykh Abū Bakr said this only because of the existence of mujtahids and learned men among the qāḍīs of that time, and he was speaking of the people of his time. [Ibn Farḥūn lists eminent jurists of that time.] Such as these do not exist in our time in the East or in the West.[548]

On the other hand, the Shāfi'ī and Ḥanbalī schools, particularly the latter, seem to have held firm in excluding the ruler from interference with qāḍī ijtihād. Although, as mentioned, members of the school do insist on qāḍīs being bound to a particular school, it seems they present this view as something to be enforced by the members of the school among themselves.[549] I have not come across authorities in either

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[547]See p. 515 above.

[548]Ibn Farḥūn, Tabṣirat 1:44-45.

[549]It should be noted that in Islamic judicial history most often it was the chief qāḍī [*qāḍī al-quḍāh*] who imposed and enforced school discipline, since he influenced or carried out the appointment of qāḍīs and oversaw their work. The choice of chief qāḍī often, then, determined the school of law applied. Tyan, judicial history, 173-4. Interestingly, the Shāfi'ī Ibn Abī al-Dam (d. 642 H., 1244 C.) in his book on qaḍā' allows that a qāḍī may require his delegate to follow his own school. al-Qāḍī Shihāb al-Dīn Abū Isḥāq Ibrāhīm b.

school allowing the ruler to command judgment contrary to the qāḍī's conviction of truth.[550]

Thus, as we might expect, a view of the qāḍī function insisting on a degree of ijtihād tends to coincide with a view denying power to the ruler to restrain the qāḍī's choice of law. A further example of this is afforded by Ibn Taymiyya, who indeed is among the most forceful exponents of both positions.

Let us recall from Chapter Two the characteristic spirit with which Ibn Taymiyya, and after him the Wahhābīs, approach the qāḍī function. He demands that whatever capability one has for ijtihād be exerted to evaluate the textual proof or "dalīl," and thus reach personal, independent conviction, regardless of whether another has greater knowledge -- we

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'Abd Allāh Ibn Abī al-Dam (642 H., 1244 C.), *Kitāb adab al-qāḍī*, ed. Dr. Muḥyī Halāl al-Sirḥān, 2 vols. (Baghdad: Maṭba'at al-Irshād, 1404 H., 1984 C.), 1:308. This is followed up in the late Shāfiī school. See next note.

[550]This is at least when the qāḍī has a contrary conviction. My search has not been adequate to be firm on the point. For the Ḥanbalīs, see, e.g., al-Bahūtī, *Kashshāf*, 6:292. For the Shāfi'īs, Ibn Abī al-Dam specifically rejects such a view, even as to the non-mujtahid qāḍī. Ibn Abī al-Dam, *Adab al-qāḍī*, 1:304-307. al-Ramlī upholds full freedom for the qāḍī, even a muqallid, treating any other case as a forceful, wrongful imposition by a ruler. But he also, following up on the ruling of Ibn Abī al-Dam, see previous note, provides that, when the qāḍī appoints his delegates, he may restrict them to follow school taqlīd. He also justifies such restrictions as custom, suggesting a binding custom of the school itself. *Nihāyat*, 8:239-242. These examples are enough to suggest that with fuller investigation we shall find, as between the schools and even within them, a diversity of mechanisms used to modulate school taqlīd and relations with rulers.

termed this "dalīl theory" in Chapter Two.[551] We have seen how this approach imposes even on laymen a duty to evaluate legal positions to the full extent of their capability.

> An alert person who listens to the difference of views among the 'ulamā' and their proofs in general . . . has the means to know what view is preferable.[552]

In writing about political life in his book *Siyāsa shar'iyya*, Ibn Taymiyya intimates his willingness, for the sake of upholding these very principles in doctrine, to accept steep declines from them in practice:

> Those in authority are of two types, rulers [*umarā'*] and 'ulamā'. If these two are sound, the people are sound. Each of them must seek in what he says and does obedience to God and His Prophet and adherence to the Book of God. Whenever he is able in doubtful events to know what the Book and the Sunna indicate, then this is obligatory. If he cannot attain this, because of shortage of time, deficiency in the seeker, lack of preponderance in his mind of any of the proofs, or another reason, then he has the right to practice taqlīd of one of whose knowledge and religion he approves. This is the strongest view. [Two] other views are that he has no right in any case to practice taqlīd, and that he has a right to taqlīd in all cases. These three views exist in the Hanbalī school and others. In similar fashion, prerequisites required of qāḍīs and governors must be fulfilled to the extent of ability. Indeed, [this is the case as to] the all other preconditions of religious duties, like prayer, jihād and others. These are compulsory only if there is ability. If there is inability, then God does not burden a soul beyond its power. [He gives examples from the rules of fiqh.][553]

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[551]See p. 170 above.

[552]Ibn Taymiyya, *al-Fatāwī al-kubrā li-Ibn Taymiyya*, 5 vols. (Beirut: Dār al-Ma'ārif, 1398 H., 1978 C.), 4:625.

[553]Ibn Taymiyya, *al-Siyāsa*, 182-183. Compare p. 169 above.

Clearly, unlike other theories of ijtihād, Ibn Taymiyya's is capable of smoothly telescoping to encompass all cases in one overarching theory; indeed, like a telescope, it continually extends itself in order to keep in view its single object, ignoring the cost in clarity and size of the image. In its unity and consistency the theory stands out. Its only competitor in these respects is the view at the other extreme, which understands ijtihād as a group or institutional construct, and which allows, indeed counsels, a judge or muftī, though himself learned, to practice taqlīd of another more learned, even without an excuse such as shortage of time.[554] From what we have seen throughout, the latter view operates in the Ḥanafī theory of qaḍā'.

Given these views on ijtihād, what is Ibn Taymiyya's theory on whether the ruler has power to constrain the legislative choices of his qāḍīs? We find his views on this just as demanding and forceful. To Ibn Taymiyya, the obligation of ijtihād forecloses, as to any matter of religious law, restraint not only of the qāḍī's freedom of opinion, but even of that of the layman. One can bind another in such matters only when a legal determination in particular circumstances -- such as in litigation -- is made.

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[554]Ibn Taymiyya et al. [hereafter "Banū Taymiyya"] [statement here is by Majd al-Dīn Ibn Taymiyya], *al-Musawwada fī uṣūl al-fiqh*, Muḥammad Muḥyī al-Dīn 'Abd al-Ḥamīd, ed. (Beirut: Dār al-Kitāb al-'Arabī, n.d.), 468-9, attributing such views to Abū Ḥanīfa. The latter allows that, upon shortage of time, a learned person can follow even one less learned than he. Ibid.

> In matters in common among the Islamic community [umma], nothing is law [*lā yaḥkum*] except the Book and the sunna. No one has the right to bind people to the opinion of any scholar or amīr or shaykh or king. The ḥākims [the term *ḥākim* includes anyone who issues rulings, and thus includes both judge and ruler] of the Muslims rule in particular [*juz'iyya*] matters, not in universal [*kulliyya*] ones. Whenever they judge in particular matters, they must judge by what is in the Book of God, and if there is nothing, then by the sunna of the Messenger of God (S), and if there is nothing, then the ḥākim exercises his ijtihād.[555]
>
> The muftī and the soldier and the common man, if they speak of a thing according to their ijtihād, whether by ijtihād or by taqlīd, intending to follow the Messenger to the extent of their knowledge, do not deserve punishment, this by the ijmā' of the Muslims, even if they have committed an error on which there is an ijmā'. And if they say, "What we say is the truth," and offer legal proofs, then no *ḥākim* has the right to constrain them merely by his own opinion. He cannot rule that his view is the truth, while theirs is not. Rather, the Book and the Sunna judge between him and them. The truth is what God sent through his Messenger, not being hidden but apparent. If it is apparent, all return to it; if it is not apparent, then each should be quiet about the other. No one, because he is a ḥākim, may say that one who follows one legal school must follow another. Things could change and the latter could become ḥākim . . . .[556]

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[555]Quoted in Abū Zayd, *al-Taqnīn*, 76. Ibn Taymiyya's usages here -- *kulliyya* and *juz'iyya* -- seem odd and inexact, perhaps indicating that here he was on the frontiers of fiqh conceptions. His "particular" decisions, since rulers also are referred to, would seem to include decisions in full siyāsa mode, such as everyday administrative directives, even though these are of more or less general application. It seems he here is insisting that no fiqh matter, no question of truth, is foreclosed by power or worldly authority, while he is prepared at the same time to admit binding decisions of a ruler on any matter whenever a ruler's "particular" siyāsa decision (inspired by texts but also grounded in current utility [*maṣlaḥa*]) forces the "general" issue. Cf., Ibn Taymiyya's discussions of the issues of fixing prices, *al-Ḥisba*, 38 ff., or paying tribute to brigands, *al-Siyāsa*, 102-115, especially 107.

[556]Ibn Taymiyya, *Majmū'at*, 35:379-380.

> [He was asked:] May one who assumes office over Muslims, and whose legal school does not consider the "work partnership" lawful, prohibit people [from using it]? The answer: He may not prevent people from such as this, nor from analogous things in which ijtihād is permitted, if he has no text to support this prohibition from the Book, Sunna or ijmā', nor anything in the nature of these.[557]
>
> The ruler, if he knows what is in the Book and the Sunna, he judges between the people by it. If he does not know, and he is capable of learning the view of so-and-so and so-and-so, to the point that he knows the truth, then he judges accordingly. If he is not capable of either of these, then he leaves the Muslims as they were, each worshiping God according to his ijtihād. He has no right to force anyone to accept another's view, even if he is ḥākim.[558]

We see here once again the fervent enhancement of the microcosmic in law-making that we have found to be so characteristic of Ibn Taymiyya and his followers. Note how this spirit stands directly in the path of legislation by the state -- in aid of preserving, first of all, the freedom of

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[557]Ibn Taymiyya, *Majmū'at*, 30:79-80.

Another text from Ibn Taymiyya may seem to contradict these views. In a discussion of *shūrā* or consultation, just prior to the text on ijtihād quoted at n. 553 above, he notes that the one in authority [*walī al-amr*] ought to consult with others, and if they "show him a rule from the Book, the sunna or the ijmā' obligatory to follow, then he must follow it." On the other hand, "if the matter is one in which Muslims have differed, then he ought [*yanbaghī*] to extract from every one of them his opinion, and the basis for it. Whichever opinion is closest to the Book of God and the Sunna of His Prophet, is applied [*'umila bih*] [citing [4:59]]." The last two words suggest not a particular judgment but a more general rule and its application. But this suggestion seems too weak to overcome Ibn Taymiyya's unambiguous statements elsewhere. The passage seems simply guidance to one in power on how to take a decision in any matter [i.e., a "particular" matter, *juz'ī*, see just previous quotation] on which fiqh opinions impinge, including bureaucratic or administrative decisions. As to the latter, "*'umila bih*" would be natural usage.

[558]Ibid., 35:387.

decision of qāḍīs and other 'ulamā', and second, what might be called religious-legal freedom of opinion among the mass. The price of this freedom is to obstruct options for macrocosmic rule-law-making -- at least as to matters on which fiqh speaks -- despite all the compelling advantages of such law-making.

Saudi qāḍīs whom I interviewed drew here as always on Ibn Taymiyya's inspiration, and evinced a similar spirit of independence toward legal determinations by the ruler. Thus, Shaykh al-Ghuṣūn told me that qāḍīs serve only the sharī'a, just as judges in a qānūnī system serve only the qānūn and not the government. Qāḍīs on the Day of Judgment will be brought to trial by those on whom they judged here. They will be asked, on what ground did you have me killed? It will then be of no use to the qāḍī to plead "I obeyed the government."[559]

Shaykh al-Laḥaydān stated the following:

> No one compels the qāḍī in the Kingdom of Saudi Arabia to judge according to a ruling that he does not think correct. There are matters of [grants of jurisdiction, *wilāyāt*] which are general or specific, by place or type of case, which a qāḍī cannot breach. As for the type of ruling that the qāḍī gives, this is based on his understanding of the text of the sharī'a, on the legal rulings [*furū'*] 'ulamā' have derived from [that text], and on their legal deductions from it. No one has the power to say to the qāḍī, "Judge according to such and such a rule," or "Qāḍīs must apply such and such a rule." This is something that does not exist, except for ta'zīr crimes, which the ruler may punish with certain general punishments. The qāḍī may, with justification, add to or subtract from these punishments.[560]

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[559]Shaykh al-Ghuṣūn, interview, Dec. 18, 1984.

[560]Shaykh al-Laḥaydān, written responses, Feb. 27, 1985.

Shaykh Bakr Abū Zayd wrote a book opposing both codification and the binding of a qāḍī to a particular opinion.[561] In it he relies chiefly on scholars' views, particularly Ibn Taymiyya's, on the irreducible freedom of ijtihād held by qāḍīs. He also rebuts one by one the claimed benefits to be derived from codification.

Several scholars, Dr. al-Faryān and Shaykh al-Ghuṣūn among them, mentioned that codification would reduce qāḍīs to mere "tools," "typewriters." Dr. al-Faryān represented codes as attempts to reduce adjudication to something mathematical ("two plus two equals four"), that would deprive qāḍīs of all freedom and discretion and would impose rigidity in place of flexibility.[562] The development of the law in Saudi Arabia can be met from fiqh sources and methods, and for this the freedom of judges to practice ijtihād is needed for flexibility and innovation.[563]

An example of views opposed to the foregoing, and supporting codification, are those of Prof. 'Aṭwa, an Egyptian, trained as a Ḥanafī at al-Azhar. He emphasized instead the uniformity of Ḥanbalī taqlīd practiced in fact in Saudi Arabia,[564] and expressed skepticism as to the ijtihād

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[561]*al-Taqnīn*.

[562]Dr. al-Faryān, interview, Mar. 6, 1983.

[563]Ibid.

[564]He also maintained, against the views of all qāḍīs and officials I spoke with, that qāḍīs remain until today subject to early orders of the King, issued for the Ḥijāz region,

qualifications attained by Saudi 'ulamā'.[565] He indulged no romanticism as to qāḍī ijtihād, but represented the application of the law, since as early as the third century and Abū Yūsuf, as a matter of school taqlīd enforced upon qāḍīs by state power.[566]

To sum up this section, we find that the chief doctrinal objection to codification derives from traditional fiqh principles obstructing state control over fiqh legislation. No doubt everyone on both sides of the dispute agrees that God alone, and not the state, is the Legislator. But the question remains open whether the sharī'a, the Divine Law, in its detailed and specific rulings and as applied, is to be found solely by the 'ulamā', or does the ruler also play a role. Medievally the 'ulamā' were immensely successful in establishing -- at least as to the partial domain traditionally governed by fiqh -- the implicit principle that it is <u>they</u> who find the sharī'a. Their success here derived

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requiring the application of the Ḥanbalī madhhab. See Chap. 2, n. 203 above.

[565]In a mimeographed statement he prepared and circulated among colleagues, he declares that the objection that a qāḍī is required to judge by his ijtihād is merely "hypothetical, contrary to the facts" [*farḍ ghayr wāqi'*]. 'Abd al-'Āl 'Aṭwa, "Taqnīn al-fiqh al-islāmī" (Riyadh: Mimeograph, Imam Muhammad University, n.d.), 7. He and others remarked to me that they knew the state of Saudi law graduates, and that they were not qualified to practice ijtihād at all.

[566]As we shall see below, however, his proposals for codification ceded nothing more than that to the ruler: 'ulamā' are to play the central role in drafting codified laws. See p. 738 below.

from their success in establishing a vision of the sharī'a, indeed of the divine sovereignty itself, as inviolably microcosmic, in the manifold senses we have explored. They so thoroughly vanquished the idea that it should be the state that finds sharī'a that virtually no doctrinal authority or historical precedent for that proposition can be cited from fourteen centuries of history.

On analyzing the practice, however, we find, here and in other contexts in this book, that macrocosmic principles of sovereignty and of law-making did survive, and were accommodated by fiqh theoretically, but only at what we have called lower orders of justification. We find that in all cases where fiqh law has been applied through state apparatuses, it has been in practice fixed within narrow limits through the institutions of the four schools of law. To police this legal conformity seems to have been usually the responsibility, according to both theory and practice, not of the ruler but of the 'ulamā' themselves. Thus, we find (once again) the 'ulamā' accommodating their system to secure certain benefits of macrocosmic law-making, and doing so on their own terms and under their own administration.

No doubt, however, the 'ulamā' could carry this process too far, and undercut the logic of their basic position. In particular, if qāḍīs are declared to be mere muqallids, who merely apply by rote one or another predetermined system of law, then it becomes unclear why, as to matters of choosing a

school, or as to points of detail, the ruler should not share with the 'ulamā', or even possess exclusively, the right to bind the qāḍīs. If the choice of law is so relative as to be based not on questions of ijtihād (i.e., of uṣūl al-fiqh), but on school affiliation arbitrarily determined (such as by region, family or nationality), then why should choices between school views require the expertise of 'ulamā'? Should they not be made by the ruler, who would do so on the basis of the needs of the society (supported by arguments from utility or *maṣlaḥa*, as discussed in the next section)? Moreover, why should choices among particular rulings, within or without a school, be made *ad hoc*, by individuals, rather than generally and uniformly by the state? Indeed, we saw that under the Ottoman system, when 'ulamā' and their fiqh law were largely coopted into the state apparatus, just these arguments proved persuasive, and these additional powers of the ruler were recognized. What significant difference then remains between such a situation and the codification of fiqh law? Indeed, widespread acceptance of codification as consistent with the Islamic state seems to owe a great deal to subliminal memories of the late Ḥanafī school and its implementation in the late Empires.[567]

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[567]Thus, I found scholars with training and background as Ḥanafīs far less likely to pose objections to codification. This is despite the fact that the history of codification in their own countries of origin had been uniformly a process of Westernization and of alienation from fiqh.

Obviously, transplanted into such macrocosmic settings, the fiqh objection to codification loses vigor. Only in contexts where the root microcosmic nature of qaḍā' is emphasized, as in Ibn Taymiyya's theory and in the practice in Saudi Arabia, does its fundamental contradiction with codification stand out clearly.

b. Pro-codification

The positive case for codification comes from another angle: in essence it emerges from the other pole of the sharī'a legal system, from what we have called "siyāsa." The following are the key arguments from traditional fiqh in favor of the power of a ruler to fix the laws applied by qāḍīs. They break down under four headings.

i. Ruler as head qāḍī

As we have seen, the public law of Islam derives state functions, including qaḍā', from the personal obligations of the imām, which he delegates to others by the contract of wilāya. If the ruler is qualified to act as judge, and if practical circumstances permit it, he can, if he chooses, be the sole qāḍī. He may also delegate that authority, to such persons and for such jurisdictions as he wishes, and may remove those delegates. Modern scholars have sought to derive from this an argument for the ruler's power to constrain the law applied by his judges. Thus, 'Abd al-Raḥmān al-Qāsim, a Saudi author of a book advocating codification,

considers that even the traditional freedom of the judge to interpret and apply sharî'a directly is itself a delegation from the ruler, who now may prefer to delegate that authority to others -- such as a legislative body.[568]

Shaykh 'Alî al-Khafîf, the late Egyptian Azharite and law professor in the University of Cairo, states that the caliph had always had the right to decide the law he would apply, after consulting the learned, and was never bound by the opinion, even the majority opinion, of the latter. Therefore, he adds,

> it is the right of the ruler that he choose from among the schools whatever he in conscience feels is best, and which, in his opinion and by his estimation, serves welfare [*maṣlaḥa*]. [This is] because the responsibility of giving judgment [*al-ḥukm*] is his *ab initio* [*ibtidā'an*]. . . ., qādîs are his delegates and representatives, and he has the right to bind them to what he chooses and considers best. They have no right to differ with him in this matter, even if their opinion is other than that he imposes on them, because their jurisdiction is drawn from the ruler . . . . If their judgment differs with what he commanded, it is void. Jurisdiction may be limited by time, place, event or legal school. Obedience to the ruler is obligatory in all that is not clear sin [*ma'ṣiya*].[569]

He even adds that, in carrying out this responsibility, the ruler is obliged neither to possess qualifications as a mujtahid himself, nor to consult those who do.[570]

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[568]al-Qāsim, *al-Taqnîn*, 299.

[569]Ibid., 23-24. (al-Qāsim collected fatāwā from a number of prominent contemporary scholars and them in his book. Several of these are cited below.)

[570]Ibid., 24.

The difficulty with this argument is that -- speaking now, as Khafīf does, within fiqh theory -- imāms in Islamic history never succeeded in claiming, or in exercising, the powers here invoked. First, anyone, whether the imām or his delegate, who applied the sharī'a did so not by consulting the ruler's law, but by either the ijtihād or taqlīd processes of fiqh. The ruler never possessed pope-like powers to determine the religious law, or even to overrule or constrain the ijtihād of others. Only as to legal matters that fiqh did not significantly cover (due either to lack of revealed texts or to lack of 'ulamā' interest, power or opportunity), and that are not at issue here, was the ruler able to impose legislation of his own making. Second, as to choosing which among the 'ulamā''s fiqh laws are to be applied, the ruler had very limited powers, as we have just seen. Third, the 'ulamā' were even able to formulate a theory of judicial independence as to substantive law, by means of the conception that the qāḍī is delegate not of the ruler, but either of the umma or of the sharī'a.[571] For all these reasons, fiqh is clear that the qāḍī is dependent on the ruler not at all for the substance of the law applied, but only for access to the official religious status, the material incidents, and the sanction of office.

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[571]Tyan, "Judicial," 236-241. Some scholars would require cause for dismissal. al-Māwardī, *al-Aḥkām*, 70, prefers such a view, because in this office are certain "rights of the Muslims."

Therefore, considered in traditional terms, this argument carries little weight.

ii. Duty of obedience to the ruler

Muslims owe a religious duty of obedience and loyalty to their ruler, as long as he does not command them to perform a clear sin [*ma'ṣiya*], meaning an act categorically prohibited by the sharī'a. If a ruler, therefore, commands his qāḍī to apply a particular fiqh rule not in conflict with sharī'a, should not the qāḍī obey? In any case, should the qāḍī not consider the command of the ruler as shifting the balance in favor of the selected fiqh view? Thus, in Prof. Aṭwa's view, even on the assumption (to him counter-factual) that a qāḍī had the qualifications entitling him to advance his ijtihād over the text of a code, a qāḍī ordered to rule according to a code

> would not be judging by other than the truth, because what is ordered by the ruler is a truth also, it being a sharī'a ruling. Judgment in accordance with the ruler's command is to be considered more correct [*tarjīḥ*] because of the textual command to obey the ruler in all not a sin. [The ruler] knows where utility [maṣlaḥa] lies because of his continual practice [*tamarrus*] of siyāsa shar'iyya and ordering affairs under it.[572]

The answer to this is to assert that obedience to the ruler in contradiction to the qāḍī's own conviction of sharī'a truth is, indeed, in conflict with the sharī'a, on the basis of the aḥādīth establishing the qāḍī's obligation to practice

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[572] 'Aṭwa, "Taqnīn." Prof. 'Aṭwa in a discussion noted that in earlier times probably the 'ulamā' were more knowledgeable than the ruler about the state of the people. Prof. 'Aṭwa, interview, Mar. 25, 1985.

ijtihād. Prof. 'Aṭwa's argument seems clearly makeshift, even adventitious, when placed in the context of the medieval debate, discussed above, on the ruler's right to constrain qāḍī ijtihād -- where it certainly would have had pride of place if valid.

This answer invokes the microcosmic and textualist standard of truth of the traditional fiqh. An argument such as Prof. Aṭwa's, however, in offering the ruler's will as a source to be weighed alongside textualist ones, is advancing a constitutive,[573] procedural, and non-textual source of law, which is moreover strongly shifted toward the macrocosmic. Usually such arguments are advanced under the headings of maṣlaḥa and siyāsa shar'iyya, to follow.[574]

iii. The doctrine of siyāsa shar'iyya

The next two arguments, highly related, are the core of the case for codification.

Siyāsa shar'iyya is, of course, an extremely general concept, meaning simply governance in accordance with the sharī'a. It is the criterion for legitimacy of any action by the ruler not otherwise dictated by the sharī'a. As we have seen, this doctrine, even by the 'ulamā''s formulation, permits the ruler to take any action, including legislation, that (a) does not conflict with a clear injunction or

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[573]See n. 39 above.

[574]Prof. Aṭwa above himself supported the argument with a reference to maṣlaḥa.

principle of the sharī'a; and (b) is needed, in the ruler's determination, for the general welfare. This is the broadest, freest statement of law-making possible consistent with the upholding of the revealed texts. Is the principle broad enough to replace uṣūl al-fiqh as the determinant of the laws applied generally, even in areas traditionally covered by fiqh? In other words, can it be extended to permit legislation that not merely "complements" fiqh (as niẓāms are said to do in Saudi Arabia), but supplants it with codified laws? Let us consider here only this issue, postponing other uses of the doctrine to the next section.

Opponents respond, in essence if not in so many words, that siyāsa shar'iyya by definition can only supplement fiqh. For this reason, Saudi 'ulamā', as we have seen, while acknowledging the need for niẓāms issued by the King, at the same time portray the niẓāms as merely administrative or penal in nature, and consider their application a matter not for the sharī'a courts. To adopt siyāsa as the primary method of determining law, over ijtihād and uṣūl al-fiqh, would be a polar shift, from one constitutional and legislative axis to another. It would also represent a great secularization of the law, since the revealed sources would then operate solely as a check, not as the inspiration and source, of the laws;[575]

[575]Such a criterion exists in the constitutions of modern Muslim states, for example, in the Preamble to the Pakistani Constitution, requiring laws not to be "repugnant" to the Islamic sharī'a.

and, again, it would be an obvious shift to the macrocosmic and the constitutive. Indeed, it was precisely such a theory that was invoked for the adoption, under colonial influence, of laws of foreign inspiration, even in spheres traditionally governed by fiqh; it was argued that such laws were acceptable since they served maṣlaḥa, and since they offended no indisputable text [naṣṣ] of the Qur'ān, Sunna or ijmā'.[576]

More technically, the response to this proposal is to argue that siyāsa shar'iyya is powerless to operate in the face not only of indisputable texts, but also of particularly strong implications and derivations from those texts, such as general principles arrived at by induction [*qawā'id* or *mabādi'*] or compelling qiyās [*qiyās jalī*, etc.]. Adopting such a position would greatly restrict the scope of the proposed siyāsa law-making, certainly in the areas traditionally governed by fiqh. Even where such law-making were recognized, only the 'ulamā' would be competent to determine the extent of conflicts between siyāsa and sharī'a, and to them would have to be entrusted the central role in formulating such siyāsa laws.

iv. The doctrine of maṣlaḥa or utility

Finally, we come to the most fundamental of the arguments for codification arising within traditional fiqh doctrine.

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[576]Thus, defenders of the modern laws of, say, Egypt, drawn predominantly from French law, argue against their replacement on the ground that they "agree with sharī'a" in all but a few points, such as the taking of interest.

General welfare or utility is the substantive basis for law-making under the last heading, but also is recognized as a source of law within fiqh. If a valid utility argument is possible satisfying both fiqh and siyāsa standards, admitted both by the ruler and the 'ulamā', codification is not only unobjectionable but perhaps obligatory.

We briefly mentioned the doctrine of general welfare or utility, maṣlaḥa, as a source of law in Chapter Two.[577] Unlike the chief four "roots" of the law or uṣūl al-fiqh, maṣlaḥa is a matter of considerable difference of opinion, some scholars dismissing it as nothing but "imaginary." Even those who deny that it is a source of law, however, acknowledge it in at least two senses, one highly technical and the other highly general. The first sense recognizes maṣlaḥa as a component part of qiyās, the fourth in priority of the four roots, where it enters into the choice of the basis [*'illa*] for analogy.[578] The second sense, at the opposite level of generality, recognizes maṣlaḥa as the ultimate objective of sharī'a, since, as scholars often repeat, the sharī'a guides to the true maṣlaḥa of mankind. This position supports an argument that the revealed law is the true measure of utility. If maṣlaḥa operated only in the

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[577]See p. 269 above.

[578]See Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muḥammad 'Abduh and Rashīd Riḍā* (Berkeley: University of California Press, 1966), 66-102.

manner these theories suggest, one would not expect it to play a fundamental role in generating fiqh.

Yet other scholars understood maṣlaḥa in a more operative sense, according it status as an independent source of law.[579] These moreover claimed that, whatever their opponents may say, maṣlaḥa is in fact determinative in the legal production of all the schools. This view is often attributed to the Mālikī school, and Mālikī scholars gave the classic formulations of the principle.[580] Many Ḥanbalīs also upheld the principle, one of them, al-Ṭūfī, more emphatically than any other medieval scholar.[581] Ibn Taymiyya and his followers, while they denied maṣlaḥa this broad independent status,[582] yet gave it a characteristic, forceful interpretation that results, in

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[579]The term for this is "*maṣlaḥa mursala*," or "unrestricted" maṣlaḥa.

[580]See al-Qarāfī, discussed in Kerr, *Islamic Reform*, 66-79, and al-Shāṭibī (d. 790 H., 1388 C.). For example, al-Shāṭibī recognized maṣlaḥa as a separate source of law on the condition that the maṣlaḥa under consideration a) agree with the overall purposes [*maqāṣid*] of the sharī'a; b) fall within the sphere of action of human reason, meaning, among other things, that there is no role for maṣlaḥa in matters of worship; c) concern the protection of a necessity [*ḍarūra*], or the removal of a hardship from the umma in a matter which is either a necessity [*ḍarūra*] or a need [*ḥāja*]. 'Abd Allāh 'Abd al-Muḥsin al-Turkī, *Uṣūl madhhab al-Imām Aḥmad -- Dirāsa uṣūliyya muqārina*, 2d printing (Riyadh: Maktabat al-Riyāḍ al-Ḥadītha, 1397 H., 1977 C.), 416-17.

[581]al-Ṭūfī upheld maṣlaḥa even over a text of the Qur'ān. See Kerr, *Islamic Reform*, 97-102.

[582]See, e.g., Ibn Taymiyya, *Majmū'at*, 11:342-5. See also al-Turkī, *Uṣūl*, 426-27.

practice, in expanded reliance upon it.[583] To the extent such positions are adopted, especially in formulations such as al-Ṭūfī's and Ibn Taymiyya's, some of the freedom and flexibility characteristic of siyāsa shar'iyya is imported into fiqh.[584]

One should note two common fundamental characteristics of maṣlaḥa under all of the above conceptions. First, the maṣlaḥas to be considered in legislating are, using our terms, not only secular and this-worldly, but also religious and other-worldly.[585] Second, any maṣlaḥa to be considered must

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[583]Laoust, *Essai*, 245-250.

[584]Indeed, the congruence between the use of maṣlaḥa in the two cases is nearly complete. Usually, under siyāsa shar'iyya the term is reserved for questions of practice, involving state power, while under independent maṣlaḥa it is used for theoretical or doctrinal fiqh positions. But this distinction is not always held up, since it is characteristic of those advocating greater 'ulamā' involvement in the application of the law -- such as Ibn Taymiyya and followers, including many Saudi 'ulamā' -- to assert that siyāsa shar'iyya means nothing but use of a source of law not based explicitly on a textual source, and this regardless of who it is who wields it. This would include the independent maṣlaḥa and related sources. E.g., Shaykh Abū Zayd, interview, Apr. 24, 1985.

[585]Thus, a maṣlaḥa in avoiding something that detracts from prayer or fasting is of great weight. This does not mean, however, that one can change the more religious of laws on the grounds of maṣlaḥa. Muslim sources emphasize that, while human reason can appreciate worldly maṣlaḥas, it cannot comprehend other-worldly maṣlaḥas known only to God. More accurately, however, this point relates not to the distinction between this world and the next, or to something like our own "religious" and "secular," but rather to a distinction between duties or transactions with God [*'ibādāt*] and transactions with men [*mu'āmalāt*].

be "general," meaning a utility of society as a whole, and not of one or a few individuals.

A useful summary of Ḥanbalī views on maṣlaḥa is provided by Saudi scholar Shaykh 'Abd Allāh 'Abd al-Muḥsin al-Turkī, now the rector of the Imām Muḥammad Islamic University, in a work on Ḥanbalī uṣūl al-fiqh. After quoting extensively from Ḥanbalī sources, he concludes:

> Most of the scholars of uṣūl from the Ḥanbalī school say that the maṣlaḥa is not a proof, a view adopted by Ibn Qudāma and those who agree with him.
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> . . . [T]he Ḥanbalīs do not neglect maṣlaḥas in their fatwās [legal opinions] and studies, but [only] as long as they are maṣlaḥas that are testified to by the sharī'a in general statements, universal rules, and general principles, or as long as they fall within a category [or genus] that the sharī'a recognizes. Therefore they do not provide an independent basis for rulings.
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> . . .
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> [T]he definition of what is a maṣlaḥa or a harm is not left to mankind, for they cannot define [maṣlaḥa] independently without a support from the sharī'a of God. If we were to say that mankind could define maṣlaḥas and harms, and base legal rules upon them, and these constitute legislation as to them, then we would have permitted them to lay down legislation. The statement that there are maṣlaḥas that the sharī'a neglects is an attack on its perfection, comprehensiveness and generality.[586]

Note how this formulation of maṣlaḥa -- as valid only when "testified to by the sharī'a" -- ensures that only the 'ulamā' would be competent to wield it as a source of legislation.[587]

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[586]al-Turkī, *Uṣūl*, 430-433.

[587]Shaykh al-Ghuṣūn, interview, Dec. 18, 1984, Jan. 20, 1985. Sometimes the textual connection is very weak -- as in references to highly general aḥādīth, like "No harm and no causing of harm" [*lā ḍarar wa-lā-ḍirār*]. See al-Turkī, *Asbāb ikhtilāf al-fuqahā'*, 2d printing (Riyadh: Maktabat al-Riyāḍ al-Ḥadītha, 1396 H., 1977 C.), 129-134.

Indeed, al-Turkī mentions fear of the principle's deployment by the ruler as a cause for the 'ulamā''s conservatism on the subject.

> What is to be feared in latitude in [maṣlaḥa as an independent source, *al-maṣālih al-mursala*] is an access to whims [*ahwā'*] and desires, and a justification to neglect the sovereignty of the sharī'a of God in everything. . . .
>
> Therefore one must be careful in endorsing maṣlaḥas. It is necessary that those who define [maṣlaḥas] be scholars of the fiqh, religion and of knowledge of sharī'a, as those who hold with maṣlaḥa require.
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> Shākir al-Ḥanbalī [a modern scholar] said, "Conservatism of the scholars in adopting [maṣlaḥa] as an [independent] basis for legislation stems from their fear that rulers will take it as a means to achieve their aims, i.e., their whims and caprices, so they were very stringent in it to foreclose the access of evil [*saddan li-al-dharī'a*]."[588]

Thus, a broad maṣlaḥa principle is resisted to prevent dissociation occurring between the fiqh and its textualist guardians. It is often reiterated that the latter alone can appreciate maṣlaḥas properly, drawing on their profound knowledge of, and loyalty to, the objectives of the sharī'a as a whole, and that they alone can be trusted to resist the seduction of false maṣlaḥas foisted on Muslims from the West.[589]

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[588]Ibid., 431-32. This modern scholar is frank in admitting that 'ulamā' can adopt a doctrinal position -- denial of maṣlaḥa -- for reasons of maṣlaḥa (more precisely, that doctrine's corollary "the foreclosing of evil").

[589]See Muḥammad Sa'īd Ramadān al-Būṭī, *Dawābiṭ al-maṣlaḥa fī al-sharī'a al-islāmiyya ("Rules limiting* maṣlaḥa *in the Islamic* sharī'a*")*, 2d ed. (Beirut: Mu'assassat al-Risāla, 1977).

al-Turkī is frank, however, in observing that this restrictive position as to maṣlaḥa does not fully capture Ḥanbalī views on the subject. The Ḥanbalīs recognize that other legislation, that laid down and administered by the ruler, employs maṣlaḥa in a much more liberal way:

> It is to be observed that the Ḥanbalīs hold broadly with the maṣlaḥas in siyāsa shar'iyya, and with concern for the maṣlaḥas of mankind under that theory.
>
> . . .
>
> It is not permissible to a Muslim that he act independently in regard to a legislation, as long as God has not given him this right. Many matters that are built upon maslahas, like siyāsa shar'iyya, the public and private official functions [*wilāyāt*], and regulations [*anẓima*] -- in all of these God has given those who exercise them rights to act within their sphere, even if he did not lay down in a text the particulars of the action [to be taken].[590]

It seems, therefore, that al-Turkī has taken two contradictory positions -- one limiting maṣlaḥa out of fear of the whims of rulers, and the other making maṣlaḥa over to rulers without restriction. These positions can be reconciled by observing that the two standards of maṣlaḥa tend toward opposite ends of a spectrum defined by the two different legislative functions, namely, fiqh administered microcosmically by the 'ulamā', and siyāsa administered macrocosmically by the ruler. In rejecting the independent maṣlaḥa, al-Turkī, and others like him, seemingly declare that its breadth of action properly belongs -- for better or for worse -- to the realm of the state, force and power. They favor maintaining the distinction between the two functions,

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[590]al-Turkī, *Uṣūl*, 431, 433.

while advocates of the broader maṣlaḥa contemplate relaxing it.

One invocation of maṣlaḥa prominent in discussions of fiqh codification falls somewhere between the two modes of maṣlaḥa use al-Turkī describes. This is the idea that a fiqh code should be compiled from existing fiqh views, taken from the four schools and perhaps other fiqh authorities, and that the criterion of selection should be the relative maṣlaḥa of the views -- i.e., not which view is doctrinally (in an uṣūl al-fiqh sense), or internally, the most correct and the most consistent with other rules (evaluations that may include maṣlaḥa as a consideration to be weighed with others[591]), but which view is externally the more suitable in meeting the needs of the people of the time and country in question. As one Saudi scholar stated this approach:

> [A]dopting the views of the mujtahid fiqh founders [*a'imma*] in that which agrees with the maṣlaḥas of the Muslims is something obligatory in the sharī'a, since the Islamic schools take from a single source, and do not differ as to any categorical matter. [They differ] only in that in which the Wise Legislator permitted ijtihād, and the ruling of which changes with the changing of utility with time and place. This is the reason for the suitability of the Islamic sharī'a for every time and place.[592]

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[591]We encountered this conception when Shaykh al-Ghuṣūn endorsed qāḍīs considering utility in choosing between ijtihād views, even of different schools, to do justice in the concrete case. See p. 270 above. This use is consistent with the narrow maṣlaḥa doctrine just discussed; it is what is referred to in many of the medieval statements endorsing the practice.

[592]Shaykh Ibn Jubayr, written answers, p. 3.

We have already encountered this conception several times. One was as a criterion of the Ottoman practice of sulṭānic choice among school views made binding on qāḍīs;[593] another was as an important stratagem in statutory modernizations of family law.[594] The foreignness of such a method to the dalīl theory and ijtihād spirit of Saudi qāḍīs as described in Chapter Two is clear; also clear is its relative shift to the macrocosmic.

Let us stop here to note that the positions outlined so far in this section suggest a large number of possible forms of law-making based on maṣlaḥa, which can be arranged on a scale extending from microcosmic law-making to macrocosmic. At one pole is qāḍī ijtihād using traditional uṣūl al-fiqh and textual sources to decide a concrete case, in which maṣlaḥa is treated as one dalīl among others and is assessed by the qāḍī as it arises from the concrete case.[595] Next in order would

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[593]See p. 515 above.

[594]See p. 536 above.

[595]Shaykh al-Ghuṣūn praised this, analogizing it to driving, a skill possessed by some more than others. In his conception it is an obligation of microcosmic ijtihād rooted in religious knowledge [*'alā {al-qāḍī} an yataḥarrā al-maṣlaḥata 'an al-'ilm*]. Shaykh al-Ghuṣūn, interview, Jan. 20, 1985. Recall, as a vivid, though extreme, example of such a view, the view of Shaykh Abū Zayd that, even in matters such as traffic laws, an apparent obvious case for taqnīn, the law should be determined case-by-case by qāḍīs, since, for example, there are differences in drivers (some have prior offenses) and in cars (some have better brakes). A temperate view of another opponent of codification, Dr. al-Faryān, was that the qāḍī, when deciding an issue based on the general utility, must consult with the ruler and government, just as the latter consults 'ulamā' on the fiqh. Dr. al-Faryān,

be, once again, qāḍī adjudication in the specific case, but now with the maṣlaḥa assessed, not for each case, but by a general ruling made by a collective 'ulamā' authority.[596] Such an authority may go further, and recommend a single fiqh ruling from among those available in various schools, on the basis that it best serves the maṣlaḥa. Going even further, the authority may compile from such positions a non-binding code (this is our fatwā model). A third position would be the same as this last (the fatwā model), except it would shift from the narrow conception of maṣlaḥa to the broad, independent one. In other words, legislative freedom would become the basic principle, and the texts would be only a check on that freedom. Indeed, the term "texts" here would refer here only to the relatively firm and more fundamental sharī'a rules and standards (the inclusiveness of "texts" itself varying across a spectrum of doctrinal views). The fourth and fifth positions would be the same as the second and third, but with the ruler imposing upon qāḍīs as binding the outcomes reached by the 'ulamā'.[597] The justification for so

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interview, Oct. 15, 1984.

[596]See, e.g., Chap. 2, n. 244, where the Board of Senior 'Ulamā' instructs qāḍīs as to the relative maṣlaḥa of two rules. Note that in the current system this is a fatwā only.

[597]At about this point falls every modern codification of Islamic law, including the Majalla, the Ottoman Law of Family Status (1917), and all personal status codifications since. Among scholars advocating such codifications are Muḥammad 'Abduh, Abū al-A'lā al-Mawdūdī and Muḥammad Abū Zahra. As we saw, King 'Abd al-'Azīz invoked this criterion in his proposal, previously noted, to codify fiqh from the four

binding them is siyāsa shar'iyya. The sixth position would shift to the ruler himself the function of selecting among available fiqh opinions, according to the broad maṣlaḥa as he assesses it, merely as advised by the 'ulamā'[598] -- this is the civil-law model with which we began. Here both the content and the form of the law-making would be founded on siyāsa shar'iyya. The seventh and last position would be the same as the sixth, except that the laws would be constructed by the ruler from the whole cloth of maṣlaḥa, virtually ignoring traditional fiqh and its uṣūl, with advice from the 'ulamā' only to avoid clear conflict with indisputable textual rulings. This position could be (and has been) used to justify the adoption of foreign codes.[599] This is the standard pattern for legislating laws in spheres traditionally seen as "outside" fiqh, and as such it is the theory under which most Saudi niẓāms have issued.

Notice the highly varying roles that maṣlaḥa plays in all these forms of legislation. To reiterate, in some cases it is one of the several factors weighed in an individual ijtihād

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schools.

[598]As we saw, Shaykh 'Alī al-Khafīf did not even require consultation. Similarly, al-Qāsim declares that the Saudi Arabian Council of Ministers would be an appropriate body to legislate new codes. al-Qāsim, al-Taqnīn, 301-02.

[599]For example, in Egypt, sharī'a codifications are reviewed by committees of 'ulamā' from al-Azhar, but the legally binding votes are by the People's Assembly, in which there is scant 'ulamā' membership, and this not formal or ex officio.

leading to a unique judgment; in another it is the source for a rule recommended generally; in another it does not determine the content of a particular rule at all, but rather the choice among rules already existing; in another it justifies making such a choice binding; in another it justifies making such binding choices across the board, i.e., codification; in another it justifies that the ruler, not the 'ulamā', make these choices, make these rules binding, or both; in a final case maṣlaḥa is made the basis for a form of legislation nearly independent of fiqh or 'ulamā' expertise.

For the remainder of this section let us concern ourselves with the maṣlaḥas that can be cited to justify codification itself, *i.e.*, not its content but its process, or (returning to the civil-law model) the drafting of general laws which then, by the ruler's command, are made binding on qāḍīs. A Saudi scholar lists many of these maṣlaḥas:

> [Codification] is appropriate to follow in this age particularly, in which whims have multiplied, opinions grown diverse, and artifices increased. Also, new transactions now appear in their various types, in accordance with the necessities of practical life in the modern age. Moreover, the level of the judiciary is in general weaker than before. [Codification] distances qāḍīs from suspicious and doubtful circumstances, and from proclivities toward desires and bias in cases and decisions. This is an obvious maṣlaḥa, which necessity demands as a guarantee to secure justice, and to better dispel suspicion and satisfy litigants. . . . It is preferable to leaving the choice and weighing of proofs to every qāḍī individually, which would cause contradictions in judicial decisions similar in their

elements and facts, due to the plurality of fiqh opinions on many issues.[600]

Prof. 'Aṭwa explains the last point at greater length:

> [L]eaving judgment to the qāḍīs according to their own opinions, without a fixed authority to which they refer, when we know of the spread of taqlīd among them, leads to confusion and disagreement in the rulings, or, indeed, their mutual contradiction. There is no doubt that this will lead to confusion and conflict of ideas, and will open a wide door to indictment of the sharī'a by its enemies for its clashing and contradictory views. It is better, and a maṣlaḥa, to set a bound to these contradictions. This is by binding the qāḍīs to refer to the collection of codified rulings, in the form which we have described above. . . . It may be objected that qāḍīs in the early times were mujtahids, and ijtihād leads to divergence in rulings; that nonetheless the 'ulamā' did not disapprove [of the divergence]; and that . . . , therefore, the divergence is not prohibited.
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> The answer to this is that a confusion in conceptions [about fiqh rulings] among the public in the early periods, the time of the mujtahids, did not pose any danger as it does in later periods. This is because [the public then] were somewhat aware of the secrets of the legislation and of ijtihād, and had great confidence in their qāḍīs. They regarded them with respect and veneration. None among them would accuse the sharī'a of conflict and contradiction as a result of this difference . . . .[601]

Prof. 'Aṭwa also names additional aspects of maṣlaḥa served by codification: that codification would make qāḍīs more

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[600]Fatwā of 'Umar b. 'Abd al-'Azīz al-Mutrak, member of the Presidency of the Judiciary. al-Qāsim, *al-Taqnīn*, 17-18. Again, each of these claims of maṣlaḥas is rebutted in Bakr Abū Zayd, *al-Taqnīn*, 27-28. On the point that litigants should be able to know the laws in advance, Abū Zayd argues that, just as qāḍīs are enjoined not to give fatwās on matters which could come before them in court, so the rules a judge will apply should not be codified and made public. Both reasons for the former rule apply to taqnīn. One is that advance knowledge of a judge's views encourages use of legal tricks and corrupt stratagems; the other is that the judge will be placed in a bad light if he changes his view according to the circumstances of the case. Ibid., 34-37.

[601]Prof. 'Aṭwa, "Taqnīn," 3.

efficient, needed in this time of burgeoning cases; codification would not foreclose ijtihād, as some say, but rather encourage it, and in the more advantageous form of group ijtihād; codes would inform the people of the laws applying to them, thereby reducing litigation and increasing their satisfaction with judgments.

Finally, a maṣlaḥa given particular emphasis by most proponents of maṣlaḥa is the prevention of the further influx of Western laws. Muḥammad Abū Zahra writes in 1966:

> We are of the opinion that the derivation of a qānūn from the sharī'a is no longer a matter that is permissible only; it has now become obligatory and definitive. This is because we fear that our deficiency in this respect will lead to introducing a foreign law into our country, a law that does not arise from Islam and is not in agreement with it. Before us is the crossing. For when the 'ulamā' of Egypt failed to compile a qānūn taken from the four schools, its ruler Ismā'īl introduced the French law. Egypt, an Islamic country, remains under the domination of this law. Most unfortunately, the principle has begun to emanate to the other Islamic Arab countries, except the [Arabian] Peninsula, which until now has been saved. Why do those in charge of it not hurry, and avoid the evil before its occurrence, and lay down a qānūn drawn from the sharī'a? Action is necessary, for time is short, and the caravan is moving, and it is not right that the Peninsula should be among those left behind.[602]

Such are the arguments supporting codification in the civil-law model. As noted in the beginning, in their concern for utility, and their reliance on the power of the state,

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[602]al-Qāsim, *al-Taqnīn*, introduction, nūn. Prof. 'Aṭwa quotes this statement. The opponents' response is obvious, that it is precisely codification itself, not its content, that poses the greatest danger to the sharī'a legal system.

they emerge from perspectives that sound more in siyāsa than in fiqh.

D. SOME PROPOSALS AS TO CODIFICATION

The above gives us the warp and woof of argumentation about codification, as these emerge from focusing on the most prominent model, which we termed "civil-law." In this next section, let us expose some particular Saudi views favoring codification, and place them in relation to the theories just analyzed. (We omit discussion of views of opponents to codification, resting on the statements earlier in this section and material elsewhere in the book.) A key question is, to what extent do proponents suggest models of codification other than the civil law model, varying from it across one or the other of the four variables initially laid out?

1. Shaykh Muḥammad b. Ibrāhīm Ibn Jubayr

In a written communication to me, Shaykh Muḥammad Ibn Jubayr, then President of the Board of Grievances, and now Minister of Justice, expressed views that, while not explicitly approving of codification, adopt key elements of such a view.

Specifically on codification, he explained to me that in the Kingdom there were two schools of thought on the "compilation" [*tadwīn*] of laws -- he did not use the words

"code" or "codification." The first advocates that a group of 'ulamā' of various schools prepare such a compilation. This compilation would be binding on qāḍīs, but if a qāḍī is convinced that the compiled law does not achieve justice in the case before him, he could rule otherwise. His judgment would then be reviewed by a higher legal authority. If the latter disagreed with the qāḍī, it would overrule him; if it agreed, it would adopt the qāḍī's holding as a precedent, which would then become part of the compilation. The second view opposes codification, advocating that qāḍīs should practice ijtihād and decide as each sees best. Shaykh Ibn Jubayr noted objections to the second view: (a) it harmonizes badly with a system of hierarchy of courts[603]; (b) it leaves litigants unsure of the law to be applied; (c) qāḍīs are not all of a level capable of practicing ijtihād, and cannot be thrown into the "ocean" of the sunna reports, fiqh books, and so forth.

In various other discussions, Shaykh Ibn Jubayr expressed four doctrinal positions supportive of extensive codification. First, he endorsed the position that there are large spheres of law where the revealed texts, and accordingly 'ulamā' expertise in interpreting them, exert weak or no influence,

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[603]Shaykh Ibn Jubayr supports the publication of court decisions, or important ones; he accomplished this for the Board of Grievances. Shaykh Ibn Jubayr, interview, Apr. 30, 1985.

and as to these the Divine Legislator intended unfettered pursuit of maṣlaḥa:

> The fundamental principle in all matters . . . is permissibility.[604] The doors of development are wide open, nothing restricting them other than falling into one or another of the fixed prohibitions. . . .
>
> [Thus] new affairs and transactions among the people [are permissible,] except what involves suspicion of making illicit what God and His Prophet have made licit, or making licit what God and His Prophet have made illicit. Such matters are laid before the "people of wisdom" [*ahl al-dhikr*] among the 'ulamā', if it is a public issue, or before the judiciary if a dispute has arisen involving it.[605]

He emphasizes that what is prohibited was laid out exhaustively and in detail by God and the Prophet, leaving all else permissible.[606] Second, he expressed the position, quoted above, that it is a matter "obligatory in the sharī'a" to accept from among schools' views the view that serves the general maṣlaḥa, and that such freedom of choice on grounds external to textual proofs is intended by the Divine Legislator.[607] Third, he added to the last view that such a

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[604]The technical term is *al-ibāḥa al-aṣliyya*. While there is broad classical agreement on this principle, its actual scope depends greatly on other doctrinal positions. See Zayn al-Dīn b. Ibrāhīm b. Muḥammad Ibn Nujaym (d. 970 H., 1563 C.), *al-Ashbāh wa-al-naẓā'ir 'alā madhhab Abī Ḥanīfa al-Nu'mān* (Beirut: Dār al-Kutub al-'Ilmiyya, 1400 H., 1980 C.), 66 (permissibility of "things"). Shaykh Ibn Jubayr characteristically gives the principle wide scope. Thus he declares that Muslims have "full freedom to develop new contracts that serve their maṣlaḥas." His position correlates with views that maṣlaḥa mursala and siyāsa shar'iyya have broad application.

[605]Shaykh Ibn Jubayr, written answers, pp. 2, 4.

[606]Ibid., p. 2.

[607]See p. 727 above.

choice among available fiqh views based on maṣlaḥa may even be made by the ruler himself, who moreover may bind qāḍīs with his choice:

> The ruler's [*walī al-amr*] choice of an ijtihād ruling to be applied in the courts, even if that ruling is relatively the weaker view [*marjūḥ*], rests upon utility considerations as evaluated by the imām of the Muslims. The weaker view becomes the stronger due to its being chosen by the ruler. This is . . . the closing of the door of ijtihād on a particular issue, due to more pressing practical considerations. These [latter] are the desire to unify the rulings of the courts on an issue as to which rulings differ, whenever in his opinion some courts have chosen the ijtihād that is stronger as to [textual] proof, for example, or some of them have chosen inferior ijtihād due to considerations of the general utility. Hence, the ruler here chooses the most likely of the two views to achieve justice [*'adāla*] and the general welfare. The courts hold themselves obligated by his choice, so that their rulings become unified. Because of this any judgment is reversible if it contradicts the limitation on ijtihād as to the particular issue [by the King's command].[608]

Fourth, and most tellingly, he endorsed obligating qāḍīs to apply the anẓima of the Kingdom, even as to fiqh and ijtihād matters.

> The basic general norm applied in the judiciary is the rulings [*aḥkām*] of the Islamic sharī'a and the observed niẓāms issued in execution of it and pursuant to the powers of the ruler determined by the Islamic sharī'a. . . . As to that which does not differ with naṣṣ or ijmā', these [niẓāms] have the right to bind [qāḍīs] to one among various ijtihād views . . . if it appears that the adoption of that view serves a valid maṣlaḥa. This is because [the exercise of] state authority over the people [*al-wilāya al-'āmma 'alā al-ra'iyya*] is dependent

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[608]Shaykh Ibn Jubayr, written answers, p. 2. In discussion, he admitted that many 'ulamā' do not accept this idea, insofar as they do not consider binding on them an order by the King to the Minister of Justice to implement a fatwā of the Board of Senior 'Ulamā'; he held that one day opinion would crystallize in support of such an authority. Interview, May 15, 1985.

> and conditional [*manūṭa*] upon maṣlaḥa, as much in fiqh as in administrative matters.[609]

Taken together, these four positions would seem implicitly to allow codification on the civil-law model. Note, however, that the Shaykh's initial description of the codification contemplated in the Kingdom falls somewhat short of it, in referring the legislative drafting entirely to a council of 'ulamā'.

2. Shaykh 'Abd al-'Āl 'Aṭwa

Prof. 'Aṭwa offers a model close to the one just described. His position also differs somewhat from the civil-law model in giving the 'ulamā', both collectively and individually as qāḍīs, a larger role in legislation.[610]

Prof. 'Aṭwa approves of codification on the following conditions:

> [-- that it consist of] rulings [*aḥkām*] of the sharī'a taken from the recorded fiqh schools . . .
> -- that [its drafting] be entrusted to a committee of fuqahā' of the four schools, known for their piety, trustworthiness, complete knowledge of the Islamic fiqh,

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[609]Shaykh Ibn Jubayr, written answers, May 15, 1985.

[610]Prof. 'Aṭwa is more insistent than Shaykh Ibn Jubayr that only 'ulamā', and indeed mujtahids, be involved in drafting. Prof. 'Aṭwa, interview, Mar. 25, 1985. Consideration of maslaḥa in this process is merely part of weighing of the dalīl. Ibid., Jan. 8, 1984. Siyāsa shar'iyya has no authority over any issue as to which there is any proof, even an uncertain one, from texts. Ibid., Nov. 23, 1983. Even to evaluate social utility in such matters demands ijtihād. Ibid. This ijtihād requires the participation of 'ulamā' not only of religious law, but also of worldly sciences. Ibid. But a ruler is not frozen out: while if not a mujtahid he must consult the 'ulamā', yet if the latter differ, he may choose the view that seems to him best, based on his general knowledge [*thaqāfa*]. Jan. 8, 1984.

> expertise in matters of the current transactions of people, and experience in judging and in judicial affairs
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> -- that [it] be accompanied by an explanatory memorandum giving a commentary on each section, including its [doctrinal] support . . . from any or all of the texts of the Qur'ān, sunna, ijmā', qiyās, general principles [*qawā'id*], or sayings of the fuqahā' [and giving full references]
>
> -- that the school applied in the country be codified. If there is a ruling that causes people difficulty or hardship for any reason, then there shall be chosen from the recorded schools and the views of the precursors [*salaf*], supported by correct proofs, whatever is soundest for the people, most consonant with the time, most just in adjudication, and easiest to apply
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> -- that it be stated in the preamble of the compilation that these are rulings of the sharī'a, and that as to whatever is not provided for explicitly reference shall be made to the school followed in the country . . . [611]

Prof. 'Aṭwa, again like Shaykh Ibn Jubayr, envisions a role for the ijtihād of individual qāḍīs in the legislative process. Where a qāḍī cannot find an applicable rule either in the code or in the school fiqh, he is to practice ijtihād according to uṣūl al-fiqh. His solution "is referred to the 'ulamā' committee, which will undertake to codify it if it considers it correct, or to renounce it if it finds it wrong."[612] Moreover, even where the code does make a provision, if the qāḍī's own ijtihād conflicts with it, then his ijtihād is again referred to the committee for the same consideration.[613]

3. Shaykh 'Abd al-'Azīz b. 'Abd Allāh b. Ḥasan Āl al-Shaykh

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[611]Prof. 'Aṭwa, "Taqnīn," 1-2.

[612]Ibid., 5.

[613]Ibid.

Shaykh 'Abd al-'Azīz Āl al-Shaykh, former Minister of Education, in about 1965 issued a fatwā[614] approving that sharī'a rules be organized and presented in the literary form of niẓāms, as long as these are prepared by 'ulamā' trusted for their religion and knowledge. He thereafter states:

> [After such codes' issuance] there would be no obstacle in a qāḍī's adjudicating in accordance with such niẓāms taken from the sources of the Islamic law, even if the qāḍī believes that another opinion is stronger or more correct in his view, as long as this preference arises from an ijtihād of his own, not from a sharī'a text. However I would prefer personally for the qāḍī and the drafter of this sort of niẓām to leave to the qāḍī an opportunity for ijtihād within the general frame of the sharī'a and in particular cases, on condition that it be restricted to those qāḍīs with capacity to undertake such, or that [the qāḍī] offer as proof for the correctness of his view a text, an example, or a similar case. . . .[615]

This view, thus, is ambiguous about binding judges by state power, and is close to the fatwā model.

4. Judiciary Regulation

As discussed in Chapter Two, the *Judiciary Regulation* in 1975 floated a conception of judicial law-making suggestively related to certain codification models. It provided that the Supreme Judicial Council shall review sharī'a matters, at the instance of the Minister of Justice, in order to declare

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[614]His compatriots among those questioned by al-Qāsim remained non-committal. Thus, Shaykh 'Umar b. 'Abd al-'Azīz al-Mutrak found no doctrinal basis for ruling out codification, and asked for further study and decision based on relative maṣlaḥa. Shaykh Bin Bāz suspended judgment, awaiting further study of the question. al-Qāsim, *al-Taqnīn*, 15-20.

[615]al-Qāsim, *al-Taqnīn*, 16.

"general sharī'a principles" [*mabādi' 'āmma shar'iyya*], which would then bind the courts, that an arm of the Ministry of Justice will collect and study general principles emerging from the courts' jurisprudence and propose principles for adoption by the Council, that the lower appeal court [*maḥkamat al-tamyīz*] shall meet *en banc* when it decides to deviate from "an ijtihād it had earlier adopted," and that the Council shall have jurisdiction to resolve, with binding effect, differences of opinion within the lower appeal court on such issues.[616]

These provisions are an attempt to establish procedures of formal judicial law-making, within fiqh and by qāḍīs and 'ulamā'. As shown in Chapter Two, the Council has successfully opposed the implementation of these provisions, firmly rejecting a law-making role. Indeed, it even opposes circularizing its decisions to qāḍīs.

5. Dr. Muṭlab al-Nafīsa

Dr. al-Nafīsa discussed the problem of codification with me on several occasions. He did not take a position on any single model of codification, although he clearly favors some form of binding legislation in fiqh matters. He was rather concerned to show that, in practical terms, many of doctrinal controversies about codification were either overblown or misdirected, and that there are many possible avenues of legal

[616]Judiciary Regulation, Sec. 8, 14, 89.

development that lie doctrinally and practically open to the Saudi system.

For example, he emphasized that there is no need now for comprehensive codes, the prospect of which most arouses fear among opponents of codification. The system already has an adequate capacity for adaptation and practical solutions, thanks largely to the pragmatic nature of the Ḥanbalī school in worldly matters [*mu'āmalāt*], and the complementary nature of the legislative processes of the ruler and of the 'ulamā' (for example, the ruler's benefiting from differences among the 'ulamā' in that he chooses whichever view is most advantageous). He anticipates that Saudi Arabia's future legislative needs will be met by *ad hoc*, interstitial legislation (as traditionally in the United States legal system, statutes operated against the background of a common law), the whole harmonized and enforced by an independent and prestigious judiciary.

Further, he argued that the 'ulamā''s objections to codification -- for example, on compelling qāḍīs views [*ilzām*] or reducing qāḍīs to "machines" -- are really false issues. Such objections arise not on real doctrinal grounds, but from ignorance and fear of what codification would bring. For example, the 'ulamā' may not be aware (as, I would add, Dr. al-Nafīsa is, having had experience in both French and American legal systems) that in no legal system are judges reduced to mere "machines." Even if declared bound to apply

legislation, a qāḍī will still remain free in many respects to legislate, by interpreting the laws, distinguishing particular cases, and elaborating judge-made rules through force of precedent and the multi-level court system. This provides adequate scope for the qāḍī's conscientious devotion to the sharī'a. Again, the role of judges in the common-law system is a useful standard.[617]

As for the form of legislation, Dr. al-Nafīsa did not propose any single model for legislation, but raised several, seemingly advocating that they be used pragmatically and in combination to advance the legal system. First, he recognized a broad power of state legislation in fields now governed by fiqh. In civil law matters outside the family, the sharī'a, particularly according to the Ḥanbalī school, allows great freedom to formulate solutions in accordance with maṣlaḥa, since texts are few. In the modern Saudi system, these few texts should be understood as of a constitutional order, as checks on the legislative power, and the state seen as otherwise totally free to legislate in pursuit of maṣlaḥa.[618] Sharī'a checks on the drafting of the legislation would be preserved by the state's seeking advice from the 'ulamā', and

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[617]Note here, but as an overarching point, that, at least in terms of legal method and system, the common law affords far closer analogies to the sharī'a than does the civil law. Unfortunately, it is the latter that is the model of modern law throughout the Arab world.

[618]This is to endorse a position discussed in the section on siyāsa shar'iyya above, and now used for niẓām legislation.

after the legislation is issued, by review of issues raised in particular cases.[619] He also proposed, as a second model for legislation, encouraging judicial law-making through establishing principles of respect for precedent and of hierarchical control of doctrine, as was attempted, so far unsuccessfully, in the Regulation of the Judiciary. As a third model, he proposed widening the power of reversal by higher courts, hopefully to include the power not merely to remand, but also to substitute a judgment. Such a power, even if the laws were not seen to bind qāḍīs, would render a qāḍī's difference with appellate courts futile in practice, and gradually bring about conformity of view. As a last model, he suggested, on the example of the Restatements of Laws in the United States, that the non-binding opinions of a learned body such as the Board of Senior 'Ulamā' be used to influence judges on crucial points, and thereby, once they have won their way, especially among the appellate courts, perform some of the functions of legislation.

As a last point, in Dr. al-Nafīsa's view, it will not be these doctrinal disputes or particular legislative models that will be most determinative of the future legal development of the Kingdom, but rather the state of the Kingdom's legal

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[619]In one interview, Dr. al-Nafīsa suggested that if such an issue arises, the trial should be suspended and the "constitutional" issue referred to an appropriate body, which would vary according to the type of issue raised. He felt no single body should possess this ultimate authority. H.E. Dr. Nafīsa, interview, May 25-27, 1986.

education. His most urgent call is that future 'ulamā' and qāḍīs, while learning fiqh, learn at the same time about related modern legal conceptions, institutions, and problems. He often decried the fact that, for example, while future qāḍīs study a great deal about fiqh contracts of hire, they remain totally unacquainted with modern labor law, and even Saudi Arabia's labor code. 'Ulamā' ignorance of such matters -- and no doctrinal obstacle -- is the greatest obstacle to the progress of the legal system.

In sum, Dr. al-Nafīsa has taken a pragmatic and non-dogmatic approach to his goal of sound legal development in the Kingdom. He sketches out a number of possible models for development, drawing freely on a broad range of sources, from the Islamic past and from foreign countries. Assessing such alternatives, and the existing flexibility and resourcefulness of Saudi legal institutions, he is confident that the Kingdom can solve its various problems, including the need for reconciliation or unification of the systems for legislation and adjudication. He is committed to the position that the Kingdom's development not result in accentuating the existing bifurcation of the legal system between fiqh and siyāsa, between Western and Islamic, or (potentially at least) between religious and secular, but rather remain in harmony with the country's deeply religious history and traditions.

E. CONCLUSION

Having aired the debate, largely in its own terms, let us now step back and draw some observations about the controversy itself. Note how it has, on the doctrinal plane, a certain artificiality about it, a disjunction from what is really at stake. Both sides, invoking old Islamic doctrinal forms, find themselves, while no doubt directly engaged with each other, yet only obliquely oriented toward the challenges codification poses. Indeed, the arguments of the two sides can even take on a certain interchangeable, or mirroring, quality, in that by a change of emphasis, or the introduction of an exception, an argument readily shifts to the other side. It often seems that proponents differ from opponents only in the angle from which they choose to look. A sign of this is that we find traditionally trained 'ulamā' on both sides of the dispute.

In Islamic doctrinal terms, the arguments offered derive, on the one side, from the transcendent stringencies of uṣūl al-fiqh, and on the other side, from the here-and-now urgencies of siyāsa. Islamic legal thought and practice is old with the struggle between these pairs, and hence neither side in this dispute will be able to muster a coup-de-grâce. In many ways the arguments are complementary, the two sides of a coin.

But our observation about artificiality alerts us that perhaps understanding of codification is not advanced by this fiqh/siyāsa division of the argument. Codification is a new, different, conception of law, in fact poorly captured by an

opposition between ijtihād and maṣlaḥa. Locked in the old rhetoric, controversies on codification become sterile, unable to articulate what both sides sense is at stake. For the opponent of codification, this inaptness may trouble, but not deter, him; part of his responsibility is ever to reinforce the old forms and words. His proponent, facing such interlocutors (or indeed having himself the same predilections), may follow suit, fearing even greater losses from shifting to new ground.

Finally, notice that, if the argument for codification is traditionally framed, this framing gives a fatal advantage to the opponents of codification. If the debate is ultimately between ijtihād and maṣlaḥa, between truth and power, then the question of legitimacy is automatically won by the opponents. Then, even if codification is adopted, the justifications for it remain tainted by their origin, falling low in the epistemological hierarchy erected by the fiqh; their origin infects the outcomes with the germ of ultimate illegitimacy. If this is all the sanction the 'ulamā' are willing to offer to codification, that would seem to dispose of codification as an answer to the system's demand for unification and reconciliation. But yet the issue of codification is perennial, driven back into the forum time and again by forces -- theories and actors -- coming from outside the old paradigms.

Given this unsatisfactoriness in the terms of the debate, let us attempt to put into our own, artificial, words some of what is "really" going on. Let us consider the question of codification first solely from the perspective of the 'ulamā', both supporters and proponents.

Let us single out the point just made, that codification, if evaluated according to traditional fiqh categories, inevitably falls short of the permanent, the high, ground occupied by textual ijtihād, advancing instead on the lower-order justifications of siyāsa or maṣlaḥa. This relative delegitimization is the starting point in common between both 'ulamā' positions, that of supporters and that of opponents, neither of whom dare, or even wish, to change it. As we now know well, the 'ulamā' have for ages indeed depended on just this delegitimization as the key mechanism enabling accommodation to actual legal systems. In a way, then, the disagreement between the 'ulamā' on codification boils down to whether this same mechanism will meet the new challenge posed by codification. Why should codification not serve simply as one more method, like school taqlīd or chief-qāḍī hierarchical control in the past, through which the 'ulamā' effect control over legislation? Why should codification be any different from any of these old bargains with siyāsa and its techniques?

Supporters of codification seem to think that, even if codification does mean sacrificing much of the higher

legitimacy of law in sharī'a courts, and much of the piety of the qāḍī function, yet, if they insure that elite 'ulamā' dominate the drafting of codes, the result would be a net gain for the 'ulamā', or rather their elite.[620]

Opponents to codification might respond with three points. First, the historical record does not support any optimism that by codification the 'ulamā''s role, collectively or individually, will be enhanced, or even maintained. Since Western influence began, and the idea of codification spread, no similar accommodators from the 'ulamā' have realized such hopes.[621] Codification has uniformly had the opposite result.

Second, now more than ever, when old siyāsa ambitions have vigorously cross-bred with the aspirations to omnipotence of the modern nation-state, giving in to siyāsa to any degree is fraught with danger for the 'ulamā' and the traditional fiqh. What may once have been a safe bargain, given the old balance of social and technological power favoring the 'ulamā', would be foolhardy now.

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[620]After all, it has always been the elite alone who enjoy the freedom of ijtihād and the responsibility to treat with the ruler.

[621]The most probative case is that of Muḥammad 'Abduh, who, in support for codification, developed the fiqh justifications still used for it, but at the same time made clear that he intended 'ulamā' to play key legislative and adjudicative roles. The former part of his program was eagerly adopted; the latter was ignored. See Layish, "Contributions of the Modernists"; al-Qāsim, *al-Taqnīn*, 301.

Third, even if accepting codification or similar accommodations would lead to enhancing the fiqh's and 'ulamā''s institutional roles, there may be hidden losses. There is the profound threat (as we saw exemplified in the career of fiqh under the Ottomans) of further undermining the microcosmic grounding of the fiqh, and with it the transcendence of the sharī'a itself. Islamic religiosity has always depended vitally on that particular transcendence.[622] And in modern times that transcendence is threatened as never before.

Such is the 'ulamā''s dilemma. Note that both sides in their debate rely on the old fiqh/siyāsa distinctions, and on a continuation of strong 'ulamā' roles. This leads us to ask whether their responses are adequate to curtail the forces that push toward codification. Will adopting their views not lead toward either out-and-out codification (the dreaded civil-law model) or stagnation in the status quo, neither outcome achieving the reconciliation that all desire? Is there no form of reconcilation acceptable on 'ulamā' terms? There are in fact many, but all do impose costs in terms of change in 'ulamā' habits of mind, if not their beliefs; many of them were suggested by Dr. al-Nafīsa. All of them involve deploying a great deal of legal creativity, enriched by

[622]From Ibn Ḥanbal, the Ḥanbalīs have had the particular calling to protect that transcendence.

profound comparison with other systems, to evolve a unique modern legal system meeting Saudi Arabia's needs.

To give one encompassing example, one can imagine a successful model evolving from the following elements: (a) as to the judicial system: strong and independent judges, widely educated though still grounded in fiqh, who, applying both niẓāms and fiqh, assert a broad delegation to interpret the law and to employ case-by-case discretion, and maintain live connections with the law's ultimate ethical, textual roots; (b) as to the substantive content of laws: continued reliance on both Ḥanbalī fiqh and niẓāms, supplemented i) as to fiqh, by fatwās emerging from a massive effort at group ijtihād, these fatwās circulated to judges as presumptively, but not conclusively, binding, and ii) as to siyāsa, by new niẓām legislation by the King, the Council of Ministers and the new Consultative [*Shūrā*] Council; (c) as to the legislative process: i) in siyāsa matters, continuation of the present system, disciplined now by post-hoc sharī'a court review; and ii) as to fiqh, new procedures for collaborative ijtihād by fatwā authorities, courts and individual 'ulamā', disciplined now by new direct interaction with niẓāms, and by new formal procedures for consultation with the siyāsa authorities just named.

Again, none of this demands profound change in fiqh principles of legitimation. But this leaves us wondering, is there another, a third, way, that aspires not only to

reconciliation of the two sides of the legal system, but to their integration? Again, there are many such ways -- but all demanding of the 'ulamā' not just changes of habit, but partial renunciation of the fiqh/siyāsa dichotomy and much that goes with it. They also demand radical shifts from traditional uṣūl al-fiqh toward new sources of legitimacy, or more accurately, old legitimacies traditionally avoided by the fiqh, though they always sustained and enlivened siyāsa.

These other legitimacies draw on the many relatively macrocosmic conceptions that spring, in their ultimate root, from the conception of the umma, or the Muslim community. For example, ideals of justice and equality could be invoked to advocate codification as a means to advance due process and the equal protection of the laws, and to quell corruption and false privilege. Or, conceptions such as *naṣīḥa* (advice toward doing good, including advice to the ruler), *bay'a* (oath of loyalty), and ijmā' (in a scaled-down, relativized sense of consensus among an authoritative group of Muslims), and most importantly, *shūrā* (consultation) could be combined to construct a more compelling, more highly legitimated, theory of codification than one relying merely on maṣlaḥa.[623] Such theories, in passing the confines of medieval uṣūl al-fiqh, emerge into constitutional and political thought, or *uṣūl al-*

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[623]Prof. 'Aṭwa's theory of codification is part of a larger theory he holds of the modern Islamic legal system, including a theory of law-making through shūrā.

Note also that the 1991 'ulamā' petition represents a bold assertion of these ideals.

ḥukm.[624] Indeed, they tend to combine the two *uṣūl* together in new constructs.

Such new constructs are gaining ground slowly throughout the Muslim world, and will become increasingly a part of the Saudi debate over codification. The 'ulamā''s petition to the King in 1991 reflects such constructs to an extraordinary extent, in its demands not only for a Consultative Council [*majlis al-shūrā*] but for suppression of official corruption, favoritism, abuse of influence and incompetence, and its praise for equality, economic justice, defense of rights, freedom for restraint, and human dignity. The King's decision in 1992 to create a Consultative Council gives institutional form to most emphatic of these emerging ideals, consultation. Although many Saudis were disappointed with the concept of the new Council when unveiled, judging it against the legislatures of democratic states, its adoption indubitably plants a seed. Depending on how (and whether) this seed develops (in particular, what role the 'ulamā' play in, and in relation to, the Council) it may lead to a significant shift in the conceptual content of the debate on codification.

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[624]Sounded also is an emerging theory of economic justice, with macrocosmic ramifications.

APPENDIX A

ORGANIZATION AND BRIEF HISTORY OF THE SAUDI SHARĪ'A COURT[625] SYSTEM

The history of the present-day Saudi Arabian system of sharī'a courts is divisible into two periods of roughly thirty years each. The first begins with the conquest, completed 1926, of the Ḥijāz, the relatively cosmopolitan Western province, comprising Mecca and Medina, and King 'Abd al-'Azīz's adoption at that time of a relatively modern and sophisticated system of courts to be applicable to the Ḥijāz alone. The second period begins with the extension of that

[625]For discussion of the "siyāsa" tribunals, see p. 552 above.

Ḥijāzī system to the entire country, and the unification of the national judicial system, between 1956 and 1960. The following describes the evolution of judicial system during the two periods, first, as a dual system with separate regimes for the Ḥijāz and for the rest of the country, and then as a single system continuing to evolve from the Ḥijāzī form.

Prior to conquest of the Ḥijāz, the judicial system of Saudi regimes was simplicity itself. In Wahhābī Najd, the Sa'ūdī ruler would appoint single judges to the major towns, who held the general jurisdiction. Such a judge would work closely with the local governor [*amīr*]: the amīr would refer cases usually only after his failure to resolve the dispute by agreement, and after judgment the case would revert to the governor for enforcement, if the losing party did not submit to enforcement voluntarily. Procedure was almost entirely oral, records few, and adjudication expeditious in the extreme.[626] Justice was free.[627] The only appeal would be through complaint to the ruler. Yet judges were also guided and supervised by their seniors among the 'ulamā', whose authority derived in part from their learning and in part from

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[626]Sa'ūd b. Sa'd Āl Durayb, *al-Tanẓīm al-qaḍā'ī fī al-mamlaka al-'arabiyya al-sa'ūdiyya* (Riyadh: Maṭābi' Ḥanīfa, 1403 H., 1983 C.), 330-333.

[627]'Abd Allāh Ṣāliḥ al-'Uthaymīn, "Muḥammad Ibn-'Abd-al-Wahhāb: the Man and His Works" (Ph.D. diss., University of Edinburgh, 1972), 148. Until today, justice remains free or subject to nominal fees for registrations and such services.

the influence their learned gained them, in the form of veneration among the people and resulting access to the King.

In the Ḥijāz the Wahhābī conquerors encountered a relatively sophisticated judicial system. Sharīf Ḥusayn had maintained a system following the lines of old Ottoman sharī'a court organization, with a Ḥanafī chief judge and three deputy judges representing each of the other three Sunnī schools; the system likely possessed refinements like professional notaries, and elaborate record-keeping, but apparently not appellate level courts.[628] Though the system thus boasted urban sophistication, Wahhābī authors excoriate it as slow, wedded to corruption and bribery, and compliant to the Sharif.[629] Indeed, we would expect such weaknesses, as endemic vices in old Ottoman judicial systems.

After briefly maintaining this system in place, in 1927 King 'Abd al-'Azīz adopted a new framework for the courts of

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[628]Muḥammad Sa'd al-Rasheed, "Criminal Procedure in Saudi Arabian Judicial Institutions" (Ph.D. diss., University of Durham, 1973), 50. The Ottoman secular court system, the *niẓāmiyya* courts, were not instituted in al-Ḥijāz. Ibid.; C.V. Findley, "Maḥkama," *Encyclopedia of Islam*, 2d ed., 9; Āl Durayb, *al-Tanẓīm*, 302. On appeal in the *niẓāmiyya* system under the Ottomans, see Bernard Lewis, *The Emergence of Modern Turkey*, 2d ed. (New York: Oxford University Press, 1968), 121-23; Āl Durayb, *al-Tanẓīm*, 282-84. On review, very restricted, of sharī'a court judgments in the Ottoman system, see H.A.R. Gibb and Harold Bowen, *Islamic Society and the West: A Study of the Impact of Western Civilization on Moslem Culture in the Near East*, 2 vols. (New York: Oxford University Press, 1957), 2:129, 132; Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V.L. Ménage (Oxford: Oxford University Press, 1973), 257-8.

[629]Āl Durayb, *al-Tanẓīm*, 302.

the Ḥijāz.[630] Strikingly, as signalled by its provision of multiple judge courts and appeal levels, this system imitated not the preexisting organization, but the more modern and Western-influenced *niẓāmī* court system which had been in existence more than one-half century in the Ottoman Empire, but not applied to the Holy Cities.[631] The new system was formally applicable only in the Ḥijāz, the judiciary in the remainder of the country standing aloof, and only gradually coming to see need for the measures evolving in the Ḥijāz. As noted, however, after thirty years the system was formally unified, and the Ḥijāzī arrangements made universal; therefore, the following description of the Ḥijāzī system will make references also to the situation prevailing today.

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[630]The first such decree was Royal Decree of 4 Ṣafar 1346 (Aug. 2, 1927), reprinted in Government of Saudi Arabia, Institute of Public Administration, *Majmū'at al-nuẓum, Qism al-qaḍā' al-shar'ī, min sanat 1345 ilā sanat 1357* (Riyadh: Institute of Public Administration, n.d., reprint of 1357 H., 1938 C. edition), 6-9. (The latter source gives a chronological record of the various disparate decrees and orders affecting the Ḥijāzī sharī'a courts.) This first decree was soon supplemented and superseded, but only as to details, by many other decrees and orders, the most lengthy and complex of which are *Niẓām sayr al-muḥākamāt al-shar'iyya*, Royal Order 21, 29 Rajab 1350 (July 15, 1931), reprinted in Institute of Public Administration, *Majmū'a*, 21-25; *Niẓām al-murāfa'āt al-shar'iyya*, Royal Order, 11 Ṣafar 1355 (May 5, 1936), reprinted in Institute of Public Administration, *Majmū'a*, 43-62; *Niẓām tarkīz mas'ūliyyāt al-qaḍā' al-shar'ī*, Royal Confirmation No. 109, 24 Muḥarram 1382 (June 26, 1962) (Riyadh: Government Presses, 1398), also reprinted in Institute of Public Administration, *Majmū'a*, 65-106. None of these decrees has ever, to my knowledge, been repealed; each subsequent such decree holds over previous ones only to the extent of conflict.

[631]It seems he acted on the proposal of the Consultative [*Shūrā*] Council in Ḥijāz, to which this issue was referred.

Appendix A

In 1927, King 'Abd al-'Azīz, by means of a written regulation, defined two trial court jurisdictions, still existing today. Each of these courts possesses both civil and criminal jurisdiction. The lower-level jurisdiction is that of the *Musta'jala*, or Summary, Courts.[632] These courts have jurisdiction over all criminal cases except certain crimes involving potential sentences of death or "cutting," meaning amputation or retaliation for physical injury, and over civil cases (except land and certain family matters) involving less than certain amounts (in 1985 the amount was 8000 riyals [about $2000], or, in claims for compensation for bodily injury [*diya* or *arsh*], involving less than one fifth[633] the blood money for death, or about 20,000 riyals [$ 6000]). These restrictions have the consequence that the Summary Courts hear the great majority of criminal cases, but only few civil cases. Cases are heard in these courts by a single judge. The second level of trial court is that of the Sharī'a Courts, called Greater Sharī'a Courts [*Maḥākim Shar'īya Kubrā*] in the larger cities.[634] These courts hear all cases not

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[632]Special Summary Courts were created for Bedouin, and for certain small towns. These courts no longer exist. The name "Summary Courts" was changed in the 1975 Regulation of the Judiciary to "Limited Courts" [*maḥākim juz'iyya*], but this name seems not to have taken hold in practice.

[633]Al Durayb, *al-Tanẓīm*, 450.

[634]Again, the name of these courts was changed in the 1975 Regulation of the Judiciary to General Courts [*maḥākim 'āmma*], but this name seems to be ignored in practice. Sharī'a Courts in less populated locales assume all sharī'a functions not otherwise provided for locally, including those of the Summary

heard by the Summary Courts; as a result they hear most of the civil cases, and few criminal cases, though these are the most serious.[635] Cases are heard in these courts by a single judge, except for the criminal cases, which are heard by panels of three judges.[636]

In 1927 also, King 'Abd al-'Azīz created a judicial authority to hear appeals from Ḥijāz court judgments. This practice has also carried down to the present. Since 1927 all serious criminal cases have been appealable;[637] all other cases of any significance have also been appealable (excepting a period from 1954 to 1962, when appeals were cancelled; this is discussed below). Currently, judgments are appealable unless, for criminal cases, the sentence is of less than forty lashes or ten days imprisonment, and, for civil cases, judgment is for less than 500 riyals (about $ 150).[638]

Courts, the Notaries Public and the Public Treasury.

[635]al-Rasheed, "Criminal," 50-58.

[636]Kingdom of Saudi Arabia, *Niẓām al-qaḍā'*, Royal Order No. M/64, 14 Ranjab 1395 (July 22, 1975) (Riyadh: Maṭābi' al-Hukūma, 1396 H., 1976 C.), sec. 23 (hereafter cited as *Judiciary Regulation*). From 1927 to 1931, the Decree of 4 Safar 1346, Art. 1, required all cases to be decided by the judges of the court as a group, if more than one. It also established multi-judge panels for serious criminal matters, which persists to today. Ibid.

[637]Rasheed, "Criminal," 53.

[638]Certain judgments, such as those in default, concerned with real estate, or against juveniles or charitable trusts [*awqāf*], or for both prison and lashing, are always appealable. Rasheed, "Criminal," 55-61. Judgments based on admissions, reconciliation [*ṣulḥ*] or consent are unappealable. Al Durayb, *al-Tanẓīm*, 359.

The judicial body charged with hearing appeals has varied considerably over the years. At first vested in an individual, the President of the Judiciary [*ra'īs al-quḍāh*], from 1931 to 1954 it resided in the supreme administrative authority for the judicial system in the Ḥijāz, a committee called the Presidency of the Judiciary, sitting as the Board of Review [*tamyīz*].

Above the body charged with appeals there has always been a supreme judicial authority providing a final review of certain judgments, particularly sentences of death or cutting (which moreover are also confirmed by the King), and receiving requests for extraordinary appeals. In the Ḥijāz, the President of the Judiciary exercised this authority.

Theoretically, above the supreme judicial authority is always the King himself. Inevitably, as noted above, the Islamic ruler is an ultimate court of appeal. In Saudi Arabia appeals may always be made to the highest authorities, meaning the King or the Crown Prince, against any decision.[639] Since, however, Saudi kings have been scrupulous about a policy of avoiding interference in sharī'a matters and of leaving these to the 'ulamā',[640] such appeals are usually merely the

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[639]Rasheed, "Criminal," 223, 255-57. This authority was explicit in the earliest Ḥijāzī decrees (Royal Decree of 4 Ṣafar 1346, Sec. 7(w); Royal Decree of 24 Ṣafar 1346, reprinted in Institute of Public Administration, *Majmū'a*, 9), but, interestingly, disappears from subsequent decrees on judicial organization, such as the *Niẓām sayr al-muḥākamāt al-shar'iyya*, Sec. 32-33, issued in 1350 H.

[640]See p. 767 below.

occasion for referral of the matter to the supreme judicial authority, or to some other sharī'a tribunal, and are granted only on claims that the usual procedures of justice have miscarried. (We will touch on the jurisdiction of the Board of Grievances [*dīwān al-maẓālim*] which derives from an ancient Islamic expression of this ultimate authority, now given modern institutional form, and deals with suits against the government. The Board's past practice, and its present regulations, prevent it from interfering in the jurisdiction of Islamic courts.[641])

This describes the judicial system originating in the Ḥijāz. Although the system elsewhere was until the late 1950s untouched formally by institutions in the Ḥijāzī, yet apparently it was influenced by them. Indications are that by then, in an arrangement parallelling the regular Ḥijāzī appellate authority, a single very influential scholar, Muḥammad b. Ibrāhīm Āl al-Shaykh, the Chief Muftī of Saudi Arabia, heard regular appeals.[642] There also were parallels to the supreme judicial authority. Formally, the King performed this function, but in practice it seems a single scholar -- again Muḥammad b. Ibrāhīm -- had all the powers of supreme judicial authority. In any event, it had been a long-

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[641]See p. 562 above.

[642]Muḥammad b. Ibrāhīm in Najd began to perform the functions of Chief Muftī after 1950. Rasheed, "Criminal," 62. Ibid., 233 & n. 94 asserts that the muftī, and, after its creation, the Presidency of Najd acted as an appeal court, citing a letter dated 1955.

standing practice that one of the 'ulamā' serve as the King's "resort" [*marja'*] to nominate -- and likely supervise and discipline -- judges.[643]

The second half of the history of the legal system begins in 1957 when King Sa'ūd implemented in Najd and the Eastern Province a judicial organization paralleling that in the Ḥijāz, and in 1960, unified the two systems under a single Presidency of the Judiciary in Riyadh, extending to the entire country the regulations developed for Ḥijāz.[644] Shaykh Muḥammad b. Ibrāhīm served as the new President of the Judiciary until his death in 1969. This unification was part of the larger, long-delayed, administrative unification of the country, which King 'Abd al-'Azīz had set into motion when he ordered the creation of the Council of Ministers, just one month before his death on November 11, 1953.

While the 'ulamā' by now seem wholly reconciled to these developments, there were signs of opposition. One is the cancellation of appeals in 1954. One commentator accounts for this by a desire to accelerate procedure.[645] While this is no doubt partly true, a more basic reason would have been the

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[643]Āl Durayb, *al-Tanẓīm*, 331-33, noting that before him his uncle, 'Abd Allāh b. 'Abd al-Laṭīf, was the *marja'* in nominations. An order in 1957 gave Muḥammad b. Ibrāhīm authority as the general *marja'* of the 'ulamā' of the Kingdom.

[644]Āl Durayb, *al-Tanẓīm*, 333. This resulted in a flurry of organizational activity and institution-building. Ibid.

[645]Rasheed, "Criminal," 59.

opposition to regular appeals felt by Najdī 'ulamā',[646] knowing that the Ḥijāzī system would soon be extended to them.[647] In 1962, the King restored appeals, in the form of courts dedicated solely to appeals, called the Boards of Review [*hay'āt al-tamyīz*].[648] However, he limited their power of reversal to a fiqh standard -- discussed at length in the text[649] -- which was narrower than had applied to appeals in the Ḥijāz.[650] Even after 1962, until 1967, most Summary Court cases continued to be unappealable.

Another indication of opposition is the delay -- for sixteen years after the creation of the Council of Ministers -- in creating the Ministry of Justice. Apparently, the government could not contemplate this step before the death of

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[646]Rasheed, "Criminal," 233 and n. 94 cites letter by the Muftī that the decision of the trial judge ends a case, and that the rule of reversal provides the sole grounds for reversal.

[647]See introduction to Kingdom of Saudi Arabia, *Tanẓīm al-a'māl al-idāriyya fī al-dawā'ir al-shar'iyya*, Royal Confirmation No. 109, 24 Muḥarram 1372 (Oct. 13, 1952) (Riyadh: Maṭābi' al-Ḥukūma, 1398 H., 1978 C.), replacing *Niẓām al-murāfa'āt*. Actual unification commenced in 1956, and in 1957 the Ḥijāz organization began to be extended to the rest of the country.

[648]Rasheed, "Criminal," 58-61. Now officially called collectively the "Court of Review [*maḥkamat al-tamyīz*]." Boards of Review sit in panels of three judges, except in appeals from criminal judgments involving sentences of death or "cutting," which require panels of five judges. *Judiciary Regulation*, sec. 13.

[649]See p. 257 above.

[650]See p. 258 above.

the redoubtable Shaykh Muḥammad.[651] From 1970 to 1975 the judicial system was extensively reformulated bureaucratically, the resulting structure summed up in a new Regulation of the Judiciary (1975).

In this period the most striking change was the reduction of the powers of the Presidency of the Judiciary through distribution of its functions among different agencies of the government. The Presidency of the Judiciary had possessed great powers, extending far beyond the judicial system, over religious functions, including the issue of fatwās, the supervision of religious instruction, and the staffing of religious positions such as leading of prayers and preaching.[652] By 1975 these functions had all been assigned to newly created independent agencies or to other ministries. For example, the Board of Senior 'Ulamā', supported by the Administrations of Religious Research, Iftā', Propaganda and Guidance [*idārāt al-buḥūth al-'ilmiyya wa-al-iftā' wa-al-da'wa wa-al-irshād*], took over the responsibilities of iftā', both to the Government and to the people at large; the Ministry of Pilgrimage and Awqāf employed and paid other religious functionaries, such as preachers in mosques; another new

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[651]See Summer Scott Huyette, *Political Adaptation in Sa'udi Arabia: A Study of the Council of Ministers* (Boulder, Colorado: Westview Press, 1985), 76.

[652]This was true even in the Ḥijāz, from the first 1927 organization of the courts. Royal Decree of 4 Ṣafar 1346, Sec. 7(d); *Niẓām tarkīz*, secs. 2-12. Solaim, "Constitutional," 110; Āl Durayb, *al-Tanẓīm*, 334-335.

Presidency assumed the function of "ordering the good and forbidding the evil" (discussed in the text[653]); another Presidency the education of girls; and so forth.[654]

As to judicial matters, powers of the Presidency of the Judiciary had included supervision both of judicial administration and of adjudication *per se*. The new Regulation of the Judiciary now separated these functions between the Ministry of Justice, to deal with administrative matters, and a new Supreme Judicial Council [*majlis al-qaḍā' al-a'lā*][655] with authority for appeals and judicial supervision.

From this summary of Saudi court organization, a number of characteristics stand out. Clearly, the system created for the Ḥijāz boasted certain modern features, particularly an appeal structure, multiple judge benches, and written regulations governing sharī'a court organization and procedure, which were unknown in central Saudi Arabia, and only won the day there after three decades.

Yet, despite the novelty of the Ḥijāz court organization, and despite signs of opposition to extending them to Najd, I found no indication of Najdī 'ulamā' opposition to their

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[653]See Chap. 3, n. 22 above.

[654]Āl Durayb, *al-Tanẓīm*, 334-335.

[655]The entity was variously constituted and named between 1971 and 1975. Rasheed, "Criminal," 61-63.

adoption in the Ḥijāz.[656] Present-day Saudi 'ulamā' seem to have become reconciled to them. Shaykh Muḥammad b. Ibrāhīm Al-Jubayr states there is no difference of opinion about these steps.[657]

Independence of the Judiciary from the Executive

One feature about the new bureaucratized judiciary deserves special comment. By this bureaucratization, the 'ulamā' gained a power that had eluded positive, formal implementation throughout Islamic legal history -- this is the guarantee that the ruler not interfere in the exercise of judicial authority.

Certainly, as an Islamic principle, this guarantee exists and has long been celebrated. Thus, stories are told showing great judges' opposition to rulers' interference.[658] Other stories have pious rulers leaving their thrones and submitting their own persons to the jurisdiction of their judges when subjects raise claims against them. Indeed, such stories are

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[656]The general 'ulamā' opposition to regulations is clear, and is discussed in Chapter Three. It may be that regulations in judicial matters, as long as they were confined to the Ḥijāz, were accepted by Najdī and Wahhābī 'ulamā' as allowing them to exert on the Ḥijāz supervisory powers and other pressures toward unification.

[657]H.E. Ibn Jubayr, interview, Apr. 30, 1985; Āl Durayb, *al-Tanẓīm*, 305.

[658]N. J. Coulson, "Doctrine and Practice in Islamic Law: One Aspect of the Problem," *Bulletin of the School of Oriental and African Studies*, 18 (1956): 214-19.

told about King 'Abd al-'Azīz.[659] But these stories only underline that upholding judicial independence is a matter entrusted to the conscience of the ruler, as a pious and virtuous act. Fiqh public law on the other hand emphasizes that the ruler is the ultimate judge; indeed, were it physically possible and he were qualified, he could be the sole judge. Only if and when he chooses to delegate this authority do others gain jurisdiction; he may relieve such appointees at will. From these facts some have concluded that qāḍīs possess no independence in Islamic law.[660]

This dire picture of the powers of qāḍīs is false, as the entirety of Chapter Three seeks to show. In brief, judicial independence has always been supported legally by a number of fiqh doctrines, and socially and politically by the influence of 'ulamā' and their institutions. Saudi regimes themselves are apt examples, since their rulers have always been eager, because of their intimate political dependence on the 'ulamā', to avoid intrusion into matters belonging to the sharī'a courts;[661] the courts correspondingly assert strong independence of the ruling family and the executive branch. Persons of various nationalities and social and political

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[659]William A. Eddy, "King Ibn Sa'ūd: 'Our Faith and Your Iron,'" *Middle East Journal* 17 (1963): 259-60.

[660]Coulson, "Doctrine," 218; idem, "The State and the Individual in Islamic Law," *International and Comparative Law Quarterly* 6 (1957):56-60.

[661]Rasheed, "Criminal," 34-36, 255-257.

positions remark on this independence.[662] Lawyers tell stories of qāḍīs' disdaining to bend to royal prestige or even communications of royal will.[663]

Thus, Islamic systems may well have often achieved judicial independence to some degree through, in effect, cultural means; such has been the case in Saudi Arabia. But it remains true that qāḍī independence never in medieval times attained to protection by formal, positive, constitutional and legal guarantees.

In modern Saudi Arabia, however, a step in this direction has been taken, by the inclusion of certain guarantees in the *Judiciary Regulation* and other laws. Of course, regulations in Saudi Arabia are far from constitutional provisions. Indeed, one could say they lack even the dignity of laws, being in Islamic construction merely an expression of the ruler's present will. Yet when combined with the customary

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[662]An American consul praised Saudi qāḍīs as "incorruptible." Parker T. Hart, "Application of Hanbalite and Decree Law to Foreigners in Saudi Arabia," *George Washington Law Review* 22:172 (1953). See Ṣubḥī Maḥmaṣānī, *al-Awḍā' al-tashrī'iyya fī al-duwal al-'arabiyya* (Beirut: Dār al-'Ilm, 1965), 404; Samir Shamma, "Law and Lawyers in Saudi Arabia," *International and Comparative Law Quarterly*, 14 (1965): 1035; Solaim, "Constitutional," 137; Rasheed, "Criminal," 34-36, 71, 255-257. I frequently heard it stated that "No one controls the qāḍīs," and that no influence is useful once a case is before the qāḍī.

[663]E.g., a qāḍī repulsed a request, specifically supported by the King and conveyed by the King's brother, that an American consul attend a trial. Dr. Mujāhid Maḥmūd al-Ṣawwāf, interview with author, Jidda, May 21, 1983. Dr. al-Ṣawwāf often attended King Faisal's majlises, and observed him routinely reject petitions involving sharī'a matters. Ibid.

Wahhābī respect for the judiciary, they amount to more than that. They may, from this conjunction between tradition and form, be gaining some of the constitutional status, enforceability, and durability, of the laws from Western countries whose forms they imitate.[664]

The following are the key formal guarantees of judicial independence, all of them embodied in regulations [niẓām]. First, the Regulation for Trial of Ministers makes it a crime for a Minister to interfere in sharī'a court matters.[665] Second, the Regulation of the [Provincial] Governors in numerous provisions forbids governors from similar interference.[666] Third, the Board of Grievances, which is, in a way, the institutionalization of the King's own judicial authority, is barred from hearing any matter before the sharī'a courts.[667] Fourth, the 1975 *Judiciary Regulation*

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[664]See p. 565 ff. above. Of course, many of the laws come to Saudi Arabia through other Arab countries, particularly Egypt.

[665]*Niẓām muḥākamat al-wuzarā'*, Royal Decree No. 88, 22 Ramaḍān 1380 (Mar. 9, 1961) (Riyadh: Maṭābi' al-Ḥukūma al-Amniyya, 1401), Sec. 5(f).

[666]*Niẓām al-umarā' wa-al-majālis al-idāriyya*, Royal Order No. 41/1/1, 15 Muḥarram 1359 H. (Feb. 23, 1940), Arts. 15, 24. Similar provisions are found in other regulations establishing provincial administration.

[667]Kingdom of Saudi Arabia, *Niẓām dīwān al-maẓālim*, Royal Decree No. M/51, 17 Rajab 1402 (May 10, 1982), Sec. 9.

provides qāḍīs certain guarantees encouraging independence and impartiality.[668] Its first article reads:

> Judges are independent, and there is no authority over them in the exercise of adjudication other than the rulings [*aḥkām*] of the Islamic sharī'a and the authoritative anzima. No one has the right to interfere in adjudication.[669]

The regulation states that qāḍīs cannot be terminated at all after one year's probation, but can only be "transferred to [paid] retirement."[670] The Regulation specifies the causes justifying forced retirement, which are all to be determined by "decision of the Supreme Judicial Council," and then implemented by royal command.[671] The causes for transfer are the following (besides reaching the retirement age of 70 and chronic illness). The first arises from the examination [*taftīsh*] conducted by the Ministry of Justice into each judge's performance. If examination (which can be contested by the judge) results in a "less than average" grade three

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[668]Earlier regulations had included some of these guarantees, particularly the "Judges' Cadre," Royal Decree No. 1, April 22, 1967. See Soliman A. Solaim, "Constitutional and Judicial Organization in Saudi Arabia" (Ph.D. diss., The Johns Hopkins University, 1970), 103-111. King Faisal called for judicial immunity, a Ministry of Justice and a Supreme Judicial Council in his Ten Point Program on taking office as Prime Minister in November 6, 1962. King Faisal b. 'Abd al-'Azīz,
"Ministerial Statement of 6 November 1962 by Prime Minister Amir Faysal of Saudi Arabia," *Middle East Journal* 17:161-162 (1963); Rasheed, "Criminal," 26. See also Rasheed, "Criminal," 40-41.

[669]*Judiciary Regulation*, Sec. 1.

[670]Ibid., secs. 51, 85.

[671]Ibid., sec. 51.

times running, then he is retired.[672] The second relates to the general power of supervision over a judge granted to the Minister of Justice and to the president of the particular court. If a qāḍī's president issues him a warning, and this warning is then investigated and sustained (again, the qāḍī has opportunity to contest), and even then the qāḍī does not reform, complaint is raised to the Supreme Judicial Council which conducts a full-dress hearing.[673] The last cause, the most general and undefined, is simply that a qāḍī has lost "the reliability and respect which the position demands."[674] These provisions no doubt reserve for the executive, in the form of the Ministry of Justice, considerable powers of supervision, backed by broad threats of forced retirement; yet they place the power to punish solely in the hands of a judicial body, the Supreme Judicial Council, and not the Ministry of Justice or the King.

Lastly, the 1992 *Fundamental Regulation* enshrines the principle of judicial independence:

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[672]Ibid., sec. 69.

[673]Ibid., secs. 71-84. This procedure is in addition to any other criminal or civil proceedings against a qāḍī. But a qāḍī cannot be tried, criminally or civilly, or subjected to arrest or to any criminal investigation, without notification to and approval by the Supreme Judicial Council. Ibid., secs. 4, 71-84.

[674]Ibid., sec. 51.

The judiciary is an independent power. There is no authority over judges in their adjudication other than the authority of the Islamic sharī'a.[675]

[675]*Fundamental Regulation*, Art. 46.

APPENDIX B

WEBER'S "KADIJUSTIZ"

We have described the functioning of the qāḍī in terms that suggest the application of the Weberian term "charismatic." Indeed, Weber chose the very term "*Kadijustiz*" to identify the ideal type, the pure concept, of "charismatic adjudication." The fame of this term, the exceptional attention it draws to the Islamic qāḍī, and its intriguing association of the qāḍī with the "charismatic," all demand our attention.

We do so here, however, with another purpose in mind, that of airing, and testing, three theses relevant to our investigations. The first of these draws a lesson for comparative law, by explaining how, despite certain

appropriate initial insights, Weber's progress toward understanding Islamic law was blocked by certain characteristically Western presumptions distorting the objectivity of his method. The second thesis is also comparative, that, in order to relate our results explicitly to a framework of Western ideas, the legal and sociological schemata of Weber serve, especially given their immense influence and reach, as useful reference points. The last thesis begins by agreeing with Weber's association of "charisma" with qāḍī justice, but argues that the idea has a very different content than Weber gave it. Namely, the thesis is that the "charisma" of qāḍī justice should be understood as traceable, or even as equivalent, to the drive toward inner-directedness in reality architecture that we have noted in certain Islamic legal phenomena.[1] A more general claim is suggested that Weber's "charisma" relates in a fundamental way to the phenomenon of inner-directedness. This third thesis is too complex and ambitious to establish or fully investigate in this book, and is mentioned for now only as an explanatory stance from which to organize and approach the material of this book.

> "Charisma" to Weber is
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> a certain quality of an individual personality by virtue of which he is set apart from ordinary men and treated as

[1]See p. 186 above.

> endowed with supernatural, superhuman, or at least specifically exceptional qualities.[2]

This "certain quality" and its sources within the individual Weber does not attempt to explore, beyond ascribing to it terms like "supernatural," as above, or elsewhere "enthusiasm," "frenzy," "magic."[3] Instead, Weber chooses to define charisma, in the above definition and elsewhere, in external terms, by reference to the manner in which the charismatic individual is received, treated, by others. His definition is positive, concerned with the fact of the authority the individual attracts:

> The charismatic leader gains and maintains authority solely by proving his strength in life. . . . [H]is divine mission must 'prove' itself in that those who faithfully surrender to him must fare well. . . .
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> . . .
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> . . . His power rests upon this purely factual recognition [by his followers] and springs from faithful devotion. It is devotion to the extraordinary and unheard-of, to what is strange to all rule and tradition and which therefore is viewed as divine. It is a devotion born of distress and enthusiasm.

Consistently with his objectives, charisma is defined socially, in terms of social acts. Here we should recall Weber's definition of a social action[4]:

> Action is social in so far as, by virtue of the subjective meaning attached to it by the acting individual (or individuals), it takes account of the

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[2]Max Weber, *On Charisma and Institution-Building*, ed. S.N. Eisenstadt (Chicago: University of Chicago Press, 1968), 48.

[3]Ibid., 18-19, 48-49.

[4]See Introduction, n. 7 above.

> behaviour of others and is thereby oriented in its course. . . .
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> . . .
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> . . . Subjective attitudes constitute social action only so far as they are oriented to the behaviour of others. For example, religious behavior is not social if it is simply a matter of contemplation or of solitary prayer.[5]

Since, however, most charismatic phenomena are not oriented, in terms of their meanings as viewed internally by the charismatic individual and his followers, toward their effects on others or their social effects and influence, this definition inevitably flattens descriptions of the charismatic phenomena themselves. By his definition, therefore, Weber shows a decision not to explore these internal meanings, and, beyond this, the inner structures of thought or feeling that give rise to charisma. Yet, on examining Weber's remarks about charisma, he uses the term "charisma" precisely when he encounters sources of legitimizing, validating, sanctifying, ordering, social power which, internally to the charismatic leader and often also his followers, have referents, arise in strata, can be assigned to impulses or causes, within an individual or individuals and not in external, social spheres. His definition of charisma serves to give him a terminological handle with which to manipulate these phenomena without investigating their inner dimensions. Perhaps Weber felt this approach was dictated by his method, but in reality it seems

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[5]Weber, *Charisma*, 3-4.

to reflect and depend upon a substantive thesis about the origins and nature of charisma. As S.N. Eisenstadt observed,

> For Weber, freedom, creativity, and personal responsibility did not lie outside the scope of society, of social relations and activities. On the contrary, interpersonal relations, organizations, institutional structures, and the macrosocietal setting constituted the arena in which freedom, creativity, and responsibility could become manifest.[6]

By Weberian standards, then, this book's discussion has largely been an investigation of the "charismatic" ideal of the qāḍī, but with a difference from Weber that we have investigated it from the internal standpoint of the qāḍī and the legal system. We have sought to describe the internal reality-structure of a legal process that strains toward a microcosmic ideal, which seeks to a maximum extent to deny the very relevance to it of the "interpersonal relations, organizations, institutional structures and macrosocietal setting" in which Weber situates charisma. In other words, we have sought to penetrate, rather than to avoid by a positivist or behavioral definition, the contradiction that, like Weber, we are studying charisma's effects in the very context which it, viewed in its internal meanings and those of its adherents, wholly eludes.

The task of finding the inner meanings of charismatic phenomena seems even more important if we take the phenomena we here examine as falling under Weber's concept of "routinized charisma." This he explains as follows:

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[6]Weber, *Charisma*, xvi.

> In its pure form charismatic authority has a character specifically foreign to every-day routine structures. The social relationships directly involved are strictly personal, based on the validity and practice of charismatic personal qualities. If this is not to remain a purely transitory phenomenon, but to take on the character of a permanent relationship forming . . . any sort of political or hierocratic organization, it is necessary for the character of charismatic authority to become radically changed. Indeed, in its pure form charismatic authority may be said to exist only in the process of originating. It cannot become stable, but becomes either traditionalized or rationalized, or a combination of both.[7]
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> "[E]conomic factors . . . predominantly determine the routinization of charisma: the need of social strata, privileged through existing political, social, and economic orders, to have their social and economic positions 'legitimized.' . . . These interests comprise by far the strongest motive for the conservation of charismatic elements of an objectified nature within the structure of domination. Genuine charisma is absolutely opposed to this objectified form. It does not appeal to an enacted or traditional order, nor does it base its claims upon acquired rights. Genuine charisma rests upon the legitimation of personal heroism or personal revelation. Yet precisely this quality of charisma as an extraordinary, supernatural, divine power transforms it, after its routinization, into a suitable source for the legitimate acquisition of sovereign power by the successors of the charismatic hero.[8]

Here we find Weber restricting charismatic authority to phenomena arising from a single individual; that authority can be stabilized and perpetuated only if its nature is "radically" changed, to allow its institutionalization as "objectified." Objectified charisma is no longer charisma, but traditional or rational authority.

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[7]Ibid., 54.

[8]Ibid., 39.

Thus, if the qāḍī practice described above is to be understood as "routinized" charisma, Weber's explanations of it become flattened still further, with the suggestion that it is then wholly traditional, rational or both. Such an understanding is even less able to account for the inner dynamic of the qāḍī practice we have observed, which, in rooting itself in microcosmic interpretation, is not wholly traditional or rational in Weber's senses, but is also charismatic in some observed effects. Here we see perhaps another consequence of Weber's basic definition of charisma, directed at understanding authority and domination: a tendency to see charisma as an inscrutable quality confined in the individual who is a leader and wields authority, and not as a quality sensible in the values or outlook he exemplifies or propounds, which is appreciated and participated in by his followers; charisma can move beyond the individual leader only after being changed "radically."

In view of this assessment of the Weberian treatment of "charisma," let us return to Weber's choice of the term "Kadijustiz" to label the ideal-type of "charismatic adjudication." If it is true, as we posit, that Weber tended to use the label "charismatic" to cover all phenomena justified internally within the single individual, then, given our discoveries about the qāḍī function, we are not surprised at his association of charisma with "Kadijustiz." But, if our assessment of his treatment of charisma as "flattening"

internal explanations is correct, then we would expect, first, that his description of Kadijustiz will be flat in the ways just explored, and second and in general, that his system will be ill-suited to describe the phenomena we have observed. Both of these expectations are borne out.

After drawing the oppositions between the charismatic and the traditional and rational, Weber describes charismatic forms of domination. As to law he writes:

> Genuine charismatic domination therefore knows of no abstract legal codes and statutes and of no 'formal' way of adjudication. Its 'objective' law emanates concretely from the highly personal experience of heavenly grace and from the god-like strength of the hero. Charismatic domination means a rejection of all ties to any external order in favor of the exclusive glorification of the genuine mentality of the prophet and the hero. Hence, its attitude is revolutionary and transvalues everything; it makes a sovereign break with all traditional or rational norms: 'It is written, but I say unto you.'

Clearly, this is an apt description of the lawmaking of the Qur'ān, through Muḥammad, on which no doubt it was partly modeled. (It, however, does not aptly describe the reported actual adjudications by Muḥammad, who observed, for example, formal rules of evidence and who reasoned from earlier revelation and from common sense.) At this point Weber brings in the term Kadijustiz:

> The specific form of charismatic adjudication is prophetic revelation, the oracle, or the Solomonic award of a charismatic sage, an award based on concrete and individual considerations which yet demand absolute validity. This is the realm of "*kadi*-justice" in the proverbial, not the historical sense.[9]

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[9]Weber, *Economy*, 2:1115.

In referring here to Kadijustiz in the "proverbial sense" Weber is not confining charismatic adjudication in Islam to the Prophet Muḥammad. Weber's information about Islam led him to the belief, historically false, that Islamic legal theory sanctioned, for the earliest eras of Islam, a charismatic lawmaking exercised by "prophets of the law, the mujtahidun of the charismatic epoch, who were still thought of as agents of juridical revelation," whose laws were ever after sanctified by ijmā'. He described ijtihād as "the charismatic, juridical-prophetic power of legal interpretation," exercised by these "prophets of the law."[10] Presumably, Weber imagined such mujtahids exercising in their adjudications charismatic authority similar to the Prophet's. As to Kadijustiz in the "historical sense," Weber thought that after the law was generated and fixed, actual, historical qāḍīs were engaged in a wholly different activity:

> For the adjudication of the (historical) Islamic *kadi* is determined by sacred tradition and its interpretation, which frequently is extremely formalistic; rules are disregarded only when these other means of adjudication fail.[11]

Where formalistically determined rules of the sacred law failed or were disregarded, the qāḍī decided

> in terms of concrete ethical or other practical valuations . . . know[ing] no rational 'rules of decision' (*Urteilsgründe*) whatever.[12]

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[10]Ibid., 2:819.

[11]Ibid., 2:1115.

[12]Ibid., 2:976.

Weber thus understood the qāḍī enterprise as profoundly split -- both in historical era and in function -- into two types of extreme irrationality -- one an ancient near-prophetic charismatic adjudication *cum* lawmaking, the other a modern adjudication either enslaved to an obtuse formalism or abandoned wholly to concrete valuations unaided even by standards or principles.

The "irrationality" to which Weber refers is explained in his famous schema of forms of legal rationality. This schema derives from the permutation of the oppositions rational/irrational, formal/substantive.[13] According to his descriptions of the fiqh in various places -- which again are infected with vital errors of fact and interpretation -- Islamic legal phenomena comprise behavior in all four categories: (i) fiqh exhibits formal irrationality, in that it submits to the concrete rulings of revelation, as laws "which cannot be controlled by the intellect"; (ii) fiqh exhibits formal rationality, in the sense that it casuistically elaborates legal propositions by qiyās, which he takes as "the analogy of extrinsic elements," not "the logical analysis of meaning" or "highly abstract rules"; (iii) fiqh includes substantive rationality, to the extent that substantive general principles motivate the law and at times survive, but only covertly, in formalized rulings; (iv) fiqh

[13]Ibid., 2:654-58.

exhibits substantive irrationality, this to the extent that judgments are made

> "influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms."[14]

The "proverbial" Kadijustiz stood chiefly as the label for the ideal-type of the fourth form, substantive irrationality "advanc[ed] to a prophetic break with all tradition,"[15] and thus linked with the charisma of the lawmaker or lawfinder. The "historical" Islamic Kadijustiz, however, along with the fiqh itself, can be seen to include on occasion all four of these categories. But "Kadijustiz" proper is for Weber the label for adjudication in the fourth category. Occasionally Weber faintly hints at an overlap into the third category. Thus,

> Charismatic justice in the form of the oracle, ordeal, *fetwa* of a *mufti* or judicature of an Islamic ecclesiastic court, is irrational and at best decides a given case according to considerations of equity.[16]

Yet note that, as in this quote, Weber still wished to associate such adjudication with the term "charismatic."

From our own knowledge of the qāḍī, it is obvious that, although there is an element of truth in each leg of this

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[14]Ibid., 2:656.

[15]Ibid., 2:976.

[16]Ibid., 2:1185. See also 2:844-45. But most references replace it firmly in the fourth category: 2:813, 814, 823, 891-2, 976-980, 1395. In view of these citations, Rheinstein's note, 2:806, n. 40, stating that "Kadijustiz" to Weber means the administration of justice by "postulates of a substantively rational law," is puzzling.

analysis, each leg gives an extremely exaggerated characterization, and is subject to very serious qualifications. The result is that overall the description is at best a caricature; working one's way through it proves to be an empty exercise. Qāḍī justice, as we found it, combines all of these four elements organically, in a way that Weber's four categories cover (because they are analytically exhaustive) but do not illuminate. Most notable is that Weber's conception fails to capture the sorts of rationality and formality[17] that we have discovered and that are marshalled and disciplined precisely to yield the sort of charismatic judgment bound to the concrete factors of the particular case that Weber wishes to exile to a negatively defined fourth category, the non-formal, non-rational. Or, put another way, the combination of the four elements in actual qāḍī-justice issues, integrally and organically through microcosmic interpretation, in a lawfinding exhibiting a force Weber wants to call "charismatic" -- but at the same time evades categorization in the irrational categories Weber defined as Kadijustiz par excellence. The bottom line is that we can hardly be comfortable with a description of the qāḍī

[17]The formality here includes the Islamic use of the distinction of bāṭin and ẓāhir in analysis of the trial and its outcome, discussed Chap. 2, n. 381.

function we have observed as utterly irrational in either legal or ethical terms.[18]

Thus, aided by his misapprehension of Islamic law, Weber saw in qāḍī justice an example of extreme irrationality in adjudication. His flat view of charismatic authority leads him readily to drive adjudication enjoying "charismatic authority" into the "substantively irrational" term of his legal rationality schema. Therefore, it seems clear that, at least for the sort of charismatic phenomena we observe here, Weber's term "Kadijustiz" does reflect the flatness and lack of explanatory power that we anticipated. If the problem is to be stated in one word, it is that Weber's treatment of rationality and charisma in law is biased toward the macrocosmic in our sense.[19] Weber's bias is due to his having as his ultimate preoccupation providing an explanation for modern Western modes of political domination and authority, which he believed to be unique in history and to occupy the extreme of the macrocosmic in our sense. Our discussion leads us to point out that such a macrocosmic bias will prevent him from attaining an organic, viable, conceptualization of at

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[18]See Weber's use of the term "value-irrationalism" for a much milder Western attempt to turn from precedent toward balancing of values in each individual case. Weber, *Charisma*, 122.

[19]See Harold Berman, "Some False Premises of Max Weber's Sociology of Law," *Washington University Law Quarterly*, 65 (1987):758, 760-63, arguing that Weber defined domination and law positively, and studied law with emphasis on the formally rational category, because he himself held a positivist theory of value.

least some forms of charismatic phenomena, including certainly those we confront here. We are led to ask whether, lacking such a conceptualization, any Weberian explanation of such charismatic phenomena will succeed, even in accounting for them in their external aspect as social behavior.

A final question is whether any lesson can here be drawn, beyond mere shortcomings in Weber's method or defects in the information he obtained about Islamic law and history. My point is that both these forms of error, since they have such tendentious results, are ultimately not accidental, but are symptomatic of a larger difficulty, extending to us all, in grasping what the Islamic law is about. The common modern Western predilection is still the same as Weber's, to imagine law as general, positive, public, mandatory, secular, externally and socially rooted. If we indulge such predilections, and also, as Weber does, adopt a scientific method that virtually guarantees that we will not pass beyond them, we will make Weber's mistakes about the qāḍī function, and about the Islamic law ideal.

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APPENDIX C

CHART OF ḤUDŪD PENALTY OCCURRENCES

From May 16, 1981 through April 18, 1992 (12 Rajab 1401 to 16 Shawwāl 1412) -- almost eleven (solar) years.

All theft penalties are by amputation of the right hand. All adultery penalties are by stoning (the other adultery punishment, flogging, applicable to offenders never married is not reported in these sources). All other penalties, except where noted, are by beheading.

The third column, headed "brigandage," includes court convictions for ḥirāba, killing ghīlatan, ta'zīr by death penalty, and executions siyāsatan on the King's authority.

Judging by names and nationalities, all persons stoned for adultery were Muslims. The other penalties, however, were enforced both on Muslims and non-Muslims.

Numbers in parentheses give the number of separate announcements, since some announcements refer to incidents involving more than one offender.

	Sariqa Theft	*Zinā* Adultery	*Ḥirāba/Ghīla/Ta'zīr* Brigandage, etc.
5/16/81 ¦ 12/31/81	2	1	3 (2)
1982	2	0	6 (5)
1983	1	1	8 (6)
1984	2 (1)	0	1 (by shooting)

Appendix C

	Sariqa Theft	*Zinā* Adultery	*Ḥirāba/Ghīla/Ta'zīr* Brigandage, etc.
1985	9	1	20 (13) (includes 4 arm and leg amputations)
1986	7	1	7 (4)
1987	0	0	16 (11)
1988	0	0	9 (5)
1989	15 (6)	0	68 (25)
1990	5 (2)	0	16 (incl. 1 crucifixion after execution)
1991	2 (1)	0	19 (13) (incl. 1 crucifixion after execution)
to Apr.18, 1992	0	0	4 (2)
TOTALS	**45 (31)**	**4**	**177 (103)**

APPENDIX D
INFORMATION ABOUT MAJOR INTERVIEWS AND COURT OBSERVATIONS

Interviewees

Abū Sulaymān, Professor 'Abd al-Wahhāb Ibrāhīm. Professor at College of Sharī'a, Umm al-Qurā University, Mecca. Recently appointed Member, Board of Senior 'Ulamā'. Interview in Jidda, September 1, 1983.

Abū Zayd, Shaykh Bakr b. 'Abd Allāh. Vice Minister of Justice; former qādī; author of a number of scholarly works, particularly on Ibn al-Qayyim. Interviews in the Ministry of Justice, Riyadh, April 20, 29, 1985 and April 13, 1987.

'Alī, Dr. Muḥammad Aḥmad Ibrāhīm. Professor at College of Sharī'a, Umm al-Qurā University, Mecca. Interview in Jidda, September 1, 1983.

'Aṭwa, Shaykh 'Abd al-'Āl. Professor of qaḍā' and siyāsa shar'īya, High Judicial Institute, Imām Muḥammad b. Sa'ūd Islamic University, Riyadh. Numerous interviews at the Institute, Riyadh, in 1983-85.

al-Faryān, Dr. Ḥamad b. Muḥammad. Deputy Minister of Justice for Administrative and Financial Affairs. Numerous interviews at the Ministry of Justice, Riyadh, from 1983-1985.

al-Ghuṣūn, Shaykh Ṣāliḥ 'Alī. Member of Supreme Judicial Council (now retired). Member of the Board of Senior 'Ulamā'. Numerous interviews at the Council, Riyadh, 1984-1985.

Ibn Jubayr, H.E. Dr. Muḥammad b. Ibrāhīm. President of the Consultative Council (since 1992); Member of the Board of Senior 'Ulamā'; former President of the Board of Grievances (office held during interviews); former President of the Presidency of the Judiciary (predecessor to the present Supreme Judicial Council). Interviews. Board of Grievances,

Riyadh, on Apr. 30 and May 15, 1985.

_____. Various written responses to my questions, on file with author.

al-Laḥaydān, Shaykh Ṣāliḥ. President of the Supreme Judicial Council, Riyadh; formerly President, Standing Board, Supreme Judicial Council, Saudi Arabia; Member of the Board of Senior 'Ulamā'. Numerous interviews with author at the Council, Riyadh, from 1984-85, 1987, and at his home, Riyadh, 1991.

_____. Various written responses to author's questions, on file with author.

Morgan, Salim. Formerly American Muslim student, College of Sharī'a, Imām Muḥammad b. Sa'ūd Islamic University. Interview with author, Riyadh, June 21, 1983.

al-Muhannā, Shaykh Sulaymān b. 'Abd Allāh. Qāḍī, Great Shari'a Court of Riyadh [*al-Maḥkama al-Kubrā bi-al-Riyāḍ*]. Several interviews, at the Court, Riyadh, March-June, 1983.

al-Mūsā, Shaykh Sulaymān b. Muḥammad. Member, Committee for the Settlement of Commercial Disputes [*Hay'at Ḥasm al-Munāza'āt al-Tijāriyya*] and Qāḍī, Greater Sharī'a Court, Riyadh. Several interviews, Riyadh Branch, 1985.

al-Nafīsa, H.E. Dr. Muṭlab 'Abd Allāh. President, Bureau of Experts, Council of Ministers. Numerous interviews in Riyadh and al-Hada, from 1982-1992.

al-Rikābī, Prof. Zayn al-'Ābidīn. Professor, College of Da'wa, Imām Muḥammad b. Sa'ūd Islamic University, Riyadh. Various interviews in his home, Riyadh, 1984.

al-Ṣawwāf, Dr. Muḥammad Maḥmūd. Practicing attorney in Jedda. Interview, at his office, Jidda, May 21, 1983.

Shawwāf, Sa'ūd. Practicing attorney, Riyadh. Interview. Riyadh, Mar. 27, 1983.

Solaim, H.E. Dr. Soliman A. Minister of Commerce. Interviews, Ministry of Commerce, Riyadh, May 14 and 27, 1985.

Qārūb, Muḥammad Ḥusayn. Member (delegated by Ministry of Commerce), Committee for the Settlement of Commercial Disputes [*Hay'at Ḥasm al-Munāza'āt al-Tijāriyya*], Jidda Branch. President, Ministry of Commerce, Jedda Branch. Several interviews at the Jedda Branch, May, 1987.

al-'Umarī, Shaykh Aḥmad b. 'Alī. Chief Judge. Summary Court of Jidda [*al-Maḥkama al-Musta'jala bi-Jidda*]. Numerous

interviews, July 1983-September 1983.

_____. Written responses to author's questions, on file with author.

Court Observation and Records[1]

Committee for the Settlement of Commercial Disputes [*Hay'at Hasm al-Munāza'āt al-Tijāriyya*], Jidda Branch. Several sessions attended in May 1987.

_____. Court records consulted for one day, May 1987.

Committee for the Settlement of Commercial Disputes [*Hay'at Hasm al-Munāza'āt al-Tijāriyya*], Riyadh Branch. Observed daily sessions for September - November, 1985.

_____. Court records consulted for several days, November 1985.

Great Shari'a Court of Riyadh [*al-Maḥkama al-Kubrā bi-al-Riyāḍ*], Riyadh, Court of al-Muhannā, Court of Shaykh Sulaymān b. 'Abd Allāh al-Muhannā. Observed daily sessions from March - June, 1983.

_____. Court records (civil) consulted. Various occasions in 1983.

_____. Court records (criminal) consulted. Various occasions in 1983.

_____. Court of Shaykh Musā'id al-Mu'tiq, Court of Guarantee and Marriages [*maḥkamat al-ḍamān wa-al-ankiḥa*]. Personal observations, April 12, 18, 19 and May 3, 1983.

Summary Court of Jidda [*al-Maḥkama al-Musta'jala bi-Jidda*]. Court of Shaykh Aḥmad b. 'Alī al-'Umarī, Chief Judge. Personal observations, attending court daily from July - September 1983.

_____. Court records consulted July through September 1983.

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[1]All court records mentioned here are maintained by the court in large hand-written ledgers, which are theoretically available for inspection by the public, but which can be seen only with the permission of the judge in question. I had only limited access to these records, particularly in the Committees for Commercial Settlements.

G L O S S A R Y A N D I N D E X
OF ARABIC TERMS

(Numbers refer to page number of first use)

aḥādīth	pl. of ḥadīth	88
ʿālim	one possessing ʿilm, knowledge; scholar; scholar of the religious sciences; sing. of ʿulamāʾ	122
ʿaqīda	faith, dogma, credo, creed	205
bāṭin	inward state, inner truth	73
bayʿa	oath of allegiance	456
dalīl	guide, indicator, legal proof	170
faqīh	specialist in fiqh	113
farḍ ʿayn	individual obligation, applying to a specific individual	449
farḍ kifāya	collective obligation, falling on all capable of it until it is fulfilled by some of them	449
fatāwā	pl. of fatwā	150
fatwā	an advisory opinion by a qualified scholar on a point of law	150
fiqh	the science of the divine law, the sum of man's knowledge of God's law	117
ghīlatan	lit., "surreptitiously," used for killings by stealth or for motive of property	616
ḥadd	sing. of ḥudūd, crime defined in Qurʾān and sunna and assigned a fixed penalty	597
ḥadīth	a report of a saying, action or acquiescence of the Prophet	88
ḥirāba	or muḥāraba, ḥadd crime of brigandage	615
ḥudūd	class of crimes defined in Qurʾān and sunna and assigned fixed penalties sing., ḥadd	596

'ibādāt	acts of worship, duties owed God, as opposed to mu'āmalāt, or duties arising among men	183
iftā'	the function of giving a fatwā	150
ijmā'	consensus, agreement of scholars of age one of four uṣūl of fiqh	101
ijtihād	effort, use of individual reasoning in matters of fiqh	116
'illa	efficient cause, term used for the basis of analogy in qiyās	111
imām	lit., leader, thus, leader of prayer, caliph, founder of a madhhab	123
isnād	the chain of transmitters of a ḥadīth or other historical narration	91
khalīfa	caliph. Generally, successor, vicegerent	58
khamr	wine, grape-wine, intoxicant	98
madrasa	the medieval Islamic institution of learning	461
ma'rūf	"recognized," morally accepted	399
maṣāliḥ mursala	"unrestricted" utility, utility not enjoined or excluded by revelation	269
maṣlaḥa	interest, utility; public interest	270
maẓālim	"grievances," used for calls for justice raised to the ruler	470
mu'āmalāt	transactions among men, opposed to 'ibādāt, or acts of worship	183
muftī	a specialist in religious law issuing legal opinions	150
mujtahid	one qualified to practice legal ijtihād	116
munkar	rejected; improper; evil	399
muqallid	one practicing taqlīd	155
muslim	one who has submitted, Muslim	61
mutawātir	category of ḥadīth report; narrated from generation to generation, at each stage by	92

	such a large number of narrators as to preclude their collusion on a forgery	
niẓām	lit., regulation, system, used for ruler legislation by the Ottomans and Saudis	552
qaḍā'	the art of adjudication	138
qāḍī	Islamic judge	140
qiṣāṣ	retaliation, as in eye for eye, life for life, a civil claim for intentional killing or physical injury	595
qiyās	analogy	111
qur'ān	recitation, Qur'ān	40
sharī'a	the divine law	54
shūrā	consultation	419
siyāsa	'policy', administration	466
siyāsa shar'iyya	siyāsa within the limits assigned to it by the sharī'a	467
siyāsatan	lit., "by siyāsa," as used in "killing siyāsatan," a form of capital punishment for heinous acts with overwhelming proof	612
sunna	precedent, normative legal custom; normative words, actions of Prophet Muḥammad	85
ta'zīr	chastisement, moral correction, a class of criminal penalties for sins, punished in discretion of ruler	106
taqlīd	relying upon the opinion of another, not practicing ijtihād	155
tarjīḥ	choosing the preponderant opinion	164
'ulamā'	the religious scholars of Islam	122
umma	the nation, usually Islamic nation	58
uṣūl	(sing. aṣl), lit., roots (opp. to furū') the sources of fiqh (as uṣūl al-fiqh)	35
uṣūl al-fiqh	roots or sources of fiqh, science of legal reasoning and derivation	35
waqf	pious foundation, mortmain	461
wilāya	competence, jurisdiction, delegating	448

	authority to another	
ẓāhir	the literal meaning (of Koran and and traditions), apparent, 'outward' state	73
ẓann	surmise, guess, probable truth	64
ẓulm	oppression, evil-doing	60