SCHOOL BOUNDARIES AND SOCIAL UTILITY IN ISLAMIC LAW: THE THEORY AND PRACTICE OF *TALFĪQ* AND *TATABBUʿ AL-RUKHAṢ* IN EGYPT

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By

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A Note on Transliteration

I follow the transliteration style of the International Journal of Middle East Studies (*IJMES*), with some modifications. For Arabic, *IJMES* uses the modified *Encyclopedia of Islam* system, in which qaf = q not k and jim = j not dj. I will, however, use macrons and dots not only in italicized technical terms, but also in personal names, place names, names of political parties and titles of books. I also transliterate non-technical terms such as *Sharīʿa*, even though they are not transliterated according to *IJMES*. Below is a list of the *IJMES* Arabic sounds:

ء	ʾ
ب	b
ت	t
ث	th
ج	j
ح	ḥ
خ	kh
د	d
ذ	dh
ر	r
ز	z
س	s
ش	sh
ص	ṣ
ض	ḍ
ط	ṭ
ظ	ẓ
ع	ʿ
غ	gh
ف	q
ك	k
ل	l
م	m
ن	n
ه	h
و	w
ي	y

Long vowels

ا	ā
و	ū
ي	ī

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ABSTRACT

In this study, I focus on how the Ottoman legal establishment used the pluralistic Sunni legal system to serve the needs of Egyptian society. I examine a thousand and one cases from three Egyptian courts from the seventeenth and eighteenth centuries, namely the Courts of Miṣr al-Qadīma, al-Bāb al-ʿĀlī and Bulāq. I show that although the Ottomans supported Ḥanafism as the official school, it functioned more like a default school, in which most cases were brought to Ḥanafī judges unless there was a need to bring them to other judges. When there was a need to choose another school, the most lenient school was used to facilitate people's transactions. This was achieved through either *tatabbuʿ al-rukhaṣ* or *talfīq.* Those practices of the court, which date back to the Mamluk period, led to a change in juristic attitudes towards the pragmatic crossing of school boundaries. In the process of the legal theoretical adjustment to social practice, debates over the validity of *talfīq* and *tatabbuʿ al-rukhaṣ* raged after the stabilization of the schools and the ascendancy of *taqlīd*,[1] eventually leading to a breach of the classical consensus over their ban. Although this process started as early as the thirteenth century, the debate continued well into the Ottoman period.

[1] *Taqlīd*, is a legal term that means following another jurist's opinion. It is usually used in opposition to *ijtihād*, which is exercising one's independent legal reasoning.

Those Ottoman debates laid the way for the codification of *Sharīʿa* in the twentieth century, using those pragmatic approaches. Modern jurists and legislators engaged those same Ottoman debates in their own discussion of crossing school boundaries for utility. Through a marriage between theory and practice, I argue that the codification of *Sharīʿa* in the twentieth century can therefore be viewed as a natural evolution of the Ottoman legal system. In the first two chapters, I trace the views towards crossing school boundaries to show that there was a gradual shift in juristic attitudes in favor of permitting crossing school boundaries, contrary to some contemporary scholars' argument that *talfīq* was outright forbidden in the pre-modern period. In the third and fourth chapters, I discuss the practice of seventeenth and eighteenth-century Egypt and compare it with the modern codification of *Sharīʿa*.

This dissertation is dedicated to my family and to the people of Tunisia and Egypt who through peaceful protests redeemed their freedom from oppressive regimes.

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INTRODUCTION

In 2006, Shaham conducted a study on the shopping of legal forums among Egyptian Christians within the pluralistic Egyptian legal system of the nineteenth century. He showed that Christians maneuvered between their own family laws and those of the Islamic majority and suggested that a similar study should be conducted for the four Sunni schools of law among Muslims.[2] There are two terms in Islamic legal history that are associated with this maneuvering among the four schools when it is performed for pragmatic reasons namely *talfīq* and *tatabbuʿ al-rukhaṣ* (see below). They refer to a choice of forum, i.e. the legal doctrines of one of the four Sunni schools of law, which is not performed based on the strength of evidence or any inherent value in that opinion, but simply for utility.[3]

I will show that *talfīq* and *tatabbuʿ al-rukhaṣ*, which were forbidden in classical legal theory, were increasingly becoming a subject of debate in the Mamluk and

[2] Ron Shaham, "Shopping for Legal Forums: Christians and Family Law in Modern Egypt," In *Dispensing Justice in Islam: Qadis and their Judgments,* ed. Muḥammad Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 468.

[3] Utilitarianism is a consequentialist theory which states that the moral worth of an action is determined by its contribution to happiness. For discussions of consequentialist and deontologist ethical philosophies, see Joel J. Kupperman, "Vulgar Consequentialism," *Mind,* vol. 89, No. 355 (July 1980), 321-337; Crisp Roger, *The Oxford Companion to Philosophy*, ed. Ted Honderich (Oxford University Press, 1995); David Sosa, "Consequences of Consequentialism," *Mind*, Vol. 102, No. 405 (Jan., 1993), 101-122. The functioning of the Ottoman courts and the ensuing theoretical debates about the crossing of school boundaries were essentially a struggle between what can be called legal deontologists and consequentialists. The consequentialists considered the consequences of actions as the basis for determining their acceptability. Those jurists supported the choice of schools based on the legal results, rather than the legal rules. Legal deontologists, on the other hand, wished to assess actions/legal rulings not by their consequences, but by the inherent soundness of those rulings through *ijtihād* or through the *taqlīd* of the *ijtihād* of others, namely a school or a *muftī.*

Ottoman periods. The result of those debates was that their status changed from forbidden by consensus to allowable within the more fluid *ikhtilāf* paradigm.[4]

There is no study that diachronically traces attitudes among scholars towards *talfīq* and *tatabbuʿ al-rukhaṣ* in legal theory. There is, however, evidence that people chose judges based on the legal outcome, which had to do with differences among the four schools. Tucker, for example, discusses a *fatwā* (a non-binding legal opinion issued by a *muftī*) by the seventeenth-century Ḥanafī jurist, Khayr al-Dīn al-Ramlī, in which the *fatwā*-seeker had previously chosen a Shāfiʿī judge to get a divorce according to Shāfiʿī law.[5] Similarly, in her study of seventeenth and eighteenth century court records from Jerusalem and Damascus, Tucker shows that the court system made use of legal diversity, granting women divorce in situations where Ḥanafī doctrine would not have achieved the desired results.[6]

While the above instances mentioned by Tucker correspond to what Mamluk and Ottoman jurists dubbed *tatabbuʿ al-rukhaṣ*, no study has been conducted on the practice of *talfīq*. There is also no systematic study on *tatabbuʿ al-rukhaṣ* that attempts to comprehend the consistency of the use of the four schools according to the types of cases in question. If there was a distribution of labor among the four Sunni schools of law; how consistent was it? Was the choice of forum not circumscribed at all by the

[4] *Ikhtilāf* refers to the body of legal literature, on which jurists from the four Sunni schools of law did not agree either on issues of substantive law or legal theory.
[5] Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008), 108.
[6] Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (California: University of California Press, 1998), 82-3.

Ottoman authorities? Those questions will be addressed through a study of seventeenth and eighteenth-century Egyptian court records. Answering those questions will illuminate not only the history of Islamic law, but will also make a contribution to our understanding of Ottoman society in the seventeenth and eighteenth centuries. This examination of the practice of *tatabbuʿ al-rukhaṣ* and *talfīq* will also shed light on how the Ottomans used legal pluralism to permit the sale of endowment properties,[7] and to protect women's financial rights in certain cases.

In addition to the above questions, in the course of studying the two legal strategies, I will engage a number of larger discussions in Islamic history, namely (1) the issue of doctrinal change in Islamic law, (2) the predictability of the Ottoman legal system, (3) and the codification of *Sharīʿa* and the periodization of legal modernization in Egypt.

Change in Islamic law

According to Joseph Schacht and Noel J. Coulson, Islamic law was developed during the formative period, which extends until the tenth century.[8] Chafik Chehata agrees with this view, but adds that the most systematic forms of reasoning underlying the various legal ordinances of Islamic law were developed in the period between the tenth and

[7] "Legal pluralism" refers to the situation where, in colonies, parts of the law applied in state courts consisted of native law and custom. Some of those native laws and customs received recognition from the state and were considered law, but others did not receive the same recognition. But this term has since been used to refer to the existence of more than one legal system outside of the colonial context. See John Griffiths, "Preface," in *Legal Pluralism in the Arab World*, ed. Baudouin Dupret, Maurits Berger and Laila al-Zwaini (The Hague: Kluwer Law International, 1999), xii.

[8] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, Oxford, 1964), 70; N. J. Coulson, *A History of Islamic Law* (Edinburgh University Press, Edinburgh, 1964), 75-85.

twelfth centuries. After the formative period, Islamic law was thought to have largely ceased to change, although Coulson holds that in the field of civil transactions some modifications of the strict classical doctrine were introduced.[9] But this view changed due to the work of later historians such as Hallaq, Tucker, Peters, Johansen, Haim Gerber among others.

The issue of doctrinal change in Islamic legal history was discussed by Kaya, who shows that the different social settings in which early Ḥanafī scholarship developed affected substantive legal rulings, sometimes departing from the teachings of the masters of Ḥanafī law, namely Abū Ḥanīfa (d. 150/767), Abū Yūsuf (d. 182/798), al-Shaybānī (d. 189/805),[10] Zufar b. al-Hudhayl (d. 158/775) and Ḥasan b. Ziyād al-Lu'lu'ī (d. 204/819).[11] While Kaya discusses doctrinal change overtime, he does not venture into the period after which the system of *taqlīd* had dominated, namely the twelfth-thirteenth century. Similarly, Fierro shows how Berber customs influenced Mālikism during its early development in the Iberian Peninsula and North Africa.[12]

Another example of doctrinal change is to be found in the Ḥanafī school, in which during the eleventh century the dominant view of Abū Ḥanīfa was replaced by the view of his disciple Abū Yūsuf on the issue of written communications from a judge

[9] Cited in Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Ḥanafīte Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988), 1.
[10] Abū Yūsuf and al-Shaybānī are Abū Hanīfa's most influential disciples.
[11] Eyyup Said Kaya, "Continuity and Change in Islamic Law: The Concept of Madhhab and the Dimensions of Legal Disagreements in Ḥanafī Scholarship of the Tenth Century," in *The Islamic School of Law: Evolution, Devolution and Progress*, ed. Peri Bearman, Rudolph Peters and Frank E. Vogel (Cambridge, Massachusetts, Harvard University Press, 2005), 26-40.
[12] Maribel Fierro, "Ill-Treated Women Seeking Divorce: The Qur'anic Two Arbiters and Judicial Practice Among the Mālikī s in Al-Andalus and North Africa," In *Dispensing Justice in Islam: Qādīs and their Judgments,* ed. Muhamamd Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 331-343.

whose name is not stated in the document. Abū Ḥanīfa considered the document null and void, whereas Abū Yūsuf accepted it. It was not until the eleventh century that Abū Yūsuf's view was promoted to the forefront of Ḥanafism.[13] This change was inspired by a desire on the part of al-Damghānī al-Kabīr (d. 477/1084) to facilitate this practice, which was necessary for the functioning of the courts. Another study of doctrinal change from the modern period deals with the Libyan *Sharī'a* Court of Ajdābiya from 1951-1954, in which Layish shows that judges were using documentary evidence in the courts, contradicting the traditional rules of evidence.[14]

Studies that show doctrinal change in the schools in the post-classical period and before the nineteenth century are fewer.[15] Perhaps the earliest such study was conducted by Baber Johansen on land tax and rent during the early period, as well as the Mamluk and Ottoman periods. He demonstrates that there was a clear doctrinal change in Balkh and Bukhārā during the eleventh century, where *istiḥsān* was used to justify contradicting the rules of legal analogy. In the Mamluk and Ottoman periods, Egyptian and Syrian Ḥanafī jurists were able to invoke those medieval Transoxanian views to change the Ḥanafī doctrine of the formative period. Johansen's study is

[13] Wael B. Hallaq, "Qādīs Communicating: Legal Change and the Law of Documentary Evidence," *Al-Qanṭara* 20 (1999): 466.
[14] Aharon Layish, "*Shahādat Nqal* in the Judicial Practice in Modern Libya," In *Dispensing Justice in Islam: Qādīs and their Judgments,* ed. Muḥammad Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 514-5.
[15] The term "post-classical" will be used to refer to the period after 1265, when *taqlīd* was fully dominant over *ijtihād*, a process which gradually took place over the course of the eleventh and twelfth centuries, after the stabilization of the four Sunni schools. By the thirteenth century, there was a clear system of *taqlīd*, culminating in Baybars' decision in 1265 to appoint four chief judges in Cairo.

important as it shows doctrinal change taking place as late as the Ottoman period, refuting the worn-out claims of the immutability of Islamic law.[16]

While Johansen successfully shows doctrinal change in the views of Ḥanafī scholars overtime, he attributes this change to *ijtihād*, rather than *taqlīd*.[17] He concludes his study by saying: "In the light of research along these lines a re-interpretation of the relationship between *ijtihād* and *taqlīd* seems desirable. Far from being a historical reality at all levels of legal activities, *taqlīd* often seems to be a pious wish rather than the actual practice of the jurists."[18] Similarly, in his commentary on Johansen's work, Chibli Mallat rejoices, "it adds a nail to the coffin of the theory of the 'closing of the *bāb al-ijtihād,*' and blurs the segmentation between classical and post-classical *Sharī'a*."[19] It is typical of studies of doctrinal change in Islamic law to frame such change in the context of *ijtihād*. In Johansen's study, I argue that since the changes that took place in the doctrine of the Mamluk and Ottoman jurists were mostly based on *istiḥsān*,

[16] Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Ḥanafite Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988).
[17] I use *ijtihād* in the sense used by Sherman A. Jackson: "*The interpretation of scripture directly with no intermediate authorities standing between the sources and the individual jurist*." (italics in original) Sherman A. Jackson, "*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory *Muṭlaq* and '*Āmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī," *Islamic Law and Society* 3, 2 (1996): 167. In this sense, analogy plays an important role as the tool through which rulings are derived directly from the textual sources. Thus, the process of applying analogy directly to the textual sources is a type of *ijtihād*. See Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), 23. *Taqlīd* means following the views of earlier jurists without exercising independent legal reasoning.
[18] Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Ḥanafite Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988), 124-5. Baber Johansen also shows that the status of the human body in Islamic legal doctrine was "culturally constructed," and that permissible behavior towards the body changes according to gender, kinship, religion and free or servile status. See Baber Johansen, "The Valorization of the Human Body in Muslim Sunni Law," in *Law and Society in Islam*, ed. Devin J. Stewart, Baber Johansen and Amy Singer (Princeton: Markus Wiener Publishers, 1996), 71-112.
[19] Chibli Mallat, "Review [untitled]," *Bulletin of the School of Oriental and African Studies* 54, 1 (1991): 155-156.

contradicting the conclusions of legal analogy, these are not instances of *ijtihād*, which is, by definition, the use of analogy. Besides, the authorities behind those changes in the Mamluk and Ottoman periods derived their authority from eleventh-century Balkh and Bukhārā.[20] Thus, it is fair to argue that this instance of doctrinal change occurred within the context of *taqlīd*, rather than *ijtihād*.

Most of the examples of doctrinal change we see in the Mamluk and Ottoman periods are based on a *taqlīd* of sorts. For instance, Gerber shows that the charging of interest was accepted by seventeenth and eighteenth-century judges of the Ottoman Empire, departing completely from traditional substantive law. This was done through the use of legal stratagems, known as *ḥiyal*.[21] We do not really see jurists re-interpreting the textual sources or applying analogy to those sources to reach different conclusions about the charging of interest.

Thanks to the work of those scholars, there are very few historians today who would disagree with the proposition that Islamic law, like any other legal system, has experienced throughout its long history instances of change motivated by the realia of law on the ground. But how did that change come about and through what gate? As we saw in the above examples, many historians would argue that it was through *ijtihād*

[20] Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Ḥanafite Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988), 82-93.
[21] Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (New York: State University of New York Press, 1994), 19-20. Another example of change of legal doctrine relates to additions to the *Sharī'a* brought about by Ottoman Sultanic laws (*qānūns*). One such example is the *sai bil'fesad* (habitual criminality), which Gerber shows was part of the *fatāwā* collections of the seventeenth and eighteenth centuries, even though they have no origin in Islamic law. See Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (New York: State University of New York Press, 1994), 98-9.

that such change was brought about. This belief is so deeply rooted in Islamic legal historiography that much intellectual energy has been expended on the issue of *ijtihād*. Many scholars of Islam argued that the gate of *ijtihād* was closed, which, to them, explains the decline of Islamic law and society generally.[22] Hallaq's study in which he argues that the gate of *ijtihād* was never really closed represents a paradigm shift in this debate.[23]

Despite a general consensus that the gate of *ijtihād* was never fully closed, the debate about legal change continued at the hands of scholars such as Jackson and Mohammad Fadel. Fadel, for instance, is critical of both Muslim and Western writers for their negative views of *taqlīd*.[24] While Jackson argues that the creative energies of jurists were not depleted despite the rise of *taqlīd,* which he explains through the concept of legal scaffolding.[25]

According to Jackson, a mature legal system veers away from new interpretations of the sources (*ijtihād*); and jurists become more involved in "legal scaffolding," which refers to adjustments made through "new divisions, exceptions, distinctions, prerequisites and expanding or restricting the scope of existing laws." It

[22] See for instance, Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, Oxford, 1964), 70; Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press, Edinburgh, 1964), 75-85. Norman Anderson, *Law Reform in the Muslim World* (London: Athlone Press, 1976), 7.
[23] Wael B. Hallaq, "Was the Gate of *Ijtihād* Closed?" *International Journal of Middle East Studies* 16, 1 (1984): 3-41.
[24] Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of *Mukhtaṣar*," *Islamic Law and Society* 3, 2 (1996): 193.
[25] Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996); See also Sherman A. Jackson, "*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory *Muṭlaq* and '*Āmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī," *Islamic Law and Society* 3, 2, (1996): 165-192.

was through legal scaffolding or what is called in the literature *ijtihād fī al-madhhab* that creativity was maintained within the schools.[26]

In addition to legal scaffolding, I show in this study another process that was simultaneously taking place, namely the readjustment of *taqlīd* to allow for an expansion of available rulings both within and outside the fully-formed school.[27] I show that there was a doctrinal shift in juristic attitudes towards the two strategies, which represents a natural evolution of the more rigid view of *taqlīd* that dominated in the classical period. Jurists, oftentimes, invoked social practice as the source of such change, rather than delving into a re-examination of the evidence forwarded by the dominant view within the school. *Tatabbuʿ al-rukhaṣ* and *talfīq* were also used by jurists to redefine the dominant view within the school (*rājiḥ*). In other words, instead of selecting legal rulings according to the strength of evidence via *tarjīḥ* or *taṣḥīḥ*,[28] it was done for utility through *tatabbuʿ al-rukhaṣ* and *talfīq*. Where this process of change within the school had not yet caught up with court practice, which oftentimes addressed specific social needs, subjects of the law in litigation, notarization and rituals

[26] Jackson, *Taqlīd.* Jackson explains that *ijtihād fī al-madhhab* is really a form of *taqlīd* as there are intermediaries between the jurist and the text.

[27] Needless to say, the ascendancy of *taqlīd* happened gradually, from the eleventh century when the schools were fully stabilized to the thirteenth century, when *taqlīd* became the dominant norm. This reform of *taqlīd* started around the thirteenth century as the first voices supporting *tatabbuʿ al-rukhaṣ* come from this period. See Sherman A. Jackson, "*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory *Muṭlaq* and '*Āmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī," *Islamic Law and Society* 3, 2 (1996): 168; Hallaq shows that in the eleventh century, the words *iftāʾ* (giving *fatwā*) and *ijtihād* were used interchangeably, as the *muftī* had to be a *mujtahid*. By the thirteenth century, *muftīs* were allowed to be *muqallids*. Thus, *taqlīd* had stabilized and matured by the thirteenth century. See Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 75-76.

[28] Hallaq talks about *taṣḥīḥ* within schools, which is another name for *tarjīḥ*, in which opinions within the schools are weighed evidentially to determine which one was more *ṣaḥīḥ* or *rājiḥ*. He argues rightly that this process allowed the law to keep up with social change. See Hallaq, *Authority*, 147-166.

were able to transcend the whole school in search for more appropriate rulings. I will conduct a case study on a thousand and one cases from three courts in Cairo and Bulāq to show how people were able to draw on the immensely different school views, born of multifarious geo-political settings from Transoxania to North Africa to accommodate social needs.

The predictability of the Ottoman legal system

The second theoretical discussion engaged in this study is how predictable the Ottoman legal system was in view of this legal pluralism. In the above discussion of doctrinal change I examined theoretical legal works, but in order to address the issue of the predictability of the legal system, I will turn my attention to the practice of the courts. Weber's notion of justice is practically defined against his concept of *Kadijustiz*. A just legal system from his perspective should be stable, predictable, grounded in general rules, and impersonal. It also must have a structured system of appeal.[29]

Islamic law was characterized according to Weber by *Kadijustiz* denoting arbitrariness and irrationality. Its judgments were ad hoc and not derived from general principles. The judge ruled in every case on the basis of personal, particularistic

[29] For a definition of law, see Marc Galanter, "Law and Society in Modern India," in *Law and Anthropology: A Reader,* ed. Sally Falk Moore (Oxford: Blackwell Publishing, 2005), 73-80. He defines law as possessing four attributes, namely the attributes of authority, which means that the law has to be propounded by people who can induce compliance. The rule must have the intention of universal application. In other words, the legal decision must be intended to be utilized in similar future cases. The third attribute is *obligatio*, which refers to the part of the decision that states the rights of one party and the duties of the other. The fourth attribute is that it has to have a sanction. This definition of law was criticized for its narrowness by legal plurAlīsts. See John Griffiths, "Preface," in *Legal Pluralism in the Arab World*, ed. Baudouin Dupret, Maurits Berger and Laila al-Zwaini (The Hague: Kluwer Law International, 1999), vii-xviii. For a more elaborate discussion of legal pluralism, see that section below.

grounds. Weber saw a clear disconnect between this arbitrary practice and the universal legal code of Islam which he categorized as rational law. It is a one-judge system, where the decisions of the judge could not be appealed.[30] Unlike the practice of courts, Islamic substantive law itself was rational and consistent, but rigid, which explains why judges had to depart from it. Thus, Islam lacked a necessary condition for the creation of a capitalist system.[31]

Certainly, Weber's views were not informed by any extensive study of Islamic law or knowledge of Arabic. Yet, they were perpetuated without re-examination by some scholars and put to the test by others. For instance, building on Weber's thesis, Rosen discusses the role of the judge in the contemporary Moroccan town of Sefrou. He argues that the judge is not bound by fixed legal rules, thereby making the legal process one of fluid bargaining.[32] Other scholars reached different conclusions. Gerber's study of Ottoman courts shows that the Ottoman judge applied laws that were known in advance to litigants and the legal outcomes were completely predictable.[33] Chibli Mallat demonstrates through a study of seventeenth-century courts in Tripoli that the court

[30] Max Weber, *Economy and Society: An Outline of an Interpretive Sociology,* ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 2: 806, 896; 3: 976-78; Bryan S. Turner Islam, "Islam, Capitalism and the Weber Theses," *The British Journal of Sociology*, vol. 25, No. 2 (June, 1974), 230-243; see also Max Rheinstein (ed.), *Max Weber on Laws in Economy and Society,* translated by Edward Shils and Max Rheinstein (Cambridge, Mass.: Harvard University Press, 1964).

[31] Max Weber, *Economy and Society: An Outline of an Interpretive Sociology,* ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 2: 806, 896; 3: 976-78; Bryan S. Turner Islam, "Islam, Capitalism and the Weber Theses," *The British Journal of Sociology*, vol. 25, No. 2 (June, 1974), 230-243; see also Max Rheinstein (ed.), *Max Weber on Laws in Economy and Society,* translated by Edward Shils and Max Rheinstein (Cambridge, Mass.: Harvard University Press, 1964).

[32] Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Muslim Society* (Cambridge: Cambridge University Press, 1989), 11-19.

[33] Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (New York: State University of New York Press, 1994), 177.

system was not arbitrary, but rather grounded in consistent rules. He found that the single judge directed the administration of evidence systematically and efficiently. "The flexibility, predictability and consistency of the system are notable for the modern reader," he adds.[34] Testing the predictability of the legal system in Egypt in the seventeenth and eighteenth centuries, this time through descriptive statistics, I show that the system was highly predictable, even within the context of crossing school boundaries. What this study adds to this discussion is that not only is predictability the result of the uniform legal rulings followed in each distinct school, as we see in Gerber's study, but also predictability exists despite the crossing of school boundaries. We see that certain types of cases in seventeenth and eighteenth-century Cairo and Bulāq tend to be brought to certain schools. We also see that Ḥanafism in that period had a semi-default status, which further enhanced the predictability of the Ottoman pluralistic legal system.

Another critique of Weber's assumptions has to do with his view of the gap between theory and practice in Islamic law. Weber's views, which were not based on research in Islamic law, were reiterated by such scholars as Goldziher and Schacht.[35] But later more serious examination of this assumption produced different results. Gerber's study of the legal structure of the Ottoman Empire between the sixteenth and nineteenth centuries belies this notion. He takes his findings further by arguing for a

[34] Chibli Mallat, "From Islamic to Middle Eastern Law, A Restatement of the Field Part II," *The American Journal of Comparative Law* 52, 1 (2004): 209-286.
[35] For a discussion of the views of Goldziher, Schacht, and Hurgronje on the issue of theory and practice, see Abraham L. Udovitch, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970), 5; See also Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 75.

causal relationship between the Ottoman Empire and the ability of modern Turkey to maintain a democratic polity. He rejects the possibility of a complete rupture with the Ottoman past, arguing that there is a line of continuity with the Ottoman "Dark age," the seventeenth and eighteenth centuries.[36] I attempt in this study not only to challenge the assumption about the disconnect between theory and practice, but also to show how uneasy some jurists felt about that disconnect and how practice was invoked to change the theory.

The codification of Islamic law

The last theoretical discussion this study engages relates to the nineteenth and twentieth-century codification of Islamic law. The two utilitarian strategies, which were heavily used in the modern codification of the *Sharīʿa*,[37] were oftentimes dubbed a modern form of "juristic opportunism," and a development that had no basis in the *Sharīʿa*.[38] Coulson also argues that the use of *talfīq* and *tatabbuʿ al-rukhaṣ* in the modern period marks the end of traditional *taqlīd*.[39] Ironically, those judgments by some historians resemble anti-modernist Islamist discourses on the topic. The opponents of codification oftentimes make negative references to the "modern" personal status laws

[36] Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994), 1-2.
[37] It is important here to point out once more that while *ijtihād* was touted by many historians as the most important tool of legal reform, most legal changes in the twentieth-century codification of the *Sharīʿa* were based on *taqlīd*. It was through the utilitarian crossing of school boundaries (*talfīq* and *tatabbuʿ al-rukhaṣ*) within the system of *taqlīd* that most such reforms were introduced.
[38] See Aharon Layish, "The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt des Islams* 44, 1 (2004): 94; N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 197-201; David Bonderman, "Modernization and Changing Perceptions of Islamic Law," *Harvard Law Review* 81, 6 (1968): 1177.
[39] N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 201.

of Egypt and other Arab countries, where the laws are drawn from the four schools based on utility, rather than the *rājiḥ* (preponderant) view in those schools.[40] Showing how legal pluralism functioned in a pragmatic manner both in theory and practice offers a counter narrative to this anti-modernist discourse.

The issue of the codification of Islamic law also has contemporary relevance. In Saudi Arabia, due to the calls of reformers and businesspeople exasperated by the unpredictability of the uncodified *Sharīʿa* legal system and its restrictions on personal freedoms, King Abdullah in 2005 asked the Supreme Judiciary Council (SJC) to consider codifying the *Sharīʿa*. After much controversy, the SJC agreed in May 2010 to codify the *Sharīʿa* in the form of a *majAllāh* (compendium) of published legal rulings. It is not clear at this point what types of reforms will be introduced and whether or not the codifiers would veer away from the strict legal rules of the Ḥanbalī school. Yet the efforts have already faced serious opposition from conservatives, whose concerns range from misgivings about their future ability to exercise *ijtihād* in the new fixed system to worries about the State drawing upon other schools in a utilitarian way to appeal to modern mores.[41]

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[40] See also ʿAbd al-Raḥmān Bin Saʿd al-Shithrī, *Taqnīn al-Sharīʿa Bayna al-Taḥlīl wa al-Taḥrīm*, http://www.ahlalhdeeth.com/vb/showthread.php?t=112366 pps. 10-15 (accessed online on September 1, 2010).

[41] Saudi Arabia: Codified *Sharīʿa* Could Benefit Business, *Zawya* http://www.zawya.com/story.cfm/sidZAWYA20100826075952/Benefiting%20Business (Accessed online on August 31, 2010); See also ʿAbd al-Raḥmān Bin Saʿd al-Shithrī, *Taqnīn al-Sharīʿa Bayna al-Taḥlīl wal-Taḥrīm*, http://www.ahlalhdeeth.com/vb/showthread.php?t=112366 pps. 10-15 (accessed online on September 1, 2010); See also The Codification of Islamic *Sharīʿa*, *Asharq Alawsat*, April 28, 2006. http://www.aawsat.com/english/news.asp?section=2&id=4740 (Accessed online on August 31, 2010); See also Al-Mahdī http://webcache.googleusercontent.com/search?q=cache:uE04v56mzVoJ:almahdy.net/vb/showthread.p

Legal modernity

Legal modernity is characterized by three main objectives: unification of laws across ethnic, religious and class segments of society, limiting laws to the borders of the nation-state, and achieving justice, in new notions of what constitutes justice. In this study, I approach the process of legal modernization with these inherent assumptions about what constitutes legal modernity in the context of the nation-state. In order to achieve the objectives of unification of laws across ethnic, religious and class boundaries and to limit laws to the borders of the nation, the new nation-state had to create a written, fixed code.[42] Central to European notions of justice was the creation of an appeal system and a hierarchy of courts with defined jurisdictions. Thus, legal modernization referred to two main processes: (1) the establishment of a legal hierarchy and (2) the codification of the law, whether *Sharīʿa*-based or of European provenance within the borders of the nation-state.

The question of whether or not there was a hierarchical structure in Islamic legal practice prior to nineteenth and twentieth-century legal modernization is subject to debate. The common wisdom is that the strict rules of *Sharīʿa* do not allow the judge's decisions to be appealed.[43] Tyan posits that the office of the chief judge (*qāḍī al-quḍāh*)

hp%3Ft%3D4454+%D8%B9%D8%A8%D8%AF+%D8%A7%D9%84%D9%84%D9%87+%D8%A7%D9%84%D8%B3%D8%B9%D9%88%D8%AF%D9%8A%D8%A9+%D8%A7%D9%84%D8%B4%D8%B1%D9%8A%D8%B9%D8%A9&cd=3&hl=en&ct=clnk&gl=us&client=firefox-a (Accessed online on August 31, 2010).

[42] See Karl A. Wittfogel, "The Ruling Bureaucracy of Oriental Despotism: A Phenomenon that Paralyzed Marx," *The Review of Politics* 15, 3 (1953): 350-359.

[43] David S. Powers, "On Judicial Review in Islamic Law," *Law and Society Review* 26, 2 (1992): 315-41.

did not constitute an appellate jurisdiction.[44] Shapiro proposes the theory that judicial hierarchies provide legitimacy for central regimes by reminding subjects that the sovereign's authority extends over every corner of the state. Therefore, appellate institutions are more related to the political purposes of central regimes than they are to upholding individual justice and are likely to exist wherever there is a central regime. He opines that the Islamic legal system is an anomaly. It does not need an appeal system because Muslim society is non-hierarchical. He adds that there are some exceptions to this rule in Islamic history, namely the Abbasid and Ottoman empires, which developed hierarchical political structures, allowing for a limited form of appeal, in which the secular *dīwāns* (councils) acted like quasi-supreme courts. But this appeal process was obscured by the use of trial de novo on appeal and the intermingling of litigation and complaint jurisdiction.[45]

This concept of the exceptionality of Islamic law was challenged by Johansen, who discusses several ways in which the judge's decision can be reviewed.[46] Powers, through a study of the practice of the Moroccan courts in the fourteenth century, shows that quasi-appellate structures were more common than previously thought. He argues that the decisions of the judge were reversible both in legal theory and in the practice of the courts.[47] His results are consistent with Peters' findings from early

[44] Emile Tyan, "Judicial Organization." In: *Law in the Middle East*, ed. Majid Khadduri and H. J. Liebesny (Washington DC: The Middle East Institute, 1995), 236-78.
[45] Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 52, 209-222.
[46] Baber Johansen, "Le Jugement comme Preuve. Preuve Juridique et Verite Religieuse dans le Droit Islamique Hanefite," *Studia Islamica* 72 (1990): 5-17.
[47] David S. Powers, "On Judicial Review in Islamic Law," *Law and Society Review* 26, 2 (1992): 330-36.

nineteenth-century Egypt, where the judges of the capital city had a form of appellate jurisdiction over the provinces. Peters also found an appellate function for the *muftī* in nineteenth century Egypt.[48] According to this line of research, the 1897 Egyptian Ordinance on the Organization of the *Sharīʿa* Courts into three levels: Courts of Summary Justice (*maḥākim juz'iyya*), Courts of First Instance (*maḥākim ibtidā'iyya*) and a Supreme Court (*maḥkamā ʿulyā*), is not as radical of a change as previously thought. There was already a local proto-hierarchal structure that facilitated the above ordinance. The issue of appeal in Islamic legal history requires further research, as it can shed light on the evolution of Islamic law in the modern period.[49]

In my discussion of the modern period, I do not focus on the creation of a hierarchical legal structure, which is one of the main components of legal modernization, but on the second element – codification. I show that the codification of the *Sharīʿa* drew on the Ottoman practice of reformed *taqlīd* to achieve the legal flexibility needed for modern times. Since serious challenges are posed to the novelty and European provenance of legal hierarchies and the utilitarian use of the pluralist Sunni legal system, the traditional view of the novelty and origins of some of the legal changes that took place in the nineteenth and twentieth centuries need to be revisited.

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[48] Rudolph Peters, "Islamic and Secular Criminal Law in Nineteenth Century Egypt: The Role and Function of the Qadi," *Islamic Law and Society* 4 (1997): 70-90.

[49] The modern period refers to dramatic social, economic and political changes that took place in nineteenth-century Egypt under Mehmed ʿAlī and European colonialism. For more on colonizing, modernizing and centralizing Egypt, see Khaled Fahmy, *All the Pasha's Men: Mehmed Alī, his Army, and the Making of Modern Egypt* (Cairo; New York: American University in Cairo Press, 1997); Timothy Mitchell, *Colonising Egypt* (Berkeley and Los Angeles, California: University of California Press, 1988). For works discussing an earlier periodization of modernity in Egypt, see Peter Gran, *Islamic Roots of Capitalism: Egypt 1760-1840* (Syracuse, N.Y.: Syracuse University Press, 1998).

The periodization of Egyptian legal modernization

The colonial view of the history of modern Egyptian law is that there was no system of justice prior to the colonial period. This claim is made by the colonial administrator Evelyn Baring, who argued that there was no system of justice in Egypt prior to 1883.[50] Although he was not a legal specialist, his views were accepted by later scholars, who saw the colonial period as the source of legal modernization in Egypt. Thus, some historians choose 1883 with the establishment of national courts as the beginning of Egyptian legal modernity.[51] Another view places the beginning of modernization in 1876 when the mixed courts were created.[52]

The view that situates the beginning of legal modernization in the 1870s and 1880s was challenged by some who argue that the modernization process started much earlier than previously thought.[53] Focusing on codification, the revisionists show that such attempts started as early as 1829 with the creation of the first criminal code and continued up until the second half of the nineteenth century. Peters argues that the period between 1829 and 1882 was more important to legal modernization in Egypt

[50] Evelyn Baring, *Modern Egypt* (London: Routledge, 2002), II: 514-523; What Cromer means by a "system of justice," is based on modern notions of justice, discussed above.
[51] See Latīfa M. Sālim, *al-Niẓām al-Qaḍā'ī al-Miṣrī al-Ḥadīth* (Cairo: al-Hay'a al-Miṣriyya al-'Āmma lī al-Kitāb, 2001), I: 51-96.
[52] Nathan J. Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge: Cambridge University Press, 1997), 26-29.
[53] Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth Century to the Twenty-First Century* (Cambridge, UK: Cambridge University Press, 2005), 133,136; Rudolph Peters, *1829-1871 or 1876-1883? The Significance of Nineteenth-Century Pre-Colonial Legal Reform in Egypt,* paper presented at "New Approaches to Egyptian Legal History: Late Ottoman Period to the Present" (Conference held in Cairo, 11-14 June, 2009).

than the colonial period.[54] Similarly, Emad Helal shows that there was a codification of criminal law prior to the colonial period, even before Peters' watershed date of 1829.[55] This view that much of the centralization and modernization of the legal system took place under Mehmed Alī is corroborated by Zeinab A. Abul-Magd's findings from the Qina province in Upper Egypt. In her dissertation entitled "Empire and its Discontents: Modernity and Subaltern Revolt in Upper Egypt, 1700-1920," she demonstrates that the *Sharī'a* court was an important tool of Mehmed Alī's (reigned 1805-1849) hegemonic policies. He made the court part of the state apparatus, where judges carried out bureaucratic duties and were obliged to apply the new civil codes issued by the state.[56]

Whether the modernization of legal institutions started in the colonial 1880s or the Ottoman 1820s is important because it shows that the legal sea change that took place in the nineteenth century was not a western export in all its component parts. Some of those changes were directly related to the history of colonialism, but there are some legal strategies that have their roots in the local administrative, political and

[54] Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth Century to the Twenty-First Century* (Cambridge, UK: Cambridge University Press, 2005), 133-136; Rudolph Peters, "'For His Correction and as a Deterrent Example for Others': Meḥmed ʿAlī's First Criminal Legislation (1829-1830)," *Islamic Law and Society* 6, 2 (1999): 164-192; Rudolph Peters, *1829-1871 or 1876-1883? The Significance of Nineteenth-Century Pre-Colonial Legal Reform in Egypt,* paper presented at "New Approaches to Egyptian Legal History: Late Ottoman Period to the Present" (Conference held in Cairo, 11-14 June, 2009).

[55] Emad Helal, *Majmuʿ Umūr Jinā'iyya. The Attempts to Collate Criminal Laws in Egypt in the Nineteenth Century,* paper presented at New Approaches to Egyptian Legal History: Late Ottoman Period to the Present Conference, June 11-13, 2009, Cairo, Egypt.

[56] Zeinab A. Abul-Magd, *Empire and its Discontents: Modernity and Subaltern Revolt in Upper Egypt 1700-1920* (PhD Dissertation, Georgetown University, 2008), 132-3. The centralization efforts of Mehmed ʿAlī included reforming the army and education, and codifying some of the laws, as well as placing the state in the personal lives of individuals by surveilling (the panoptican) and controlling their movement. See Khaled Fahmy, *All the Pasha's Men: Mehmed Alī, his Army, and the Making of Modern Egypt* (Cairo; New York: American University in Cairo Press, 1997); Timothy Mitchell, *Colonising Egypt* (Berkeley and Los Angeles, California: University of California Press, 1988), 24-62.

social environment. Some of those changes were created under Mehmed Alī (d. 1849), while others predated him by centuries. Thus, Egyptian legal modernity should be situated, not only in the context of colonialism, but also within Ottoman legal history and the earlier Egyptian socio-juristic environment.

I will show that while modern codification and the creation of hierarchical judicial councils started in the early nineteenth century, some strategies associated with the modern codification of Islamic law, namely *talfīq* and *tatabbu' al-rukhaṣ* evolved much earlier to accommodate a more flexible legal system. The use of those legal strategies evolved in the Ottoman period and was later readily applied by modern legislators in their codification project in a way that is strikingly similar to their use in the seventeenth and eighteenth centuries. I will also demonstrate that there was no discursive shift in the juristic writing of the modern period on those techniques, when compared with the pre-modern period.

The theoretical constructs: legal pluralism

Due to the nature of the Sunni legal system, it is important to briefly discuss the concept of legal pluralism. Throughout the 1960s and 1970s, the field of the anthropology of law was going through a debate over a cross-culturally applicable definition of law and whether it was valid to use Western legal categories to describe non-Western legal processes. By the seventies, the debate had shifted from the analysis of rule-governed institutions to the behavior connected with disputing. Most studies within the field of legal anthropology are concerned with either the "rule-centered

paradigm" or "processual paradigm." The rule-centered paradigm treats law as a form of social control, where legal procedures are the means of enforcing social rules. This paradigm saw the outcome of cases as predictably generated by the application of codified law; and it was associated with the application of Western legal concepts to non-Western societies. Legal processualists had a wider view of what constituted legal phenomena, shifting away from judge-oriented accounts and towards the treatment of indigenous rules as the object of negotiation.[57] This wider view of what constituted law was used by legal pluralists to incorporate some informal rule-making institutions in that definition, thus, creating a pluralist legal system.

Legal pluralism was also a reaction to the legal centrist approach, which situates the state at the center of the legal process, excluding all other players.[58] It usually refers to the circumstance in which there is a rivalry between local laws and customs on the one hand and a modern legal system on the other. Local customs and laws are usually viewed as sources of incoherence that impede the effectiveness of official law. The relationship between modern and local laws is one of competition, not of complementarity.[59] Legal pluralism also refers to a situation where the sovereign

[57] Peter Just, "Review: History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law," *Law & Society Review* 26, 2 (1992): 373-412.
[58] Gordon Woodman, "The Idea of Legal Pluralism," in *Legal Pluralism in the Arab World*, ed. Baudouin Dupret, Maurits Berger and Laila al-Zwaini (The Hague: Kluwer Law International, 1999), 1-21.
[59] Ihsan Yilmaz "Secular Law and the Emergence of Unofficial Turkish Islamic Law," *Middle East Journal* 56, 1 (2002): 113-117.

tolerates the application of legal systems for different ethnic, religious or geographical groups.[60]

John Griffiths holds that the struggle for the recognition of legal pluralism was frequently waged over the definitions of terms, especially "law." However, he argues that the struggle was really about the place in the social order of law-like forms of social control. His problem with the traditional views of lawyers was not the restriction of the word "law" to the type of social control exercised by the state, but that law in this sense is "a very special sort, autonomous and dominant over the rest," which is to be studied and understood as a social phenomenon by itself. In the 1970s Vanderlinden launched an attack on the traditional view of law. He argued that looking at social life in that law-centered manner will not enable us to answer the following three essential questions: (1) How do rules of behavior function in society? (2) What is the role of the rules of state-law in social life? (3) When and why do disputes about the application of rules arise? The challenge posed to the traditional view of law came to be known as "legal pluralism."[61]

> Implicit in the very idea of "recognition" and of (colonial) "legal pluralism" was the acceptance of the existence of law *not* recognized as such by the state.[62]

[60] Cited in Ron Shaham, "Shopping for Legal Forums: Christians and Family Law in Modern Egypt," In *Dispensing Justice in Islam: Qādīs and their Judgments,* ed. Muhamamd Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 453.
[61] John Griffiths, "Preface," in *Legal Pluralism in the Arab World*, ed. Baudouin Dupret, Maurits Berger and Laila al-Zwaini (The Hague: Kluwer Law International, 1999), xii.
[62] Griffiths, *Preface*, viii.

Griffiths proposes a new way of looking at all legal order, which consists of explicit acknowledgement that non-recognized law is every bit as much "law" as recognized law. In other words, the fact of recognition does not determine what is "law," and that this is applicable not only to the colonial setting but to all legal settings. His theory of legal pluralism is based on the idea of "semi-autonomous social fields," (SASF) which was developed by Sally Falk Moore. These social fields have their own normative capacities and are able to enforce these laws on their members.[63]

Griffiths adds that legal pluralism is a model for analysis that needs to be modified on a case-by-case basis.[64] Some studies focus on the competition between state control and local conflict resolution mechanisms. This is the traditional type of legal pluralism, which historically emerged in the context of colonialism.[65] Gordon Woodman calls this type "state law pluralism," and calls the other type where there are two elements, namely the law of the state and normative rules not associated with the state "deep legal pluralism."[66] Maurits Berger studies the question of whether legal pluralism can be utilized in the study of *Sharīʿa*. He distinguishes between the formal and informal applications of the *Sharīʿa* in modern Syria.[67] Similarly, Bernard Botiveau

[63] Griffiths, *Preface*, vvii-xviii.
[64]Griffiths, *Preface*, vii-xviii.
[65] See Bernard Botiveau, *Loi Islamique et Droit dans les Sociétés Arabes: Mutations des Systèmes Juridiques du Moyen-Orient* (Paris: Karthala, 1993). In this study, Botiveau examines the management of blood feud conflicts in Upper Egypt, which is an example of a semi-autonomous social field that not only produces binding norms, but also contradicts the state's legal order.
[66] Gordon Woodman, "The Idea of Legal Pluralism," in *Legal Pluralism in the Arab World*, ed. Baudouin Dupret, Maurits Berger and Laila al-Zwaini (The Hague: Kluwer Law International, 1999), 1-21.
[67] Maurits Berger, "The *Sharīʿa* and Legal Pluralism: The Example of Syria," in *Legal Pluralism in the Arab World*, ed. Baudouin Dupret, Maurits Berger and Laila al-Zwaini (The Hague: Kluwer Law International, 1999), 131-125; See also Rudolph Peters "An Administrator's Nightmare: Feuding Families in Nineteenth

examines contemporary Palestinian law, which is a combination of Ottoman, customary, and Jordanian laws. Again, in this instance, the pluralism is within the same state legal system, which Botiveau calls the "internal pluralism of state law."[68]

I will engage the concept of legal pluralism in this internal manner within the same official state law, not in the context of the modern nation-state,[69] but rather within the imperial Ottoman legal system. The Ottoman legal system in Egypt was a pluralistic system, in which there was a complementary competition between the four Sunni schools of law. By the nineteenth-century legal modernization, this legal pluralism was compounded by imported legal codes, mostly of French provenance in the case of Egypt. The legal pluralism inherent in Sunni Islamic law is not the result of a competition between the state and local customs. Quite the contrary, the Ottoman period witnessed the rise of Ḥanafism as the official school, but the Ottomans employed a utilitarian approach that took advantage of this pluralism to accommodate social needs and mores. I examine legal pluralism, not only beyond the context of colonialism and the modern nation-state, but also in a non-competitive, utilitarian manner.

Century Bahariyya Oasis," in *Legal Pluralism in the Arab World*, ed. Baudouin Dupret, Maurits Berger and Laila al-Zwaini (The Hague: Kluwer Law International, 1999), 135-144.

[68] Bernard Botiveau, "Palestinian Law: Social Segmentation Versus CentrAlīzation," in *Legal Pluralism in the Arab World*, ed. Baudouin Dupret, Maurits Berger and Laila al-Zwaini (The Hague: Kluwer Law International, 1999), 57-73.

[69] For a discussion of the modern nation-state, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London; New York: Verso, 2006).

Legal formalism and realism

Islamic legal historians have traditionally taken more of a legal formalist approach, which is primarily concerned with legal rules and doctrines at the expense of social, cultural and political factors that might explain some legal decisions. Because legal formalists believed that legal rules alone determined the outcome of a legal question, there was a neglect of the study of legal practice.[70] The legal formalist view has been challenged by legal realists,[71] who see law as an interpretive process, which does not have an identity apart from the activity of its interpretation. They adopt a participant's view of the law, where every actor in the practice of law plays a role.[72] Judith Tucker discusses the divergent views on whether judges, *muftī*s and laypeople play a part in the development of the law. Adopting a realist view, she argues that the courts played a role in the development of Islamic law by way of *fatwā*. Her view is juxtaposed with Colin Imber's study of the sixteenth-century *muftī* of Istanbul, in which he contends that judges did not play an important role in the development of the law.[73] Imber's view is in line with the formalist view of law, where litigants and other participants in the legal process are passive recipients. They are social history subjects, rather than active producers of the law.

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[70] Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), 2-9; Kristen Stilt, "Price Setting and Hoarding in Mamluk Egypt," in *The Law Applied: ContextuAlīzing the Islamic Sharīʿa*, ed. Peri Bearman, Wolfhart Heinrichs and Bernard G. Weiss (London: I.B.Tauris, 2008), 57-58; Brian Leiter, "Legal ReAlīsm and Legal Positivism Reconsidered," *Ethics* 111, 2 (2001): 278-301.
[71] Stilt, *Price,* 57-58. Leiter, *Legal Realism,* 278-301.
[72] Fitzpatrick, *Mythology,* 3-8.
[73] Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008), 16-17; See also Colin Imber, *Ebu's-suʿud: The Islamic Legal Tradition* (Stanford, California: Stanford University Press, 1997), 7.

In this study, I explore the roles played by participants in the legal process, namely subjects of the law, *muftī*s and legal practitioners. They all played an important role that deeply impacted the legal process. I will show how legal theory did not stand aloof from the practice of regular people in the courts. People's practice of the law and understanding of it, as well as the knowledge disseminated to laypeople through *muftī*s and minor religious scholars, created a legal practice that contradicted classical legal theory. The tension between the practice and the theory was felt in legal theoretical writings, with some jurists rejecting those practices as anomalies that needed to be corrected. Others tried to bridge the gap between theory and practice, following a less prescriptive approach. It is in the discussion and practice of the use of legal pluralism for utility that we see how participants in the legal process changed what the law is.

Unit of analysis

In this study, I will focus on Egypt as a good representative both of theoretical legal writings in the seventeenth and eighteenth centuries and of legal modernization in the nineteenth and twentieth centuries. Egypt was an important Ottoman province that had a vibrant jurisprudential community of scholars. Due to its geographical location and history, three of the four Sunni schools of law had many followers among the population. Mālikism had a large presence in Egypt, where much of the later doctrine of that school was developed. The situation is similar with Shāfiʿism, as the eponym of the school spent the later part of his life in Egypt, developing his more authoritative later doctrine. Ḥanafism saw a fast rise in Egypt after the Ottoman

conquest in 1517, gaining the status of the official school, thus depriving Shāfiʿīsm of its leading role in the Mamluk period. Out of the four Sunnī schools of law, Ḥanbalism had the least following in Egypt. However, as we will see in chapter III, its utilization to facilitate certain transactions in Egyptian Ottoman courts was disproportionately high compared to the number of its adherents.

In my attempts to chart out attitudinal transformations in the theoretical literature towards the crossing of school boundaries, I will not focus only on Egyptian jurists. It is hard to chart out a legal attitude geographically because scholars were extremely mobile in their pursuit of knowledge. Many of them spent most of their formative years away from where they were born, in major centers of scholarship such as Cairo and Damascus. Geography is less useful in any attempt to draw group doctrine, than the legal school, which transcended geography. Jurists functioned like a professional guild, whose members engaged each other across geographical boundaries. Their works were utilized by the members of the school regardless of geographical origins.

It is appropriate to discuss the theoretical legal writings within the schools as a discourse produced for and by a well-connected network of scholars. When geographical school differences over the official school doctrine occur, jurists usually point them out. In that case, the school would have two or more competing doctrines. This is the situation with the issue of *talfīq* among Mālikīs. An Egyptian Mālikī refers to

the fact that North African Mālikīs permit *talfīq*, whereas Egyptians do not; nevertheless, he himself follows the North African view.[74]

The legal strategies

In the age of *taqlīd*, which is supposed to have dominated between the eleventh and thirteenth centuries, the boundaries of schools were crossed in many ways. *Tamadhhub*, i.e. abiding by one's school in all legal transactions, was a peripheral view that never gained traction in legal theory as far as subjects of the law were concerned. However, judges were required to follow their school.[75] Yet, subjects of the law, for example, were by the Mamluk period permitted to pursue the schools that presented the most beneficial outcome to their legal transactions. By the Ottoman period, there was even a growing strand in legal theory that allowed *muftī*s to provide legal advice from outside of their own schools, serving the needs of the subjects of the law.

In the classical period, which for the purposes of this study will end in the Mamluk period when Baybars made his decision to appoint four chief judges in Cairo in 1265, *taqlīd* had not yet overtaken the territory occupied by *ijtihād*. The stabilization of the schools (around the eleventh century) and the rise of *taqlīd* (around the twelfth and thirteenth centuries) removed some of the unpredictability in the legal system.[76] An

[74] Al-Dasūqī, *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr* (Cairo: Dār Iḥyā al-Kutub al-ʿArabiyya, ʿĪsā al-Bābī al-Ḥalabī, 1984), I: 40-47.

[75] Judges in the age of *taqlīd*, after the school dogmas were fixed and stabilized, were required not to exercise their own reasoning, but to follow the views of their schools. Furthermore, *muftī*s were no longer required to be *mujtahids.* See Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 75-76.

[76] See Sherman A. Jackson, "*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory *Muṭlaq* and '*Āmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī," *Islamic Law and Society* 3, 2

unpredictable *ijtihād*-based system of justice would have not been to the liking of the Mamluk imperial regime, which explains why judges were specifically required to follow one school in their rulings.[77]

The shift from the classical period to the post-classical period cannot escape being somewhat arbitrary. It is hard to pinpoint a date or even a decade where a break took place, as the process of change was gradual and fluid. At some point, we see that judges are expected not to follow their *ijtihād*, but the dominant view within the school. In fact, we even see the exercise of *ijtihād* being considered grounds for overruling a judge's decision.[78] This gradual process culminated in schools creating a great level of predictability, coupled with what Jackson terms a "corporate status" that allowed the schools to protect their members.[79]

Despite the rise of the school as a corporate entity, the lines between schools were crossed sometimes by the subjects of the law, and by the *muftī*s to a lesser extent. Most jurists allowed Muslims to change their school affiliation holistically, but there was disagreement over whether Muslims should be allowed to pick a ruling from another school while remaining in one's original school. When the holistic change of

(1996): 168; Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 75-76.

[77] Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 81.

[78] For discussions of *taqlīd* and *ijtihād*, see Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of *Mukhtaṣar*," *Islamic Law and Society* 3, 2 (1996): 193; Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996); Wael B. Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16, 1 (1984): 3-41.

[79] Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996), 103.

school occurs, it is usually performed by jurists who, at least traditionally, have found the new school ideology inherently more coherent.[80]

The atomistic change of school in a single transaction can either be motivated by ideology or utility. For non-jurists, the change of school is usually motivated by social utility, since they are not thought to have a rigid school affiliation. They usually have a *muftī* that they consult on legal matters. The crossing of school boundaries for ideological reasons has been accepted in legal theory since its early beginnings, but change for utility has created some tension throughout the history of Islamic legal theory. A conservative strand within legal theory did not allow schools to be evaluated on grounds external to their arguments. This is clear in their opposition to the use of utility in the choice of school, as I will show below. Another strand tried to legitimize this social practice, which many of them admitted was taking place in their societies.

The simple change of schools for strictly evidential reasons never attained a technical term. But there are two terms that have been used consistently throughout Islamic legal theory to describe the conscious change of school that aims at utility, rather than the pursuit of the 'correct' ruling, namely *talfīq*, and *tatabbu' al-rukhaṣ*. A third term that is similar to the above two is *takhayyur*. While the latter was not used to refer to the use of the law for utility in the pre-modern period, it was appropriated by reformers in the modern period, who took it to mean the utilitarian eclectic use of

[80] ʿIzz al-Dīn Ibn ʿAbd al-Salām, *al-Qawāʿid al-Kubrā: Qawāʿid al-Aḥkām fī Iṣlāḥ al-Anām* (Damascus: Dār al-Qalam, 2000), 2: 274-275; Ibn Taymiya, *Mukhtaṣar al-Fatāwā al-Miṣriyya* (Beirut: Dār al-Kutub al-'Ilmiyya, 1949), 60-61, 601-603.

rulings of multiple schools to create modern codes. I will now present what those terms mean according to the pre-modern juristic literature examined in this study. The works I have examined range from legal authorities as early as the ninth century up to the modern period.

What is *talfīq*?

> A person marries his daughter off with no guardian (*walī*), according to the Ḥanafī school, no witnesses according to the Mālikī school and no dower according to the Shāfiʿī school, turning marriage into fornication.[81]

The term *talfīq* comes from the verb *laffaqa*, which is to sew two pieces of cloth together.[82] In its technical sense, the term is used to refer to putting together elements of two or more doctrines to create a new different doctrine. The marriage example mentioned above is one type of *talfīq*, which Hallaq and Layish named synchronic, where it occurs in the same legal transaction. The other type they term diachronic is when an individual follows the doctrine of a *mujtahid* in a transaction whose legal effect has not been exhausted. Then he follows another *mujtahid* before the legal effect of the first case has been exhausted. An example of this is when an individual exercises the right of pre-emption (*shufʿa*) according to the Ḥanafī school which gives the adjoining neighbor that right. Then once he buys the land, he adopts the Shāfiʿī school in a future

[81] See for example al-Samahūdī, *al-ʿIqd al-Farīd fī Aḥkām al-Taqlīd*, MS Dār al-Kutub 45 Uṣūl Taymūr, folio 21a, microfilm # 11397.
[82] See Ibn Manẓur, *Lisān al-ʿArab*. http://www.baheth.info/web/all.jsp?select=all&search=%D8%B5%D9%8E%D9%81%D9%8E%D9%82%D9%8E#12 (accessed online August 31, 2010)

sale, thus depriving his neighbor of the same right to pre-emption he himself had claimed on the same piece of land.[83]

In the writings of all the pre-modern jurists I have examined for this study, there is a general consensus that *talfīq* refers to the practice of combining the rulings of multiple schools in a single decision. It is in the modern period that confusion seems to occur, mostly among western scholars. I will explain what *talfīq* meant to modern scholars in my discussion of the modern evolution of the term in chapter four.

What are *rukhṣa* and *tatabbu' al-rukhaṣ*?

Rukhṣa, literally "permission," or "dispensation," is defined by Peters as "a legal ruling relaxing or suspending by way of exception under certain circumstances an injunction of a primary and general nature." One example that he cites is the suspension of the obligation to fast during Ramadan while being ill or on a journey. This *rukhṣa* is allowed in all the four schools of law. One has the choice whether or not to make use of the *rukhṣa*, but if he fears death by not following the *rukhṣa*, he has no choice but to use it.[84] A *rukhṣa* is usually described in the four schools as a clear relaxation of the rules in certain prescribed situations. This type is not based on the diversity of schools, but it is available within each school. Washing over shoes during ritual ablution is a case in point. One does not need to change his school to benefit from

[83] Wael B. Hallaq; Aharon Layish, "Talfīḳ," *Encyclopaedia of Islam,* ed. P. Bearman , Th. Bianquis , C.E. Bosworth , E. van Donzel and W.P. Heinrichs. Brill, 2008.
[84] Peters, R.; Haar, J.G.J. ter. "Rukhṣa." *Encyclopaedia of Islam, Second Edition*. Ed., P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, and W.P. Heinrichs, Brill, 2010.

this *rukhṣa* as it is contained within each school. A person performing the ritual can choose whether to wash over his shoes or take them off and wash his feet.[85]

The second type is based on the differences of opinion among the schools, known as *tatabbuʿ rukhaṣ al-madhāhib,* or simply *tatabbuʿ al-rukhaṣ.*[86] This was used in the Mamluk and Ottoman periods to refer to the conscious decision to pursue the one ruling perceived to be most expedient in any of the four Sunni schools. In this sense, any act of *talfīq* can be seen as a form of *tatabbu' al-rukhaṣ.* The term *tatabbu' al-rukhaṣ* was also used to describe the act of choosing the most expedient of multiple rulings within the same school. In this sense, it is more general than *talfīq*. Any act of *talfīq* can be a form of *tatabbu' al-rukhaṣ,* but the reverse is not necessarily true. This term is seldom discussed in modern historiography of Islamic law.

Those who opposed this legal technique, oftentimes associated it with the Qurā'nic term *ittibā' al-hawā* (following whims): "Judge between them in the light of what has been revealed by God, and do not follow their whims."[87] Some jurists who were opposed to *tatabbu' al-rukhaṣ* even used it interchangeably with *ittibā' al-hawā.* This negative association might explain the choice of modern reformers to opt for the use of the term *takhayyur* to mean the same thing, as explained below.

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[85] 'Abd al-Wahhāb al-Shaʿrānī, *al-Mizān al-Shaʿrāniyya al-Mudkhala.* MS Dār al-Kutub 77 Fiqh Madhāhib, folio 8a, 8b, 15a, microfilm # 48209.

[86] This is the definition of *tatabbuʿ al-rukhaṣ* in *taqlīd*. There is also another less common type, known as *tatabbu' al-rukhaṣ* in *ijtihād*, which simply means reaching the same ruling as another school by sheer coincidence, rather than through *taqlīd*, and after examining the necessary evidence required in any *ijtihād*.

[87] Aḥmad Alī, *Al-Qur'ān: A Contemporary Translation* (Princeton: Princeton University Press, 1993), 5:49.

The most similar case in classical Islamic history to a written book that takes advantage of legal pluralism was seen as an example of *tatabbu‘ al-rukhaṣ*, not of *talfīq*. In the Sunan of al-Bayhaqī (d. 458/1066) there is a discussion over choosing the anomalous views of different scholars (*al-akhdh bi-nawādir al-ʿulamā’*), in which he relates the story of someone by the name of Ismāʿīl al-Qāḍi who said:

> I entered into the company of al-Mu‘taḍid, who showed me a book, in which the easier paths of the anomalies of the scholars (*al-rukhaṣ min dhilal al-ʿulamā’*) were collected. I said, “the author of this book is a heretic (*zindīq*).” Al- Mu‘taḍid said, “Are these traditions not authentic?” I said, “They are, but whoever permitted the drinking of inebriants, did not permit *mutʿa* marriage; and whoever permitted *mutʿa* marriage, did not permit the drinking of inebriants. Every scholar makes an error (*zalla*). Those who collect the errors of scholars, and follow them, lose their faith. Then al-Muʿtadid ordered the book burned.”[88]

This book was considered an example of *tatabbu‘ al-rukhaṣ* because although there are different divergent opinions contained in the same book, each case belongs to only one scholar.

What are *takhayyur* and *tarjīḥ*?

In traditional Islamic legal theory, *takhayyur* means the jurist’s choice of the most appropriate opinion.[89] Unlike *tatabbuʿ al-rukhaṣ*, *takhayyur* does not refer to utility as the motivation of that choice. Al-Ghazālī uses the term *takhayyur* to refer to two opinions with the same strength of proof, where a person chooses between them.[90] The

[88] Taqī al-Dīn Muḥammad Ibn Aḥmad al-Futūḥī, *Sharḥ al-Kawkab al-Munīr* (Cairo: al-Bābi al-Ḥalabī, n.d.), 4: 577, 578; Al-Shawkānī, *Irshād al-Fuḥūl* (Cairo: Maṭbaʿat al-Saʿāda, 1910), 272.
[89] Tāj al-Dīn al-Subkī, *Ṭabaqāt al-Shāfi‘iyya al-Kubrā* (Cairo: Hajr Lī al-Tibāʿa Wa al-Nashr, 1992), 6: 182.
[90] Al-Ghazālī, *Al-Mustaṣfā Min ʿIlm al-Uṣūl* (Beirut: Muʾassasat al-Risāla, 1997), 2: 347-348.

choice is not based on the strength of proof since they are on the same level; instead an arbitrary choice is made. The same word is also used by Ibn al-Ṣalāḥ (d. 643/1245) to refer to an arbitrary choice of a ruling that is not based on an evaluative legal process.[91] Ibn Ḥazm uses the term *takhyīr* to refer to instances where God allows Muslims two options that are equally valid. One of the examples he cites is the expiation that has to be made by the pilgrim if he cannot shave his head because of a disease for example before the sacrifice. Those two options are based on Qur'ān 2:196:

> "Perform the pilgrimage and holy visit ('Umra, to Makkah) in the service of God. But if you are prevented, send an offering which you can afford as sacrifice, and do not shave your heads until the offering has reached the place of sacrifice. But if you are sick or have ailment of the scalp (preventing the shaving of hair), then offer expiation by fasting or else giving alms or a sacrificial offering. When you have security, then those of you who wish to perform the holy visit along with the pilgrimage, should make a sacrifice according to their means. But he who has nothing, should fast for three days during the pilgrimage and seven on return, completing ten. This applies to him whose family does not live near the Holy Mosque. Have fear of God, and remember that God is severe in punishment."[92]

In his discussion of the *muqallid*-judge who is faced with contradictory opinions within the schools, Ibn Farḥūn (d. 799/1396) cites three positions in the Mālikī school. The first was that he must follow the most learned; the second was that he must follow the majority of jurists, and the third was that he was free to choose any of the opinions (*takhayyur*), as long as he was not behaving arbitrarily.[93] Here, *takhayyur* is similar to *tarjīḥ*, because of the specific warning against arbitrariness in the choice. Similarly, the

[91] Ibn al-Ṣalāḥ al-Shahrazūrī, *Adāb al-Muftī* (Cairo: Maktabat al-Khānjī, 1992), 123.
[92] Ahmed Alī, *Al-Qur'ān: A Contemporary Translation* (Princeton: Princeton University Press, 1993), 2:196.
[93] Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of *Mukhtaṣar*," *Islamic Law and Society* 3, 2 (1996): 212.

Ḥanafī Ibn Qutlubugha (879/1474) holds that the judge who is able to exercise *ijtihād* should choose (*takhayyara*) the most appropriate of contradictory opinions.[94]

In the theoretical literature covered for this study, the use of *tatabbuʿ al-rukhaṣ* was associated with the crossing of school boundaries for utility, whereas *takhayyur* and *tarjīḥ* were mostly exercised within the same school and were based on the strength of arguments, rather than on utility. In the case of a layperson, *takhayyur* tends to be an arbitrary choice, but for the jurist it is similar to *tarjīḥ*, which refers to the choice of one view from a range of different opinions based on which of them is the most epistemologically sound.[95]

The term *takhayyur* evolved in the nineteenth century, in which it was initially used to choose laws from within the Ḥanafī school.[96] Subsequently, it was used for the choice of laws from other schools as well, where utility became an essential criterion for choice.[97] In other words, the term has evolved overtime due to the efforts of modern reformers and eventually came to refer to what pre-modern jurists would term *tatabbuʿ al-rukhaṣ*. On the continuum of *ijtihād-taqlīd*, *tarjīḥ* stands within the *taqlīd* side but close

[94] Cited in Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihad*," *Islamic Law and Society* 3 (1996): 261.
[95] Wael W. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge, UK: Cambridge University Press, 2001), 126-7.
[96] See for example, A. Layish and R. Shaham, "Tashrīʿ," *Encyclopaedia of Islam,* ed., P. Bearman , Th. Bianquis , C.E. Bosworth , E. van Donzel and W.P. Heinrichs. Brill, 2008.
[97] See John L. Esposito, *Women in Muslim Family law* (Syracuse: Syracuse University Press, 1982), 95-101. See also Birgit Krawietz, "Cut and Paste in Legal Rules: Designing Islamic Norms with *Talfiq*," *Die Welt des Islams* 42, 1 (2002): 4; Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1962); Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihad*," *Islamic Law and Society* 3 (1996): 247.

to the *ijtihād* end. *Tatabbuʿ al-rukhaṣ* and *talfīq* stand in the *taqlīd* side further away from *ijtihād*.

Research scheme and sources

I studied the indices of the Dār al-Kutub al-Qawmiyya Library and al-Azhar Library in Cairo, which contain some of the largest collections of works of legal theory and substantive law from the pre-modern period. Out of a total of approximately 2000 manuscripts, I located about 50 with discussions relevant to the legal techniques under examination. I use those unpublished sources, as well as published theoretical works to gauge attitudes towards those legal techniques synchronically. I then select a representative sample from the courts of seventeenth and eighteenth-century Cairo and Bulāq examples of the practice of those legal techniques.

In the first and second chapters, I show that attitudes towards *tatabbu' al-rukhaṣ* and *talfīq* in the legal theoretical literature started to change at some point in the Mamluk period, despite the classical consensus-based opposition to both techniques. Legal theoreticians were both aware that such practices were taking place in the courts, and more accepting of those practices. In the late Ottoman period, jurists were obsessed with this discussion, so much that treatises for and against such practices were written, sometimes causing discord within the legal scholarly community.

In the third chapter, through the study of three courts in Cairo and Bulāq, I show that the change of school for utilitarian purposes was practiced in the Ottoman

period in ways that correspond to both *tatabbu‘ al-rukhaṣ* and *talfīq*. This practice helped legal theory establish a more flexible *taqlīd* system by drawing on the diversity of legal opinions within the four schools. In the fourth chapter, I discuss the attitudes of modern jurists towards *tatabbuʿ al-rukhaṣ* and *talfīq*. I show that modern juristic attitudes represent theoretical continuity with the pre-modern period. I also discuss the ways in which the terms were understood by modern jurists and academics. I conclude that legal theory was reflective of and responsive to social reality.

Chapter 1

Pursuing the Easier Rulings: *Tatabbuʿ al-Rukhaṣ*

In this chapter, I will analyze attitudinal transformations towards *tatabbuʿ al-rukhaṣ* going as far back as the eponyms of the four Sunni schools of law and arriving at the early nineteenth century, before the legal modernization efforts of the Egyptian legal system.

Ijtihād-taqlīd and the rise of the *rājiḥ*

Absolute *ijtihād* (*muṭlaq*), in which the scholar applies himself directly to the text, usually through the use of analogical reasoning (*qiyās*), is on one end of a continuum.[98] On the other end lies, *taqlīd* of the layperson, who does not even know the evidence supporting a particular ruling. *Tatabbuʿ al-rukhaṣ* (pursuing the easier rulings) and *talfīq* (combining two rulings in the same transaction) are situated on the *taqlīd*-end of the continuum. *Tarjīḥ* (the process of choosing the preponderant view, *rājiḥ*) which in the theoretical literature should be exercised by jurists based on the strength of arguments, also lies within *taqlīd*, since the jurist is usually only choosing between the opinions of other scholars. But it is closer to the *ijtihād* end, as there is a degree of effort exerted to choose from a number of rulings, based on the strength of their arguments. This is the system of *taqlīd* that dominated the legal picture after the stabilization of the

[98] For discussions of the role of *qiyās* in *ijtihād*, see Schacht, J.; MacDonald D.B. "Idjtihād," *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman; Th. Bianquis; , C.E. Bosworth; , E. van Donzel; and W.P. Heinrichs, Brill, 2011; Wael B. Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16 (1984): 30.

four schools.[99] The ascendancy of *taqlīd* took place over the course of the eleventh and twelfth centuries.[100] During the twelfth century, jurists began to argue that there was a hierarchy of authority among the Ḥanafī masters.[101] This hierarchy came overtime to represent the *rājiḥ* of the school. This development came at a time when *taqlīd* was at a later stage of development as the dominant force in the legal system. By the thirteenth century, *muftī*s were allowed to exercise *taqlīd*.[102] It was in this context that the Mamluk Sultan Baybars appointed four chief judges in Cairo in 1265 CE. This decision represents the culmination of the system of *taqlīd* and its formalization by the Mamluk authorities for the purpose of drawing on the diversity of legal opinions in the four schools.[103]

Needless to say, this dichotomy between *ijtihād* and *taqlīd* does not mean that there was a clean rupture that can be situated in time and space. When I present this dichotomy, I am referring to dominant strands of both legal theory and practice. Even in the age of *taqlīd*, when truth is thought by many to be restricted to the views of the four schools, we still see scholars arguing for *ijtihād* beyond the views available in the schools.[104] To reconcile their views towards *ijtihād* with the dominant dogma, some

[99] The term *istiqrār al-madhāhib* appears in Mawārdī's *Adāb al-Qaḍā'* (d. 450/1058). Thus, the stabilization of the schools must have been complete in the eleventh century. See Sherman A. Jackson, "*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory *Muṭlaq* and '*Āmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī," *Islamic Law and Society* 3, 2 (1996): 168.
[100] Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of *Mukhtaṣar*," *Islamic Law and Society* 3, 2 (1996): 194-196; See also Jackson, *Taqlīd*, 165-192.
[101] Rudolph Peters, "What does it Mean to be an Official Madhhab?" in *The Islamic School of Law: Evolution, Devolution and Progress*, ed. Peri Bearman, Rudolph Peters and Frank E. Vogel (Cambridge, Massachusetts, Harvard University Press, 2005), 149-152.
[102] Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 75-76.
[103] Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qādī*s under the Mamluks," *Islamic Law and Society* 10 (2003): 210.
[104] Wael B. Hallaq, "Was the Gate of Ijtihād Closed?" *International Journal of Middle East Studies*, 16 (1984), 3-41.

argued that the four schools contain the truth on most issues, but there are issues about which new *ijtihād* can be right even if it contradicts the four schools.[105]

The unpredictability inherent in a system of *ijtihād* is perhaps the best explanation for the rise of *taqlīd* after the stabilization of the four schools.[106] This new development denotes the maturity of the legal system, in which according to Jackson "legal scaffolding," becomes dominant over the abandonment of previous legal rules, represented by *ijtihād*.[107] Jackson adds that the institutionalization of *taqlīd* in the post-formative period set the stage for legal scaffolding. I demonstrate that after the full institutionalization of *taqlīd* in the thirteenth century, a process of reform was set in motion. This reform gave subjects of the law and jurists access to a wider range of legal opinions both within each school and through the crossing of school boundaries. Such practice created a tension between two groups – prescriptive and descriptive jurists. Prescriptive jurists continued to hold the classical view that transcending school boundaries and resorting to weak opinions was forbidden. Descriptive jurists were uncomfortable with this tension and tried to permit the practices of *talfīq* and *tatabbuʿ al-rukhaṣ* in their theoretical writings.

The fact that there was a debate rather than a consensus over the two strategies meant meant that those practicing *talfīq* and *tatabbuʿ al-rukhaṣ* were no longer subject to

[105] Ibn Taymiya, *Mukhtaṣar al-Fatāwā al-Miṣriyya* (Beirut: Dār al-Kutub al-'Ilmiyya, 1949), 61.
[106] Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of *Mukhtaṣar*," *Islamic Law and Society* 3, 2 (1996): 193-233; Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qādīs* under the Mamluks," *Islamic Law and Society* 10 (2003): 210.
[107] Legal scaffolding refers to introducing adjustments to the legal system through new divisions, exceptions, distinctions, or through restricting or expanding the scope of existing laws, instead of resorting to new interpretations. See Sherman A. Jackson, "*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory *Muṭlaq* and '*Āmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī," *Islamic Law and Society 3,* 2 (1996): 167.

the same legal consequences prescribed in Islamic law. These legal consequences include losing legal probity (*ʿadāla*), which disallows them from practicing judgeship or testifying in court according to most jurists. The lack of consensus would also mean that judicial rulings based on those strategies would not be overruled.[108] I then examine a thousand and one cases from seventeenth and eighteenth century Egypt to show how this system of utility worked in the courtroom in the Ottoman period.

This shift both in the practice of the courts and the ensuing theoretical shift amounts to a reform of *taqlīd* as it was known in the classical period to accommodate its changing role in Islamic society. *Taqlīd* was no longer circumscribed to its evidential variety, in which the view of the jurist is followed based on the evidence he presents, but to a pragmatic form that permits *tatabbuʿ al-rukhaṣ* as we will see in this chapter and *talfīq* as we will see in the next chapter. In this mature *taqlīd*-system, there is growing acceptance of utility in pursuit of the easier rulings in the four schools. This process would not have been possible in an inherently changeable system of *ijtihād*.

Following the schools: *tamadhhub* and *tatabbuʿ al-rukhaṣ*

Most jurists throughout Islamic history, both during the classical and post-classical periods, permitted people to change their school holistically.[109] There is little disagreement that a person can change his school for all transactions. Most scholars also allowed an individual to change schools for the space of a single transaction, as

[108] See Muḥammad Fiqhī, *Risāla fīmā Yataʿallaq bi-Aḥwāl al-Muftī*. MS Dār al-Kutub 198 Uṣūl Fiqh, folio 3b-5b, Microfilm # 23027.
[109] For the purposes of this study, the classical period ends in the Mamluk period, when Baybars decided to appoint four chief judges in Cairo in 1265 CE.

long as it was for evidential reasons, such as finding one doctrine more convincing, or its evidence stronger. Very few jurists throughout Islamic history have supported *tamadhhub*, that is, the prohibition of choosing rulings from other schools in a single transaction. Instead, *tamadhhub* was oftentimes associated with the belief in the superiority of one school or *imām* over the others, which was seen as fanatical by some jurists.[110]

However, even the few supporters of *tamadhhub*, such as the Shāfiʿī Abū al-Ḥasan al-Kiyā (d. 504/1110), were mostly motivated by the fear of people's manipulation of the quadruple system for utility. Abū al-Ḥasan al-Kiyā is quoted as saying that *tamadhhub* was not practiced in the first generation of Muslims because the schools had not been codified; and hence there was no concern that people would purposefully pick and choose from the schools. But since the establishment of schools, people have to abide by one school and follow it in every act as a precaution against *tatabbuʿ al-rukhaṣ*. Since laypeople were incapable of weighing one school against another, some argued that they should never change their *muftī*. Any such change can only be based on bias, not knowledge.[111]

Tamadhhub seems to be a peripheral view that never really took hold neither in classical legal theory nor in the post-classical period. As long as the legal result is not the motivation, most legal theorists argue that changing schools both holistically and

[110] ʿIzz al-Dīn Ibn ʿAbd al-Salām, *al-Qawāʿid al-Kubrā: Qawāʿid al-Aḥkām fī Iṣlāḥ al-Anām* (Damascus: Dār al-Qalam, 2000), 2:274-275; Ibn Taymiya, *Mukhtaṣar al-Fatāwā al-Miṣriyya* (Beirut: Dār al-Kutub al-'Ilmiyya, 1949), 60-61, 601-603.
[111] Samahūdī, *al-'Iqd al-Farīd fī Aḥkām al-Taqlīd*. MS Dār al-Kutub 45 Uṣūl Taymūr, folio 14b-16b, microfilm # 11397.

in the single transaction is permissible for jurists, who can compare the evidence of the different views and choose the one that appeals the most to their reason. By the same token, changing *muftī*s is permissible for laypeople as long as it is not motivated by pragmatism. Thus, views regarding the motivation behind the change of school fell into a continuum, with one end representing evidential and the other pragmatic reasons. In classical legal theory, the utilitarian change of school was not permitted as it stood closer to the evidential side of the continuum, until some point in the Mamluk period when the focus shifted more towards the pragmatic side. This shift happened gradually throughout the Mamluk and Ottoman periods. During the Ottoman period, this shift became more pronounced, as we will see below. The discussion of the use of the schools for utility became so heated in the Ottoman period that many treatises on the subject were written, causing much discord in the jurisprudential community.

In pre-modern legal terminology, the use of the quadruple system for social utility is represented by two terms: *tatabbuʿ al-rukhaṣ* and *talfīq*. A diachronic discussion of the evolution of those attitudes will demonstrate that change in legal theory was in fact a response to social practice. There was no abrupt break with the traditional approach. Rather, a new strand of thought started to compete with the traditional account, gaining more strength overtime, particularly in the Ottoman period. The new strand can be understood as an attempt on the part of some descriptive jurists to justify social practice.

Both opponents and supporters of *tatabbuʿ al-rukhaṣ* abound in all four schools of Sunni law. There is some irony in that not only supporters but also opponents of

tatabbuʿ al-rukhaṣ found it convenient to enlist the help of like-minded jurists from other schools. Indeed, some jurists justified their frequent engagement of authorities from the other schools by arguing that this is a topic that requires such eclecticism.[112]

One characteristic that enabled later attitudes to compete with the classical doctrine is that there was more of a tendency in legal theory than in other fields to update its authorities. While someone like al-Ghazālī (d. 505/1111) remained a significant figure, Ibn Ḥajar al-Haythamī's (d. 973/1566) views were arguably more important in the Ottoman period. This phenomenon was bemoaned by more traditional jurists such as the Ḥanbalī Ḥamad Ibn Nāṣir Ibn Muʿammar (d. 1225/1810), who says that many jurists prefer the opinions of later authorities (*muta'akhkhirīn*) over those of earlier authorities (*mutaqaddimīn*).[113] The later the better, they believe. Ḥanbalīs neglect the *ijtihād* of Ibn Ḥanbal in favor of such jurists as Ibn al-Najjār (d. 972/1565) and al-Ḥajjawī (d. 960/1553). Similarly, later Shāfiʿīs are really the followers of Ibn Ḥajar al-Haythamī (d. 973/1566) and later Mālikīs are the followers of Khalīl (d. 776/1365), not of Mālik.[114]

Attitudes towards *tatabbuʿ al-rukhaṣ* in Islamic legal theory

[112] See for example, Muḥammad al-Baghdādī, *Risāla fī al-Taqlīd*. MS Dār al-Kutub 125 Uṣūl Taymūr, folio 3a-5b, microfilm # 23855; ʿAbd al-Ghanī al-Nābulsī, *al-Ajwiba ʿAn al-As'ila al-Sitta*. MS Dār al-Kutub 365 Uṣūl Fiqh, folio 5a-5b, microfilm # 16703.

[113] This term is usually used to refer to scholars from the first 300 years of the Islamic calendar, thus *muta'akhkhirīn* begins roughly in the 10th century. See for example, Christopher Melchert, "Aḥmad Ibn Ḥanbal and the Qu'rān," *Journal of Qur'ānic Studies* 6 (2004): 22-34. See also Ibn Ḥajar al-ʿAsqalānī, *Lisān al-Mizān* (Cairo: al-Farūq al-Hadītha lī al-Ṭibāʿa wa al-Nashr, 1996), 1:8.

[114] ʿAbd al-ʿAzīz Ibn Ibrāhīm al-Dukhayyil, *al-Taḥqīq fī Buṭlān al-Talfīq Naṣṣ ʿAlā Futyā lī al-Shaykh Marʿī al-Ḥanbalī* (Riyadh: Dār al-Ṣumayʿī, 1998), 91-94.

I will now introduce the classical view on the pragmatic use of the pluralist legal system, followed by the paradigmatic shift which started in the Mamluk period and continued to compete with the classical doctrine until the modern period.

True to the Classical Tradition

> If a person followed the view of the people of Kūfa [Ḥanafīs] on date wine, the people of Madīna [Mālikīs] on listening to music and the people of Mecca on *mutʿa* marriage, s/he is a sinner.[115]

In the pre-classical period, *tatabbuʿ al-rukhaṣ* was not accepted by most jurists. Opposition to this legal technique started quite early in Islamic legal theory. Sulaymān al-Taymī (d. 143/760), one of the generation following the companion generation (*tābiʿīn*), is quoted as saying that, "all evil converges on whomever takes the easier rulings of every scholar."[116] Al-Awzāʿī (d. 157/773), the leader of a school in Syria that did not survive long after his death, is reported to have said that whoever follows the anomalies of a scholar's opinions is not a Muslim. He goes as far as making sure to avoid the lenient views of the different regions in order not to fall in the trap of pursuing the easier rulings.[117] The eponym of the Ḥanbalī school, Aḥmad Ibn Ḥanbal (d. 241/855) is reported to have said that whoever pursues the easier rulings from the schools is sinful (*fāsiq*).[118] Asked about a person who is faced with different views among scholars, he

[115] This saying is attributed to Aḥmad Ibn Ḥanbal, See Ibn ʻAbd al-Barr, *Jāmiʻ Bayān al-ʻIlm wa Faḍluh* (Cairo: al-Tawʿiya al-Islāmiyya, n.d.), 2: 927.
[116] Ibn ʻAbd al-Barr, *Jāmiʻ Bayān al-ʻIlm wa Faḍluh* (Cairo: al-Tawʿiya al-Islāmiyya, n.d.), 2:927.
[117] Al-Ḥāfiẓ al-Dhahabī (d. 748/1374), *Siyar Aʿlām al-Nubalā'*(Beirut: Muʾassasat al-Risāla, 1988), 7:125.
[118] Taqī al-Dīn Muḥammad Ibn Aḥmad al-Futūḥī, *Sharḥ al-Kawkab al-Munīr* (Cairo: al-Bābi al-Ḥalabī, n.d.), 4: 578.

says that the choice should be for the view that is based on the Qur'ān and Prophetic tradition.[119]

The early authorities of the schools were also opposed to the practice, and perceived there to be a consensus against it. The *Ẓāhirī* jurist Ibn Ḥazm (d. 456/1063) disapproves of people who follow their whims, following the *rukhaṣ* of scholars. He even argues that there is consensus over the ban on following the easier rulings of the different jurists. He has much criticism for Abū Ḥanīfa's followers including his disciple Muḥammad al-Shaybānī (d. 189/805) for picking and choosing the views of the companions that fit their whims. To him, their practices are far from piety, as it leads to fornication. He links *taqlīd* to following whims. "They only followed a devastating *taqlīd*, a rotten opinion, and misleading whims (*itibāʿ al-hawā al-muḍill*)."[120]

Ibn Ḥazm was diametrically opposed to *taqlīd*, emphasizing the need for the lay *fatwā*-seeker to inquire about the source of the *fatwā*. If the answer is not the textual sources, the *fatwā*-seeker should not take it. Pragmatic choices of varying legal opinions are strictly forbidden. This attitude is clear in his epistemological hierarchy of the value of different types of evidence. If a *fatwā*-seeker is given two different *fatwā*s, which one should he choose? Ibn Ḥazm, who operates within an *ijtihād* paradigm, fully anchored in the textual sources, gives preference to the *fatwā* based on the Prophetic tradition literature, rather than the Quran. The *fatwā*-seeker is left with no agency in

[119] Cited in Nimrod Hurvitz, *The Formation of Hanbalism: Piety into Power* (London: RoutledgeCurzon, 2002), 105.

[120] Opponents of *tatabbuʿ al-rukhaṣ* talk oftentimes cite a hypothetical situation in which a woman is married without the different conditions of a marriage, which they describe as fornication (see above); Ibn Ḥazm, *Al-Muḥalla* (Beirut: Dār al-Afāq al-Jadīda, n.d.), 11: 250-252; See also Ḥasan Ibn 'Ammār Ibn 'Alī al-Shurunbulālī, *al-'Iqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub 367 Uṣūl Fiqh, folio 8b, Microfilm # 38391.

the choice of *fatwā*.[121] His near contemporary, Ibn ʻAbd al-Barr, declares in his *Jāmiʻ Bayān al-ʻIlm wa Faḍluh* that he knows of no *khilāf* on this matter.[122]

The Shāfiʿī al-Juwaynī (d. 478/1085) does not allow laypeople to change their school according to their whims.[123] The great Shāfiʿī jurist, al-Ghazālī is also opposed to the pragmatic picking and choosing from the schools.[124] Another Shāfiʿī Ibn al-Ṣalāḥ al-Shahrazūrī (d. 643/1245) clearly states his opposition to *tatabbuʿ al-rukhaṣ*.[125] Much to the dismay of Ḥanafī and Shāfiʿī scholars, the Ḥanafī jurist Ibn al-Najjār (d. 660/1261) had his marriage authorized and dissolved by Shāfiʿī judges.[126] The Ḥanbalī Ibn Qudāma (d. 1223) says that picking the easier rulings from the different schools is forbidden.[127]

This early opposition is understandable in light of the polemical nature of the competition among the schools. The struggle between the Shāfiʿīs and Ḥanafīs in Nishapur is a case in point.[128] Similar tensions and even clashes among the schools can be seen in twelfth-century Syria as well, a phenomenon that continued well into the Mamluk period.[129]

Traditionally, the only legitimate reason to change one's school is through the inherent strength of the other school's argument, which can only be assessed by a

[121] Ibn Ḥazm al-Andalusī, al-Iḥkām fī Uṣūl al-Aḥkām (Cairo: Maṭbaʿit ʿĀtif, 1978), 6: 1130-1139.
[122] Ibn ʻAbd al-Barr, *Jāmiʻ Bayān al-ʻIlm wa Faḍluh* (Cairo: al-Tawʿiya al-Islāmiyya, n.d.), 2:927.
[123] Abū al-Maʿālī Al-Juwaynī, *Maghīth al-Khalq fī Tarjīḥ al-Qawl al-Ḥaqq* (Cairo: al-Maṭbaʻa al-Miṣriyya, 1934), 14.
[124] Al-Ghazālī, *Al-Mustaṣfā Min ʿIlm al-Uṣūl* (Beirut: Muʾassasat al-Risāla, 1997), 2:469.
[125] Ibn al-Ṣalāḥ al-Sharazūrī, *Adāb al-Muftī wa al-Mustaftī* (Cairo: Maktabit al-Khānji, 1992), 138-142.
[126] Daniella Talmon-Heller, "Fidelty, Cohesion and Conformity Within Madhhabs in Zangid and Ayyubid Syria," in *The Islamic School of Law: Evolution, Devolution and Progress*, ed. Peri Bearman, Rudolph Peters and Frank E. Vogel (Cambridge, Massachusetts, Harvard University Press, 2005), 106.
[127] Ibn Qudāma al-Maqdisī, *Rawḍat al-Nādhir Wa Jannat al-Manādhir* (Cairo: Maktabat al-Kuliyyāt al-Azhariyya, n.d.), 2: 253.
[128] See Richard Buliet, *The Patricians of Nishapur: A Study in Medieval Islamic Social History* (Cambridge, Mass., Harvard University Press, 1972).
[129] See Talmon-Heller, *Fidelity*, 108-110.

jurist, not a layperson. This is the view of Shāfiʿī authorities such as al-Nawawī (d. 676/1278) who was completely against *tatabbuʿ al-rukhaṣ*.[130] The Ḥanbalī jurist Ibn Taymya (d. 728/1328) was opposed to *tatabbuʿ al-rukhaṣ*. He permits a judge to let another preside over a case if he thinks the other school's opinion is more preponderant, but he does not allow him to do so otherwise.[131] The Ḥanbalī jurist Ibn Isbāslār (d. 778/1376) says that *tatabbuʿ al-rukhaṣ* can lead to disintegration (*inḥilāl*) because it elevates the subject of the law to the status of the Prophet.[132] The Ḥanbalī opposition to the practice seems stronger than the other schools, perhaps partly because of Aḥmad Ibn Ḥanbal's famous opposition to it.[133]

The celebrated Shāfiʿī jurist Abū Yaḥya Zakariyya al-Anṣārī (d. 926/1519) is another opponent. In his commentary on "*Lubb al-Uṣūl*", an abridgement he made of *Jāmiʿ al-Jawāmiʿ* of Ibn al-Subkī (d.756/1355), he makes his position clear: people can change their school on a single transaction but the motivation should not be utility.[134] While he does not accept the pragmatic motivation for changing schools, he allows laypeople to seek a second *fatwā* for the same question, ignoring the first *fatwā*.

[130] Al-Nawawī, *Fatāwā al-Imām al-Nawawī* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1982), 168-169.
[131] Ibn Taymiya, *Al-Ikhtiyārāt al-Fiqhīyya min Fatāwā Shaykh al-Islām Ibn Taymiya* (Cairo: Dār al-Fikr, n.d.), 334.
[132] Badr al-Dīn Abū ʿAbd Allāh Muḥammad Ibn ʿAlī al-Ḥanbalī al-Baʿlī Ibn Isbāslār, *Kitāb Mukhtaṣar al-Fatāwā al-Miṣriyya*. MS Dār al-Kutub 23 Fiqh Ḥanbalī Ṭalʿat, folio 96, Microfilm # 8230.
[133] The opposite of pursuing the easier rulings, pursuing the harder rulings (*tatabbuʿ al-ʿazā'im*), is not necessarily more acceptable than its opposite. The Mālikī jurist Ibn ʿArafa (d. 803/1401) was asked by the jurists of Grenada about whether it is better to avoid jurisprudential differences, as al-Ghazālī and Ibn Rushd urged people to do. He said that if pursuing the easier path (*tatabbuʿ al-rukhaṣ*) is not praiseworthy. Neither is following the harder rulings (*tatabbuʿ al-ʿazā'im*). Al-Samahūdī disagrees with Ibn ʿArafa, arguing that following the harder path is better. His example is that washing the entire head in ritual ablution is better than washing only part of it. See al- Samahūdī, *al-ʿIqd al-Farīd fī Aḥkām al-Taqlīd*. MS Dār al-Kutub 45 Uṣūl Taymūr, folio 36a-37a, microfilm # 11397.
[134] Abū Yaḥya Zakariyya al-Anṣārī, *Ghāyat al-Wuṣūl Sharḥ Lubb al-Uṣūl* (Cairo: Matbaʿit Muṣtafā al-Bābī al-Ḥalabī, 1941), 152.

Presumably, this could occur where instead of utility driving such a pursuit, it is rather the strength of the argument.

Even the unpopular strand in Islamic legal theory that was opposed to changing schools in the single transaction, known as *tamadhhub*, found some supporters in the Ottoman period. The Ḥanafī jurist Ibrāhīm Ibn Bīrī (d. 1099/1687) held that the layperson or the jurist can change their school holistically, but not in the single transaction. To him, those who exercise this pragmatic choice of school should be subjected to discretionary punishment (*taʻzīr*). He goes as far as accusing the supporters of pursuing easier rulings of believing in multiple truths (*taʻaddud al-ḥaqq*) in the way of the Muʿtazilīs.[135] In fact, most jurists were against *tamadhhub* dubbing it a *bidʿa* (an innovation). The late Ottoman Ḥanafī jurist Baghdādī (d. 1060/1650) speculates that the sole motivation behind the *tamadhhub* position was the fear of laypeople exercising *tatabbuʿ al-rukhaṣ*.[136]

Opponents admitting lack of consensus

Although opposition to *tatabbuʿ al-rukhaṣ* never ceased to exist throughout the Mamluk and Ottoman periods, in the post-classical period, there was a noticeable change in the way later scholars saw the debate. By 897/1491 even those who oppose the practice, no longer claim a clear consensus on the subject. The Shāfiʿī al-Samahūdī

[135] The theological discussion of the unity or multiplicity of truths rarely occurs in the context of *tatabbu' al-rukhaṣ*. Occasionally, there is an accusation leveled against the proponents of *tatabbuʿ al-rukhaṣ* that they are *Mu'tazilīs* who believe in the multiplicity of truths. The proponents would usually rebut by saying that truth is one, but since we do not know what this truth is, every *mujtahid* is correct as far as we are concerned. See al-Samahūdī, *al-'Iqd al-Farīd fī Aḥkām al-Taqlīd*. MS Dār al-Kutub 45 Uṣūl Taymūr, folio 17a, microfilm # 11397; Ibrāhīm Ibn Ḥusayn Ibn Aḥmad Ibn Muḥammad Ibn Aḥmad Ibn Bīrī, *al-Kashf wal Tadqid li-Sharh Ghayat al-Tahqiq*. MS Dār al-Kutub 403 Uṣūl Fiqh, folio 6a-7b, Microfilm # 38418.

[136] Abū Ḥasan al-Baghdādī al-Mālikī , *Kitab al-Ijtihad wal Taqlīd*. MS Dār al-Kutub 894 Tawhid Arabi, folio 1a-4b, microfilm # 39287.

(d. 911/1505) extensively presents the other view, explicitly stating that there is no consensus on this issue and dismissing the consensus claimed by Ibn Ḥazm. He explains that the consensus that Ibn Ḥazm mentioned might have been referring to pursuing the easier rulings in the same act (i.e. *talfīq*), or that he must have not been referring to *taqlīd* when he forbade the practice, but rather to *ijtihād*, which would not be a form of *tatabbuʿ al-rukhaṣ*.[137] Those attempts at explaining away that consensus, which is a new phenomenon that we did not see earlier, continues well into the Ottoman period.

The question of consensus was significant because without consensus on the subject, pursuing the easier rulings is not sinful. To this effect, Samahūdī cites Zarkashī (d. 794/1392) as saying that it is not acceptable to dub the person who follows the easier rulings a sinner (*fāsiq*) because every *mujtahid* is correct (*kullu mujtahidin muṣīb*), but even if we believe that only one of them is correct, we do not know which one it is. Thus, we cannot accuse people of sin when there is doubt.[138] It is unlikely that Samahūdī would make a wrong attribution to Zarkashī, since the latter was arguing for a lack of consensus over the prohibition, when Samahūdī himself supported the prohibition.

In a similar fashion, Shams al-Dīn Muḥammad Ibn Aḥmad Ibn Ḥamza al-Ramlī (d. 1004/1595) argued that *tatabbuʿ al-rukhaṣ* is not a sin (*fisq*) but merely a mistake (*ithm*) that does not invalidate the legal act itself. Unlike *fisq*, *ithm* does not have legal consequences. Therefore, a judicial ruling based on *tatabbuʿ al-rukhaṣ* cannot be

[137] Al-Samahūdī, *al-'Iqd al-Farīd fī Aḥkām al-Taqlīd*. MS Dār al-Kutub 45 Uṣūl Taymūr, folio 12a-18a, microfilm # 11397.
[138] Al-Samahūdī, *al-'Iqd al-Farīd fī Aḥkām al-Taqlīd*. MS Dār al-Kutub, 45 Uṣūl Taymūr, folio 17a, microfilm # 11397.

overruled if it is merely an *ithm*. Although al-Ramlī does not support pursuing the easier rulings, he refuses to accept the classical doctrine that dubs the practice as a sin.[139] This in itself is an important departure from the classical period, where followers of *tatabbuʿ al-rukhaṣ* were accused of committing a sin, a fact that has legal ramifications. For instance, according to most schools, a sinner cannot testify in court. S/he cannot be a judge or *muftī*. In addition, a judge's ruling that is based on such an act could be overruled.[140]

The above are just some examples of the traditional opposition to *tatabbuʿ al-rukhaṣ* in Islamic legal theory in all the four schools. This strand of thought, which goes into the modern period, is a deeply-rooted opinion, which explains why the opponents of *tatabbuʿ al-rukhaṣ* do not feel the need to justify their position. They simply quote earlier well-established authorities. However, one can see that it has evolved overtime. What used to be an issue around which some form of consensus was claimed became an issue of debate (*ikhtilāf*) at some point in the Mamluk period. To most Mamluk and Ottoman jurists, a person exercising *tatabbuʿ al-rukhaṣ* can no longer be called a sinner. There seems to be agreement that there is no consensus on the subject, precisely because over time the diversity of schools was being used in practice to find acceptable solutions to changing needs as we will see below.

Supporters of *tatabbuʿ al-rukhaṣ*

[139] Al-Sayyid ʿAlawī Ibn Aḥmad al-Saqqāf, *Majmūʿat Sabʿat Kutub Mufīda* (Cairo: Maṭbaʿat Muṣtafā al-Bābī al-Ḥalabī, 1983) 51.
[140] See Muḥammad Fiqhī, *Risāla fīmā Yataʿallaq bi-Aḥwāl al-Muftī*. MS Dār al-Kutub 198 Uṣūl Fiqh, folio 3b-5b, Microfilm # 23027.

Not all types of *tatabbuʿ al-rukhaṣ* generate as much disagreement. Samahūdī draws a distinction between different types based on who makes the decision. The first type is the judge, who may choose rulings based on what is more beneficial to the subjects of the law, rather than the inherent logic of the opinion in question. Most scholars from both the classical period and the post-classical period do not permit a judge to rule according to another school.[141] The second type deals with the decision made by the person, a subject of the law, for himself and not for others.[142] The third type is the *fatwā* issued by the *muftī* according to different schools or weak opinions within his school. Most discussions of *tatabbuʿ al-rukhaṣ* in the theoretical literature are related to the second and third types.

Subjects of the law pursuing the easier rulings

After the institutionalization of *taqlīd* in the thirteenth century, we start seeing some voices that loosen the standards for the subjects of the law (*ʻamal fī khāṣat al-nafs*),[143] permitting them to pursue the easier rulings. The Syrian jurist ʿIzz al-Dīn Ibn ʿAbd al-Salām (d. 660/1262), who lived in Damascus and Cairo, supports *tatabbuʿ al-rukhaṣ,* even though he never used the negative term. He permits the layperson to switch the *imām* he follows. The only restriction that Ibn ʿAbd al-Salām places on those who exercise *taqlīd* (*muqallids*) in their choice of school is that they should not follow an

[141] Al-Samahūdī, *al-ʻIqd al-Farīd fī Aḥkām al-Taqlīd*. MS Dār al-Kutub 45 Uṣūl Taymūr, fol. 12b, 13a, 17a, microfilm # 11397.
[142] Al-Samahūdī, *al-ʻIqd*, folio 12b, 13a, 17a.
[143] The term "subject of the law" refers to both laypeople and jurists, in their capacity as subjects of the law rather than interpreters of it.

opinion, where a judge's decision would be overruled.[144] This refers to a situation where the judge's decision contradicts the clear text of the Qur'ān and prophetic tradition.[145] His views are later cited in the Mamluk period by al-Samahūdī.[146]

> If you do not permit [*tatabbuʿ al-rukhaṣ*], what would be your reasoning for forbidding it? Bear in mind that every *mujtahid* is correct. One does not have to follow the more qualified jurist, according to al-Bāqilānī (403/1013). In addition, legal theorists (*ahl al-Uṣūl*) said that the companions of the prophet did not restrict *fatwā*s to Abū Bakr and ʿUmar. Instead, some companions who were below them in knowledge (*ʿilm*) issued *fatwā*s in their presence, which is stronger evidence than what Abū Ḥāmid [al-Ghazālī] said.[147]

The above question is cited by al-Samahūdī to show the scope of disagreement among scholars over this issue. Ibn 'Abd al-Salām's response is that the layperson is permitted to follow in each transaction, whichever jurist he wishes. Even if he follows a jurist in a given transaction, he does not have to follow the same jurist in future transactions.[148] There is no reason we should assume that this story is fabricated. For one thing, the story is about another legal authority supporting the practice, when al-Samahūdī himself is against it. But even if the story is inaccurate, this would not detract from the general argument that attitudes towards *tatabbuʿ al-rukhaṣ* started changing in the Mamluk period, as al-Samahūdī himself was active in the fifteenth century. Al-Samahūdī says that the above question was presented by a Mālikī *muftī* and

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[144] ʿIzz al-Dīn Ibn ʿAbd al-Salām, *al-Qawāʿid al-Kubrā: Qawāʿid al-Aḥkām fī Iṣlāḥ al-Anām* (Damascus: Dār al-Qalam, 2000), 2:273-275. *Muqallids* are non-*mujtahids* who follow another jurist's ruling, rather than come up with their own based on the textual sources.

[145] Al-Ghazālī, *Al-Mustaṣfā Min ʿIlm al-Uṣūl* (Beirut: Muʾassasat al-Risāla, 1997), 2:455-456.

[146] A note on translation: I simplified the original Arabic through omitting the frequent repetitions of the Arabic original, as well as titles, which are not necessary for understanding the text. Words in square brackets do not appear in the Arabic and are added to facilitate the reading of the text.

[147] Al-Samahūdī, *al-'Iqd al-Farīd fī Aḥkām al-Taqlīd.* MS Dār al-Kutub 45 Uṣūl Taymūr, folio 17a-19b, microfilm # 11397.

[148] Al-Samahūdī, *al-'Iqd*, folio 17a-19b.

judge in Tunis by the name of Abū Muḥammad ʻAbd al-Ḥāmīd Ibn Abī al-Barakāt al-Ṣadafī, who sought the help of the Shāfiʿī ʻIzz al-Dīn Ibn ʿAbd al-Salām (660/1262) on the subject. The irony is that the Mālikī jurist is seeking the Shāfiʿī position on the subject of switching schools for utility.

Another early voice that supported changing schools for utility is the Mālikī al-Qarāfī (d. 684/1283), who claims that Mālik never said that those who follow al-Shāfiʿī in forgoing dowers in marriage have invalid marriages. Neither did al-Shāfiʿi say that the marriage of those who follow Mālik by not necessitating witnesses is null and void. Instead of declaring a break with the traditional view, al-Qarāfī reconciles his views with those of the Shāfiʿī jurist al-Rawyānī (d. 415/1025), an adamant opponent of pursuing the easier rulings, through offering alternative interpretations of al-Rawyānī's views.[149] Al-Rawyānī lays out three conditions for the permission of changing the school, namely, that it does not involve a syncretic case that neither *imām* considers valid, i.e. *talfīq*. Second, the follower should believe that the *imām* he is following is better. Third, this should not be done for pragmatic reasons. Al-Qarāfī agrees with the first condition, but tries to argue that the third condition refers only to the cases where the judge rules against a clear text, an obvious analogy or consensus.[150]

Some jurists allowed the judge to delegate a particular type of case to a judge of a different school. In his *ādāb al-qaḍī*, the Ḥanafī al-Ṭarsūsī (d. 760/1358) argued that a

[149] Ibn Amīr al-Ḥājj, *al-Taqrīr wal Taḥbīr* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1999), 6: 297-300; See also Muḥammad Munīb al-Hāshimī, *al-Qawl al-Sadīd fī Aḥkām al-Taqlīd.* MS Dār al-Kutub 197 Uṣūl Taymūr, folio 5a, microfilm # 23224.
[150] Ḥasan Ibn ʻAmmār Ibn ʻAlī al-Shurunbulālī, *al-ʻIqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub 367 Uṣūl Fiqh, folio 15b-16b, Microfilm # 38391.

Ḥanafī judge is allowed to delegate judgment to a Shāfiʿī judge in a case requiring the validity of a supplementary oath (*al-yamīn al-muḍāfa*).[151]

That legal practice informed legal theory can be seen clearly in the *fatawa* literature. The Ḥanafī Muḥammad Ibn Muḥammad al-Kurdarī al-Bizāzī (d. 827/1424), who is widely quoted in later Ḥanafī works, refers to solving certain legal problems through the change of school:

> A woman, who has not reached the menopausal age of fifty five, but has not had her period for six months after her divorce, can wait for three more months of *'idda* and remarry afterwards.[152]

Al-Bizāzī, who is a Ḥanafī, says that this marriage, though not accepted by the Ḥanafī school, is valid and cannot be overruled as it is allowed under Mālikī law. He points out to his readers, mostly Ḥanafī jurists, that this case has to be memorized because of its common occurrence.[153]

By the fifteenth-century more voices join the Mamluk supporters of *tatabbuʿ al-rukhaṣ*. The Ḥanafī Ibn al-Humām (861/1457), argues that the Prophet always liked what made things easier for his *umma.* When the Abbasid Caliph Hārūn al-Rashīd (reigned 786-809 CE.) asked Mālik to go with him to Iraq to force people to abide by al-Muwatta', Mālik refused, saying that the companions of the prophet were dispersed in different

[151]Cited in Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihad*," *Islamic Law and Society* 3 (1996): 250.
[152] Muḥammad Ibn Muḥammad Ibn Shihāb al-Bizāzī, *al-Fatāwā al-Bizāzīyya.* MS Dār al-Kutub 66 Fiqh Ḥanafī Khalīl Agha, folio 163a-165a, Microfilm # 55712.
[153] Al-Bizāzī, A*l-Bizāzīyya,* folio 163a-165a.

cities bringing different traditions to their cities. The prophet said that differences of opinion among my *umma* are mercy (*raḥma*).[154]

Ibn al-Humām's support of the practice represents an important link, to which later supporters of *tatabbuʿ al-rukhaṣ* from all four schools refer. He is seen as one of the earlier supporters of the practice and is quoted extensively by both Mamluk and Ottoman jurists. For instance, the Ḥanafī jurist Ibn Amīr al-Ḥājj (d. 879/1474) quotes Ibn al-Humām, but goes further by attacking the consensus over the outlawing of *tatabbuʿ al-rukhaṣ* claimed by the Mālikī Ibn ʿAbd al-Barr (d. 463/1070).[155]

A point usually raised by opponents of pursuing the easier rulings is that Aḥmad Ibn Ḥanbal considered it a sin (*fisq*). Ibn Amīr al-Ḥājj argues that there are two versions to the Aḥmad Ibn Ḥanbal report, one of which does not have him describing the practice as a sin. He elaborates by saying that even in the sinning version, Ibn Ḥanbal referred to pursuing the easier rulings in *ijtihād* not *taqlīd*.[156] He adds that some Ḥanbalīs held that if the person who exercises *tatabbuʿ al-rukhaṣ* is a layperson, they are not sinful.[157] The voices supporting the practice that one sees in the fifteenth century are multiplied many folds in the sixteenth through the eighteenth centuries. Amīr Bādshāh (d. 972/1564) follows in the footsteps of Ibn Amīr al-Ḥājj. He too attacks ʿAbd

[154] See for instance, Al-Samahūdī, *al-'Iqd al-Farīd fī Aḥkām al-Taqlīd*. MS Dār al-Kutub 45 Uṣūl Taymūr, folio 17a and 17b, microfilm # 11397; See also Ḥasan Ibn ʿAmmār Ibn ʿAlī al-Shurunbulālī, *al-'Iqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub 367 Uṣūl Fiqh, folio 11a, Microfilm # 38391.
[155] Ibn Amīr al-Ḥājj, *al-Taqrīr wal Taḥbīr* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1999), 6: 297-300.
[156]See *tatabbu' al-rukhaṣ* in *ijtihād* defined above.
[157] Ibn Amīr al-Ḥājj, *al-Taqrīr wal Taḥbīr* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1999), 6: 297-300.

al-Barr's consensus claim and argues for two versions to Aḥmad Ibn Ḥanbal's designation of *tatabbuʿ al-rukhaṣ* as a sin.[158]

Can a person change the judge for pragmatic reasons after submitting his claim? The Ḥanafī jurist Zayn al-Dīn Ibn Nujaym (d. 970/1563) gave the following *fatwā*:

> Question: If a person made a claim on someone before a judge, supporting his claim with only one witness; can he drop his claim to go to another judge who allows one witness and an oath?[159] Answer: he is allowed to do that as long as the judge has not been asked to issue a ruling yet.[160]

In this case, if she goes ahead with her claim under Ḥanafī law, she will not be able to get the result she desires because the Ḥanafī school requires at least two witnesses.[161] Thus, Ibn Nujaym allows the choice to be made by the litigant herself after the submission of the claim.

While pursuing the easier rules through crossing school boundaries has historically been controversial, doing so within the same school was looked upon differently. For instance, ʿAlī Qārī (d. 1014/1605) discusses a form of *tatabbuʿ al-rukhaṣ* within the Ḥanafī school, but does not even refer to it by the negative term. In his discussion of the use of written documents in narration (*riwāya*), he cites Abū Ḥanīfa's view, namely that the narrator should memorize what he is to narrate from the time of hearing it till he delivers it. This is a view that only accepts memory as a form of

[158] Ḥasan Ibn 'Ammār Ibn 'Alī al-Shurunbulālī, *al-'Iqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub 367 Uṣūl Fiqh, folio 11b, Microfilm # 38391.
[159] Unlike the Ḥanafīs, the Shāfi'īs consider the testimony of one witness and an oath sufficient for the claimant.
[160] Zayn al-Dīn Ibn Nujaym al-Ḥanafī, *Fatāwā Ibn Nujaym al-Ḥanafī* (Cairo: al-Maktaba al-Azhariyya, 2008), 122.
[161] On the supplementary oath, see David S. Powers, "Kadijustiz or *Qāḍī*-justice? A Paternity Dispute from Fourteenth-Century Morocco," *Islamic Law and Society* 1, 3 (1994): 345.

transmission because there is a suspicion of written documents. A more pragmatic approach is that of his disciple Muḥammad al-Shaybānī, who held that one can use writing for narration, even if the document is not in the possession of the narrator, which increases the possibilities of others tampering with the document. He describes Shaybānī's view as *rukhṣa*, whereas Abū Ḥanīfa's view is *ʿazīma*, the opposite of *rukhṣa.* Shaybānī's view was meant to make the process easier for people and Qārī adds that it was chosen in his time to be the dominant view in the school, (*wa ʿalayhī al-ʿamal al-ʾān*).[162]

In the seventeenth and eighteenth centuries, proponents of *tatabbuʿ al-rukhaṣ* increased. The Ḥanafī jurist Ḥasan Ibn ʿAmmār Ibn ʿAlī al-Shurunbulālī (d. 1069/1658) wrote a treatise on *tatabbuʿ al-rukhaṣ* in the case of the performance of ritual ablution. When asked for a *fatwā* on whether a Ḥanafī who bled after performing ritual ablution could follow Mālik's view that bleeding does not invalidate ritual ablution, he permits the choice of the view of Mālik, as long as there is no *talfīq*. One can choose whichever opinion suits him regardless of whether there is a pressing need for that choice or not, and whether he has acted before on a similar case under a different school or not.[163] He further illustrates this principle in the following story, where the Shāfiʿī jurist switches to the Ḥanbalī school to avoid repeating his ritual ablution:

> Al-*Imām* al-Ṭartūshī, may the mercy of God be upon him, said that one time the call for the Friday Prayer was made, and the judge Abū al-Ṭayyib al-

[162] ʿAlī Ibn Sultān Muḥammad Qārī, *Tawḍīḥ al-Mabānī ʿAlā Mukhtaṣar al-Manār*. MS Dār al-Kutub 367 Uṣūl Fiqh, folio 163a, 163b, microfilm #16715.
[163] Ḥasan Ibn ʿAmmār Ibn ʿAlī al-Shurunbulālī, *al-ʿIqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub 367 Uṣūl Fiqh, folio 2a-4b, Microfilm # 38391.

> Ṭabarī started reciting Allāhu Akbar, when he was hit by a bird dropping. He said, 'I am a Ḥanbalī,' and started praying.[164]

The Ḥanafī jurist Aḥmad Ibn Muḥammad al-Ḥamawī (d. 1098/1686) uses the same arguments deployed by Amīr Bādshāh and Ibn Amīr al-Ḥājj in support of *tatabbuʿ al-rukhaṣ*. He extensively quotes Amīr Bādshāh, rejecting Ibn Ḥazm's view that pursuing the easier rulings is *fisq* (sinful).[165] Also in the seventeenth century, we see that later Mālikīs supporting *tatabbuʿ al-rukhaṣ*, such as al-Shabrakhītī (d.1106/1694), invoke al-Qarāfī's position and re-interpretation of the classical doctrine.[166]

Also in the eighteenth century, the Shāfiʿī Muḥammad Ibn Sulaymān al-Madanī al-Shāfiʿī al-Kurdī (d. 1194/1780) not only allows an individual to follow the opinion of a school other than his own, he allows following the weak opinion within the same school. He even permits following people other than the authorities of the four schools in order to make Islam easier through the difference of opinion both within and without the four schools.[167]

The Mālikī jurist al-Dasūqī (d. 1230/1815) engages mostly seventeenth and eighteenth-century scholars when he discusses *tatabbuʿ al-rukhaṣ*. He explains away the opposition of Ibrāhīm al-Shabrakhītī, elaborating that what Shabrakhītī was referring to is when there is a contradiction with the clear textual sources and analogy (*mukhālif*

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[164] Ḥasan Ibn 'Ammār Ibn 'Alī al-Shurunbulālī, *al-'Iqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub 367 Uṣūl Fiqh, folio 6a, Microfilm # 38391.
[165] Aḥmad Ibn Muḥammad al-Ḥamawī, *al-Durr al-Farīd fī Bayān Ḥukm al-Taqlīd.* MS Dār al-Kutub 569 Uṣūl Taymūr, folio 5a, 5b, microfilm # 38402.
[166] Muḥammad Munīb al-Hāshimī, *al-Qawl al-Sadīd fī Aḥkām al-Taqlīd.* MS Dār al-Kutub 197 Uṣūl Taymūr, folio 5a, microfilm # 23224.
[167] Muḥammad Ibn Sulaymān al-Madanī al-Shāfiʿī al-Kurdī, *al-Fawā'id al-Madaniyya fī Bayān Ikhtilāf al-ʿUlamā'min al-Shāfiʿiyya* (Diyār Bakr, Turkey: al-Maktaba al-Islāmiyya, n.d.), 232-241.

al-naṣṣ wa jalī al-qiyās).[168] Al-Dasūqī then discusses whether it is better to follow the weak opinion of one's own school or the dominant view of another school. The Mālikī jurist felt it necessary to create a hierarchy between the weak opinion of one's school and the dominant view of another. Unlike judgeship and *fatwā* for others, when one acts for himself (*khāṣat al-nafs*), using the other schools gets priority over the anomalous (*shādhdh*) or the less preponderant (*marjūḥ*) of the Mālikī school (*bal yuqaddamu ʿalayhi qawlu al-ghayri in kāna rājiḥan*). The reason for giving priority to the dominant view of the other schools over one's weak opinion is that it is strong in the other school. Even within the category of crossing school boundaries, he creates a hierarchy. Al-Shāfiʿī's views get priority over Abū Ḥanīfa's views, citing the Mamluk Mālikī jurist al-Qarāfī to support his point.[169]

Despite his very permissive attitude toward *tatabbuʿ al-rukhaṣ* both within and without the school boundaries, he does not allow the *muftī* or judge to issue *fatāwā* or rulings according to the weak opinion of their schools. Only when the *muftī* or judge acts for himself is he allowed to use the weak opinion of his school, when there is need for that (*khāṣat nafsihi idhā taḥaqqaqat al-ḍarūra*). But he cannot issue *fatwās* for others because he can only be sure about necessity (*ḍarūra*) for himself. He can however issue *fatwās* for his friends according to necessity because he knows their conditions.[170]

Al-Dasūqī's Shāfiʿī student Ḥasan al-ʿAttār (d. 1250/1835) also supports *tatabbuʿ al-rukhaṣ* and argues that there was never a consensus over the issue. He explains away

[168] Al-Dasūqī, *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr* (Cairo: Dār Iḥyā al-Kutub al-ʿArabiyya, ʿĪsā al-Bābī al-Ḥalabī, 1984), 1:20.
[169] Al-Dasūqī, *Ḥāshiyat,* 1:20.
[170] Al-Dasūqī, *Ḥāshiyat,* 2: 130.

Ibn Ḥazm's view to that effect by saying that what he meant is *tatabbuʿ al-rukhaṣ* in *ijtihād* not *taqlīd* or that the reference is to the *rukhaṣ* compounded in the same legal transaction, i.e. *talfīq*.[171]

The above views supporting *tatabbuʿ al-rukhaṣ*, which marked an important evolution of *taqlīd* in the thirteenth century, did not restrict the permission to necessity. Other views tied the permission to the context and the condition of the person pursuing the easier rulings. I will briefly discuss this theme as an independent attitude towards *tatabbuʿ al-rukhaṣ*, where the choice is not completely left unrestricted. Instead, it is circumscribed by the traditional concept of necessity (*ḍarūra*).

Darura-based support of *tatabbuʿ al-rukhaṣ*

In addition to outright acceptance or rejection of *tatabbuʿ al-rukhaṣ*, some scholars invoked the concept of necessity (*ḍarūra*) to legitimize the practice of pursuing the easier rulings. In his *fatāwā*, the Shāfiʿī Taqī al-Dīn al-Subkī (d. 683/1284) divides the choice of a different school's opinion on one transaction into: (1) When the person believes that the other school's opinion is more correct than his own school. In this case, he is allowed to follow the other opinion; (2) When he believes that his *imām* is less accurate or when he does not have an opinion either way, he should follow his *imām* as a precaution. (3) If the motivation behind switching schools is for *rukhṣa* because of something the person needs (*hāja*) or necessity (*ḍarūra*), he is allowed to choose the other school's opinion. (4) If there is no need (*hāja*) or necessity (*ḍarūra*), he

[171] Ḥasan al-ʿAttār, *Ḥāshiyat al-ʿAttār ʿala Sharḥ al-Jalāl al-Maḥallī ʿAlā Jamʿ al-Jawāmiʿ* (Cairo: Dār al-Basā'ir, 2009), 2:42.

is not allowed to follow his whims (*hawāh*). (5) If s/he frequently follows the easier rulings, making *tatabbuʿ al-rukhaṣ* his religion, that is forbidden. (6) When *tatabbuʿ al-rukhaṣ* leads to a complex reality (*ḥaqīqa murakkaba*), i.e. *talfīq*, there is consensus that this is not permitted.[172] Similarly, the Shāfiʿī al-Zarkashī (d. 794/1392) argues that when people have doubts or despair, they should pursue the easier rulings lest those feelings may increase.[173] This is another permission that is predicated on the state of the person.

The traditional concept of necessity that was devised by al-Juwaynī and al-Ghazālī was meant to maintain human life. The concept of necessity employed here differs from al-Ghazālī's definition, in that it is not a technical term. While al-Ghazālī attempted to make *ḍārūra* more objective by giving it some measurable criteria,[174] in the hands of later jurists, it becomes a way to permit a broader range of practices. Since this subjective concept of necessity or need is hard to gauge, one way of measuring necessity was through consideration of the frequency of its practice. Thus, al-Subkī forbids the frequent exercise of *tatabbuʿ al-rukhaṣ* so much so that it itself becomes one's faith, although he supports the infrequent use of it when there is a need.[175] The loose use of the words *hāja* and *ḍarūra*, which some jurists even link to the strength or weakness of one's faith, as we saw above in the case of the person who is stricken by doubts about his faith, points to the reluctance of those jurists to allow the practice of

[172] Al-Samahūdī, *al-ʻIqd al-Farīd fī Aḥkām al-Taqlīd*. MS 45 Uṣūl Taymūr, folio 24a-25a, microfilm # 11397.
[173] Al-Samahūdī, *al-ʻIqd,* folio 18a.
[174] Al-Ghazālī, *Al-Mustaṣfā Min ʿIlm al-Uṣūl* (Beirut: Muʾassasat al-Risāla, 1997), 1: 284, 417-438.
[175] Al-Samahūdī, *al-ʻIqd*, folio 24a-25a.

tatabbuʿ al-rukhaṣ without some restriction, imprecise as it might be.[176] An attempt at more precise criteria, though still subjective, was made in circles that dealt more with the states of minds of people, namely in Sūfī circles.

Al-Shaʿrānī's scales: An ability-based approach to *tatabbuʿ al-rukhaṣ*

The Shāfiʿī mystic and jurist al-Shaʿrānī (d. 973/1565) represents an important and early evolution in the discussion of *tatabbuʿ al-rukhaṣ*. Although he was not the first to invoke the concept of ability or *ḍarūra* to justify pursuing the easier rulings, he represents the most elaborate articulation of this concept as it relates to the pragmatic use of legal pluralism. He also adds a mystical element to this legal issue. In his book *al-Mizān* (the scales), he introduces a relativist theory of the differences among schools, where he argues that all religious rules in the four schools have a dualistic nature of ease and strictness. The easier rulings are for those who are weaker in faith or body because the Prophet addressed people according to their ability. God did not create what is useful or harmful in an absolute manner. Sometimes a thing is useful, but harmful other times. Thus, differences among the schools are a blessing because those different rulings fit Muslims at different times.[177] These are what he calls scales, where a continuum of strictness (*ʿazīma*) and leniency (*rukhṣa*) exists on both sides.[178] While the concept of *rukhṣa* in its traditional sense (explained above) has been juxtaposed to

[176] Interestingly, the contemporary Turkish scholar Fethullah Gulen has a similar approach to *ḍarūra*. To him, the determination of what constitutes *ḍarūra* is not governed by formal criteria, but is left to the individual Muslim to assess. See Ihsan Yilmaz, "Inter-Madhhab Surfing, Neo-Ijtihad, and Faith-Based Movement Leaders," in *The Islamic School of Law: Evolution, Devolution and Progress*, ed. Peri Bearman, Rudolph Peters and Frank E. Vogel (Cambridge, Massachusetts, Harvard University Press, 2005), 201.
[177] 'Abd al-Wahhāb al-Shaʿrānī, *al-Mizān al-Shaʿrāniyya al-Mudkhala.* MS Dār al-Kutub 77 Fiqh Madhāhib, folio 2a-5b, microfilm # 48209.
[178] Al-Shaʿrānī, *al-Mizān*, folio 2a-5b.

ʿ*azīma* in Sufi writings for quite some time before al-Shaʿrānī, his addition of the type of *rukhṣa* that is based on legal pluralism is more novel.[179]

Al-Shaʿrānī holds that with legal pluralistic *rukhṣa* one cannot choose freely but rather according to his own ability. He cites the example of washing one's head during ritual a+blution. The prophet is reported to have washed his entire head on one occasion and only some of the head on other occasions. This is not a case of abrogation (*naskh*) because otherwise, that would be tantamount to discrediting some of the schools, who hold a different view. It is a case of *rukhṣa*, where the person has to wash his entire head in the summer for instance, but only some of it in the winter. Every strict ruling has an opposing one that is more lenient in another school, or another opinion within the same school.[180]

This diversity of legal opinions does not result from arbitrary human interpretations of the textual sources. They are ordained by God to fit the different natures of His subjects. God's foreknowledge dictated the existence of this continuum because what is good for one person might not be good for another and what is good for a person at one time is not necessarily good at another time. However, a person who is not weak in body or faith should not choose the easier rulings.[181]

Al-Shaʿrānī provides evidence for his theory from the practice of the earlier generations of Muslims. He quotes 'Umar Ibn al-Khattāb as saying that God gives rulings according to people's conditions and times. Early jurists such as Mujāhid and

[179] For a discussion of *rukhṣa* and ʿ*Azīma*, see Peters, R.; Haar, J.G.J. ter. "Rukhṣa." *Encyclopaedia of Islam, Second Edition*. Ed., P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, and W.P. Heinrichs, Brill, 2010.
[180] Al-Shaʿrānī, *al-Mizān*, folio 8a, 8b, 15a.
[181] Ibid., folio 4a-6b.

Mālik refused to issue *fatāwā* in hypothetical situations, saying that those *fatāwā* should be issued by the scholars of the time when those events occur. When a *fatwā* is issued, the particular needs of the individual should be born in mind.[182]

In addition to his textual proofs, al-Shaʿrānī describes a mystical experience through which he was convinced that every scholar is correct. While he was in Mecca performing his pilgrimage, he explains, a voice from the sky, said:

> We have given you scales that you could use to determine the opinions of *mujtahids* and followers, till the Day of Judgment. But no one of your age would appreciate them.[183]

God allowed the eye of his heart to see the fountain of *Sharīʿa*, out of which came the opinions of different scholars. He became certain that every *mujtahid* is correct and that no school of law is better than another.[184]

Al-Shaʿrānī argues that once a mystic reaches the level of a saint or friend of God (*walī*), he can see the fountain of the *Sharīʿa* from which all *mujtahids* obtain their rulings. The *walī* can then go back to the source rather than follow any *mujtahids*. Therefore, if a mystic says he is Shāfiʿī or Ḥanafī, he has not yet reached that level of perfection.[185] If the *imām*s knew that each school is connected to the same fountain of *Sharīʿa*; why then did they hold debates over legal issues among themselves? He answers that those debates must have taken place before they reached that God-given

[182] Ibid., folio 18b.
[183] Ibid., folio 10a-12b.
[184] Ibid., folio 10a-12b.
[185] Ibid., folio 12a, 12b.

knowledge and perfection.[186] Al-Shaʿrānī was aware of the novelty of his ideas. He even excuses the opponents of his book, because "it is unfamiliar. No one had written something like it before."[187]

This continuum not only explains the differences among schools, but also the contradictory prophetic traditions on which those rulings were based. The fountain of *Sharīʿa* contains those traditions, as well as the opinions of the four schools. He deplores the behavior of some people, who would not follow a prophetic tradition from al-Bukhārī or Muslim if it contradicted the view of their *imām*s.[188] He says that the Shāfiʿī view that touching one's genitals invalidates the ritual ablution was based on a prophetic tradition to that effect and so was the contradictory Ḥanafī view that it does not invalidate the ablution. Al-Shaʿrānī explains those seeming contradictory traditions as designed for two different types of people. The more strict tradition was meant for the superior believers (*akābir al-muʾminīn*), whereas the more lenient tradition is for laypeople.[189] He introduces a Sufi approach to this legal question through creating levels of piety similar to Sufi stations.

We can see the potential unorthodox manifestations of his theory in his citation of some contradictory Prophetic tradition. One such tradition says: "Drink, but do not get drunk,"[190] which contradicts: "What is inebriating in large quantities is forbidden in small quantities." To al-Shaʿrānī, both traditions are part of the *Sharīʿa*. They are the

[186] Ibid., folio 13b.
[187] Ibid., folio 2a-5b.
[188] Ibid., folio 6b.
[189] Ibid., folio 38a.
[190] ʿAbd al-Raḥmān al-Nisāī, *Sahīh al-Nisāʾī* (Riyadh: Maktabat al-Maʿārif lī al-Nashr wa al-Tawzīʿ, 1998), 188, Ḥadīth No. 5695.

two ends of the continuum of strictness and leniency. Both of them are acceptable, but for different people.[191]

He argues that some earlier jurists offered *fatwā*s in all of the four schools such as 'Izz al-Dīn Ibn Jamā'a (d. 819/1333) and the Mālikī Shihāb al-Dīn al-Burlusī (d. 899/1493). He also quotes al-Suyūṭī (d. 911/1505) as saying that many scholars issued *fatwā*s in the four schools for laypeople who did not abide by a school. To al-Shaʿrānī, those jurists provided *fatwā*s according to the two levels of strength referred to above, in line with the condition of the *fatwā*-seeker (*mustaftī*).[192] Although laypeople, who are weak in his taxonomy, will seek the easier rulings, they are as obedient to the *Sharīʿa* as scholars who follow the harder rulings (*ʿazīma*) because they get their water from the same source. When a scholar and a layperson go to a sea to fill their jugs with water, there is no difference between the water collected by the scholar and that collected by the layperson.[193] Thus, there is no qualitative difference between the different schools and the seemingly contradictory Prophetic traditions.[194]

This concept of ability is similar to the concept of *ḍarūra* in that weakness is used to justify a practice that would not otherwise be permitted. In that sense,

[191] 'Abd al-Wahhāb al-Shaʿrānī, *al-Mizān al-Shaʿrāniyya al-Mudkhala.* MS Dār al-Kutub 77 Fiqh Madhāhib, folio 56a, 64a, microfilm # 48209.
[192] Ibid., folio 9a-10b.
[193] Ibid., folio 7a.
[194] Another objective of his theory is to reconcile a contradiction in people's beliefs about the schools. On the one hand, they believe verbally that all the four imams are rightly guided (*ʿalā hudā*), but on the other hand they feel obligated to follow their own imams. Whenever they follow another imam, Shaʿrānī opines, "their heart aches." Their words will not match their actions, unless they truly feel that their following of one is the same as the rest of them. Shaʿrānī also aims to protect some of the imams, especially Abū Ḥanīfa, against accusations that they followed their own reasoning (*raʾy*), rather than the textual sources. See Al-Shaʿrānī, *al-Mizān*, folio 2a-8b, 14a.

Shaʿrānī's approach is a development of the use of *ḍarūra* by Zarkashī. Since there are no formal criteria for determining what constitutes weakness of body or faith, the choice is left to the discretion of the subjects of the law and sometimes the *muftī*s, as we will see below in the discussion of the *muftī*'s role in orchestrating *tatabbuʿ al-rukhaṣ*.

Post-Shaʿrānī *ḍarūra*-based *tatabbuʿ al-rukhaṣ*

Using *ḍarūra* to justify pursuing the easier rulings in the different schools became very common in the Ottoman period. For instance, the Shāfiʿī scholar Zayn al-Dīn Ibn 'Abd al-'Azīz al-Malibārī (d. 987/1579) argues that *tatabbuʿ al-rukhaṣ* is forbidden unless the person is stricken by doubts lest he leaves the *Sharīʿa*.[195]

Another author who invokes the concept of *ḍarūra* in its subjective, immeasurable sense is the Shāfiʿī jurist 'Umar Muḥammad al-Fārāskūrī (d. 1018/1609) who argues in verse that changing schools is allowed when there is a need. But he cautions that *tatabbuʿ al-rukhaṣ* is not allowed, i.e. in the absence of such needs.[196]

> You may follow this in a transaction and that in another if need be;
> As long as you do not follow the easier rulings, the ruling is not against the text;
> And there is no combination of two schools, in which each one does not accept the combination [*talfīq*].[197]

Again, in al-Fārāskūrī's work, the need in which *rukhṣa* was anchored and by which it was justified is not defined in the technical sense governing the definition of *ḍarūra* in the traditional Sunnī legal literature.[198] Instead, the subject of the law is in

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[195] Zayn al-Dīn Ibn 'Abd al-'Azīz al-Mālībarī. *Fatḥ al-Muʿīn bi-Sharḥ Qurrat al-'Ayn* (Cairo: Maṭbaʿit Muḥammad 'Alī Subayḥ, 1928), 136-138.
[196] 'Umar Muḥammad al-Fārāskūrī al-Shāfiʿī, *Kitāb al-Bahja al-Muraṣṣaʿa bi-Durar Yanābīʿ Ikhtilāf al-A'imma al-Arbaʿa*. MS Dār al-Kutub 66 Fiqh Madhāhib 'Arabī, folio 2b, microfilm # 46645.
[197] Al- Fārāskūrī, *Kitab al-Bahja* , folio 2b.
[198] See for instance, Al-Ghazālī's definition of *ḍarūriyyāt* in *Al-Mustaṣfā Min ʿIlm al-Uṣūl* (Beirut: Muʾassasat al-Risāla, 1997), 1:414-422.

charge of making the decision as to whether or not he/she has a need that warrants the use of another school's ruling. Furthermore, the seventeenth-century Ḥanafī jurist Muḥammad al-Fiqhī wrote a professional manual for *muftī*s in 1104/1692, in which he disagrees with the view that subjects of the law have to choose the opinion that they think is correct. A person who is given a number of *fatwā*s can choose whatever he likes, based on his needs and conditions. He cites examples of the opinions of later jurists being chosen over those of Abū Ḥanīfa because of the change of people's needs.[199]

Similarly, Muḥammad Ibn Sulaymān al-Madanī al-Shāfiʿī al-Kurdī (d. 1194/1780) justifies his position on *tatabbuʿ al-rukhaṣ*, not through textual evidence, but by reference to social needs. He says that al-Subkī issued *fatwā*s permitting the sale of an absent commodity, which is based on a weak opinion because most people need it (*li-iḥtiyāji ghālib al-nāsi ilayhī*). He adds that it is not a big problem (*al-ʾamru fi dhālika khafīfun*) because the standards required of laypeople are not the same as jurists.[200] In a way that mirrors al-Malībari's approach, al-Fārāskūrī adds that pursuing the easier rulings is permitted for those who have doubts, or desperation in order not to leave the faith.[201] As we saw above, the discussion of *tatabbuʿ al-rukhaṣ* dealt with how jurists *attitudes* changed overtime to the changes in their societies, following two approaches: one which permitted the practice without qualification and another that restricted the

[199] Muḥammad Fiqhī, *Risāla fīmā Yataʿallaq bi-Aḥwāl al-Muftī*. MS Dār al-Kutub 198 Uṣūl Fiqh, folio 5b-6b, Microfilm # 23027.
[200] Muḥammad Ibn Sulaymān al-Madanī al-Shāfiʿī al-Kurdī, *al-Fawā'id al-Madaniyya fī Bayān Ikhtilāf al-ʿUlamā'min al-Shāfiʿiyya* (Diyār Bakr, Turkey: al-Maktaba al-Islāmiyya, n.d.), 256.
[201] Al-Madanī al-Kurdī, *al-Fawa'id,* 232, 233.

permission to vague and subjective criteria such as weakness of faith and body. Those attitudes dealt mostly with subjects of the law. I will now discuss juristic attitudes towards legal practitioners themselves making such pragmatic choices on behalf of people.

Pursuing the easier rulings: *muftī*s and judges

As the debates above show, some jurists differentiated between the lay person changing schools and the jurist. Such differentiation applied also to judges and *muftī*s. The standards for judges were generally far stricter than those for laypeople. The restriction on judges to follow a school other their own is harder to relax because it could lead to unpredictability and instability in the legal system, which is the main reason behind the rise of *taqlīd* as discussed earlier in this chapter. But for *muftī*s, one sees a strand of thought permitting *tatabbuʿ al-rukhaṣ* in the issuance of *fatwā*s. Since the *muftī*'s views are not binding except on himself, lifting such restrictions is a way to introduce an element of flexibility that will ultimately benefit subjects of the law, without destabilizing the legal system.

The dominant doctrine after the rise of *taqlīd*, which has continued to be a strong strand in legal theory, holds that the *muftī* should issue his *fatwā*s and the judge should issue his rulings according to the preponderant (*rājiḥ*) of his school. In the Ottoman period, while this view had not changed for the judge, it evolved as far as the *muftī* is concerned. Some jurists such as al-Fishnī (d. 978/1570) permitted *muftī*s to issue *fatwā*s based on the weak opinion in their school, but only if they make it clear to the *fatwā*-seeker (*mustaftī*) that it is a weak opinion. In that case, this is not a *fatwā*, but

narration (*riwāya*). In other words, the *muftī* is not issuing a legal opinion based on examination of the views of previous scholars and perhaps even after weighing the different views against one another, but rather simply relating the view of another jurist.[202] This technical differentiation, in reality, amounted to little in the age of *taqlīd*, in which many legal opinions do not exceed the realm of narration. Designating such *fatwā*s as narration was a way to avoid the strong traditional opposition to *muftī*s crossing school boundaries. Similarly, a late anonymous Shāfiʿī jurist from the seventeenth or eighteenth century wrote a treatise entitled "*Risāla Jalīla fī al-Taqlīd*," where he argues that *muftī*s following al-Shāfiʿī can choose one of the opinions within the Shāfiʿī school without having to seek the more preponderant. Here the choice would be based on pragmatism, rather than the evidential value of the weak opinion.[203]

It is through this ability of the *muftī*s to choose a view other than the *rājiḥ* view of the school that ultimately led to the phenomenon of the change of *rājiḥ*.[204] This process is one of the most important ways in which Islamic law continued to be flexible despite the dominance of *taqlīd*. Social needs would lead to a *muftī* issuing a *fatwā* according to a non-*rājiḥ* view within the school. If the social need is pressing enough

[202] Aḥmad Ibn Ḥijāzī Ibn Budayr Shihāb al-Dīn al-Fishnī, *Kifāyat al-Mustafīd fi Aḥkām al-Taqlīd*. MS Dār al-Kutub 367 Uṣūl Fiqh, folio 4a, microfilm # 16704.

[203] Anonymous author, *Risala Jalīla fi al-Taqlīd,* reproduced in: Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihad*," *Islamic Law and Society* 3 (1996): 290-304.

[204] There is evidence that the State sometimes intervened in this process by issuing orders to elevate a weak opinion to the level of the dominant view. For instance, there are thirty two cases in which the Ottomans imposed their own choice. See Colin Imber, *Ebu's-suʿud: The Islamic Legal Tradition* (Stanford, California: Stanford University Press, 1997), 169. For a similar case of state intervention from nineteenth-century Egypt, see Rudolph Peters, "What does it Mean to be an Official Madhhab?" in *The Islamic School of Law: Evolution, Devolution and Progress*, ed. Peri Bearman, Rudolph Peters and Frank E. Vogel (Cambridge, Massachusetts, Harvard University Press, 2005), 154-5.

and continues over a longer period of time, the new *rājiḥ* can make it from *fatwā*s into legal manuals, eventually becoming the new *rājiḥ*. Hallaq cites one such example of the change of *rājiḥ*: the disagreement between Abū Ḥanīfa and Abū Yūsuf over the issue of whether or not documentary evidence sent from one judge to another without specifying his name should be accepted as valid. Abū Ḥanīfa held that such a communication is null and void, whereas Abū Yūsuf deemed such ambiguity as insufficient to invalidate the document. The Chief Justice al-Damghānī al-Kabīr (d. 477/1084) revived Abū Yūsuf's doctrine against the view of the eponym, which was up until that point the *rājiḥ* of the Ḥanafī school.[205]

Not only did some Ottoman jurists allow issuing *fatwā*s based on the weak opinions in their schools, some like Ibn Ḥajar al-Haythamī (973/1566), even allowed *muftī*s to issue *fatwā*s based on a completely different school. He explains that *fatwās* in later times are based on narration not *ijtihād*. Therefore it does not matter whether this narration is from one's *imām* or from another.[206] The traditional opposition to *muftī*s issuing *fatwā*s based on other schools is resolved by legal theorists by obligating the *muftī* to answer the *fatwā* seeker in the form of a narration (*riwāya*), not as a *fatwā*, which is not forbidden. Thus, if a Ḥanafī jurist is asked about the Shāfiʿī view on an issue, he has to make it clear that it is a Shāfiʿī *fatwā*.[207]

[205] Wael B. Hallaq, "Qādīs Communicating: Legal Change and the Law of Documentary Evidence," *Al-Qanṭara* 20 (1999): 466.
[206] Muḥammad Ibn Sulaymān al-Madanī al-Shāfiʿī al-Kurdī, *al-Fawā'id al-Madaniyya fī Bayān Ikhtilāf al-ʿUlamā'min al-Shāfiʿiyya* (Diyār Bakr, Turkey: al-Maktaba al-Islāmiyya, n.d.), 220.
[207] Muḥammad Fiqhī, *Risāla fīmā Yataʿallaq bi-Aḥwāl al-Muftī*. MS Dār al-Kutub 198 Uṣūl Fiqh, folio 7a, 7b, Microfilm # 23027.

As we saw above, in the Ottoman period, some jurists permitted *muftī*s to go beyond the dominant view in their school to open the door for both the weak opinions within their school and in the other schools as well. The welfare of society and the practice of the courts were the primary motivation behind such a departure from the classical doctrine. For instance, in order to enable people to return to their marriages after the wife-initiated divorce known as *khulʿ*, *muftī*s from the Ḥanafī school either dug up some peripheral view that *khulʿ* did not count as a divorce or provided a *fatwā* based on the Ḥanbalī school.[208] Similarly, some Shāfiʿīs permitted the *muftī* to seek stratagems to get the *fatwā* seeker out of a dilemma such as an oath, as long as this *fatwā* brings about good, not harm.[209] As we will see in chapter III, those strategies were also used in the Ottoman period to circumvent the prohibition of usury. This utilitarian approach to the issuing of *fatwā*s, in the absence of a need, was not welcomed by the more traditional jurists such as the seventeenth-century jurist al-Fiqhī, who describes those pragmatic *muftī*s as "misguided."[210] As we will see in the fourth chapter, the strategies used to codify the *Sharīʿa* in the modern period are similar to those devised by Ottoman jurists.

In a way the increasingly permissive attitudes of some jurists towards the pragmatic use of legal pluralism when practiced by *muftī*s and judges parallel attitudes towards the *tatabbuʿ al-rukhaṣ* exercised by subjects of the law. The *muftī*'s ability to

[208] Fiqhī, *Risāla*, folio 9a-10b; See also Al-Sayyid ʿAlawī Ibn Aḥmad al-Saqqāf, *Majmūʿat Sabʿat Kutub Mufīda* (Cairo: *Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī*, 1983) 37; For the Ḥanbalī view on *Khulʿ* divorce, see Marʿī Ibn Yūsuf al-Karmī al-Ḥanbalī, *Dalīl al-Ṭalib lī Nayl al-Maṭālib* (Beirut: Mu'assasat al-Risāla, 1996), 429.
[209] Yūsuf al-Ardabīlī, *al-Anwār lī Aʿmāl al-Abrār* (Cairo: Mu'assasat al-Ḥalabī wa Shurakāh, 1970), 2: 611.
[210] Muḥammad Fiqhī, *Risāla fīmā Yataʿallaq bi-Aḥwāl al-Muftī*. MS Dār al-Kutub 198 Uṣūl Fiqh, folio 9a-10b, Microfilm # 23027; Al-Sayyid ʿAlawī Ibn Aḥmad al-Saqqāf, *Majmūʿat Sabʿat Kutub Mufīda* (Cairo: *Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī*, 1983) 37.

veer away from the dominant view of his school was unrestricted by some jurists, while others linked it to the state of the *fatwā*-seeker. This is an example of putting Shaʿrānī's theory of the levels of leniency and strictness in legal rulings to practice, but from the *muftī*'s perspective, rather than that of the subject of the law. The late Ottoman Shāfiʿī jurist al-Sayyid ʿUmar al-Baṣrī was asked a question regarding the issues in which al-Ramlī and Ibn Ḥajar al-Haythamī disagree.[211] He answered that the *muftī* should rule according to what he found preponderant if he is capable of exercising juristic preference (*min ahl al-tarjīḥ*), but it is better for the *muftī* to rule according to the state of the *fatwā* seeker.[212] Thus, instead of weighing the opinions evidentially, it is better to weigh them socially.

Similarly, the seventeenth-century Ḥanafī jurist Muḥammad al-Fiqhī wrote a treatise in 1104/1692 in which he allows *muftī*s to provide easier *fatwā*s to weaker people, which usually refers to weakness of faith, but sometimes it refers to physical weakness. A *muftī* should always choose the opinion that he thinks brings about good (*maṣlaḥa*). But he is against utility unhinged by need.[213] He is also opposed to allowing *muftī*s to take money for their *fatwā*s because this would lead them to follow their whims (*ittibāʿ al-hawā*). He condemns the practice of his time of taking money for issuing *fatwās*, which leads *muftī*s to provide people with easier rulings for money.[214] This fear of manipulation of the legal system through bribery was perhaps one of the

[211] It is not clear when Baṣrī died, but he wrote a treatise on tobacco, which places him in the Ottoman period, perhaps in the sixteenth or seventeenth centuries. Tobacco was introduced at the end of the sixteenth century and found wide distribution in the seventeenth century.
[212] Al-Sayyid ʿAlawī Ibn Aḥmad al-Saqqaf, *Majmūʿat Sabʿat Kutub Mufīda* (Cairo: *Maṭbaʿat Muṣtafā al-Bābī al-Ḥalabī*, 1983) 37, 38.
[213] Fiqhī, *Risāla*, folio 7a, 7b.
[214] Fiqhī, *Risāla*, folio 3b-5b.

reasons that kept the traditional view against *tatabbuʿ al-rukhaṣ* from extinction. His opposition to the practice of *muftī*s in his time is an example of this tension between theory and practice, which permeates throughout this study. As we saw above, prescriptive jurists such as al-Fiqhī treated those practices as anomalies that needed to be put right, whereas descriptive jurists used the practice to justify the theory.

As we saw above, there was a clear evolution of the jurists' approach to the pragmatic use of legal pluralism. There is an acceptance of a realist approach to law and a slow suppression of the more idealistic classical approach to *taqlīd.* Now, I move on to the question of how subjects of the law and legal practitioners learned about this legal pluralism to be able to use it to their advantage.

The Ottoman *ikhtilāf* literature

Another indication that *tatabbuʿ al-rukhaṣ* was gaining increasing acceptance particularly in the Ottoman period is the noticeable rise of a specific type of *ikhtilāf* literature, namely short treatises that were written as professional manuals for legal practitioners. Those manuals, which appear mostly in the seventeenth and eighteenth centuries, had two main characteristics. First, there is a clear trend toward treatises dealing with one area of the law in the four schools. Second, only substantive legal rulings are provided, veering away from legal reasoning and the proofs supporting those rulings. This type of *ikhtilāf* literature is a far cry from the classical disputation-based (*jadal*) literature.[215]

[215] For examples of disputation-based *ikhtilāf* literature, see George Makdisi, *Ibn 'Aqil: Religion and Culture in Early Islam* (Edinburgh: Edinburgh University Press, 1997), 5, 6.

Most of the earlier *ikhtilāf* literature elaborated on the reasoning behind rulings, and mobilized proofs in support of each view. They were a form of legal disputation rather than professional manuals. Some earlier *ikhtilāf* works even contained many chains of narration for different views. Furthermore, the views of different authorities within the schools or of the companions of the prophet are mentioned, rather than only the dominant views within each school.[216] Other *ikhtilāf* works might have been primarily concerned with legal theory such as Ibn Rushd's "*Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid.*"[217] Other *ikhtilāf* works contain different views within each school.[218]

This newly-found focus of the Ottoman *ikhtilāf* literature is explicitly stated by some of the authors. The Shāfiʿī jurist ʿUmar Muḥammad al-Fārāskūrī (d. 1018/1609) states that many people wrote on *ikhtilāf*, but they elaborated more than necessary. He is only interested in the rulings, rather than their justification or evidence.[219] This *ikhtilāf* genre became very succinct, and it was even presented in verse, which indicates that it was intended to be memorized by legal professionals. A manual of this sort helped legal practitioners, whether *muftī*s, judges or minor religious scholars, provide legal advice to subjects of the law, drawing upon the diversity of schools to serve social needs. This legal knowledge did not require extensive legal training. It is the proliferation of those manuals in the late Ottoman period that enabled subjects of the

[216] See for example, Ibn Mundhir al-Nisābūri (d. 319 AH), *Ikhtilāf al-'Ulamā'.* MS Dār al-Kutub 68 Fiqh Madhāhib Ṭalʿat, microfilm # 8257; See also Ibn Ḥazm, *Al-Muḥalla* (Beirut: Dār al-Afāq al-Jadīda, n.d.).
[217] See Maribel Fierro, "The Legal Policies of Almohad Caliphs and Ibn Rushd's Bidayat al-Mujtahid," *Journal of Islamic Studies* 10, 3 (1999): 226-248.
[218] See Abū Jaʿfar al-Ṭabarī, *Ikhtilāf al-Fuqahāʾ* (Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.).
[219] 'Umar Muḥammad al-Fārāskūrī al-Shāfiʿī, *Kitāb al-Bahja al-Muraṣṣaʿa bi-Durar Yanābīʿ Ikhtilāf al-A'imma al-Arbaʿa.* MS Dār al-Kutub 66 Fiqh Madhāhib 'Arabī, folio 2b-3b, microfilm # 46645.

law, through the mediation of their local religious authorities, to gain a functional knowledge of the law to serve their legal transactions.

In some *ikhtilāf* texts, the purpose of the genre is clearly indicated. For example, in his book dealing with marriage contracts in the four schools, Abī al-ʿAbbās Aḥmad Ibn ʻUmar al-Darbī al-Shāfiʿī (d. 1151/1738), says that his father and others asked him to write a book on marriage in the four schools because such a book will help people exercise *taqlīd* even if it is not that of their own school. This is acceptable because differences among the four *imām*s are a form of mercy from God (*raḥma*).[220] In a similar fashion, in 1198/1783, the Shāfiʿī ʿAbd al-Muʻṭī al-Samalāwī wrote a treatise on marriage in the four schools. He stated as his motivation the questions of peasants about the different rules for marriage contracts in the four schools. They wished to know the rules of those contracts in all the schools because they are not bound by any particular one.[221]

Discussing the Mālikī conditions for the marriage of an orphan girl in his *ikhtilāf* work, ʿAbd Allāh Ibn Hijāzī al-Sharqāwī (d. 1227/1812) encourages the reader to choose one of the other three schools on this issue because of the strict Mālikī view.[222] On another occasion, the author of the *matn* (original text), Muḥammad Ibn Sālim al-Muʻayṣirāwī alerts the readers to more differences among the schools, urging them to

[220] Abū al-ʿAbbās Aḥmad Ibn ʻUmar al-Darbī al-Shāfiʿī, *Ghāyat al-Maqṣud lī Man Yataʻāṭa al-ʻUqūd ʻalā al-Madhāhib al-Arbaʿa* (Cairo: Maktabit Muṣtafā al-Bābī al-Ḥalabī, 1956), 2-3.
[221] ʿAbd al-Muʻṭī al-Samalāwī, *al-Qawl al-Murabbaʻ fī Ḥukm al-ʻAqd ʻalā al-Madhāhib al-Arbaʻ*. MS Dār al-Kutub 226 Fiqh Taymur, microfilm # 29730.
[222] ʿAbd Allāh Ibn Ḥijāzī al-Sharqāwī, *Sharḥ ʻalā al-Jawhar al-ʻAzīz*. MS Dār al-Kutub 68 Fiqh Madhāhib, folio 32b-34a, Microfilm # 46647.

follow whom they wish, *qallid li-man tahwā wa-ittabiʿ*.[223] Nūr al-Dīn al-Shāfiʿī (d. 1044/1634), sees those differences as a blessing from God (*niʿmatan minhū musdāh wa raḥma*).[224]

This new evidence supports Nelly Hanna's argument that the legal doctrines of the four schools of law seem to have been understood by laypeople and that it was common knowledge in the Ottoman period.[225] This knowledge must have come about through this *ikhtilāf* literature. The clear references to questions by peasants and other laypeople about the differences among the schools shows that there was demand for such knowledge and that jurists tried to fill that need with this *ikhtilāf* genre.

The nineteenth-century works of substantive law by reformers such as Qadri Pasha, which only contained the authoritative opinions of the Ḥanafī school, can now be viewed not as a novel development of modern legal reforms, but rather as another version of what I call above the Ottoman *ikhtilāf* literature.

Conclusion

The rise of *taqlīd* as the dominant force in Islamic law limited the avenues through which legal change can be achieved. There was a narrowing of legal options, which forced jurists to seek other options such as legal scaffolding, but also a readjustment of the very meaning of *taqlīd* itself. Some jurists from the thirteenth century onwards broke away from the classical opposition to the pragmatic use of Sunni legal pluralism

[223] Al-Sharqāwī, *Sharḥ*, folio 49a.
[224] Nūr al-Dīn ʿAlī Ibn Ibrāhīm al-Shāfiʿī, *Mabāhij al-Umma fī Manāhij al-A'ima al-Arbaʿa.* MS Dār al-Kutub 63 Fiqh Madhāhib Talʿat, folio 2b, microfilm # 8253.
[225] Nelly Hanna, "The Administration of Courts in Ottoman Cairo," In *The State and Its Servants: Administration in Egypt from Ottoman Times to the Present*, ed. Nelly Hanna (Cairo: The American University in Cairo Press, 1995), 44-59.

to meet social needs. Their debate broke the consensus of the previous generations of jurists, relegating the issue of *tatabbuʿ al-rukhaṣ* to the realm of *ikhtilāf*. This view gained an increasing number of supporters in the fifteenth century onwards.

The pragmatic use of legal pluralism was not just restricted to the subjects of the law. A parallel discussion of *muftī*s exercising *tatabbuʿ al-rukhaṣ* on behalf of the subjects of the law by providing them with rulings from other schools is even accepted by some scholars, as long as these declarations are not issued as *fatwā*s but as narration (*riwāya*). The role of *muftī*s was complemented by the role played by jurists who wrote legal manuals. *Muftī*s participated in this system by providing legal advice to subjects of the law. Professional manuals were written for *muftī*s and minor religious scholars to serve this function. This legal advice literature helped subjects of the law seek the school that could provide the best outcome for their legal transactions. In this sense, *muftī*s acted somewhat like lawyers. *Muftī*s, jurists and minor legal practitioners bridged the knowledge gap, enabling people to navigate the system for their utility. The *ikhtilāf* literature dealt with popular, narrow topics such as marriage and divorce. The differences among the schools were sometimes presented in verse to make it easier for legal practitioners to memorize.

The discussion of whether it is better to follow the anomalous rulings of one's own school or the preponderant of another, both for jurists and laypeople, would be pointless if changing school for social utility was disallowed. There was a trend towards legitimizing the practice of pursuing the easier rulings for the subjects of the law and the *muftī*s who provided them with the legal information required to make their

decision. This does not mean that the traditional anti-utilitarian view was completely muted. It continued to counter this reform of *taqlīd* until the modern period. By the late Mamluk period, consensus on the issue was no longer claimed. People who follow the easier rulings could no longer be dubbed as sinners. They could no longer be deprived of legal rights such as the ability to give testimonies and to take legal positions such as judgeships or *muftī*ships. Judicial rulings that are based on *tatabbuʿ al-rukhaṣ* could not be overruled, since the very practice of it is an issue of *ikhtilāf*.

Chapter 2

Talfīq in Islamic Legal Theory

In this chapter, I analyze attitudes towards *talfīq* going back to the first mentions of the term in the Mamluk period and arriving at the rise of Mehmed Alī in the early nineteenth century, when the modernization of the Egyptian legal system arguably started.

The common wisdom is that *talfīq* was made lawful only in the nineteenth century, when legislators used it to write codes that were more compatible with modernity.[226] Hallaq and Layish argued that it was outright unlawful prior to the nineteenth century.[227] This view led Layish to dub the practice as "legal opportunism," aimed at enabling legislators in Muslim majority societies to create a code both based on Islamic *Sharī'a* and compatible with the modernization of the legal system along European lines. He thus concludes that the modern codification of *Sharī'a* was a development that occurred outside the classical tradition, not an internal evolution.[228] This view was challenged by Wiederhold who argued that the issue of *talfīq* was debated

[226] See for example, Norman Anderson, *Law Reform in the Muslim World* (London: Athlone Press, 1976), 34-80; Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1962); The term *talfīq* comes from the verb *laffaqa*, which is to sew two pieces of cloth together. In its technical sense, the term is used to refer to the putting together of elements of two or more doctrines to create a new different one. For a more detailed discussion of the meaning of *talfīq*, see the introduction.

[227] Wael B. Hallaq; Aharon Layish, "Talfīḳ," *Encyclopaedia of Islam,* Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth , E. Van Donzel and W.P. Heinrichs. Brill, 2008.

[228] Aharon Layish, "The Transformation of the Sharī'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt des Islams* 44, 1 (2004): 94; N. J. Coulson, *A History of Islamic Law*, 197-201.

prior to the nineteenth century.[229] Similarly, studying two *fatāwā* from the seventeenth and eighteenth centuries, Krawietz shows two sides to the debate over the prohibition of *talfīq*.[230] Despite the use of *talfīq* in modern codification, there has not been any extensive study of it to my knowledge.

Based on the evidence presented below, I argue that the status of *talfīq* changed through the seventeenth and eighteenth centuries from an issue over which a consensus had been formed to an issue of *ikhtilāf*. Although strong opposition to the practice continued throughout the Ottoman period, the topic was clearly seen as open to debate in the later centuries of Ottoman history. Growing acceptance of *talfīq* can be seen in discussions in which even some of the opponents of this technique refused to overrule *talfīq*-based judicial decisions. As I will discuss in the fourth chapter, nineteenth century reformers recycled the juristic arguments of supporters of *talfīq* from the seventeenth and eighteenth centuries to support the modern codification of *Sharīʿa*.

It is not until the Mamluk period that we see any references to *talfīq*. The classical jurists working prior to the Mamluk period did not see a need to discuss it, because they had already forbidden what was called by scholars "pursuing the easier rulings" (*tatabbuʿ al-rukhaṣ*). It was not until attitudes towards *tatabbuʿ al-rukhaṣ* started changing that *talfīq* was singled out by some of the new supporters of *tatabbuʿ al-rukhaṣ*

[229] Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihad*," *Islamic Law and Society* 3 (1996): 234-304.
[230] Birgit Krawietz, "Cut and Paste in Legal Rules: Designing Islamic Norms with Talfiq," *Die Welt des Islams* 42, 1 (2002): 3-40.

as the only type of *tatabbuʿ al-rukhaṣ* that is forbidden.[231] It acted somewhat like a foil for *tatabbuʿ al-rukhaṣ.*

The earliest discussions of *talfīq* are found in the Mamluk period and are uniformly opposed to the practice. Though the dating is not exact, the term *talfīq* begins to be discussed in Islamic legal theory sometime in the early Mamluk period, not long before the Mālikī jurist al-Qarāfī (d. 682/1283), who was one of the first jurists to single it out as forbidden, compared with *tatabbuʿ al-rukhaṣ*, pointing to a consensus on the subject.[232] The consensus claim means that there was a discussion of it prior to the consensus, which must have taken place not long before al-Qarāfī. This is born out by the absence of the term from earlier detailed debates about changing schools for pragmatic reasons. The first Ḥanafī to discuss *talfīq* is said to be Najm al-Dīn Ibn Ibrahīm Ibn ʿAlī al-Ṭarsūsī (d. 758/1357).[233] In the earliest writings on the term, far from being discussed as a juristic tool, *talfīq* is mentioned only pejoratively, as a misguided practice in the courts. [234]

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[231] It is hard to state a specific date for when the change of the classical doctrine took place, partly because it happened so gradually over a long period of time. However, I consider Baybars' institutionalization of the four *qādī* system as a marker for the end of the Classical Period.

[232] Ibrāhīm Ibn Ḥusayn Ibn Aḥmad Ibn Muḥammad Ibn Aḥmad Ibn Bīrī, *Al-Kashf wa al-Tadqīq lī Sharḥ Ghāyat al-Taḥqīq*. MS Dār al-Kutub, Uṣūl Fiqh 403, folio 9, Microfilm # 38418.

[233] See Birgit Krawietz, "Cut and Paste in Legal Rules: Designing Islamic Norms with Talfiq," *Die Welt des Islams* 42, 1 (2002): 13.

[234] Ṭarsūsī (d. 758/1357) mentions that a judge in 681 had issued a ruling that was made up of two opinions, namely Abū Ḥanīfa's and Abū Yūsuf's. Ṭarsūsī objected to the ruling, but then saw a similar form of it in *Munyat al-Muftī*, where it was permitted. One of the examples that were permitted by the *Munyat al-Muftī* is when a judge rules against an absent person, based on the testimony of a sinner, which combines two elements, each of which is only acceptable to one of the schools. The Shāfiʿīs permit the issuing of rulings in absentia, whereas the Ḥanafīs allow the testimony of sinners. See Ḥasan Ibn ʿAmmār Ibn ʿAlī al-Shurunbulālī, *al-ʿIqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub 367 Uṣūl Fiqh, folio 14a, 14b, Microfilm # 38391. In the Mamluk period, we do not see anyone supporting *talfīq*. Everyone, regardless of their position on *tatabbuʿ al-rukhaṣ*, seems to distance himself from this practice.

The opposition to *talfīq* remained strong throughout the Ottoman period, but the consensus claimed by the Mamluk jurists was challenged. Some of the supporters of *tatabbuʿ al-rukhaṣ* found *talfīq* much harder to stomach than its simpler utilitarian sibling. The Shāfiʿī Ibn ʻAlān al-Makkī (d. 1057/1647), for instance, completely rejected both synchronic and diachronic *talfīq,*[235] even though he accepted *tatabbuʿ al-rukhaṣ.*[236]

The discussion of *talfīq* usually assumes that the two opinions come from two different schools. But occasionally some jurists would explicitly state their opposition to *talfīq*, even when practiced within the same school. For example, Ibn Bīrī (d. 1099/1687) cites as an example the case of a person who wishes to endow to herself a group of trees. Such an endowment includes two legal issues: First, can an individual make an endowment to herself? Second, can she make an endowment of a moveable item? There are different opinions on both of these issues in the Ḥanafī school. In order to make this transaction permissible, pieces of the rulings of two authorities within the Ḥanafī school are combined. The first is the Ḥanafī Abū Yūsuf, who allows the endowment of moveable items, but does not allow the endowment of any item to oneself; whereas Abū Ḥanīfa allows endowment to oneself, but does not allow the

This strand continues throughout the Ottoman period. As we saw in the previous chapter, some jurists explained away earlier references forbidding *tatabbuʿ al-rukhaṣ* by claiming that they were directed at *talfīq*. Save for a few negative references to *talfīq* in the Mamluk period, there is hardly a discussion of the issue. It is not until the Ottoman period that *talfīq* becomes a heated topic. See Samahūdī, *al-ʻIqd al-Farīd fī Aḥkām al-Taqlīd*. MS 45 Uṣūl Taymūr, microfilm # 11397, folio 12a-18a; Ḥasan Ibn ʻAmmār Ibn ʻAlī al-Shurunbulālī, *al-ʻIqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub 367 Uṣūl Fiqh, folio 2a-4b, 15b-16b, Microfilm # 38391; Ḥasan al-Attār, *Ḥāshiyat al-ʿAttār ʻala Sharḥ al-Jalāl al-Maḥallī ʻala Jamʻ al-Jawāmiʻ* (Cairo: Dār al-Baṣā'ir, 2009), 2:42.

[235] For a discussion of those two types of *talfīq,* see the introduction.

[236] Ibn ʻAlān al-Makkī, *Al-Talaṭṭuf Fī al-Wuṣūl ilā al-Taʻarruf*. MS Dār al-Kutub, Uṣūl Fiqh144, folio 125a, Microfilm # 40314.

endowment of moveable items. Hence, according to al-Bīrī, such an endowment should be forbidden because the actual transaction would not be permitted by either authority, albeit for different reasons.[237]

This opposing strand toward *talfīq* in Ottoman legal thought continued well into the eighteenth century. Although Abī al-ʿAbbās Aḥmad Ibn ʻUmar al-Darbī al-Shāfiʿī (d. 1151/1738) wrote a book that was designed for laypeople to pick and choose the easier rulings of the schools, he did not accept the complex pragmatic sibling, *talfīq*.[238] Muḥammad Ibn Sulaymān al-Madanī al-Shāfiʿī al-Kurdī (d. 1194/1780) is another Shāfiʿī jurist who permitted *tatabbuʿ al-rukhaṣ*, but completely rejected *talfīq* as unlawful.[239]

The rise of a pro-*talfīq* camp

Some dissenting voices ignited a heated debate in the seventeenth and eighteenth centuries, rendering the practice of *talfīq* a matter of debate (*ikhtilāf*). This new status broke the consensus that had been formed over the subject in the Mamluk period. Strong voices both for and against the practice were emerging. The Ḥanbalī jurist Marʻī Ibn Yūsuf Ibn Abī Bakr al-Karmī al-Maqdisī, the *Muftī* of the Ḥanbalīs in Egypt (d. 1033/1623) issued a *fatwā*, in which he permitted the practice of *talfīq*.[240] The

[237] Ibrāhīm Ibn Ḥusayn Ibn Aḥmad Ibn Muḥammad Ibn Aḥmad Ibn Bīrī, *al-Kashf wa al-Tadqīq lī Sharḥ Ghāyat al-Taḥqīq*. MS Dār al-Kutub, Uṣūl Fiqh 403, folio 1-4, Microfilm # 38418. For a discussion of his works, see ʻAbdel Raziq Ibrāhīm ʻIsa, *Tarikh al-Qada' fi Miṣr al-ʻUthmaniyya 1517-1798* (Cairo: al-Hay'a al-Miṣriyya al-ʻAmma lī al-Kitab, 1998), 342-343.

[238] Abū al-ʿAbbās Aḥmad Ibn ʻUmar al-Darbī al-Shāfiʿī, *Ghāyat al-Maqṣud lī Man Yataʻāṭa al-ʻUqūd ʻalā al-Madhāhib al-Arbaʿa* (Cairo: Maktabit Muṣtafā al-Bābī al-Ḥalabī, 1956), 2-3.

[239] Muḥammad Ibn Sulaymān al-Madanī al-Shāfiʻī al-Kurdī, *al-Fawā'id al-Madaniyya fī Bayān Ikhtilāf al-ʿUlamā'min al-Shāfiʻiyya* (Diyār Bakr, Turkey: al-Maktaba al-Islāmiyya, n.d.), 244-245.

[240] ʻAbd al-ʻAzīz Ibn Ibrāhīm al-Dukhayyil, *al-Taḥqīq fī Buṭlān al-Talfīq Naṣṣ ʻalā Futyā lī al-Shaykh Marʻī al-Ḥanbalī* (Riyadh: Dār al-Ṣumayʻī, 1998), 178-181.

controversy erupting from his *fatwā* was still the subject of a response decades later, when another Ḥanbalī, Abī al-'Awn Muḥammad Ibn Aḥmad al-Safārīnī (d. 1188/1774) wrote a treatise entitled "*Al-Taḥqīq fī Buṭlān al-Talfīq*," forbidding *talfīq* outright.[241]

By the time the Ḥanafī jurist Ibrāhīm Ibn Bīrī (d. 1099/1687) wrote his treatise, he was able to say with confidence in its opening that *talfīq* had become an issue of *ikhtilāf* or debate. Even though his treatise came out strongly against the practice, he noted that those who have argued against it often do so without providing evidence.[242] The intensity of the debate shows that it was seen as essential to jurists of this period. It was unusual for jurists to denigrate their peers or use insulting language in their writing even on matters of *ikhtilāf*. The following comments by al-Nābulsī (d. 1143/1730), found in his later response to al-Makkī's stand on *talfīq*, suggest that it may have been a defining issue for some jurists:

> See how this person [al-Makkī], who is deficient in understanding (*qāsir al-fahm*), thought that *talfīq* was permitted [based on Ibn al-Humām's] view that the layperson can choose in each transaction the opinion of a *mujtahid* that is easier for him. What is meant by the transaction is the entire transaction, not part of it.[243]

Al-Makkī (d. 1061/1650), in turn, describes people from his school who refuse to follow al-Shāfi'ī in combining two prayers when travelling (*al-jam'*) as

[241] Al-Dukhayyil, *al-Taḥqīq*, 178-181. Mar'ī was so respected as a jurist that even Safārīnī praised his knowledge before disagreeing with him.
[242] Ibrāhīm Ibn Ḥusayn Ibn Aḥmad Ibn Muḥammad Ibn Aḥmad Ibn Bīrī, *al-Kashf wa al-Tadqīq lī Sharḥ Ghāyat al-Taḥqīq*. MS Dār al-Kutub, Uṣūl Fiqh 403, folio 1-4, Microfilm # 38418.
[243] 'Abd al-Ghanī al-Nābulsī, *al-Ajwiba 'an al-As'ila al-Sitta*. MS Dār al-Kutub, Uṣūl Fiqh 365, folio 13b, microfilm # 16703.

"ignorant, and fanatical imbeciles," who subsequently miss the prayer entirely because they do not wish to exercise *talfīq*.[244]

Another example where insulting words were exchanged over this debate is cited by Ibrāhīm Ibn Bīrī (d. 1099/1687) in his treatise forbidding *talfīq*, which drew the ire of an unnamed pro-*talfīq* scholar. According to him, this scholar insulted Ibn Bīrī over the issue in a public meeting, "*Takallama 'allayya fī majlisihī bimā yuqallilū min ḥasanātihī wa yukthirū sayyi'ātih.*"[245]

The supporters' arguments

Jurists in support of the practice defended it in several ways. For one, they argued that opposition to the practice is only a recent development and can thus be dismissed as a departure from the traditional view. For instance, a book written in 1051/1641 by Muḥammad Ibn ʿAbd al-ʿAẓīm al-Rūmī al-Mawrawī (d. 1061/1650) gave more impetus to the supporters of *talfīq*. Al-Mawrawī, who was aware of the negative views that had been expressed by other jurists, pointed out that those negative views are only of later scholars (*mutaʾakhkhirīn*), and that the earlier authorities did not forbid the practice.[246] Some jurists went as far as claiming that some arguments against *talfīq*

[244] Muḥammad 'Abd al-Mu'ṭī Ibn Furūkh al-Makkī, *Ta'līqa fī al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Taymūr 166, folio 6a, 7b, microfilm # 24026; See also Muḥammad 'Abd al-Mu'ṭī Ibn Furūkh al-Makkī, *al-Qawl al-Sadīd fī Ba'ḍ Masā'il al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Fiqh 147, folio 3b, microfilm # 38537.

[245] Ibrāhīm Ibn Ḥusayn Ibn Aḥmad Ibn Muḥammad Ibn Aḥmad Ibn Bīrī, *al-Kashf wa al-Tadqīq lī Sharḥ Ghāyat al-Taḥqīq*. MS Dār al-Kutub, Uṣūl Fiqh 403, folio 9a-9b, Microfilm # 38418. This is roughly translated as: "He spoke about me in public in a way that reduces his good deeds and increases his bad deeds."

[246] Muḥammad Ibn ʿAbd al-Aẓīm al-Rūmī al-Mawrawī, *al-Qawl al-Sadīd fī Ba'ḍ Masā'il al-Ijtihād wa al-Taqlīd* (Kuwait: Dār al-Da'wa, 1992), 100-113.

attributed to earlier authorities were forged by later scholars. Specifically, that the reference to Ibn al-Humām, a prominent Ḥanafī scholar who was thought to have forbidden the practice, was in fact inserted by later scholars opposed to *talfīq*.[247]

In their efforts to give support to their permission of the practice, sometimes scholars attributed stories to the eponyms of the four schools of Sunni law. These stories portray them as accepting the practice of *talfīq*. For instance, al-Makkī relates the story of al-Shāfiʿī who had a hair-cut and prayed with so much hair on his clothes that, according to his old doctrine, would have invalidated his ritual ablution. When asked about this, he said when we had a problem (*ibtulīnā*), we moved to the school of the people of Iraq, meaning the Ḥanafīs.[248] This is an example of *talfīq* because al-Shāfiʿī fused his performance of the ritual ablution, which is based on his old doctrine, with the relaxation of his view regarding the ritual purity of hair.

The supporters of *talfīq* also cited the founders of the Ḥanafī school exercising *talfīq*. They relate the anecdote in which Abū Yūsuf (d. 181/798) after having performed his ritual ablution, was informed that there was a dead rat in the water. He said, "I will take the opinion of the people of Madīna [the Shāfiʿī school] that if the volume of water

[247] Muḥammad ʻAbd al-Muʻṭī Ibn Furūkh al-Makkī, *Taʻlīqa fī al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Taymūr 166, folio 2a-5b, microfilm # 24026.

[248] The view that hair invalidates prayer is a peculiar view that is attributed to al-Shāfiʿī in his old doctrine. Hair is neither ritually impure in his later, more authoritative doctrine, nor in the other Sunnī schools. See Muḥammad ʻAbd al-Muʻṭī Ibn Furūkh al-Makkī, *Taʻlīqa fī al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Taymūr 166, folio 4b, microfilm # 24026; See also Muḥammad Saʿīd al-Bānī, *ʿUmdat al-Taḥqīq fī al-Taqlīd wa al-Talfīq* (Damascus: Maṭbaʿat Ḥukūmat Dimashq, 1923), 93.

is two jugs (qullatayn) or more,[249] it does not carry dirt (*khubth*)."[250] Opponents of *talfīq* cited another version attributed to *al-Quniyya* by al-Zāhidī (d. 658/1259) according to which, Abū Yūsuf actually repeats his prayer because he thought his first prayer to be invalid. The supporters of *talfīq* do not accept this version.[251]

Another way supporters of *talfīq* tried to back up their position was through seeking out examples of *talfīq* in the earlier Ottoman theoretical literature. Al-Makkī cites Ibn Nujaym al-Miṣrī (d. 970/1563) as allowing combining, in the case of religious endowments (*waqf*),[252] the contradictory opinions of Abū Ḥanīfa and Abū Yūsuf.[253] He sees this as evidence that earlier authorities supported *talfīq*.[254]

Using practice as justification for the permission of *talfīq*

Social practice or custom has played an important role in Islamic law. Custom was used to fill in areas of the law that are not scripturally determined. One example would be the use of custom in contracts, where what is considered custom in a

[249] There is disagreement over how much water is in a *qulla* (a type of jug), with most views ranging from 100 to 500 pounds. See for example, Yaḥyā al-Zaḥlī Ibn Hubayra, *Ma'īn al-Umma 'alā Ma'rifat al-Wifāq wa al-Khilāf Bayna al-A'imma*, MS Dār al-Kutub, Fiqh Madhāhib Talaat 51, folio 6a-6b, Microfilm # 8241.

[250] Ibrāhīm Ibn Ḥusayn Ibn Aḥmad Ibn Muḥammad Ibn Aḥmad Ibn Bīrī, *al-Kashf wa al-Tadqīq lī Sharḥ Ghāyat al-Taḥqīq*. MS Dār al-Kutub, Uṣūl Fiqh 403, folio 9a-9b, Microfilm # 38418; Ḥasan Ibn 'Ammār Ibn 'Alī al-Shurunbulālī, *al-'Iqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub, Uṣūl Fiqh 367, folio 20a, Microfilm # 38391.

[251] Ibn Bīrī, *al-Kashf*, folio 9a-9b; Al-Shurunbulālī, *al-'Iqd*, folio 20a; Muḥammad 'Abd al-Mu'ṭī Ibn Furūkh al-Makkī, *Ta'līqa*, folio 5a-5b.

[252] A *waqf* is a piece of property set aside as either a charitable endowment (*waqf khayrī*) or as a civil endowment (*waqf ahlī*). Most instances of *waqf* in the Ottoman period were of the latter type, in which the beneficiaries were members of the endower's family.

[253] Muḥammad 'Abd al-Mu'ṭī Ibn Furūkh al-Makkī, *Ta'līqa fī al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Taymūr 166, folio 2a-5b, microfilm # 24026.

[254] This example was rejected by opponents of *talfīq*, who argued that combining the doctrines of authorities in the same school does not constitute *talfīq*. See 'Abd al-Ghanī al-Nābulsī, *al-Ajwiba 'an al-As'ila al-Sitta*. MS Dār al-Kutub, Uṣūl Fiqh 365, folio 9b-13b, microfilm # 16703.

particular contract is an implicit condition unless there is a stipulation to the contrary.[255] But can social practice lead to a change in an already existing legal ruling? The issue of *talfīq* offers an answer to this question. Legal theoreticians in general were well aware that *talfīq* was taking place in practice. Evidence of this in the literature includes debates regarding whether a ruling based on *talfīq* must necessarily be overruled. Even those strongly opposed to *talfīq* were not necessarily prepared to reject a ruling based upon it. Consider the example of whether or not the ruling of a judge in which a sinful (*fāsiq*) witness testifies against an absent person can be overruled. This case constitutes *talfīq* because the Shāfiʿīs do not accept the testimony of a sinner, but allow ruling in absentia. The Ḥanafīs do not allow ruling against someone in absentia, but allow the testimony of the sinner.[256]

It is also evidence of the practice that legal theoreticians were inclined to defer to social practice as evidence for its permissibility in theory. Ibn Furūkh Al-Makkī, for example, tried to justify *talfīq* with reference to *al-Fatāwā al-Bizāziyya* of Muḥammad Ibn Shihāb Ibn Yūsuf al-Kurdarī, known as al-Bizāzī (d. 827/1424). Al-Kurdārī refers to cases in which Ḥanafī women, who would not be able to testify at all under Shāfiʿī law, were allowed to testify against an absent person, which they cannot do under Ḥanafī law.[257] In other words, the Ḥanafī acceptance of women's testimony was combined with the

[255] Chibli Mallat, "From Islamic to Middle Eastern Law, A Restatement of the Field," *The American Journal of* Comparative Law 52, 1 (2004), 257-62.
[256] Ibrāhīm Ibn Ḥusayn Ibn Aḥmad Ibn Muḥammad Ibn Aḥmad Ibn Bīrī, *al-Kashf wa al-Tadqīq lī Sharḥ Ghāyat al-Taḥqīq*. MS Dār al-Kutub, 403 Uṣūl Fiqh, folio 1a-4b, Microfilm # 38418.
[257] ʿAbd al-Ghanī al-Nābulsī, *al-Ajwiba ʿan al-As'ila al-Sitta*. MS Dār al-Kutub, Uṣūl Fiqh 365, folio 9b-13b, microfilm # 16703; Muḥammad ʿAbd al-Muʿṭī Ibn Furūkh al-Makkī, *Taʿlīqa fī al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, 166 Uṣūl Taymūr, folio 2a-5b, microfilm # 24026.

Shāfiʿī acceptance of ruling in absentia. Similarly, he mentions that some of the Ḥanafī scholars of Khawārizm did not consider prayer invalidated when someone makes a mistake in reading, although this ruling belongs to the Shāfiʿī school.[258] Therefore, that prayer consists of Ḥanafī rules, as well as that Shāfiʿī element.

Some jurists explicitly state that it is unrealistic to try to change people's practice. Thus, *talfīq* should be legitimized:

> *bal haythū waqaʿa dhālika ittifāqan khuṣūṣan min al-ʿawāmm al-ladhīna la yasaʿuhum ghayra dhālika.*
>
> Where this takes place, especially as performed by laypeople, who cannot do otherwise.[259]

According to al-Mawrawī, *talfīq* is easier and it is normal for people to follow what is easier for them.[260] To al-Makkī, the use of *talfīq* is a practical social need. He criticizes people from his school, who refuse to follow al-Shāfiʿī in combining two prayers when travelling (*al-jamʿ*) and thus miss the *ʿaṣr* prayer completely. He decries them as zealots.[261]

In the theoretical literature, there are three distinct approaches to the reality of the practice of *talfīq*. One approach is to treat it as an anomaly that needs to be put

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[258] ʻAbd al-Ghanī al-Nābulsī, *al-Ajwiba ʻan al-Asʾila al-Sitta*. MS Dār al-Kutub, 365 Uṣūl Fiqh, folio 9b-13b, microfilm # 16703; Muḥammad ʻAbd al-Muʻṭī Ibn Furūkh al-Makkī, *Taʻlīqa fī al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, 166 Uṣūl Taymūr, folio 2a-5b, microfilm # 24026.

[259] ʻAbd al-ʻAzīz Ibn Ibrāhīm al-Dukhayyil, *al-Taḥqīq fī Buṭlān al-Talfīq Naṣṣ ʻAlā Futyā lī al-Shaykh Marʻī al-Ḥanbalī* (Riyadh: Dār al-Ṣumayʻī, 1998), 178-181.

[260] Muḥammad Ibn ʿAbd al-Aẓīm al-Makkī al-Ḥanafī al-Rūmī al-Mawrawī, *al-Qawl al-Sadīd fī Baʻḍ Masāʾil al-Ijtihād wa al-Taqlīd* (Kuwait: Dār al-Daʻwa, 1992), 100-113.

[261] Muḥammad ʻAbd al-Muʻṭī Ibn Furūkh al-Makkī, *Taʻlīqa fī al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Taymūr 166, folio 6a-7b, microfilm # 24026; see also Muḥammad ʻAbd al-Muʻṭī Ibn Furūkh al-Makkī, *al-Qawl al-Sadīd fī Baʻḍ Masāʻil al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Fiqh 147, folio 3b, microfilm # 38537.

right. For example, some jurists argue that if a judge's decision contains a *talfīq*, which is practiced by "ignorant judges," it should be overruled.[262] The second approach adopted by jurists sees the practice of *talfīq* as evidence of its validity and tries to adapt the theory to this practice (as we saw above in the case of the Ḥanbalī jurist Marʿī). A third approach is not to accept the practice, yet to refuse to overrule it when it does take place. This is the position of al-Birī, who, though a strong opponent of the practice of *talfīq*, nevertheless attempts to salvage the *talfīq*-based rulings that take place in practice. He does this by arguing that the judge's *ijtihād* (independent legal reasoning) led him to these solutions, and that his decision only happens to agree with those of al-Shāfiʿī and Abū Ḥanīfa in their constituent parts.[263] There is no evidence that those approaches followed school lines.

It is through the last two approaches to observing the legal practice that this reality has the potential to shape legal theory. This finding belies Coulson's claim that the Mālikī, legal work *al-ʿAmal al-Fāsī* is the single instance of a "realist" form of Islamic jurisprudence, which follows the practice of the courts, rather than precedes it. In fact, this approach was more common than Coulson claimed. This is a descriptive strand of Islamic legal theory that is concerned with the law not as it ought to be, but as it actually is in practice.[264]

Diachronic vs. synchronic *talfīq*

[262] Ḥasan Ibn ʻAmmār Ibn ʻAlī al-Shurunbulālī, *al-ʻIqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub, Uṣūl Fiqh 367, folio 13b-14b, Microfilm # 38391.
[263] Ibrāhīm Ibn Ḥusayn Ibn Aḥmad Ibn Muḥammad Ibn Aḥmad Ibn Bīrī, *al-Kashf wa al-Tadqīq lī Sharḥ Ghāyat al-Taḥqīq*. MS Dār al-Kutub, Uṣūl Fiqh 403, folio 1a-4b, Microfilm # 38418.
[264] Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1962), 147.

So far approaches to *talfīq* varied from wholesale acceptance to complete rejection. Another approach used by proponents of the practice of *talfīq* was to distinguish between *talfīq* in the same act (synchronic) and *talfīq* in two separate transactions (diachronic). More jurists were willing to allow diachronic *talfīq*, in which parties to a case follow the rulings of different schools, as long as the rulings can be seen as referring to different acts or transactions, even if they are linked. For example, following one *imām* in his/her ritual ablution, and then following a different *imām* in prayer, does not invalidate the prayer because the ablution and the prayer are seen as two separate acts, even though the legal effect of the first act had not yet been exhausted by the time of the second act.[265]

Another example is of a woman who was divorced three times and therefore cannot marry her now ex-husband unless she consummates a marriage with a different man. If she marries herself to a new man without a guardian under Ḥanafī law, can this marriage acceptable to her Shāfiʿī husband (a male guardian is essential to a marriage according to the Shāfiʿīs)? Supporters of *talfīq* said that it is permissible for the Shāfiʿī husband to accept this marriage as valid and therefore be able to remarry her after she is divorced.[266] Since her marriage to the *muḥallil* is separate from her re-marriage to her

[265] See for example, Zayn al-Dīn Ibn ʻAbd al-ʻAzīz al-Mālībarī. *Fatḥ al-Muʿīn bi-Sharḥ Qurrat al-ʻAyn* (Cairo: Maṭbaʿit Muḥammad ʻAlī Subayḥ, 1928), 136-138.

[266] Anonymous author, *Risāla Jalīla fī al-Taqlīd*, reproduced in, Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihad*," *Islamic Law and Society, 3 (1996),293-299.* In all the four Sunni schools of Islamic law, when a woman is divorced three times, she cannot remarry her husband until she has consummated a marriage with another man. This man is called a *muḥallil*.

once husband and the subject of both transactions is the same or the legal effect of the first act has not been exhausted, it is a case of diachronic *talfīq.*

Al-Timirtāsh (d. 1004/1595) permits only diachronic *talfīq*. His example is of a Ḥanafī judge settling a dispute between parties to a mortgage (*raḥn*) contract drawn up under a Mālikī judge. The schools differ on how such transactions are handled. Specifically, when an asset is mortgaged (for example a cow), a Ḥanafī judge would view the fruit or product of the mortgaged asset as belonging to the original asset (*thamaratu al-rahn takūnu taba'an lil-aṣl*). That is, if the cow were to bear a calf, it would belong to the owner of the cow, and would not become part of the mortgage. The Mālikī view in contrast would be that the calf, if born while the cow is mortgaged, is mortgaged along with its mother. Al- Timirtāsh says that the Ḥanafī judge can adjudicate a dispute over this contract according to his school because although it deals with the same asset, the contracting transaction is separate from the later dispute that arose over the product of the mortgage.[267] In the above example, the mortgager would prefer to continue with the Ḥanafī judge, since this would give him possession of the calf, whereas the mortgagee would choose the Mālikī judge. In such situations, where there is a conflict of interest, jurists developed a system that determines whose choice gets priority, as we will see later in this chapter.

[267] Muḥammad Ibn 'Abd Allāh al-Ghazzī al-Ḥanafī al-Timirtāsh, *al-Fatāwā al-Timirtāshiyya*. MS Dār al-Kutub, Fiqh Ḥanafī Ṭal'at 520, folio 96b, Microfilm # 8558. Similarly, Ibn Ziyād (d. 975/1568) saw only synchronic *talfīq* as forbidden. See ʿAbd al-Raḥmān Ibn Muḥammad Ibn Ḥusayn Ibn ʿUmar, *Bughyat al-Mustarshidīn fī Talkhīṣ Fatāwā Ba'ḍ al-A'ima al-Mut'akhkhirīn* (Cairo: Muṣtafā al-Bābī al-Ḥalabī, 1952), 9.

That this distinction between synchronic and diachronic *talfīq* was growing in importance can be seen through the arguments of the detractors against it. Although the Shāfiʿī jurist al-Fishnī (d. 978/1570) is opposed to both synchronic and diachronic *talfīq*, he admits that the Mālikīs allowed diachronic *talfīq*.[268] In order to argue that this is just as unacceptable as the synchronic type, he brings the example of a Shāfiʿī who follows Abū Ḥanīfa in taking advantage of the right of preemption of the neighbor (*shufʿa*). If this individual asserts his right to having preference in buying a piece of land being sold by his neighbor, he should not then be allowed to change back to the Shāfiʿī school in order to sell the same piece of land to someone else before offering the right to buy it to his neighbor.

Talfīq and *ijtihād*

The distinction between exercising *talfīq* within *ijtihad* or within *taqlīd* was used by both sides of the debate to support their arguments.[269] The anti-*talfīq* jurists, claiming that a consensus existed on *talfīq* in earlier generations, would explain away cases in earlier sources in which the rulings of more than one school appear to be mixed as instances of *ijtihād*, not *taqlīd*.[270] For example, according to the Shāfiʿī school, ritual ablution requires washing only part of the head, but touching the genitals invalidates an ablution. In the Ḥanafī school, touching the genitals does not invalidate

[268] Aḥmad Ibn Ḥijāzī Ibn Budayr Shihāb al-Dīn al-Fishnī, *Kifāyat al-Mustafīd fi Aḥkām al-Taqlīd*. MS Dār al-Kutub, Uṣūl Fiqh 367, folio 7a, 7b, microfilm # 16704.
[269] *Ijtihad* is the exercise of independent legal reasoning, whereas *taqlīd* is the opposite, as it refers to following the ruling of another authority, usually one of the four Sunni legal schools.
[270] See for instance, Ibrāhīm Ibn Ḥusayn Ibn Aḥmad Ibn Muḥammad Ibn Aḥmad Ibn Bīrī, *al-Kashf wa al-Tadqīq lī Sharḥ Ghāyat al-Taḥqīq*. MS Dār al-Kutub, Uṣūl Fiqh 403, folio 1a-4b, Microfilm # 38418.

an ablution, but washing must cover the whole head. A *mujtahid* may theoretically come to the conclusion through his own legal reasoning that he should wash only part of his head, and that touching his genitals does not invalidate his ablution. To those opposed to *talfīq*, historical examples of this type do not constitute evidence of the early practice of *talfīq*. They would argue that the ruling of the *mujtahid* happened to coincide in part of it with the Ḥanafī position and in another with the Shāfiʿī one. As we saw above, according to the dominant view within Sunnism, there was a belief that every *mujtahid* is correct (*kullu mujtahidin muṣīb*).[271]

Others used the acceptance of *talfīq* in *ijtihād* as an argument for allowing the *taqlīd*-based type as well. Some argued that if the prayer of the *mujtahid* as described in the above example is acceptable, then so should be the prayer of the *muqallid* (one who follows the rulings of his school). In other words, *talfīq* in *taqlīd* should be treated the same way as *talfīq* in *ijtihād*.[272] A story is mentioned in support of this position in which ʻUmar Ibn al-Khattāb changes the ruling in the same case. If ʿUmar was allowed to change his *ijtihād*, *muqallids* should be allowed to change their *taqlīd* and if *talfīq* is permitted, when reached through *ijtihād* by the early authorities, it should be allowed when reached through *taqlīd* as well.[273]

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[271] Al-Samahūdī, *al-ʻIqd al-Farīd fī Aḥkām al-Taqlīd*. MS Dār al-Kutub, 45 Uṣūl Taymūr, fol. 17a, microfilm # 11397.

[272] Muḥammad Ibn ʿAbd al-Aẓīm al-Makkī al-Ḥanafī al-Rūmī al-Mawrawī, *al-Qawl al-Sadīd fī Baʻḍ Masāʾil al-Ijtihād wa al-Taqlīd* (Kuwait: Dār al-Daʻwa, 1992), 100-113.

[273] Muḥammad ʻAbd al-Muʻṭī Ibn Furūkh al-Makkī, *Taʻlīqa fī al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Taymūr 166, folio 5a-5b, microfilm # 24026; Muḥammad ʻAbd al-Muʻṭī Ibn Furūkh al-Makkī, *al-Qawl al-Sadīd fī Baʻḍ Masāʻil al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Fiqh 147, folio 10a, 7a-7b, microfilm # 38537.

By the late eighteenth century and early nineteenth century, the Egyptian Mālikī jurist al-Dasūqī (d. 1230/1814) says that there are two opinions among Mālikīs regarding the use of *talfīq*. The first is that of the Egyptians, who forbid it, and the second is that of the North Africans (*maghāriba*) who allow it. He sides with the North African opinion, which he says is the dominant view within the school (*wa-rujjiḥat*).[274] Al-Dasūqī outlines the discussion of washing over shoes in ritual ablution (*al-masḥ ʿalā al-khuff*).[275] There is an opinion regarding washing over the torn shoe (*al-masḥ ʿalā al-mukharraq*), which permits it for shoes torn the equivalent of a third of the foot. Another opinion is that if the tearing covers most of the foot, it is not allowed. The Iraqis hold that if the torn part makes it unacceptable for chivalrous people (*aṣḥāb al-murūʾa*) to walk in it, then washing over it is not permitted. He concludes that the most correct opinion (*al-ẓāhir*) is that it is permitted to use *talfīq* between these opinions so that washing over shoes is allowed in what is torn below the third (first opinion) and also on what is torn below most of the foot (second opinion) and, in shoes in which chivalrous people can walk (third opinion).[276]

Leadership in prayer (*al-iqtidāʾ*)

One of the issues that became a litmus test for whether a jurist was for or against the practice of *talfīq* was whether or not the prayer of someone following an

[274] Al-Dasūqī, *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr* (Cairo: Dār Iḥyā al-Kutub al-ʿArabiyya, ʿĪsā al-Bābī al-Ḥalabī, 1984), 1:40-47.
[275] This is a legal concept in which a person is allowed to wash over his shoes instead of washing his/her feet directly for ritual ablution. This permission is a *rukhṣa* (see the definition in the introduction) that is particularly used in cold weather and during travel.
[276] Al-Dasūqī, *Ḥāshiyat*, I: 143-145.

imām of a school other than his own is valid. The validity of the prayer of the *maʾmūm* (the person being led in prayer) is linked to that of his *imām* (the leader of the prayer). That is, if the *imām*'s prayer is not done according to the requirements of Islamic *Sharīʿa*, the prayers of those following him are not valid. The controversy was whether in order for the prayer of the *maʾmūm* to be valid, the prayer of the *imām* must meet the requirements of the *maʾmūm*'s school, or was it sufficient for the *imām*'s prayer to meet the requirements of his own school, even if it was different from the school of the one he is leading? Because the validity of the prayer of the *maʾmūm* consists of both his own prayer and that of the *imām*, if the *imām* is not praying in the manner of the *maʾmūm*'s school, then to follow that *imām* is a form of *talfīq*. Thus, opponents of *talfīq* argue that the prayer is only valid if it follows the school of the *maʾmūm*, whereas proponents of *talfīq* consider it to be valid as long as it meets the requirements of the school of the *imām*.

Al-Shurunbulālī, for instance, claims that earlier authorities consider the prayer of the *maʾmūm* invalid, if his *imām*'s prayer is invalid from the *maʾmūm*'s point of view.[277] Although al-Shurunbulālī is one of the supporters of *tatabbuʿ al-rukhaṣ*, he is staunchly opposed to *talfīq*. He cites the views held by earlier authorities against following an *imām* from a different school to support his position. For a Ḥanafī to be allowed to be led in prayer by a non-Ḥanafī, the leader must not have invalidated his prayer under

[277] Al-Shurunbulālī explicitly states that the view, which considers the validity of the prayer from the *maʾmūm*'s perspective, is against *talfīq*. See Ḥasan Ibn ʻAmmār Ibn ʻAlī al-Shurunbulālī, *Marāqī al-Falāḥ Sharḥ Nūr al-Iḍāḥ* (Cairo: Maktabat Muṣtafā al-Bābī al-Ḥalabī, 1947), 56; Ḥasan Ibn ʻAmmār Ibn ʻAlī al-Shurunbulālī, *al-ʻIqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub, Uṣūl Fiqh 367, folio 11b-15b, Microfilm # 38391.

the Ḥanafī school, even if his prayer would be valid under another school. If a Shāfiʿī *imām* bleeds, he has to renew his ritual ablution for the prayer of a Ḥanafī, who is following him to be valid, as bleeding invalidates ablution in the Ḥanafī school. He adds that if *talfīq* was permitted, these earlier authorities would not have set this condition for the validity of the prayer of those led by *imām*s from other schools.[278] Similarly, other opponents of *talfīq* such as the Ḥanafī jurist al-Sanadī (d. 978/1570) and the Ḥanafī jurist al-Nābulsī, see validity as dependent upon the fulfillment of the requirements of the school of the *maʾmūm*, not the *imām*.[279]

The opposite view is taken by the Ḥanafī jurist ʿAlī Ibn Sultan Muḥammad Qārī (d. 1014/1605), who accepts *talfīq* in the issue of the leadership in prayer. However, his support is restrained. To him, if a Ḥanafī follows an *imām* who does not wash the whole head during ritual ablution, his prayer is still valid, but it is not recommended (*makrūh*). The Ḥanafī *maʾmūm* does not need to repeat his/her prayer, but he/she should try to avoid such a situation.[280] He holds that it is better to follow an *imām* from one's own school, but if one is not available, it is better to follow an *imām* from a different school than to pray on one's own.[281]

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[278] Ḥasan Ibn ʿAmmār Ibn ʿAlī al-Shurunbulālī, *al-ʿIqd al-Farīd lī Bayān al-Rājiḥ min al-Khilāf fī al-Taqlīd*. MS Dār al-Kutub, Uṣūl Fiqh 367, folio 11b-15b, Microfilm # 38391.

[279] Al-Sanadī, *Risāla fī Bayān al-Iqtidā' bī al-Shāfiʿīyya*. MS Dār al-Kutub, Uṣūl Taymūr 233, folio 3b, microfilm # 23659/22748; ʿAbd al-Ghanī al-Nābulsī, *al-Ajwiba ʿan al-Asʾila al-Sitta*. MS Dār al-Kutub, Uṣūl Fiqh 365, folio 6b, microfilm # 16703.

[280] ʿAlī Ibn Sultān Muḥammad Qārī, *al-Ihtidā' fī al-Iqtidā'*. MS Dār al-Kutub, Uṣūl Taymūr 172, folio 16b, microfilm # 23313.

[281] ʿAlī Ibn Sultān Muḥammad Qārī, *al-Ihtidā' fī al-Iqtidā'*. MS Dār al-Kutub, Uṣūl Taymūr 172, folio 10a, microfilm # 23313.

Another supporter of *talfīq* in prayer is the Ḥanafī jurist Muḥammad ʿAbd al-Muʿṭī Ibn Furūkh al-Makkī (d. 1052/1649). He argues that what matters for the validity of prayer is the view of the *imām*, not that of the *maʾmūm*. He accuses those who refuse to be led in prayer by an *imām* from another school of "fanaticism" (*maḥḍ taʿaṣṣub*), as this would lead to situations in which a Muslim entering a mosque would be forced to abstain from prayer entirely rather than following an *imām* from a different school.[282]

As we saw above, the earliest discussions of *talfīq* in the extant works of legal theory go back to the thirteenth century. Yet throughout the Mamluk period, jurists are opposed to the practice. It is not until the sixteenth century that I found opinions breaking the earlier consensus. The debate has continued since then up to the modern period as we will see in chapter IV.

When are differences among schools not condoned?

Having discussed the use of legal pluralism for utility, both through *tatabbuʿ al-rukhaṣ* and *talfīq,* I would like to show examples in which pluralistic relativism was not unbridled. There were issues that schools were not willing to accept, even in the absence of the picking and choosing of the easier rulings. In the early Mamluk period, the Sultan al-Ẓāhir Baybars (d. 676/1277) decided to provide representation for each school in the form of a chief judge placed to protect the rulings of judges of their

[282] Muḥammad ʻAbd al-Muʻṭī Ibn Furūkh al-Makkī, *Taʻlīqa fī al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Taymūr 166, folio 2a-2b, microfilm # 24026; Muḥammad ʻAbd al-Muʻṭī Ibn Furūkh al-Makkī, *al-Qawl al-Sadīd fī Baʻḍ Masāʻil al-Ijtihād wa al-Taqlīd*. MS Dār al-Kutub, Uṣūl Fiqh 147, folio 5a, microfilm # 38537.

school.[283] Safeguarding these differences led to the formation of a quadruple system of law, in which no judge could punish a subject for contradicting the ruling of his school of Islamic jurisprudence, as long as his act was acceptable in at least one of the schools. It was also in the Mamluk period that each school had developed a corporate identity that provided protection to their members, and to the rulings of their judges.

This quadruple system of law protected against the type of incidents that Baybars had faced at the beginning of his reign, in which the chief judge, who was at that time a Shāfiʿī, overturned the decisions by judges of other schools because they contradicted the view of his school.[284] The system, according to Rapoport, was designed to introduce more flexibility, which was used by the Mamluk state to crack down on heresy.[285] The practice of both *tatabbuʿ al-rukhaṣ* and *talfīq* within this pluralist system requires that members of each school view different opinions in the other schools as being probable, even if they prefer the rulings of their own school and see theirs as "*aqrab ilā al-ṣawāb*" (closer to correctness). For subjects of the law to use Baybars' quadruple legal system either through *tatabbuʿ al-rukhaṣ* or *talfīq* to serve their legal transactions, a certain level of relativism is essential. That the jurists were inclined to view the founders of schools other than their own with respect despite differences of

[283] Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996), 65-66.
[284] Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996), 103.
[285] Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qādīs* under the Mamluks," *Islamic Law and Society* 10 (2003): 221-226.

opinion can be seen in writings that attempt to salvage the reputations of the founding *imām*s while also refuting their rulings.

Ibn Daqīq al-'Īd (d. 695/1302), who was trained both as a Mālikī and a Shāfiʿī, wrote a book containing issues where the four *imām*s contradicted the textual sources. He explains those departures either as wrong attributions (a later jurist wrongly attributed that opinion to the *imām*), or that the *imām*s were not aware of the particular opposing prophetic traditions. Al-Shāfiʿī is also known to have abandoned some of his own opinions when he found out about prophetic traditions that contradicted them.[286]

But how relativist was the quadruple legal system? This relativism did not go as far as the approach of al-Shaʿrānī (d. 973/1565) discussed in chapter I.[287] In fact, each school of law had certain doctrines which they saw as clear in the sources of the law (Qur'ān, Sunnah or consensus) despite the existence of contradictory rulings in other schools.[288] According to Taqī al-Dīn al-Subkī (d. 683/1284), although a Shāfiʿī witness to a murder committed by a Muslim against a non-Muslim would be allowed to testify to that effect before a Ḥanafī judge, he should not. The reason is that such a testimony would lead to a Muslim being killed for an unbeliever, which is not permitted in Shāfiʿī law. Similarly, it is permissible in Ḥanafī jurisprudence for a free person to be executed

[286] Alī al-Quṣī, *Tashnīf al-Asmā' bī Ma'rifat al-Ijmā'*. MS Dār al-Kutub, Uṣūl Taymūr 183, folio 10a-16b, microfilm # 22087.
[287] According to him, no *mujtahid* can be wrong, even when there is a seeming contradiction with the text because the spring of *sharīʿa* contains the Qur'ān, the traditions of the prophet, the traditions of the companions and the opinions of the *mujtahids*. See 'Abd al-Wahhāb al-Shaʿrānī, *al-Mizān al-Shaʿrāniyya al-Mudkhala.* MS Dār al-Kutub, Fiqh Madhāhib 77, folio 15a-18a, microfilm # 48209. For more information about al-Shaʿrānī see chapter 2.
[288] See for example Abū Yaḥya Zakariyya al-Anṣārī, *Ghāyat al-Wuṣūl Sharḥ Lubb al-Uṣūl* (Cairo: Matba'it Muṣṭafā al-Bābī al-Ḥalabī, 1941), 149-152.

in punishment for the murder of a slave, whereas in Shāfiʿī jurisprudence, only the payment of blood money is an acceptable punishment when this difference of status exists. Still, because of the high stakes in this type of case, some Shāfiʿī jurists would argue that a Shāfiʿī hangman who kills a free person for the murder of a slave, even at the orders of a Ḥanafī judge, is liable for retaliation or blood money.[289]

Similarly, the Ḥanbalī Ibn Mufliḥ (d. 884/1479) holds that a judge's decision to kill a Muslim for a non-Muslim should be overruled. His explanation for this is that it contradicts the textual sources.[290] This statement recognizes the possibility that the accepted rulings in a given school could be seen by members of other schools as contradicting the clear texts of the faith. Al-Anṣārī also states that if the views of a judge were seen to contradict the Qur'ān, Sunnah or consensus, his decision could be overruled.[291]

Regardless of whether or not there is pragmatism in the choice of school, some rulings are simply unacceptable to some schools, especially those types that involve

[289] Nūr al-Dīn al-Samahūdī, *al-'Iqd al-Farīd fī Aḥkām al-Taqlīd*. MS Dār al-Kutub, Uṣūl Taymūr 45, folio 32b-33a, microfilm # 11397; See for instance, Anonymous author, *Risāla Jalīla fī al-Taqlīd* [reproduced in] Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihad*," *Islamic Law and Society* 3 (1996): 300-301.

[290] Abū Isḥāq Burhān al-Dīn Ibn Mufliḥ al-Ḥanbalī, *al-Mubdi' Sharḥ al-Muqni'* (Beirut: Dār al-Kutub al-'Ilmiyya, 1997), VIII:176.

[291] See for example Abū Yaḥya Zakariyya al-Anṣārī, *Ghāyat al-Wuṣūl Sharḥ Lubb al-Uṣūl* (Cairo: Matba'it Muṣṭafā al-Bābī al-Ḥalabī, 1941), 149-152. Other examples can be found in the work of the Ottoman Shāfiʿī jurist al-Ardabīlī (d. 799/1396), who outlines a number of rulings that should be overruled if referred to a Shāfiʿī judge for implementation. These include marrying the wife of a person who has been missing for four years. Shāfiʿīs should also overrule *mutʿa* marriage contracts and the decision to exclude *qaṣāṣ*, in a murder committed with a heavy object (*muthqal*). This is because of the prophetic tradition in which a Jewish man killed a slave-girl with a rock. He was executed for it by the Prophet despite the fact that he may not have intended to kill her. At the same time, there were decisions in other schools that Shāfiʿī judges are not allowed to overrule, such as marriage with no guardian or witnesses, or with the witness of sinners. See Yūsuf al-Ardabīlī, *al-Anwār lī A'māl al-Abrār* (Cairo: Mu'assasat al-Ḥalabī wa Shurakāh, 1970), II: 633.

cases that are deemed to disturb the social order such as murder. For instance, if a Ḥanafī person is tried by a Ḥanafī judge for killing a non-Muslim, the judge's death sentence according to this literature, would not be approved by a Shāfiʿī judge if he had the power to overrule the decision. It is with some issues like these that jurists drew a line in the sand between differences that were acceptable to them and ones that were not. The pluralism of the legal system did not lead to unrestricted relativism among the schools.

Even jurists who permit their members to use a ruling of another school in a given case, would usually exclude rulings that their school views as contradicting the clear textual sources. For instance, although Abū Ḥanīfa allows the drinking of date wine, according to Taqī al-Dīn al-Subkī, a Ḥanafī who drinks it should be subject to the prescribed punishment (*ḥadd*) because the proof on which Abū Ḥanīfa's permission was based is weak.[292] Muḥammad Ibn Shihāb al-Bizāzī (d. 827/1423) also points out instances of differences among the schools where the decision of a judge is not respected. For example, a husband's sexual impotence is grounds for a wife to return to her family in the Shafiʿs school. In the Ḥanafī school, this is not sufficient grounds for her to leave the marriage against the will of her husband. If a Shāfiʿī judge decides not to return the wife to the marriage, his decision, according to al-Bizāzī, can be overruled because it

[292] Al-Samahūdī, *al-ʻIqd*, folio 29b-30a.

contradicts a clear text: Qur'ān 2:228 "Their husbands have priority in returning them to the marriage" (*wa buʿūlatihunna aḥaqqu bi-raddihinna*).[293]

Ibn Ḥajar al-Haythamī (d. 973/1566) provides a list of issues, where the decision of the judge is overruled. A judge's decision to execute a Muslim for killing a non-Muslim (*dhimmī*)[294] will be overruled because it contradicts a prophetic tradition.[295] Unlike the Ḥanafīs, the Shāfiʿīs, Mālikīs and Ḥanbalīs consider that tradition, "*La yuqtalu muslimun bi-kāfir,*"[296] as conclusive evidence supporting their view. This line between acceptable and unacceptable differences among the schools continued to be drawn throughout the Ottoman period. ʿUmar Muḥammad al-Fārāskūrī al-Shāfiʿī (d. 1018/1609) states that changing schools is allowed when there is a need, as long as the ruling is not against the textual sources.[297]

In the face of these irreconcilable doctrinal differences, to what degree, in practice, were members of a given school able to overturn other schools' decisions when they deemed those decisions contradictory to the clear text or obvious analogy? Needless to say, the ability of a school to protect its rulings, and to overrule the decisions of other judges that were deemed contradictory to the textual sources, depended on the political power of the school. There is some evidence that, in Ottoman

[293] Muḥammad Ibn Muḥammad Ibn Shihāb al-Bizāzī, *al-Fatāwā al-Bizāzīyya.* MS Dār al-Kutub, Fiqh Ḥanafī Khalīl Agha 66, folio 163a-164b, Microfilm # 55712.
[294] A *dhimmi* is a term that usually refers to non-Muslim Christians, Jews and Zoroastrians living under Muslim rule.
[295] Al-Sayyid ʿAlawī Ibn Aḥmad al-Saqqāf, *Majmūʿat Sabʿat Kutub Mufīda* (Cairo: *Maṭbaʿat Muṣtafā al-Bābī al-Ḥalabī*, 1983) 59.
[296] Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī Bī Sharḥ Ṣaḥīḥ al-Bukhārī* (Cairo: Maktabat al-Kulliyāt al-Azharīyya, 1978), Hadith No. 6517.
[297] 'Umar Muḥammad al-Fārāskūrī al-Shāfiʿī, *Kitāb al-Bahja al-Muraṣṣaʿa bi-Durar Yanābīʿ Ikhtilāf al-Aʾimma al-Arbaʿa.* MS Dār al-Kutub, Fiqh Madhāhib 'Arabī 66, folio 2b, microfilm # 46645.

Egypt, the Ḥanafī legal establishment (the official school of the Ottoman Empire) tried to pre-empt the rulings of judges from other schools in certain key areas of difference. The issue of ruling in absentia is a case in point, where Ḥanafī Ottomans tried to enforce their school position by not allowing non-Ḥanafī judges to hear such cases.[298] Whether this attempt was successful or not is an issue that should be the subject of a future study. It is likely that the line drawn between acceptable and unacceptable differences was only a theoretical one for the rest of the schools that lacked the political backing of the Ottomans.

Conclusion:

Hallaq and Layish's view that both diachronic and synchronic types of *talfīq* were forbidden before the nineteenth century needs to be revised.[299] As we have seen above, there was much tension over the issue. Jurists on both sides were aware that *talfīq* was taking place in practice. Some threw their support behind it. Others restricted their support only to diachronic *talfīq* or forbade both of them.

By the end of the Ottoman period, jurists were aware that the issue was subject to debate. Like *tatabbuʿ al-rukhaṣ*, *talfīq* became part of the *ikhtilāf* literature. This is important because rulings based on *tatabbuʿ al-rukhaṣ* and *talfīq* cannot automatically be overruled, since this has become a debatable issue open to disagreement. This was exactly the view of most of the jurists examined in this study. This new status of

[298] James Baldwin, *Islamic Law in an Ottoman Context: Resolving Disputes in Late 17th/Early 18th-Century Cairo* (PhD dissertation, New York University, 2010).
[299] Wael B. Hallaq; Aharon Layish, "Talfīḳ," *Encyclopaedia of Islam,* Edited by: P. Bearman , Th. Bianquis , C.E. Bosworth , E. van Donzel and W.P. Heinrichs. Brill, 2008.

tatabbuʿ al-rukhaṣ and *talfīq* was accepted even by the opponents of those legal techniques.[300]

This change of status proves that Islamic law continued to be dynamic throughout the Ottoman period, with jurists revising traditional doctrine. This revision was clearly motivated by social practice, with some jurists even using social practice as justification for the permission of the pragmatic use of the diversity of schools.

As we will see in chapter IV, modern jurists have used these Ottoman arguments to show that the pragmatic use of Sunni legal pluralism is still open to debate. Rashīd Riḍā (d. 1354/1935), for instance, says that *talfīq* is subject to *ikhtilāf* among jurists. He adds that many forbade it, even though it is essential for *taqlīd*. But the evidence for those who permitted it is stronger.[301] It is those Ottoman discussions that modern jurists had to invoke in their defense of the practice of *talfīq*. To understand the phenomenon of the practice of *talfīq* and *tatabbuʿ al-rukhaṣ* discussed in theoretical juristic writings, I will now examine a thousand and one cases from Ottoman Egyptian courts in the seventeenth and eighteenth centuries.

[300] See for instance, Ibrāhīm Ibn Ḥusayn Ibn Aḥmad Ibn Muḥammad Ibn Aḥmad Ibn Bīrī, *al-Kashf wa al-Tadqīq lī Sharḥ Ghāyat al-Taḥqīq*. MS Dār al-Kutub, Uṣūl Fiqh 403, folio 6a-7b, Microfilm # 38418; Muḥammad Ibn Muḥammad Ibn Shihāb al-Bizāzī, *al-Fatāwā al-Bizāzīyya.* MS Dār al-Kutub, Fiqh Ḥanafī Khalīl Agha 66, folio 163a-165a, Microfilm # 55712.

[301] Muḥammad Rashīd Riḍā, *Fatāwā al-Imām Muḥammad Rashīd Riḍā* (Beirut: Dār al-Kitāb al-Jadīd, 1970), I: 69.

Chapter 3

Tatabbuʿ al-Rukhaṣ and *Talfīq* in Practice

In this chapter, I show examples of *tatabbuʿ al-rukhaṣ* and *talfīq* in the practice of three Egyptian courts in the seventeenth and eighteenth centuries, not long before the modernization efforts of Mehmed Alī in the nineteenth century. I will first briefly discuss the practice of courts prior to the Ottoman period, as well as how the choice of school is made and by whom.

> The people of Damascus are often in need of a judge from this *madhhab* [the Ḥanbalī school] in most contracts of sale and lease, in sharecropping contracts of *muzāraʿa* and *musāqāh*, in settlements following damages caused by force majeure *(jawā'iḥ samāwiyya*) according to the principle of *lā ḍarara wa lā ḍirār*, in marrying off a male slave to a free woman with the permission of his master, in stipulating that a bride should not be re-located from her hometown, in dissolving the marriage of a husband who deserted his wife without maintenance, and in the sale of a dilapidated endowment that is of no use to its beneficiaries.[302]

The above royal decree appointing al-Tanūkhī as the chief Ḥanbalī judge in Mamluk Damascus shows how *tatabbuʿ al-rukhaṣ* was practiced in the Mamluk period. This state-orchestrated view of the law as serving social functions continued into Ottoman times. While we have evidence that *tatabbuʿ al-rukhaṣ* was used under the Mamluks, there is no such evidence pointing to the practice of *talfīq*. As we saw in chapters I and II, the number of supporters of *tatabbuʿ al-rukhaṣ* and *talfīq* was increasing during the Ottoman period, eventually breaking the consensus against it reached in earlier legal theory. *Tatabbuʿ al-rukhaṣ*, as shown in chapter I, was gaining

[302] Abū al-ʿAbbās Aḥmad al-Qalqashandī, *Ṣubḥ al-Aʿshā fī Ṣināʿat al-Inshā* (Cairo: Dār al-Kutub al-Miṣriyya, 1922), 12: 57.

increasing support among scholars of legal theory during the late Mamluk and Ottoman periods. Acceptance of the practice of *talfīq*, however, does not start until the Ottoman period. The main reason that theorists advocated these practices was that they were being used in the courts so extensively that they had effectively become a social necessity.[303]

State practice of *tatabbuʿ al-rukhaṣ*

In a collection of *fatāwā* authored by the Shāfiʿī jurist Tāj al-Dīn al-Fazārī (d. 690/1291), he says that in 1264, Baybars was laying siege to the Palestinian coastal town of Arsūf, some legal questions were sent to the jurists of Damascus. One of these questions asked whether a person who is affiliated with the Shāfiʿī school can seek the easier rulings (*yatattabaʿ al-rukhaṣ*) of the other schools.[304] In al-Suyūṭī, we find a similar account where Baybars had asked the Shāfiʿī chief judge Tāj al-Dīn Ibn Bent al-Aʿaz about an issue, but the latter refused to deal with it. When Baybars asked him to appoint a Ḥanafī judge to adjudicate on the matter, he refused.[305] The chief judge's refusal to cooperate with Baybars and the tension between Baybars and Tāj al-Dīn Ibn Bent al-Aʿaz was cited by some scholars such as Jackson as the main motivation behind Baybers' decision to appoint four chief judges.

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[303] Ibn Ḥajar al-Haythamī, *al-Fatāwā al-Kubrā* (Beirut: Dār al-Kutub al-'Ilmiyya, 2008), 2: 314.
[304] See Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qādīs* under the Mamluks," *Islamic Law and Society* 10 (2003): 212; Maqrīzī (d. 845/1442), *khiṭaṭ*, quoted in Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh University Press, 1981), 6.
[305] Muḥammad Ibn Sulaymān al-Madanī al-Shāfi'ī al-Kurdī, *al-Fawā'id al-Madaniyya fī Bayān Ikhtilāf al-ʿUlamā'min al-Shāfi'iyya* (Diyār Bakr, Turkey: al-Maktaba al-Islāmiyya, n.d.), 237.

The explanations revolving around the relationship between Baybers and the Shāfiʿī chief judge are then attacked by Rapoport, who points out that the expansion of the system to other towns in the Mamluk Empire and the previous attempts going as far back as the Fāṭimids point to deeper institutional considerations. He concludes that the four chief judgships were meant to introduce flexibility into the increasingly rigid system of *taqlīd*.[306] Baybars' decision in 1265 can therefore be seen as the first successful attempt at the institutionalization of the pragmatic use of legal pluralism. It is no coincidence that Baybars' decision took place in the thirteenth century, after the stabilization of the schools around the eleventh and twelfth centuries and the decline of *ijtihād*.

School affiliation and utility in practice

Legal professionals of any given school recognized the validity of the others, despite the many areas of differences both in their legal theory and substantive law. Seasoned jurists were oftentimes knowledgeable about where the differences lay. There is even evidence of them shifting between schools when it was demanded by practical considerations. Evidence for this is that some jurists reportedly changed schools to

[306] See Sherman A. Jackson, "*Taqlīd*, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory *Muṭlaq* and '*Āmm* in the Jurisprudence of Shihāb al-Dīn al-Qarāfī," *Islamic Law and Society* 3, 2 (1996):168; Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 75-76; For a discussion of the controversy over the closure of the gate of *ijtihād* and the rise of *taqlīd*, see Wael B. Hallaq, "Was the Gate of *Ijtihād* Closed?" *International Journal of Middle East Studies*, 16 (1984), 3-41; Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of *Mukhtaṣar*," *Islamic Law and Society* 3, 2 (1996): 193-233; Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qādīs* under the Mamluks," *Islamic Law and Society* 10 (2003): 221. For a discussion of the twelfth-century Fāṭimid attempt at introducing four chief judgships, see Adel Allouche, "The Establishment of Four Chief Judgeships in Fāṭimid Egypt," *Journal of the American Oriental Society* 105, 2 (1985): 317-320.

obtain certain salaried positions. This change is clearly attributed to pragmatic reasons, not to an ideological shift. Al-Suyūṭī (d. 911/1505), who was opposed to *tatabbuʿ al-rukhaṣ* was aware of the practice of changing schools in pursuit of salaried teaching positions at the many mosque colleges of his time. He quotes a man who applied for a job at al-Shaykhūniyya school as saying "my school is the school of bread and food." He was ready to adopt any school that would provide him with the salary associated with the Shaykhūniyya endowment.[307] Similarly, the Shāfiʿī Muḥammad Ibn Mūsa al-Lakhmī joined the Mālikīs, then returned to the Shāfiʿīs in order to assume some of their offices.[308]

Details of the practice of *tatabbuʿ al-rukhaṣ* can be found in debates about its acceptability, which continued throughout the Mamluk and Ottoman periods. Ibn Khaldūn (d. 808/1406), for example, complained that some *muftī*s satisfying the whims of their *fatwā* seekers (*mustaftīs*), issued *fatwā*s using the different schools for their arbitrary practice, which lacked any normative guidelines.[309] Whereas Ibn Ḥajar al-Haythamī (d. 973/1566) argues that approaching a judge from a different school for the

[307] Muḥammad Saʿīd al-Bānī, *ʿUmdat al-Tahqīq fī al-Taqlīd wa al-Talfiq* (Damascus: Maṭbaʿat Ḥukūmat Dimashq, 1923), 79; Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihād*," *Islamic Law and Society* 3 (1996): 256.
[308] See Ibn Ḥajar al-Haythamī, *Inbāʾ al-Ghumr* (Cairo: Lajnat Iḥyāʾ al-Turāth al-Islāmī, 1969), 1: 106, 410; Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihād*," *Islamic Law and Society* 3 (1996): 250.
[309] Wiederhold, *Legal*, 252.

purpose of obtaining a more advantageous decision has been practiced for a long time and is made legitimate by practical consensus (*ijmāʿ fiʿlī*).[310]

Other evidence of the acceptability of moving between schools is the existence of a genre of books designed for legal practitioners including sections on differences among the four schools for the benefit of legal subjects. In the late Mamluk period, the Shāfiʿī jurist al-Asyūṭī (d. 880/1475) wrote a book entitled *The Pearls of Contracts: Manual for Judges, Scribes and Witnesses*, containing formulas for contracts in all fields of law. In it, he discusses some of the issues of disagreement among the four schools.[311] He instructs the reader, for example, that after drawing up a contract, he should refer it to a judge of whichever school allows it. He thus, prescribes the choice of judge based on the predicted outcome, rather than on school affiliation.[312]

In 1178/1764, the Ottoman jurist Muḥammad Ibn ʿAbd Allāh Alī Zādah wrote a practical guide for judges and court scribes to teach them how to formulate legal contracts. One of the lines that appear in many of the contract formulas included in this work is that the judge is aware of the differences among the four Sunni schools on this subject.[313] It is likely that the judge's knowledge of the four schools was necessary so that he can help subjects of the law to choose whichever school permits the

[310] Ibn Ḥajar al-Haythamī, *al-Fatāwā al-Kubrā* (Beirut: Dār al-Kutub al-'Ilmiyya, 2008), 2: 314; Lutz Wiederhold, "Legal Doctrines in Conflict: The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihād*," *Islamic Law and Society* 3 (1996): 253.
[311] Not to be confused with the famous al-Suyūtī (d. 911/1505), who was also a Shāfiʿī.
[312] See, for example, Shams al-Dīn Muḥammad Ibn Aḥmad al-Minhājī al-Asyūṭī, *Jawāhir al-ʿUqūd wa Muʿīn al-Quḍāh wa al-Muwwaqiʿīn wa al-Shuhūd* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1996), I: 100-103.
[313] Muḥammad Ibn Abd Allāh al-Madʿu Alī Zadeh, *Tuḥfat al-Ḥukkam fi Maljaʾ al-Qadāʾ*. MS Dār al-Kutub 446 Fiqh Ḥanafī Talʿat, folio 20b-26b, Microfilm # 8509.

transaction in question. Indeed, according to the text of one *waqf* deed in this collection, the permission of any of the four *imām*s seem to be sufficient for the officiating of a contract: "This is a valid *waqf* deed, where the necessary conditions for its validity according to the opinion of one of the foregone *imām*s who permits it, were met."[314]

Who chooses the school?

Sometimes the state made the choice of school; such a decision was usually motivated by state interests. This goes back as early as the Mamluk period. Tāj al-Dīn al-Subkī (d. 771/1369), for example, approves of the practice of the Mamluk authorities, that oftentimes referred cases requiring *ta'zīr* (discretionary punishment) to Mālikī judges. In Mālikī law, the judge had unrestricted powers in determining the punishment, which could be as harsh as the death penalty.[315] The other schools did not give the judge as much discretionary powers. Rappoport argues that Mālikī law was also used strategically by the state in the Mamluk period to crack down on heresy.[316]

Some legal theorists give the impression that judges are primarily responsible for that decision. In multiple legal works, judges are allowed to refer cases to other schools in order to facilitate a legal transaction not allowed in their school. Taqī al-Dīn

[314] Muḥammad Ibn Abd Allāh al-Madʿu Alī Zadeh, *Tuḥfat al-Ḥukkam fi Maljaʾ al-Qadāʾ*. MS Dār al-Kutub 446 Fiqh Ḥanafī Talʿat, folio 26b, Microfilm # 8509.
[315] See Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qādīs* under the Mamluks," *Islamic Law and Society* 10 (2003): 221; see *Muʿīd al-Niʿam wa-Mubīd al-Niqam*, ed. David M. Mythrman (London: Luzac, 1908), 36.
[316] Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qādīs* under the Mamluks," *Islamic Law and Society* 10 (2003): 221-227.

al-Subkī (d. 756/1355) allows a Shāfiʿī judge to refer a case involving written documents to a Mālikī judge, since the Shāfiʿī school does not accept written documents as evidence. He also allows a case of establishing an endowment to oneself (*waqf ʿala al-nafs*), which is invalid in the Ḥanafī school, to be referred to Ḥanbalī judges, who permit such cases.[317] Ḥanafīs are also recorded as having referred cases that required accepting the testimony of one witness to Shāfiʿī judges.[318] Similarly, the Ḥanafī Kurdārī al-Bizāzi (d. 827/1423) allows the judge to refer cases that cannot be adjudicated according to the Ḥanafī school to other schools.[319] I have also found examples in Ottoman courts of judges referring cases to other judges who would permit them.[320]

There is also evidence that some jurists operated on the assumption that subjects of the law had a role in the choice of school, either because of their own beliefs (an affiliation with a particular school) or because of practical considerations, and the outcome they desired from the case. Al-Qarāfī (d. 682/1283), writing in the early Mamluk period, discusses the monopoly of the Chief Judge of his day, who was from the Shāfiʿī school. He complained bitterly about jurisconsults who would respond according to their own views, even if the petitioner expressly designated his school affiliation.[321] In his view, the school affiliation of the person bringing the case should decide which school's ruling should be followed. According to him, a member of the Mālikī school is

[317] Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qādīs* under the Mamluks," *Islamic Law and Society* 10 (2003): 221; Al-Subkī, Kitāb al-Fatāwā, vol. 2, 445.
[318] See Muwaffaq al-Dīn Ibn Qudāma, *al-Mughnī* (Cairo: Hajr, 1990), 12:11.
[319] Muḥammad Ibn Muḥammad Ibn Shihāb al-Bizāzī, *al-Fatāwā al-Bizāzīyya.* MS Dār al-Kutub, 66 Fiqh Ḥanafī Khalīl Agha, folio 163a-165a, Microfilm # 55712.
[320] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, document 98.
[321] Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996), 111-215.

not bound by what al-Shāfiʿī says, nor vice versa.[322] This assumes that subjects of the law were able to choose a judge of the school which would give them the legal outcome they desired. Jurists such as Muḥammad Ibn Muḥammad Ibn Shihāb al-Bizāzī (d. 827/1423) argues that in cases where there are differences among the schools, the judge needs to ask the claimant whether the ruling corresponds to his personal belief. If it does not, the judge should not issue a ruling in this case.[323]

The litigant's choice can also be seen in works debating which litigant has this right if there is a disagreement between multiple parties to the same case. Al-Asyūṭī (d. 880/1475) includes this question in his work, entitled *The Pearls of Contracts: Manual for Judges, Scribes and Witnesses*. He uses hypothetical cases to guide legal practitioners. In the following case of a custody dispute, he discusses the differences among the schools:

> [Hind] came to the court of [ʿAmr], presided over by the Shāfiʿī, Ḥanafī, or Ḥanbalī judge. She brought her divorced [husband Zayd], claiming that he had contracted a valid marriage with her according to the Sharīʿa. They consummated the marriage, bearing a child named [ʿUthmān] in his house, whose age is such and such. He then concluded a final divorce dated such and such. She received her said child after the divorce according to the *Sharʿī* right to custody. She was then married to a different man named [Khālid], [by] which [she] waived her right to custody of her said child. His father took him away from her after she married the said person. But she was then divorced irrevocably from the said husband. During the present claim, she has no husband and therefore is entitled to custody of her said child after taking him from his father's custody. But he has refused to give him back to her... The judge rules that she should obtain custody of her said child.[324]

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[322] Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī* (Leiden: Brill, 1996), 111-215.

[323] Muḥammad Ibn Muḥammad Ibn Shihāb al-Bizāzī, *al-Fatāwā al-Bizāziyya.* MS Dār al-Kutub, 66 Fiqh Ḥanafī Khalīl Agha, folio 163a, 163b, Microfilm # 55712.

[324] Shams al-Dīn Muḥammad Ibn Aḥmad al-Minhaji al-Asyuti, *Jawāhir al-ʿUqūd wa Muʿīn al-Qudā wal Muwaqqiʿīn wal Shuhūd* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1996) II: 194, 195; names were added to make the quote more readable.

He states explicitly that the woman can only obtain a favorable decision, granting her custody of the child with reference to the Shāfiʿī, Ḥanafī or Ḥanbalī schools. This is accompanied by another version of the case in which the husband pre-empts her and brings the same case before a Mālikī judge. In this case, according to him, the ruling would be in favor of the husband.[325] Al-Asyūṭī assumes that either parent is free to choose the judge who would grant him or her custody. Further, he grants priority in the choice of judge to whoever files his claim first.

That individuals were assumed by jurists to be free to choose their school can be seen in an ongoing debate in the literature regarding this issue of which party has that prerogative in cases where it makes a material difference in the outcome for each. Within the Ḥanafī school, the two disciples of the eponym of that school disagreed. Abū Yūsuf gave the choice to the plaintiff, whereas Muḥammad al-Shaybānī gave it to the defendant, which is the dominant view within the Ḥanafī school.[326] In the Ottoman period, the Ḥanafī Ottoman Shaykhulislām Ebu's-suʿud, supported the dominant view by siding with al-Shaybānī.[327] This view was further solidified through a sultanic decree, stipulating that judges are not allowed to hear cases if the defendant has not agreed to the choice of forum.[328]

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[325] Shams al-Dīn Muḥammad Ibn Aḥmad al-Minhaji al-Asyuti, *Jawāhir al-ʿUqud wa Muʿīn al-Qudā wal Muwaqqiʿīn wal Shuhūd* (Beirut: Dār al-Kutub al-ʻIlmiyya, 1996), II: 194, 195.
[326] Rudolph Peters, "What does it Mean to be an Official Madhhab?" in *The Islamic School of Law: Evolution, Devolution and Progress*, ed. Peri Bearman, Rudolph Peters and Frank E. Vogel (Cambridge, Massachusetts, Harvard University Press, 2005), 154-5.
[327] See Abdurrahman Atcil, *Procedure in the Ottoman Court and the Duties of Kadis* (MA Thesis submitted to the Department of History, Bilkent University, 2002), 42-43.
[328] Peters, *What*, 154-6.

Al-Asyūṭī (d. 880/1475) describes this kind of conflict with a hypothetical example of a maternal sister, a paternal sister and a maternal aunt. All three are fighting over the custody of their nephew or niece, whose mother had passed away:

> The judge asked the three aforementioned women. The paternal sister said, 'I have priority to take custody under the Shāfiʿī and Ḥanbalī schools.' The aunt said, 'I have priority under the Mālikī school.' The maternal sister said, 'I have priority under the school of Abū Ḥanīfa.[329]

To resolve cases like the above, the late Ottoman Mālikī jurist al-Dasūqī (d. 1230/1815) reasons that the plaintiff (*al-ṭālib*) gets to choose which judge the case is brought to, not the defendant (*al-maṭlūb*). If both are plaintiffs, then the person who gets to the judge first has the choice. If they arrive at the same time, the judge draws lots.[330]

But regardless of how precedence is granted, what is clear is that the choice of judge in most cases is left to the subjects of the law, not imposed by the state as is the case in modern codification. In cases of notarization where there is no conflict of interest between two parties, subjects of the law chose the judge freely, sometimes with the help of the legal establishment, which directed them towards the school that best suited their transactions. Rapoport, for instance, cites examples of judges transferring cases to other judges because they are not permitted in their own schools.[331]

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[329] Shams al-Dīn Muḥammad Ibn Aḥmad al-Minhājī al-Asyūṭī, *Jawāhir al-ʿUqūd wa Muʿīn al-Quḍāh wa al-Muwwaqiʿīn wa al-Shuhūd* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1996), II: 194-197.
[330] See Al-Dasūqī, *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr* (Cairo: Dār Iḥyā al-Kutub al-ʿArabiyya, ʿĪsā al-Bābī al-Ḥalabī, 1984), 2: 135.
[331] Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qādīs* under the Mamluks," *Islamic Law and Society* 10 (2003): 220.

The above case, in which each party has rights under a different school could explain the importance of professional *ikhtilāf* manuals (discussed in chapter I) as a tool for navigating through school differences. The simple language, free of legal disputation, and focused on the dominant view in each school, appears to be intended for quick reference in cases where a clearly advantageous legal outcome can be gained by bringing the case to a specific school. The simplified, practical approach to school differences seen in the works of *ikhtilāf* and in manuals like that of al-Asyūṭī cited above suggest that individuals may have approached legal experts for advice as to which judge would give them the outcome they were seeking. As we will see in the cases below, this will prove particularly useful in cases of notarization of contracts, as most Sunni schools of law have arduous restrictions on many types of contracts.

It is likely that these legal experts were *muftī*s from outside of the court system. There is evidence in the theoretical literature that some jurists practiced *tatabbuʿ al-rukhaṣ* in their capacity as *muftī*s, choosing the easier rulings from their own school and sometimes from other schools for their *fatwā* seekers. Specifically, in his discussion of wife-initiated divorce, known as *khulʿ*, the Ḥanafī Muḥammad al-Fiqhī (d.1147/1734) bemoans those misguided *muftī*s who issue the *fatwā* that *khulʿ* is not a final divorce (*bāʾin*) with reference to some peripheral jurisprudential collections, to help their *fatwā* seekers avoid a final dissolution of marriage.[332]

[332] Muḥammad Fiqhī, *Risāla fīmā Yataʿallaq bi-Aḥwāl al-Muftī.* MS Dār al-Kutub 198 Uṣūl Fiqh, folio 9a-10b, Microfilm # 23027; see also Al-Sayyid ʿAlawī Ibn Aḥmad al-Saqqāf, *Majmūʿat Sabʿat Kutub Mufīda* (Cairo: *Maṭbaʿat Muṣtafā al-Bābī al-Ḥalabī*, 1983) 37. All four schools of Islamic law do not permit a couple to return to their marriage after three instances of divorce.

The data: A thousand and one cases

In this section, I will examine 1001 cases to show that the theoretical debate that was raging during the seventeenth and eighteenth centuries and the references in the theoretical literature to practice are reflective of actual court rulings. In order to answer the question of whether *tatabbuʿ al-rukhaṣ* was used in the courtroom, I explore the motivation behind the consistent use of certain schools with particular types of cases. The figure below shows that Ḥanafism was the dominant school in terms of the pure number of cases brought to it. If the majority of cases are adjudicated by Ḥanafī judges and in the cases in which non-Ḥanafī schools are used, those schools are more lenient than the Ḥanafī school, it is fair to argue that in most of those cases the motivation for the choice of non-Ḥanafī schools is pragmatic.

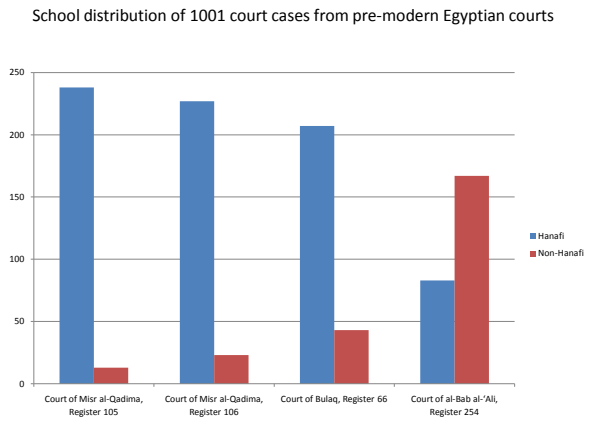

Figure 1

If we add to that the demographics of Egypt, it becomes clear that there is a disproportionate use of some schools, which can only be explained pragmatically. Although it is hard to determine the proportions of followers of the different school, what is indisputable is that Mālikism and Shāfiʿism had historically maintained a large presence in Egypt, which was an important center for the development of those two schools. The majority of Muslims in Egypt adhere to either the Shāfiʿī school (Lower Egypt) or the Mālikī school (Upper Egypt).[333] This is also clear in the positions of chief judges appointed before the Mamluk period.[334] Out of the four Sunnī schools of law, Ḥanbalism had the least following in Egypt. Ḥanafism did not gain ground in Egypt until the Ottoman conquests in 1517. The majority of the Ottoman elite adhered to this school, which was the official school of the Empire, yet the official status of Ḥanafism under the Ottomans only attracted members of the scholarly establishment in Egypt who changed their schools for financial gains. There is no evidence that this status led to a noticeable change among laypeople. Thus, it is fair to say that Shāfiʿism and Mālikism maintained their dominance over Egypt, with the former having more followers in Lower Egypt and the latter in Upper Egypt, whereas Ḥanafism was associated with the elite classes.[335]

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[333] Ron Shaham, "Shopping for Legal Forums: Christians and Family Law in Modern Egypt," In *Dispensing Justice in Islam: Qādīs and their Judgements,* ed. Muhamamd Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 454.

[334] Adel Allouche, "The Establishment of Four Chief Judgeships in Fāṭimid Egypt," *Journal of the American Oriental Society* 105, 2 (1985): 317-319; Yossef Rapoport, "Legal Diversity in the Age of *Taqlīd*: The Four Chief *Qādīs* under the Mamluks," *Islamic Law and Society* 10 (2003): 210-213.

[335] Zeinab A. Abul-Magd, *Empire and its Discontents: Modernity and Subaltern Revolt in Upper Egypt 1700-1920* (PhD Dissertation, Georgetown University, 2008), 43-44, 88. The Ottomans governors also established charitable religious endowments favoring the Ḥanafī school. See Kozlowski, G.C.; Peters, R.; Powers, D.S.;

I first discuss the sample, the types of cases examined in the three courts and the rationale for the choice of those courts. I then examine some of the patterns of cases observed in the sample such as the establishment and sale of religious endowments, entering into long rental contracts on religious endowments, loans with interest, establishment of ownership based on physical control, conditional sale, marriage, as well as dower and maintenance disputes. In addition to determining whether or not *tatabbuʿ al-rukhaṣ* is used in the Ottoman period, such an examination of the types and proportions of cases adjudicatd by Ḥanafī and non-Ḥanafī judges will shed light on the level of predictability within the pluralistic legal system and the relationship between the four schools. After examining *tatabbuʿ al-rukhaṣ*, I will study cases in which *talfīq* was used. Unlike *tatabbuʿ al-rukhaṣ*, the examination of *talfīq* does not require exploring the frequency of the case types and patterns, since it is practiced in the same transaction.

The sample

The sample of court records was obtained from the National Archives of Egypt (Dār al-Wathāʾiq al-Qawmiyya) in 2009 and 2010. The time span of the cases stretches from 1091/1680 to 1172/1758, covering parts of the two centuries in question.[336] These

Layish, A.; Lambton, Ann K.S.; Deguilhem, Randi; McChesney, R.D.; Hooker, M.B.; Hunwick, J.O. "Waḳf (a.)." *Encyclopaedia of Islam, Second Edition*. Eds., P. Bearman;, Th. Bianquis; , C.E. Bosworth; , E. van Donzel; and W.P. Heinrichs. Brill, 2011.

[336] The sample was collected from four different registers in three seventeenth and eighteenth-century Egyptian courts, namely the court of Miṣr al-Qadīma (251 cases, dated Shawwāl 20, 1091–Dhū al-Qiʿda 14, 1092 AH/ November 27, 1680-November 25, 1681 CE), the court of Miṣr al-Qadīma (250 cases, dated Dhū al-Qiʿda 1121-Jumādā al-Awwal 6, 1124 AH/ January 15, 1710-June 11, 1712 CE), the court of Bulāq (250 cases, dated from Dhū al-Ḥijja 4, 1139-Rabīʿ Awwal 22, 1141 AH/ July 23, 1727-October 28, 1728 AD) and

courts were chosen to provide a diverse sample. Taken together, they include a variety of types of transactions. Parties to the transactions come from a broad range of socioeconomic backgrounds. The court of Miṣr al-Qadīma represents a diverse Cairo neighborhood court, with a larger concentration of Christians, as well as artisans and other working classes. The types of cases brought before this court included a large percentage of personal status law involving marriages, divorces, return to marriage after divorce, and custody disputes, representing 29% of the total sample,[337] as opposed to 11% of the sample from the court of Bulāq and only 2% of the sample from the Bāb al-ʻĀlī court. An overview of some of the patterns of case types and the school affiliation of presiding judges is provided in table I.

The Bulāq court was located in the commercial port city of Bulāq, just outside of Cairo. Certain types of commercial transactions were more prevalent in this court, due to the role of this port city as a commercial center, especially in the grain trade.[338] The court of al-Bāb al-ʻĀlī attracted members of the elite, partly because there was a minimum amount for the value of the transactions brought to this court.[339] Any transaction with a value higher than five hundred silver pieces had to come to the al-

the court of al-Bāb al-ʿĀlī (250 cases, dated Muḥarram 8, 1172– Dhū al-Qiʿda 26, 1172 AH/ September 11, 1758-November 27, 1758 CE). I have randomly examined the first 251 cases of the first register, and the first 250 cases of the following three registers.

[337] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105. Cases include the first 257 cases of that register. Entries 70, 89, 104, 119, 140 and 147 were excluded because they were decrees or administrative announcements, as were cases 152 and 165, because they were illegible. From register 106 of the same court, a total of 27 entries were excluded as 18 of them were official correspondences in the form of official decrees or announcements. A total of 9 entries, mostly in the first two pages were damaged. An equivalent 27 entries were added to the first 250 entries to make up for those lost entries.

[338] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66.

[339] ʿAbd al-Rāziq Ibrāhīm ʿĪsa. *Tarīkh al-Qadāʾ fī Miṣr al-ʿUthmāniyya 1798-1517* (al-Hayʾa al-Miṣriyya al-ʿĀma lī al-Kitāb, 1998), 92.

Bāb al-ʻĀlī Court.[340] Unlike the other courts, people using this court tended to belong to the Mamluk-Ottoman military elite. Another reason was that the court of the Bāb al-ʻĀlī had a special jurisdiction. Cases of sale or long rent of religious endowments (*waqf*) were required to be brought to this court, as stated in the following decree:

> None of the scribes of the two Qisma courts and other courts in Miṣr al-Maḥrūsa, Bulāq and Miṣr al-Qadīma should handle cases designated for the al-Bāb al-ʻĀlī Court such as *Istibdālāt*,[341] long rental contracts of endowments, and introducing conditions to endowments, sale of agricultural land and sale of salaries, [long] rental contracts on agricultural land and other forbidden things that have become customary. These things should only be handled by the scribes of al-Bāb [al-ʻĀlī Court].[342]

As early as the seventeenth century, stern official decrees threatened judges of neighborhood courts with dismissal if they heard these types of cases outside of al-Bāb al-ʻĀlī.[343] Restricting cases involving sale and long rental contracts on *waqf* properties to the main court was due to the belief that those cases were particularly susceptible to corruption.[344] The following record is an example of such corruption, in which there is a long rental contract on a religious endowment that does not meet the necessary conditions:

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[340] See for instance, Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Jāmiʿ al-Sāliḥ, register 361, 2.
[341] *Istibdāl* is the exchange of a derelict *waqf* property for another property that is productive. This was meant as a way of maintaining the profitability of a *waqf*. Despite the intention of the permission of *Istibdāl* in the law, it was used as a way to effectively sell the endowment, even when it is not derelict and according to the practice of Ottoman Egypt, there was no replacement after the initial sale.
[342] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bāb al-Saʿāda, register 424, 1, reproduced in Salwā ʿAlī Milād, *al-Wathāʾiq al-ʿUthmaniyya: Dirāsa Arshīfiyya Wathāʾiqiyya li-Sijillāt Maḥkamit al-Bāb al-ʿĀlī* (Alexandria: Dār al-Thaqāfa al-ʿIlmiyya, 2004), 116.
[343] Dār al-Wathāʾiq al-Qawmiyya, the Bulāq Court, register 66, p.1 (1139-1143 AH).
[344] Muḥammad ʿAfīfī, *al-Awqāf wa al-Ḥayāh al-Iqtiṣādiyya fī Miṣr fī al-ʿAṣr al-ʻUthmānī* (Cairo: al-Hayʾa al-Miṣriyya al-ʿĀmma lī al-Kitāb, 1991), 151-182.

> Before our master Afandī, both Amīr ʻAbd al-Ghaffār, the Jurbaji of Mustaḥfiẓān,[345] son of the late Muḥammad Afandī *Imām* and Amīr Ibrāhīm, the Jurbaji of Tufkijyān, son of the late ʻAlī, the Jurbaji of Tufkijyān claimed for himself and on behalf of his brother ...that Shaykh Zayn al-Dīn ʻAbd al-Raḥmān, son of the late Shaykh ʻAbd al-Wahhāb Abū al-Surūr al-Qādirī ... who is currently the overseer of the *waqf* of the late Qaytbay ... that the aforementioned defendants received the aforementioned rental contract from Shaykh ʻAbd al-Wahhāb, the father of the aforementioned defendant and his partner ... for a period of ninety nine years ... that the rental contract issued by Shaykh ʻAbd al-Wahhāb Abū al-Surūr ... was invalid as it opposes the venerated *Sharʿ* because it had no *Sharʿī* justification [*musawwigh*] and the rent was below the fair value ... he [the judge] invalidated the rental deed ... because there is no justification [for the long rental contract] ... and because the rent is below the fair value [ujrat al-mithl].[346]

Even though the Ḥanbalī school is very liberal in its permission of the disposal of *waqf* through *Istibdāl* or long rental contracts, all of which function, for all practical purposes as a sale of the endowment, there are still conditions for the transaction to be considered valid under the Ḥanbalīs.[347] The endowment has to be in ruins, which is usually verified by the judge who sends experts to the property in question to examine it. In addition, the endowment has to be sold or rented for the fair market value. In the above example, the *waqf* was rented for ninety nine years, without verification that it was in ruins. Furthermore, it was rented for less than the fair value. The judge annulled the contract for those reasons.

The perception was that the Bāb al-ʻĀlī was more controlled and more easily overseen by the legal establishment, as it is presided over by the chief judge himself,

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[345] Jurbaji is an Ottoman military title that refers to a commander of a janissary unit. See Dror Ze'evi, *An Ottoman Century: The District of Jerusalem in the 1600s* (Albany: State University of New York Press, 1996), 222.

[346] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court al-Bāb al-ʻAlī, register 254, document 137, p. 70.

[347] *Istibdāl* is a type of sale of the endowment with the promise of using the proceeds to purchase a new endowment. This type of sale of religious endowments was monopolized by Ḥanbalī judges in the sample examined here.

and that this makes it harder for any corruption to occur.[348] One of the main functions of this court was to ensure that religious endowments are not sold or rented for long periods of time without verifying that the conditions required under the school in question are met. This is why we oftentimes see a reference in the court cases to the "legal justification" (*al-musawwigh al-Sharʿī*) for the sale, as in the following example:

> Thus he bought [*istabdala*] from him to himself ... and he has the authority to sell that in the *Sharʿī* manner as there is a *Sharʿī* justification ... namely that it is in ruins and has no use for the aforementioned *waqf* beneficiaries.[349]

Because of the special jurisdiction of the Bāb al-ʿĀlī, the number of cases related to religious endowments is 176, which represents 70% of the total sample from that court. Of these, 168 deal with the sale or long rent of religious endowments. It is also in transactions relating to religious endowments that we see significant differences among the schools. The Ḥanafīs forbid or restrict some transactions that the Mālikīs and Ḥanbalīs allow. Specifically, Ḥanbalīs were specialized in notarizing long rental contracts on *waqf* properties, which is not allowed by the Ḥanafīs. Another transaction that was a specialty of the Ḥanbalīs in the period we have examined is known as *Istibdāl* (see above).

Unlike in the courts of Miṣr al-Qadīma and Bulāq, in which the judge of the Ḥanafī school handled the vast majority of cases,[350] the Bāb al-'Ālī had a majority of cases brought to non-Ḥanafī judges. Most of these cases were brought to Ḥanbalī and

[348] ʿAbd al-Rāziq Ibrāhīm ʿĪsa. *Tarīkh al-Qadāʾ fī Miṣr al-ʿUthmāniyya 1798-1517* (al-Hayʾa al-Miṣriyya al-ʿĀma lī al-Kitāb, 1998), 134.
[349] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court al-Bāb al-ʿĀlī, register 254, document 17, p. 8.
[350] About 93% of cases in the court of Miṣr al-Qadīma and 82% in Bulāq were handled by Ḥanafī judges only.

Mālikī schools, in which there are fewer restrictions on the sale of religious endowments. A total of 117 cases were brought before the Ḥanbalī judge (47%) and 46 before the Mālikī judge (18%), while only 81 cases were brought to the Ḥanafī judge (32%).[351]

I will argue through the following case patterns that Ḥanafism enjoyed a default status, in which most case were brought to Ḥanafī judges unless there was a pragmatic reason to bring them to other judges. The importance of the default status of Ḥanafism is that it provides the much-needed predictability despite the quadruple system. This was made possible through the default status, coupled with the pragmatic choices based on the different areas of leniency inherent in the different schools. This predictability was enhanced by the Knowledge of differences among the schools, which as I argued in chapter I was circulated to a large number of religious figures through the Ottoman *ikhtilāf* literature.

Tatabbuʿ al-rukhaṣ: Case patterns

Istibdāl al-waqf

An examination of the 1001 cases in this study shows that Ḥanafism had a semi-default status and that most non-Ḥanafī cases tend to be motivated by a pragmatic reason. When a non-Ḥanafī school is chosen to perform a certain transaction, there is strong evidence that this is an example of *tatabbuʿ al-rukhaṣ* since the choice was not

[351] Out of the first 254 cases of this register, document 176 was excluded because it is not a court case, but an administrative order sent by the chief judge. Documents 38, 68, and 179 were also excluded because they were illegible.

based on the affiliation of the litigants, but is rather linked to the desired legal outcome. Needless to say there might be situations in which people choose schools to which they adhere that also happen to be more lenient. This type of coincidence, which might occur in the sample, is unlikely to distort the findings, especially if we locate cases in which there is a disproportionate use of some of the schools, compared to the numbers of their followers in Egypt such as Ḥanbalism.

The institution of religious endowment controlled many properties as it was often used as a means of protecting assets from taxation and confiscation. Establishing a *waqf* was also sometimes used as a means of distributing inheritance outside the prescriptions of Islamic Sharīʿa. A typical formula in *waqf* deeds gives whatever is left of the endowment after the death of all of the beneficiaries and their descendants to the two holy mosques in Mecca and Madīna (*al-ḥaramayn al-sharīfayn*) or another religious institution.

All four schools of Islamic jurisprudence forbid the outright sale of *waqf* (religious endowments). However, as discussed above, certain legal techniques were used to dispose of those properties. There are some types of transactions relating to religious endowments (*awqāf*) that were either not allowed under the Ḥanafī school, or had many restrictions, and therefore had to be referred to judges of other schools. The first such transaction that the Ḥanbalīs almost monopolized in the records that we have examined is known as *Istibdāl* (see above). The most permissive schools on the issue of *Istibdāl* are the Ḥanbalī and Ḥanafī schools although within the Ḥanafī school,

there is much disagreement over this issue. Some Ḥanafīs such as the famous jurist al-Ṭarṭūsī (d. 758/1356) completely forbade it.[352] Some Ḥanafīs also forbade it unless the endower stipulates that the overseer is allowed to exercise *Istibdāl* in the endowment deed.[353] Even those who permit it in the Ḥanafī school, have stringent conditions on the kinds of properties purchased in exchange for the *waqf* property. Another condition that was added by the very prominent Ḥanafī jurist Ibn Nujaym is that the exchange has to occur in the same transaction. No money should change hands.[354] This was meant to avoid the practice of selling endowments without replacing it with another, which is common in Ottoman courts.

Those Ḥanafī restrictions advocated by Ibn Nujaym, whose works played an important role in the standardization of Ḥanafī law in the Ottoman period, explain the choice of the Ḥanbalī school in the records that we have examined, which has fewer restrictions on the *Istibdāl* for money (*bī al-dārāhim wa al-danānīr*).[355] The flexibility of Ḥanbalism towards *Istibdāl* was translated into a complete monopoly over this type of case, despite the dearth of Ḥanbalīs in Egypt. Out of the 1001 cases that I have examined, there were only 85 cases of *Istibdāl*, which were all brought to Ḥanbalī judges. It was also clear that money changed hands in those transactions, with no

[352] Jamāl al-Khūlī, *al-Istibdāl wa Ightiṣāb al-Awqāf: Dirāsa Wathāʾiqiyya* (Alexandria: Dār al-Thaqāfa al-ʿIlmiyya, 2000), 54.
[353] Al-Khūlī, *al-Istibdāl*, 77.
[354] Ibn ʿAbidin, *Radd al-Miḥtār ʿalā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār* (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), 3: 388.
[355] Muḥammad Abū Zahra, *Muhāḍarāt fī al-Waqf* (Cairo: Dār al-Fikr al-ʿArabī, 2005), 159-182.

evidence of properties replacing the sold endowments.[356] The terms for buying and selling are even sometimes used interchangeably with the term *Istibdāl*, as in the following example, "The honorable Ḥājj Aḥmad ... bought and exchanged ... from his seller and exchanger."[357]

Negative views towards *Istibdāl* in the secondary literature:

One of the themes of any discussion of religious endowments whether in the Mamluk or Ottoman periods is that there was corruption that led to a loss of *awqāf* and that corruption was a sign of the weakness of the state. *Istibdāl* is oftentimes discussed as a sign of this weakness.[358] I argue that the negative views towards *Istibdāl* and the *waqf* institution in general are sometimes unwarranted, especially with civil *waqf* (*al-waqf al-ahlī*), which is designed for relatives rather than charities. Since the motivation behind locking up properties in civil cases of *waqf* (*ahlī*) was to protect them against confiscation, the use of *Istibdāl* to sell those properties should not be dubbed "corruption," because the original intention of the founder was achieved. This intention was not to give away his property to charity but to pass it on to his family to dispose of it as they wished after his death.[359]

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[356] For similar observations that no properties were purchased to replace the sold *waqf* property, see Jamāl al-Khūlī, *al-Istibdāl wa Ightiṣāb al-Awqāf: Dirāsa Wathāʾiqiyya* (Alexandria: Dār al-Thaqāfa al-ʿIlmiyya, 2000), 55.

[357] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 74 (p. 37).

[358] Muḥammad ʿAfīfī, *al-Awqāf wa al-Ḥayāh al-Iqtiṣādiyya fī Miṣr fī al-ʿAṣr al-'Uthmānī* (Cairo: al-Hayʾa al-Miṣriyya al-ʾAmma lī al-Kitāb, 1991); Al-Khūlī, *al-Istibdāl.*

[359] In *al-waqf al-khayrī*, the intention of the founder is truly charitable. Therefore, calling the sale of those properties, in contradiction to the founder's wish, corrupt is warranted.

In almost all the cases of *waqf* that I have seen in the court records, the founder typically establishes the endowment on himself and his descendants. Then there is a clause in the end that only grants the revenue of the endowment to a mosque on the condition that all the endower's descendants die out:

> The founder establishes the endowment on his children, then on the children of his children, then on their offspring ... until they all die out. If all of them die out, then the revenue of this endowment will be spent on the needs of the mosque of the great teacher, al-*Imām* al-Shāfiʿī.[360]

The use of the liberal Ḥanbalī attitude towards *Istibdāl*, with its fewer restrictions on the sale of *waqf* enabled the *waqf* beneficiaries to treat endowments as private properties, matching the intention of the endower. Through *Istibdāl*, delerict and frozen *waqf* properties were brought back into the private economy, which was made possible through the pragmatic crossing of school boundaries.

With the sweeping majority of *waqf* cases being of the non-charitable type, blaming the economic and commercial ails of Middle Eastern societies on the *waqf* system, as some have done, is ungrounded historically.[361] We need to revise our understanding of the role the *waqf* system played in the stagnation of the means of production, since the majority of those *awqāf* functioned for all intents and purposes as private properties. While establishing *waqf* endowments was a way to protect private

[360] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 132, (p.67).
[361] See Timur Kuran "Why the Middle East is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation," *Journal of Economic Perspectives* 18, 3 (2004), 71-90; Muḥammad ʿAfīfī, *al-Awqāf wa al-Ḥayāh al-Iqtiṣādiyya fī Miṣr fī al-ʿAṣr al-ʿUthmānī* (Cairo: al-Hayʾa al-Miṣriyya al-ʾAmma lī al-Kitāb, 1991); Max Weber, *Economy and Society: An Outline of an Interpretive Sociology,* ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 2: 806, 896; 3: 976-78; Bryan S. Turner Islam, "Islam, Capitalism and the Weber Theses," *The British Journal of Sociology* 25, 2 (1974): 230-243; See also Max Rheinstein (ed.), *Max Weber on Laws in Economy and Society,* translated by Edward Shils and Max Rheinstein (Cambridge, Mass.: Harvard University Press, 1964).

properties, *Istibdāl* was a creative way to dispose of them. The ability of the Ottoman legal system to facilitate this 'corrupt' process of sale shows a functional flexibility in the legal system to free up the movement of the means of production. The objects of those endowments were oftentimes factories, real estate and agricultural land. Due to the vast amount of properties that were within the *waqf* system, freeing the sale of those properties was an economic necessity. According to Afaf Lufti al-Sayyid Marsot, one-fifth of all arable lands in Egypt at the end of the eighteenth century were *waqf* lands.[362]

Isqāṭ al-waqf

Another procedure used to effectively sell a *waqf* is called *isqāṭ*, which literally means "dropping" the *waqf* and usually refers to the sale of usufruct (*manfaʿa*). The Ḥanafī school does not allow the sale of an abstract right in exchange for a sum of money.[363] For this reason, the Mālikī school was used in almost all such cases. The difference between *Istibdāl* and *isqāṭ* is that the former cannot be concluded until the judge verifies that there is a justification for it by making sure that the property in question is in ruins. Hence, most examples of *Istibdāl* contain a phrase that mentions that the property is in ruins. Another difference is that the intention in an *Istibdāl* is to replace the property in question with another that is productive, whereas in *isqāṭ*, the use of the property is exchanged for money without its corpus (*ʿayn*).

[362] Cited in Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Ḥanafite Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988), 82.
[363] Muḥammad Abū Zahra, *Muḥāḍarāt fī al-Waqf* (Cairo: Dār al-Fikr al-'Arabī, 2005), 156.

In the records of Miṣr al-Qadīma, there are 15 cases of *isqāṭ,* all of which were brought to Mālikī judges.[364] Likewise, in the Bulāq court, all 24 cases of *isqat* were also brought to Mālikī judges.[365] All 34 cases of *isqāṭ* in the court of al-Bāb al-ʻĀlī were brought to Mālikī judges.[366] The consistency of such cases shows that the school affiliation is an unlikely explanation in at least the majority of those cases.

Establishment of *waqf* on *manfaʻa*

Out of a total of 23 cases of the establishment of religious endowments in the three courts I have examined, 15 were brought to Ḥanafī judges and three were brought to Ḥanbalī judges. These three cases had to be brought to this school because it allows the establishment of an endowment on the usufruct of a place (*manfaʿa*), rather than the corpus (*ʿayn*), i.e. the transfer of ownership of the actual property. In other words, if someone establishes a *waqf* on a house (*ʿayn*), the actual building is no longer owned by her/him, but belongs to the *waqf* beneficiaries. If s/he only establishes a *waqf* deed on the usufruct of the house, the building is still owned by the founder, but its rent belongs to the *waqf* beneficiaries. Since establishing a *waqf* that does not include the physical real estate in the endowment is forbidden in the Ḥanafī school,[367] these transactions were brought to Ḥanbalī judges. The reason for choosing the Ḥanbalī judge can even be found in the text of the case.

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[364] Muḥammad ʿAfīfī, *al-Awqāf wa al-Ḥayāh al-Iqtiṣādiyya fī Miṣr fī al-ʿAṣr al-ʻUthmānī* (Cairo: al-Hayʾa al-Miṣriyya al-ʿĀmma lī al-Kitāb, 1991), 168.
[365] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, documents 21, 70, 72, 82, 83, 96, 127, 130, 153, 160, 174, 177, 183, 192, 193, 217, 229, 244, 118, 206, 210, 239, 3, 224.
[366] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254.
[367] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, documents 135, 173, 186 (p. 52, 65, 70).

> Before the Ḥanbalī ... the venerable Amīr Muḥammad, the Jurbaji of the Mustaḥfiẓān Corps, son of the late Muḥarram Jurbaji son of the Late Yaʿqūb ... established a *waqf* ...on the use of the entire place located in the Protected Cairo ... This [place] is under his use and benefit by virtue of the document ... issued in the Sāliḥiyya al-Nijmiyya Court by our master Judge ʿAlī al-Wafāʾī, the Mālikī *Sharʿī* judge... He designated himself as the beneficiary of this *waqf* in his lifetime to use it however he wishes, by living in it or leasing it ... the content of the *waqf* and its conditions have been established before the aforementioned judge with the testimony of his witnesses in the *Sharʿī* manner ... According to him [the Ḥanbalī judge], it is valid to establish *waqf* on the usufruct of a place, even if the designated beneficiary is oneself. This is the view of the erudite scholar Shaykh ʻAlā̓ al-Dīn [al-Mārdawī al-Ḥanbalī]... issued on the twentieth of Dhū al-Qiʿda al-Ḥarām, in the year 1140.[368]

Two of the remaining five cases were brought to Mālikī judges. In one of those two cases, it is clear that the choice of the Mālikī school is also pragmatic because the *waqf* is established on the rent of a place, rather than its ownership, which is not permitted by the Ḥanafīs, but allowed by the Mālikīs.[369] However, there seems to be no pragmatic reason for the choice of the Mālikī judge in the second case.[370] It is possible that in this case, the subjects of the law demanded the Mālikī school because of their school affiliation, but there is no way to verify that as the courts do not have this information. The remaining three cases involve multiple judges, which will be discussed in the section on *talfīq*.

Rental contracts on *waqf*

[368] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 186 (p.70).
[369] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 211 (p. 112).
[370] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 92.

Long rental contracts on a *waqf*,[371] which were not permitted by the Ḥanafīs, were brought to Ḥanbalī judges. Out of the 1001 cases examined in this study, there are 64 cases of rental contracts, 36 of which are long rental contracts on a religious endowment (exceeding three years) and 21 are short periods.[372] All 36 cases of long rental contracts on religious endowments were brought to Ḥanbalī judges. In the following example, the case was brought to the Ḥanafī judge, but he had to refer it to the Ḥanbalī because it is not a transaction that can be conducted under Ḥanafī law:

> After the revered permission, which deserves acceptance and glorification from his Excellency, our master, the greatest of the Shaykhs of Islam and the King of the great scholars ... who sent a letter to his deputy in the venerated judgeship in the aforementioned court, our Master and Leader the great Shaykh and *Imām* ... the Ḥanbalī *Sharʿī* judge to deal with what will be mentioned below ... he rented from him with his own money for his pure self, all the land ... which is in ruins ... and he has the legal authority until this date to rent this and receive its rental revenues on behalf of the aforementioned *waqf*... for 30 *ʿiqdan*, or 90 years, each *ʿiqd* is three full, consecutive, lunar years ... this was witnessed in front of our master, the aforementioned *Sharʿī* judge with the testimony of his witnesses in the *Sharʿī* manner. He ruled in the aforementioned rental contract according to his revered school and his elevated doctrine, the school of the great, honorable *Imām* Aḥmad Ibn Ḥanbal al-Shaybānī ... who forbids increase in the aforementioned rented property and nullifying the rental contract at the death of one of the two parties to the contract or one of them or with the transfer of the guardianship [of the religious endowment] ... issued on the first of Rabīʿ in 1092.[373]

In the above example, a case is brought before the chief Ḥanafī judge himself, in which he writes a letter to his deputy, the Ḥanbalī judge, referring the case to him. While it is clear why the Ḥanbalī school was used for long rental contracts on *waqf*,

[371] Rental contracts are considered long if they exceed three years. Such contracts tended to be close to a hundred years.
[372] Some Ḥanafī jurists tried to restrict the period of tenancy in *waqf* lands to three years, others to a year. Baber Johansen, *The Islamic Law on Land Tax and Rent: The Peasants' Loss of Property Rights as Interpreted in the Ḥanafite Legal Literature of the Mamluk and Ottoman Periods* (London: Croom Helm, 1988), 34.
[373] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, document 98.

there were some short rental contracts that were also brought to Ḥanbalī judges. Out of 21 short rental contracts, 17 were brought to Ḥanafī judges and 4 cases were brought to Ḥanbalī judges. Since the Ḥanafī school allows short rental contracts, why were those four cases not brought before Ḥanafī judges as well? The reason the Ḥanbalī school was used in the four instances of short rental contracts was motivated by the renters' interests. The Ḥanbalīs provide certain benefits to renters, including the prohibition of increasing the rental value and honoring the rental contract in the case of the death of one of the parties to the contract.[374] In Ḥanafī law, the death of the lessor nullifies the rental contract.[375] This insight into the pragmatic motivation behind the choice of Ḥanbalī judges is provided in all of those cases:

> Before the Ḥanbalī judge and in the company of the honorable, illustrious ... Muḥammad ʿŪdah Bāshī mustaḥfiẓān, known as Abī Ṭabaq, as well as the pride of his peers, Muḥammad Shalabī son of the late Yūsuf Jurbaji ... the great, venerable Amīr Ibrāhīm Jurbaji ... rented to himself from his lessor, the protected Raḥma Khātūn, daughter of the late Bashīr Aghā... She is the *Sharʿī* overseer of the *waqf* of the freed slave of her mother's father, the late aforementioned 'Umar Aghā ... Thus she leased him the entire [plot of] black *rizq* land which consists of thirty five *feddāns* ... The aforementioned Amir Ibrāhīm Jurbaji has the right to use the land for agriculture and can only sublease it as he wishes ... for a period of one *ʿiqd*, which consists of three full, consecutive *khurajiyyat* years ... [notarized] by our master Judge Aḥmad al-Maqdisī, the Ḥanbalī *Sharʿī* judge ... According to him, it is forbidden to accept increase in rent and the rental contract is not terminated at the death of the two parties to the contract, the death of one of them, or the transfer of the oversight of *waqf*.[376]

This issue of rental contracts is also studied by Rafeq, who examines the first extant court register from Damascus, covering the period between 11 Shaʿbān 991 and

[374] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, documents 47, 53, 56 (p. 18, 21, 22).
[375] See for instance, Hilāl Ibn Yahyā Ibn Muslim al-Baṣrī, *Kitāb Aḥkām al-Waqf* (Hyderabad: Majlis Dāʾirat al-Maʿārif al-ʿUthmāiyya, 1936), 207.
[376] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 47.

12 Rajab 993/30 (August 30, 1583-July 10, 1585). He finds that out of 50 short rental contracts, Ḥanafī judges authorized 46 contracts, whereas the Ḥanbalī judges authorized 3 and Shāfiʿī judges authorized only one contract. Rafeq argues that when the Ottoman administration was strong in the sixteenth century, Ḥanafī judges were in a position to enforce Ḥanafī law, which stipulates that agricultural endowment properties can only be leased for a maximum of three years and commercial property for a maximum of one year. He sees the ability of Ḥanafī judges to control 92% of the cases, which had to be short leases according to Ḥanafī doctrine, as a sign of the strength of the empire at that point. He then compares that to the situation in the eighteenth century, when the number of leases of long rental contracts increases, with the majority of it being authorized by the Shāfiʿī and Ḥanbalī judges. In one sample from 1189 AH /1775-6 CE, Rafeq has 37 long leases of over three years, four of which were authorized by Ḥanafī judges, even though this is against the rules of this school. He explains this discrepancy between the results from the early and late Ottoman period in terms of the power of the central government and the ability of the official Ḥanafī judges to enforce Ḥanafī doctrine.[377] The situation in Egypt seems quite different from Damascus, with the former having a higher level of consistency in the use of the schools along pragmatic lines. A larger Syrian study of legal pluralism is needed to assess the role of the different schools in the legal process.

Loans with interest

[377] Abdul-Karim Rafeq, "The Application of Islamic Law in the Ottoman Courts in Damascus: The Case of the Rental of *Waqf* Land," In *Dispensing Justice in Islam: Qādīs and their Judgments,* ed. Muhamamd Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 413-418.

There were five cases of loans in the sample. Two of them were simple loans that were brought to Ḥanafī judges,[378] while three were brought before Shāfiʿī judges.[379] Those three contained provisions for *nadhr* (votive offering), which was clearly a stipulation of interest on the loans. Loans with interest are forbidden in all four schools of Islamic jurisprudence. However, legal techniques that allowed individuals to effectively loan money with the promise of payment of interest did exist in the courts. In the following example, after a loan contract is drawn, the person receiving the loan obligates himself through *nadhr* to make a certain monthly donation to the lender as long as he has not yet repaid the loan. This donation is terminated upon repayment of the loan:

> Before the Shāfiʿī, the honorable, venerable Ḥājj Muḥammad, known as al-Farghalī ... testified that he owes ... the woman Badawiyya ... the sum of ten gold dinars ... which is the amount he owes her through a *sharʿi* loan that he received from her before this date ... After binding himself to this, the aforementioned Ḥājj Muḥammad al-Farghalī made a consensual *sharʿī* votive to God obligating himself that, God willing, he would pay the aforementioned woman Badawiyya one diwani silver piece for every day that passes starting from the first of Dhū al-Qiʿda al-Ḥarām of the year of the date below, as long as he owes [her] the aforementioned amount or part of it. The aforementioned woman Badawiyya accepted that from him for herself in the described manner ... It was issued on the twenty eighth of Shawwāl, in the year 1140.[380]

This is a clear case of *ḥiyal*, in which legal stratagems are used to circumvent the Islamic ban on interest. There is no explicit mention of the reasons for that choice in the cases in question. Both the Ḥanafīs and Shāfiʿīs permit the use of *ḥiyal*, whereas the

[378] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 58; Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, document 15.
[379] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, documents 67, 179, 216.
[380] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 179.

Mālikīs and Ḥanbalīs are staunchly opposed to them.[381] This still does not explain why Ḥanafism was not chosen. Perhaps the answer to this question lies in one essential difference between Ḥanafism and Shāfiʿīsm. Under Shāfiʿī law, one cannot go back on a *hiba* (gift) made, whereas the Ḥanafīs permit such retraction.[382] The technical legal transaction in question here is one of donation (*hiba*) of interest, and thus the votive donation (nadhr) falls under the rules of *hiba.*

In his study of seventeenth and eighteenth century Bursa and Istanbul, Gerber found that contracts with interest were common. The contracts simply avoided the formal term interest (*riba*), using instead terms like *murābaḥa.*[383] This practice seems to have taken place in Egypt through the donation strategem.

Establishing ownership based on physical control

The Shāfiʿī school gives significant rights to an individual described as *dhū al-yad* meaning that he has uncontested control over a given property. Out of the 1001 cases examined in this study, there are six cases where ownership is established through physical control, five of which were brought to Shāfiʿī judges.[384] Only one was brought to a Mālikī judge because the Shāfiʿīs give the most rights to the uncontested physical

[381] Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1962), 140-2.
[382] ʿAbd al-Raḥmān Muḥammad ʿAbd al-Qādir, *Naẓariyyat al-Isqāṭ fī al-Sharīʿa al-Islāmiyya* (PhD dissertation, the Faculty of Shaīʿa, al-Azhar University, 1977), 283; Muḥammad Zayn al-Ibyānī Bek, *Sharḥ al-Aḥkām al-Sharʿīyya fī al-Aḥwāl al-Shakhṣiyya* (Cairo: Maṭbaʿat al-Nahḍa, 1919), 432-40.
[383] *Murābaḥa* is a type of sale, in which the seller accrues a known percentage of profit in addition to the price of the commodity. See Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (New York: State University of New York Press, 1994), 74-75.
[384] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 106, documents 178, 186 and 235; the court of Bulāq register 66, document 81 and 242. In document 242, the Ḥanafī judge is on the case in addition to the Shāfiʿī judge. This case of multiple judges will be handled in the discussion of *talfīq* below.

control of properties.[385] A prominent merchant named ʿUmar, who was also from among the *ashrāf* (descendants of Prophet Muḥammad), had previously purchased a *waqf* property, a piece of land with a ruined building on it. He renovated the building with his own money, and had continually *waḍaʿa yadahu* (controlled it), and has "dealt with the land in the same way owners would deal with their property...without any partner, challenger or disputer."[386] He brought two witnesses to testify to this in order to establish his ownership. "And based upon this," the record continues:

> He [the judge] ruled according to the school of the great *Imām* Abī ʿAbd Allāh M. al-Shāfiʿī b. Idrīs, may God be pleased with him, the need to respect [the rights deriving from] his building, his right to dispose of it, and the priority to him (*taqdīm*) [in ownership] as the one who controls it (*dhū al-yad*)".[387]

Conditional sale in the Mālikī school

Out of 1001 cases examined, there were 251 cases of sales of non-*waqf* items. All but five of these cases were regular unconditional sales. The five conditional sale transactions were all brought before Mālikī judges and all the unconditional sales were brought before Ḥanafī judges.[388] In conditional sales, a Mālikī judge was needed to validate the contracts, as this type of transaction is not allowed by the Ḥanafī school.[389] This condition was that the buyer would reverse the sale and return the sold item to

[385] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-'Alī, register 254, document 157.
[386] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 81 (p.30).
[387] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 81 (p.30).
[388] Dār al-Watha'iq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 106, documents 114, 213, and 255; the Court of Bulāq, register 66, documents 134 and 175.
[389] 'Abd al-Raḥmān al-Jazīrī, *al-Fiqh ʿalā al-Madhāhib al-Arbaʿa* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2006), 2: 485-487.

the seller if she returned the sale price within a specified period of time, as in the following example:

> The aforementioned al-Zaynī Muṣṭafā bought ... from his seller the aforementioned woman, Raḥma ... the entire building located in Miṣr al-Qadīma in the quarter of Hammām Humdār ... Then the pride of his peers, the aforementioned al-Zaynī Muṣṭafā testified on himself that whenever the seller, Ḥājja Raḥma, returns the entire aforementioned amount, which is 18,800 silver *niṣf* or an equivalent amount of money from this date until the month of Rajab of this year to him, the sale will be considered null and void.[390]

Marriage

Out of the sample examined, there were 83 cases of marriage notarization. Only two of them were brought to non-Ḥanafī judges and the rest to Ḥanafī judges. It is not clear why these two cases were brought to Mālikī judges. There is no indication that the choice of the Mālikī school was done for pragmatic reasons. One of these two cases is a marriage of minors.[391] The other case is a marriage, where the dower is paid over ten years.[392] Both these types of cases are allowed by the Ḥanafī school, however. We even see other cases of marriage of underage children officiated by Ḥanafī judges in this sample.[393]

[390] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 106, document 213 (p. 55).
[391] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, document 220 (p. 78).
[392] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 106, document 115 (p. 29).
[393] See for example, Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, documents 141 and 193.

In the following example, an underage child is married by a Mālikī judge, even though the permissibility of this transaction is not a matter on which there is disagreement among the four schools.[394]

> Before the Mālikī judge, the revered Ḥājj ʻAbd al-Jawwād son of the Late Ḥājj Aḥmad al-Madābighī in Miṣr al-Maḥrūsa gave a dower to the fiance of his son Ibrāhīm, who is below the age of puberty... [his finance] is a virgin who is also below the age of puberty, daughter of Sheikh Muḥammad Salīm ... And according to this, the aforementioned father married her off to him, with his legal authority over her, [rendering this] a legal marriage. The aforementioned father accepted this on behalf of the aforementioned husband with his authority over him as well ...The aforementioned marriage contract will be effective according to the rules to which our aforementioned master the *sharʿī* Mālikī judge adheres ... This took place on the first of Shawwāl 1092.[395]

We might never know the motivation behind the choice of the Mālikī schools in those two examples. It is possible that the motivation for those choices is based on school affiliation. But even if this is true, those cases represent the exception rather than the rule in practices of seventeenth and eighteenth-century Egyptian courts. In the sweeping majority of cases, pragmatic considerations can explain instances of non-Ḥanafī adjudication.

Dower and Maintenance of Wife

In case 203 of the court of Miṣr al-Qadīma, a woman by the name of Fāṭima, daughter of Saʻd claimed that her husband Shaykh Yūsuf, son of Shaykh Salīm al-Saʿīd, a spice vendor in the quarter of Ḥumdār in Miṣr al-Qadīma had not paid her dower or *kiswa* (clothing allowance). The husband is then asked to pay 30 piasters in dower and 30

[394] ʿAbd al-Raḥmān al-Jazīrī, *al-Fiqh ʿalā al-Madhāhib al-Arbaʿa* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2006), 4: 720-723.
[395] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, document 220.

piasters in *kiswa*, but he refuses. The wife asks the judge to put him in jail, which he does. The Shāfiʿī judge must have been chosen because the wife wanted the husband to be jailed for non-payment. The Shāfiʿī school gives more weight to the wife's demands for imprisonment, compared with the Ḥanafī school. Thus, the judge puts him in jail at the wife's first request under the Shāfiʿī school, whereas in Ḥanafism, a judge cannot imprison the husband in the first instance a wife establishes the husband's indebtedness.[396]

Conclusions about *tatabbuʿ al-rukhaṣ* in practice

Between the twelfth and the seventeenth centuries, Ḥanafism developed from a scholarly, often contradictory doctrine, into a more or less homogeneous body of law,[397] which became the default legal system. This was a function of the official status of Ḥanafism and the control of the Turkish Ḥanafī judges over the judicial system in Egypt. In official Ottoman writings, Ḥanafism, is always mentioned first, followed by the Mālikī, Shāfiʿī and Ḥanbalī schools in this order.[398] The official did not mean exclusion of the other schools, but the creation of a hierarchy. The Ḥanafī school's position as the "official" school in the Ottoman period did not give it exclusive jurisdiction, rather it afforded it this default status. For the majority of cases, in which there is no significant difference between the schools, the Ḥanafī judge was usually

[396] Wizārat al-Awqāf wa al-Shuʾūn al-Islāmiyya, *Al-Mawsūʿa al-Fiqhīyya al-Kuwaytiyya* 5: 199-202. Accessed online at http://www.islam.gov.kw/site/books_lib/open.php?cat=1&book=1

[397] Rudolph Peters, "What does it Mean to be an Official Madhhab? Ḥanafism in the Ottoman Empire," in *The Islamic School of Law: Evolution, Devolution, and Progress,* ed. Bearman, R. Peters and F. Vogel (Cambridge MA: Harvard University Press, 2005).

[398] See for instance the opening paragraphs of registers 127, 131, 140, 141, 148, 164, 169, Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī.

used. The judges of other schools would be called upon when there is a particular ruling being sought that is only allowed in that school. This can be seen in the four cases brought by Yūsuf al-Jurbaji. He brought three of these cases before Ḥanafī judges, but brought a contract for the long rental of a religious endowment, to a Ḥanbalī judge.[399] For rental contracts of *waqf*, the Ḥanafī judge could only notarize rental contracts not exceeding three years,[400] and only for this reason was the Ḥanbalī judge called upon in this case. Thus, it is methodologically sound for these courts examined here to consider most cases involving a non-Ḥanafī judge to be a possible example of *tatabbuʿ al-rukhas* or *talfīq*.

Although the Ḥanbalī school had the fewest number of followers in Egypt,[401] it handled 117 cases out of 250 in the sample taken from the court of al-Bāb al-'Ālī. This was more than any other, including the Ḥanafī school, which handled only 81 in this court. Fourty-six cases went to the Mālikī judge, and not a single case from this sample was brought before a Shāfiʿī judge, despite the historical importance of that school in Egypt, having had a semi-official status in the Mamluk period. This further supports the argument that the distribution of cases was not based on the status of the school or the affiliation of the legal subjects, but on pragmatic considerations.

[399] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, documents 41, 66, 76, 91.
[400] Muḥammad ʿAfīfī, *al-Awqāf wa al-Ḥayāh al-Iqtiṣādiyya fī Miṣr fī al-ʿAṣr al-'Uthmānī* (Cairo: al-Hayʾa al-Miṣriyya al-ʿĀmma lī al-Kitāb, 1991), 146-152; see also Muḥammad Qadrī Pāshā, *Murshid al-Ḥayrān Ilā Maʿrifat Aḥwāl al-Insān* (Cairo: al-Maktaba al-Miṣriyya, 1919), 129.
[401] The majority of Muslims in Egypt adhere to either the Shāfiʿī school (lower Egypt) or the Mālikī school (Upper Egypt), see Ron Shaham, "Shopping for Legal Forums: Christians and Family Law in Modern Egypt," In *Dispensing Justice in Islam: Qādīs and their Judgements,* ed. Muhamamd Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 454.

Out of a total of 1001 cases, 752 (75%) cases were brought to Ḥanafī judges and 248 (25%) cases were brought to non-Ḥanafī judges. The default status of the Ḥanafī school becomes clearest when we exclude the court of al-Bāb al-ʻĀlī, with its special jurisdiction, which was more friendly to Ḥanbalism and Mālikism. If we take aside that court, the numbers become more striking. Out of a total of 750 cases in three registers from the courts of Miṣr al-Qadīma and Bulāq, 671 cases were brought to Ḥanafī judges (89.5%) and 79 cases were brought to non-Ḥanafī judges (10.5%).

One of the reasons that the Ottomans gave this default status to the Ḥanafī school is to make sure that the jurists they sent from Istanbul, who created an important part of the Ottoman bureaucracy, were paid more than the non-Ḥanafī local deputies, since judges were not given a salary but a percentage of the value of transactions. This way a financial as well as a power hierarchy is created in the Egyptian court system. At the top of this hierarchy lies the chief judge who is an important node in Ottoman bureaucracy and whose salary is guaranteed to be higher than any other judge in the Egyptian legal system, since most high-value cases have to be brought to the court over which he resides, al-Bāb al-ʿĀlī.

I argue that in most of these non-Ḥanafī cases, there is a clear legal result for which the other schools were chosen, either in the form of *tatabbuʿ al-rukhaṣ* or its more complex twin, *talfīq*. Evidence for this can be found in conventions in the court records themselves. In some cases in which a non-Ḥanafī judge is chosen, we sometimes see a phrase preceding the controversial bit of legislation emphasizing its legality in the

school of the presiding judge. This is particularly common in cases of *talfīq,* discussed below.

Particularly compelling evidence that the choice of a non-Ḥanafī judge was pragmatic are cases in which the same individual goes to the Ḥanafī judge for one transaction and then to a non-Ḥanafī judge for a later one that includes legal devices either not permitted by the Ḥanafī school or where Ḥanafism has more restrictions. Such is the case with document 139, in which a man by the name of Shalabī Ibn Salāma al-Qahwajī sold half a building that he owns to his wife Kuhiyya. This transaction was brought to the Ḥanafī judge. In document 143, he sells Kuhiyya his rights to the long rent on the endowment land on which the building was built (*ḥikr*). This second case was brought to the Mālikī because it is related to the sale of the use of a *waqf* property (*isqāṭ manfaʿa*).[402]

We even sometimes come across jurists in the court brought before a school judge different from their own for pragmatic reasons. The great Ḥanafī Badr al-Dīn Ḥasan al-Maqdisī, who is a teacher at al-Azhar and also a *muftī*, rented a *waqf* land for 71 years. He is described as "the beauty of the faith, Sharīʿa and religion, the unique scholar of his time, the reviver of the school of Abū Ḥanīfa al-Nuʿmān." Clearly his school affiliation and his work as a *muftī* did not dissuade him from using a Ḥanbalī judge to facilitate his transaction.[403]

[402] Dār al-Watha'iq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 106, documents 139, 143 (p. 36-37).
[403] Dār al-Wathā'iq al-Qawmiyya (Cairo), the Court al-Bāb al-ʿĀlī, register 254, document 3 (p.2).

ʿUmar, a prominent merchant from Bulāq, established a *waqf* using *talfīq* between the Ḥanafī and Ḥanbalī schools in order to tailor it to his particular specifications. One of the beneficiaries of his *waqf* is the mausoleum of the *Imām* al-Shāfiʿī. This merchant sensed no irony in the fact that he established a *waqf* to the *Imām* al-Shāfiʿī without using the school of Islamic jurisprudence that bears his name in that transaction.[404]

Talfīq in practice

While there is plenty of evidence that the practice of *tatabbuʿ al-rukhaṣ* goes as far back as Baybars, there is no evidence of the use of its more complex sibling *talfīq* from the Mamluk period. As we saw earlier, attitudes towards *tatabbuʿ al-rukhaṣ* start changing as early as the Mamluk period and *talfīq* is singled out during this period as the only type of *tatabbuʿ al-rukhaṣ* that is forbidden. Indeed, it appears that *talfīq* was not consistently practiced until the Ottoman period, prompting a heated discussion over its validity in the theoretical literature in the seventeenth and eighteenth centuries, as discussed in the previous chapter. The more controversial stand of legal scholars toward this practice has led some theorists to believe that the application of *talfīq* in the modern period was an innovative practice adopted in an effort to emulate European codes. The following collection of cases from the National Archives of Egypt (Dār al-Wathāʾiq) in Cairo will show how *talfīq* was practiced in the seventeenth and eighteenth centuries.

[404] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 91.

The norm in Islamic law is that there is only one judge presiding over each case. Thus, when more than one judge is adjudicating the same case, it is usually done for *talfīq*, where one judge validates one part of the case and the other validates another. Oftentimes, the motivation behind having more than one judge is explicitly stated in the court record. There were no cases in which rulings from different schools were combined in a transaction by a single judge. But there is also another type of *talfīq* discussed in the theoretical literature, in which two separate transactions are performed over a period of time on the same subject of transaction, such as the same building sold or the same piece of land rented. This type of *talfīq*, known as diachronic *talfīq* is commonly used in the management of *waqf* properties. Each time these properties change hands, a legal procedure of either *isqāṭ* or *Istibdāl* is required. An example is an individual who rented a *waqf* property in 1035 under the authority of the Ḥanbalī Judge, then in 1039 (four years later) the same piece of property was subject to *isqāṭ* under the Mālikī judge.[405] This type of *talfīq* was common in the court records.[406] Oftentimes, we see a transaction done under one judge and a reference to a previous transaction under a different judge on the same piece of property. I will now focus on transactions that were performed under more than one judge in the same document.

The presence of more than one judge on cases:

[405] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 3 (p. 2).
[406] See for example, Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 103; the Court of al-Bāb al-ʿĀlī, register 254, document 53 (p. 27).

The official status of the Ḥanafī school of law meant that any transaction that did not come to the Ḥanafī judge had to be permitted by him. There were different ways in which this permission was granted in the records I have examined. Thus, in a way, all transactions requiring a non-Ḥanafī judge also involved the Ḥanafī judge, granting the permission.

The degree of monopoly that the Ḥanafī school enjoyed over nearly all transactions that were legal within the school suggests that it is the legal establishment itself that automatically referred a case to the Ḥanafī judge, unless an individual requested another school. That all cases were first referred to the Ḥanafī judge can be seen through evidence in the court records that the Ḥanafī judge himself would refer the case to the judge of another school when his school did not allow him to notarize a particular transaction. This referral took the form of permissions to a non-Ḥanafī judge to take over the case, a legal formula that permeates the court records. The first type of that permission comes at the beginning of cases notarized by non-Ḥanafī judges, with a line that reads, "After the honorable permission (*baʿda al-idhn*) of our master the deputy to the Ḥanbalī judge..."[407]

Another way this authorization is granted came towards the end of the document: "He ruled according to this, a Shariʿi ruling, *muttaṣilan wa munaffadhan* [validated and executed] by our master the Ḥanafī Shar'i judge."[408] The word *ittiṣāl,* the

[407] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, this exact wording is used in documents 9, 10, 16, 17, 18, 25, 26, 27, 28.
[408] See for instance, Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254 documents 31, 32, 34, 35, 41, 48.

active participle of which was used in the previous example at the end of the case, is also used at the beginning of some cases to mean "authorized by," as in the phrase "before the Mālikī and *ittiṣāl* al-Ḥanafī [the authorization of the Ḥanafī]."[409] Those are some of the ways in which the presence and permission of the Ḥanafī was felt. In other cases, we also see another form of engagement of the Ḥanafī in transactions conducted by other judges, through apposition. In this case, the Ḥanafī usually comes after the other judge and oftentimes does not serve a *talfīq* function, as explained below in the section about the use of multiple judges without *talfīq*.

Out of the 1001 cases examined in this study, only 21 cases were brought to more than one judge, as shown in the figure below:[410]

	Court of Miṣr al-Qadīma, Register 105	Court of Miṣr al-Qadīma, Register 106	Court of Bulāq, register 66	Court of al-Bāb al-ʻĀlī, register 254
Multiple judges	7	0	10	4

Figure 2

In some of those 21 cases, we see a clear use of *talfīq*, where two judges are chosen to validate different parts of a contract. In the court of Miṣr al-Qadīma, there is a case that combines rulings of the Shāfiʿī and Ḥanafī judges in the same contract.[411] In the following example, the woman bringing the case to court was seeking to remarry her husband who has divorced her three times. All four schools of Islamic

[409] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 163.
[410] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, documents 40, 121, 199, 203, 225, 261, 259.
[411] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, document 199.

jurisprudence agree that after being divorced three times, a couple may not remarry again without the wife first marrying then divorcing someone else, known as *muḥallil*.[412] In order to avoid this unwanted intermediate marriage, the woman used a legal procedure only allowed in the Shāfiʿī school. She annulled the marriage by claiming that the two witnesses to the original marriage contract did not possess the necessary qualities for probity. For the Shāfiʿīs, evidence that a witness to an earlier performed marriage lacked probity renders the marriage null and void (*bāṭil*).[413] The Shāfiʿī view was, therefore, advantageous because if the original marriage was *bāṭil* based on this technicality, then the same couple can be remarried without a *muḥallil*. Furthermore, according to the Shāfiʿīs, although the marriage was not valid, the parties are not subject to punishment for fornication because of the principle of *shubha*, where they truly, if erroneously, believed themselves to be married. For the same reason, paternity of any children she bore from the first marriage can be attributed to the first husband. The case record carefully documents not only the component of the case which has been approved by the Shāfiʿī judge, but makes the effort of citing "Shaykh al-Islām al-Ramlī in his *Sharḥ al-Minhāj* in the section on marriage," the specific legal authority from within the school that permits it.[414]

> In front of the Shāfiʿī *sharʿī* judge, the woman Riḍā, daughter of Shaykh Suwaydān al-Harīrī al-Rifāʿī claimed that her husband, the respected Muḥammad son of al-Ḥājj Muḥammad son of the late Khalīl ... that before this date, he had married her with two witnesses who did not have legal probity... No *sharʿī* judge, who views the above-mentioned contract as valid,

[412] The second husband, who makes remarriage to the first permissible, or *ḥalāl* is called a *muḥallil*.
[413] ʿAbd al-Raḥmān al-Jazīrī, *al-Fiqh ʿalā al-Madhāhib al-Arbaʿa* (Dār al-Kutub al-ʿIlmiyya, 2006), 4: 718.
[414] This is the Shāfiʿī Muḥammad Ibn Aḥmad Shams al-Dīn Ibn Shihāb al-Ramlī (d. 1004/1595), not to be confused with with the Ḥanafī Khayr al-Dīn al-Ramlī (d. 1081/1670).

> ruled that it is. The aforementioned husband consummated the marriage. He then divorced her from his matrimonial authority thrice before this date ... Then she left [the court] and returned with the respected Shiḥādha, son of the late Ghannām al-Aḥmadi and Mansūr Ibn ʻĀmir al-Qahwajī in the above-mentioned quarter and asked them to bear witness [to her claim] ... Each one of them testified in front of our master the *sharʿī* judge ... The aforementioned claimant asked our master the *sharʿī* judge referred to above to do what is required by the honorable *sharīʿa* in this regard. He responded by ruling that she deserves the *mithl* dower from her husband,[415] the defendant mentioned above and by annulling the marriage contract... and that the sexual intercourse in this is based on *shubha* [error] and is sufficient grounds for proving paternity ... following the rules of his illustrious school, which include the validity of renewing the marriage contract with her without a *muḥallil*, as stated by Shaykh al-Islam al-Ramlī in his *Sharḥ al-Minhāj* in the section on marriage ... And in front of the Ḥanafī judge, the aforementioned honorable Muḥammad paid his fiancé, the aforementioned woman Riḍā a dower ... The aforementioned wife accepted that from him to herself in the *sharʿī* fashion and the marriage became effective ... on the fourteenth of Shaʻbān al-Muḥarram, one of the months of the year 1092.[416]

If the case had stopped at the annulment of the marriage, that would have been an example of a simple *tatabbuʿ al-rukhaṣ*. Riḍā did not have a guardian to marry her, as is clear from the statement "the aforementioned wife accepted that from him to herself." Had a guardian been present, he would have accepted the dower on her behalf.[417] Marriage without a guardian is not allowed under the Shāfiʿī school. The only school that would permit such a marriage is the Ḥanafī school. Thus, the contract requires *talfīq* in the same contract because it cannot be carried out by the Shāfiʿī judge alone.

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[415] The *mithl* dower is determined by the dower paid for a woman of the same socio-econonic status, usually based on another relative's dower.

[416] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, document 199. This case is reminiscent of the Bombay case of Muḥammad Ibrāhīm v. Gulam Aḥmad (1864), in which the woman was brought up as a Shāfiʿī, but had married without her father's consent, which contradicts Shāfiʿī law. The court recognized her marriage after she claimed that she had become a Ḥanafī. Riḍā's case is more complex though because it has two judges in the same transaction. See Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1962), 183.

[417] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, Register 105, document 199.

The social status of people involved in this *talfīq*

The above example of *talfīq* was an innovative way to solve a serious problem for Riḍā and her husband. This poses the question of whether this type of case was restricted to the powerful, who had the resources to manipulate the system. The text of the case shows that the participants were regular people. This is clear from the lack of honorary titles. Riḍā is merely a woman "*ḥurma.*" Her father is "Shaykh Muḥammad,' and her husband is "the Respected Muḥammad." Her husband's father is "al-Ḥājj Muḥammad, son of the Late Khalīl." The first witness has the title Qahwaji, a waiter in a coffee-shop and the other one is the "Respected Shiḥādha," and his father is "the Late Aḥmadī." They clearly did not belong to the military elite, the high *ʿulamāʾ*, the *ashrāf* or the merchant class. By doing that, Riḍā and her husband actually went against an Ottoman Sultanic order issued in the sixteenth century that does not allow a woman to marry herself under the Ḥanafī school, and supported by the *fatāwā* collection of Ebu's-suʿud.[418]

To get a sense of the lay social status of Riḍā and her family, compare the references made to them to the following:

> Before our master the deputy Ḥanafī judge in the presence of our master, the Shaykh, the *imām*, the gallant scholar, the descendant of scholars, the leader of great scholars, the best of teachers and researchers Shihāb al-Dīn Aḥmad, son of our late master Shaykh Sālim al-Mālikī, one of the people of knowledge and teaching at al-Azhar Mosque.[419]

[418] Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (New York: State University of New York Press, 1994), 90.
[419] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʾAlī, register 254, document 6 (p.2).

The use of the two pragmatic techniques was not restricted to the powerful military elite. It was also practiced by laypeople. In addition to the above case of annulment and subsequent marriage, we can also see a clear pragmatic motivation behind the choice of multiple judges in some cases of divorce. Out of the 1001 cases, there were nine cases of simple divorce and 33 cases of *khulʿ* (divorce initiated by the wife). All nine cases of male-initiated divorce were brought to Ḥanafī judges, although in one case, the Shāfiʿī judge presided over the case along with the Ḥanafī.[420]

People from different socio-economic strata were able to take advantage of this diversity to facilitate their legal transactions in Ottoman courts. As we saw above, Yūsuf al-Jurbaji, who was an amīr in the ʿAzbān military corps, chose different judges according to his legal needs. Similarly, Riḍā, a regular woman with no honorifics attached to her name in the court, uses the system to solve her family problem.[421] Everyone had access to this pluralism regardless of their social status. It is through those cases that we get an insight into the values of the Ottoman legal establishment. We saw them siding with a woman to imprison the husband who did not fulfill his financial obligations towards her. We also saw the Ottoman legal establishment facilitating the free alienation of endowment properties, thus bringing factories and real estate back into the economic cycle. This was all achieved through Sunni legal pluralism within the context of *taqlīd*.

[420] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, document 203.
[421] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, documents 41, 66, 76, 91.

But legal pluralism was not always used for the benefit of the underdog. In four cases, we found that *talfīq* was used to deny women some of their financial rights. In 29 out of 33 cases of *khulʿ*, the presiding judges were Ḥanafīs. In those cases, the wife waives her right to the portion of the dower that would be hers if her husband initiated the dissolution of the marriage, but she retains her rights to previous unpaid maintenance. In those 29 cases, *talfīq* was not used to put women at a disadvantage. However, the remaining four cases, the Mālikī and Ḥanafī rules are combined to deny them some of their rights as is in the case below:

> Each one of them [the two judges] ruled according to what is acceptable to him [his school], which for our master the Ḥanafī *sharʿī* judge means losing any past *kiswa* (clothing allowance) and *nafaqa* (maintenance) owed to the mentioned divorcee and to our master the aforementioned Mālikī *sharʿī* judge means losing the *mutʿa*[422] and *ʿidda*[423] money owed to the aforementioned divorcee, even if it were established.[424]

According to the Shāfiʿīs, Mālikīs and Ḥanbalīs, previous maintenance is not waived because of *khulʿ*.[425] According to the Ḥanafīs, *khulʿ* does not waive future rights such as *ʿidda* money.[426] Thus, the wife loses her right to any unpaid *kiswa* (clothing allowance) and *nafaqa* (maintenance) from past years of marriage, by the decision of the Ḥanafī judge. Through *talfīq*, she also loses any rights to *mutʿa* and *ʿidda* money on

[422] A payment that is dependent upon the consummation of the marriage.
[423] This is the waiting period after divorce during which a woman cannot be married to assure the paternity of any child if she discovers she is pregnant.
[424] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, document 40. For a discussion of those payments, see ʿAbd al-Raḥmān al-Jazīrī, *al-Fiqh ʿalā al-Madhāhib al-Arbaʿa* (Dār al-Kutub al-ʿIlmiyya, 2006), 4: 707-983.
[425] For a discussion of the different rights denied a woman by *khulʿ*, see ʿAbd Raḥmān Muḥammad ʿAbd al-Qādir, *Naẓariyyat al-Isqāṭ fī al-Sharīʿa al-Islāmiyya* (PhD dissertation, the Faculty of *Sharīʿa*, al-Azhar University, 1977), 283; Muḥammad Zayn al-Ibyānī Bek, *Sharḥ al-Aḥkām al-Sharʿīyya fī al-Aḥwāl al-Shakhṣiyya* (Cairo: Maṭbaʿat al-Nahḍa, 1919), 400.
[426] For a discussion of the Ḥanafī view on *ʿidda* payments, see Muḥammad Zayn al-Ibyānī Bek, *Sharḥ al-Aḥkām al-Sharʿīyya fī al-Aḥwāl al-Shakhṣiyya* (Cairo: Maṭbaʿat al-Nahḍa, 1919), 252-273.

the authority of the Mālikī judge. The Ḥanafīs would not make her waive the *ʿidda* and *mutʿa* money because it had not been established at the time of the contract.[427] Although the wife is the one who brings the case to the court, those judges decided to use *talfīq* to strip her of some rights provided by each school. The description of *talfīq* in the following case record uses almost the exact same language as that in document 40 quoted above:

> In front of the Ḥanafī *sharʿī* judge and the Mālikī *sharʿī* judge a person asked ... the venerable ʿAtā Allāh son of the late Mansūr al-Zaydānī in Miṣr al-Qadīma to divorce his wife, the woman Umm al-Khayr, daughter of the venerable Yaḥyā al-Qulalī from his matrimonial authority, one first divorce utterance for one dirham that he owes her... He agreed to divorce her from his matrimonial authority the requested divorce utterance for the aforementioned compensation, having admitted that he consummated the marriage with her ... Each one of them [the two judges] ruled according to what is acceptable to him [his school], which for our master the Ḥanafī *sharʿī* judge means losing any past *kiswa* and maintenance money owed to the mentioned divorcee and to our master the aforementioned Mālikī *sharʿī* judge means losing the *mutʿa* and *ʿidda* money owed to the aforementioned divorcee, as long as she is not legitimately pregnant... on the sixth of the blessed month of Shawwāl, in the year 1092.[428]

The presence of repetition of whole phrases, and formulaic language in these documents suggests that the use of *talfīq* to get this particular result in cases of *khulʿ* was common. It is unlikely of course that the wife had requested this combination of two schools. The reason behind the use of *talfīq* in those four cases could be the result of an agreement made between the spouses or of the personal view of those particular judges who decided to put the four women at a disadvantage. It could also be that the husband had not for instance paid past maintenance and wished to have that explicitly

[427] Muḥammad Zayn al-Ibyānī Bek, *Sharḥ al-Aḥkām al-Sharʿīyya fī al-Aḥwāl al-Shakhṣiyya* (Cairo: Maṭbaʿat al-Nahḍa, 1919), 258.
[428] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Miṣr al-Qadīma, register 105, document 225.

stated along with the Mālikī exclusions for extra precautions to avoid future litigation. Regardless of the motivation or how this case of *talfīq* came to being behind closed doors, the *talfīq* nature of the case is explicit in the document. This consistency is similar in its purpose and practice to the use of Sunni legal pluralism in the nineteenth-century.

The establishment of *waqf*

As we saw above, most cases of the establishment of *waqf* were brought to Ḥanafī judges, but some were brought to others, usually for pragmatic reasons. There are three cases in the sample in which documents establishing religious endowment were brought to multiple judges. In those cases, we can see a clear use of *talfīq*.[429] In one case, the first part of the case records a peculiar debate between the founder of the endowment and the *mutawallī* (guardian) appointed by the court, ostensibly in response to the desire of the former to repeal its establishment. Thus, the founder brings his case to a Ḥanafī judge, since Abū Ḥanīfa's view is that endowments are not binding. The guardian challenges the founder, saying that the view of Abū Yūsuf and Shaybānī was that an endowment is binding as soon as it is issued.[430] Then the document reestablishes the *waqf,* requiring the presence of a Ḥanbalī judge, since the document includes an endowment of the use of a place, which is not permitted by the Ḥanafīs.

[429] Dār al-Wathā'iq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 91 and 257; Dār al-Wathā'iq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 42.
[430] Abū Yusuf and Muḥammad al-Shaybānī are the two main disciples of Abū Ḥanīfa, the eponym of the Ḥanafī school.

> He handed over the aforementioned properties that he owns to a *sharʿī* guardian ...then the endower decided to retract the endowment of the aforementioned properties that he owned to return them to his ownership as they were before...following the opinion of the great *Imām* and early *mujtahid* Abū Ḥanīfa al-Nuʿmān ... that establishing *waqf* to oneself is permitted but not binding. The guardian of the *waqf* challenged him ... saying that the endowment is sound and binding ... and referring to the view of the two honorable companions, namely *Imām* Abū ʻAbd Allāh Muḥammad Ibn al-Ḥasan and *Imām* Yaʿqūb Ibn Yūsuf may God be pleased with them that endowments are binding as soon as they are issued, even if designated to oneself. They [the founder and the guardian] disagreed, until the issue was taken to our master, the aforementioned Ḥanafī judge... The establishment of the *waqf* in the use of the building, which is mentioned above, was approved by our master the aforementioned Ḥanbalī judge... Then our master the aforementioned Ḥanafī judge looked closely in this disputed issue and considered it thoroughly, until he found that the view of the two companions had a stronger proof. It is also what is used for *fatwā* and practice... he then judged that the *waqf* is valid.[431]

The Ḥanafī judge decides that a *waqf* established by an individual for himself is binding, upon the authority of the most prominent disciples of the Ḥanafī school, and that it cannot be repealed.[432] In a similar example from the same court, we see not only the Ḥanafī and Ḥanbalī judges presiding over the case, but the Mālikī judge as well. The Ḥanbalī is used for the endowment of the use of the place (*khulū*), whereas the Mālikī is needed to validate the endowment of a rent, both of which fall under the category of endowment of the use of a place. The document states that according to the Ḥanafī judge, the endowment is valid and "the endowment of the use of a place and its rent are allowed by the Mālikī and Ḥanbalī judges."[433]

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[431] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 91.
[432] The eponym of the Ḥanafī school, Abū Ḥanīfa believed that establishing an endowment to oneself is not binding, meaning that he could change his mind and retract it. His disciples, Abū Yusuf and M. al-Shaybānī ruled against the founder that they were in fact binding. Since a judge has issued a ruling, establishing that the endowment is binding, this cannot be challenged in the future, following the jurisprudential rule that the ruling of a judge cannot be overruled, or *ḥukm al-qādi yarfaʿ al-khilāf.*
[433] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 257.

The third case comes from the court of al-Bāb al-ʻĀlī, where Mālikī and Ḥanbalī judges are used to validate different parts of the document. The reasons for using those two judges is explicitly stated in the document, which states that "according to the Ḥanbalī judge, establishing an endowment to oneself on the use of a place or its ownership is permitted and according to the Mālikī judge, it is allowed to change and amend the *waqf* deed."[434]

The presence of two judges with no evidence of *talfīq*

As we saw above, we are able to explain the choice of multiple judges in some cases along pragmatic lines, but sometimes that choice cannot be explained in those terms. In most of those cases, there is a non-Ḥanafī judge, who is needed to validate the transaction, which is not permitted by the Ḥanafīs, yet the Ḥanafī judge seems to be presiding on the case with him since the terms used are, "ladā al-Mālikī wa al-Ḥanafī," (before the Mālikī and Ḥanafī judges).

There are four cases of the sale of a use of a place that were brought to the Mālikī and Ḥanafī judges together, when they could have been brought to the Mālikī alone.[435] The addition of the Ḥanafī does not seem to serve any functional purpose, except to authorize the transaction. Similarly, there are two cases of manumission that

[434] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʻĀlī, register 254, document 42.
[435] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, documents 118, 206, 210, and 239.

were brought to the Mālikī and Ḥanafī judges in the Bulāq court together when they could have been brought to either judge alone.[436]

In the court of al-Bāb al-ʻĀlī, there are two cases in which two judges presided, but no evidence of *talfīq* can be found. In one example, the Mālikī is used to change the terms of a *waqf,* where the Mālikīs are usually used, but the Ḥanafī judge is also presiding on this case.[437] Another case involves the establishment of a *waqf.* Both the Mālikī and Ḥanbalī judges presided. It is not clear from the case why both were present, as the transaction could have been performed by the Mālikī judge alone.[438] In one case of conditional sale brought before the Bulāq court, the Ḥanafī judge presided with the Mālikī judge, though the Mālikī judge could have presided over the transaction alone.[439]

While all cases of *talfīq* required the presence of more than one judge, since no single judge was allowed to rule according to more than one school, the presence of more than one judge did not always signify an example of *talfīq.* Since in most of those cases, the seemingly redundant judge seems to be the Ḥanafī, it is conceivable that this was another way for the Ḥanafī to authorize transactions performed by non-Ḥanafī judges. We saw earlier in the chapter, three other ways in which such an authorization was granted. Thus, the use of multiple judges cannot be used synonymously with *talfīq*.

Collaboration of the Ottoman legal authorities and the Azharī *ʿulamāʾ*

[436] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, documents 154, 155.
[437] Dār al-Wathāʾiq al-Qawmiyya (Cairo), Court of al-Bāb al-ʿĀlī, register 254, document 205.
[438] Dār al-Wathāʾiq al-Qawmiyya (Cairo), Court of al-Bāb al-ʿĀlī, register 254, document 177.
[439] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of Bulāq, register 66, document 134.

The practice of both *tatabbuʿ al-rukhaṣ* and *talfīq* seems to have been accepted not only by the legal establishment, but also by the high *ʿulamāʾ*. The court records are full of prestigious religious scholars attending those court cases, sitting with the judge. Sometimes, they are used as witnesses, but oftentimes, they seem to serve no legal function as witnesses, nor do they provide legal advice to the judge. This semi-honorary status of the *ʿulamāʾ* in attendance at the court and their permissiveness of those practices re-emphasize what was argued about the theoretical legal shift in attitudes within legal theory towards the pragmatic use of Sunni legal pluralism.

Many salaried professors at al-Azhar attended those cases, such as Shaykh Badr al-Dīn al-Maqdisī al-Ḥanafī, one of the prominent professors at al-Azhar,[440] or Shaykh Salīm al-Mālikī, another Azhar professor.[441] There are also examples of such prominent scholars being themselves parties to those types of contracts.[442] For instance, we see the Shāfiʿī ʿAtiyya al-Ajhūrī establishing *waqf* under the Mālikī school, with his Shāfiʿī affiliation not constituting a hurdle in that transaction.[443]

Conclusion

[440] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʻAlī, register 254, document 3.
[441] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 6, p.3. For more such examples, see documents 49 (p. 25), 68 (p. 34), 79 (p. 39), 80 (p. 40), 136 (p. 69).
[442] The presence of those figures of high status: be they scholars or military officials was mostly honorary. In one of the cases of the court of al-Bāb al-ʻAlī, after a case was written, the names of some people in attendance are added afterwards above the first line, where they would normally be mentioned. This could be because the scribe forgot to add them or because they showed up after the case was written. In this case, although there were already two undersigned witnesses, these two prominent figures were also mentioned as witnesses. Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 186 (p.99).
[443] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 92, p. 42.

The court records abound in examples of *tatabbuʿ al-rukhaṣ* and *talfīq*. The use of *talfīq* in the nineteenth and twentieth centuries was not a legal innovation as was previously thought. It has been practiced in the courts for centuries. Thus, some of the changes that took place in the nineteenth and twentieth centuries came out of an existing local Egyptian/Ottoman legal culture, which included the practice of *talfīq*.

Ḥanafism had a semi-default status. As such, cases brought to non-Ḥanafī judges can usually be explained either in terms of *tatabbuʿ al-rukhaṣ* or *talfīq*. Subjects of the law regardless of their social status were able to take advantage of those techniques. Their widespread use and the fact that there is no monopoly over their use by the military elite indicate that they were part of the legal mainstream. The way those techniques were employed in the courts was not class-based. We have seen many examples of regular people using both *tatabbuʿ al-rukhaṣ* and *talfīq* to serve their legal needs. One notable example is the case mentioned above with Riḍā and her husband, who were able to avoid a permanent dissolution of their marriage.

The flexibility of the legal system, achieved through legal pluralism served some important social and economic functions. In the same way Riḍā and her husband could solve an undesirable social problem, owners of real estate could also circumvent the rules of religious endowments. They were able to sell the *waqf* properties that they had established primarily to protect them from the encroachment of the military elite, to prevent their break-up through inheritance or to avoid paying taxes on them. This allowed those *waqf* properties to function almost like privately-owned properties. The

prevalence of such cases belies the notion that the *waqf* system led to the stagnation of the means of production, a view held by many historians.[444] Legal pluralism was used to reinforce private ownership and to bring those otherwise frozen properties back to the market.

The legal pluralism that existed within the Egyptian legal system could be used for multiple purposes. The legal establishment, for instance, imprisoned a man who failed to pay his wife her due financial rights. We also saw the local Ottoman legal establishment allow a woman to give herself in marriage, thus contradicting not only the legal opinions of famous Ottoman *muftī*s such as Ebu's-su'ud, but also Sultanic decrees. Yet, when it came to wife-initiated divorce, we also saw a few examples, in which women were denied some financial rights, again through the use of the existing legal pluralism.

As we saw in the previous chapters, the pressure created by the practice of the courts on legal theory led eventually to a shift in the views of jurists of that period. They went against the classical opposition to the pragmatic utilization of legal pluralism. Those same jurists whose views eventually changed legal theory for good, directly participated in the pragmatic use of legal pluralism, not only through their attendance of many court cases, where those practices were taking place, but also

[444] Timur Kuran "Why the Middle East is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation," *Journal of Economic Perspectives* 18, 3 (2004), 71-90.

through being parties to some of those transactions. We saw, for example, the Shāfiʿī jurist ʿAtiyya al-Ajhūrī establish a *waqf* under the Mālikī school.[445]

Just as nineteenth-century legal pluralism allowed for the creation of a predictable legal code, seventeenth and eighteenth-century legal pluralism was already being used consistently. In the seventeenth and eighteenth centuries, one could predict, for instance, that the sale of *waqf* known as *Istibdāl* would be brought to Ḥanbalī judges and that *isqāṭ* sales would be brought to Mālikī judges. All conditional sales would be brought to Mālikī judges, whereas all non-conditional sales would be brought to Ḥanafī judges. In this sense, Sunni legal pluralism functioned as a *de facto* unwritten legal code. The process was efficient and automatic. Unless there was litigation, it was clear to all the parties of the legal process where a particular case would go. In the case of litigation, certain mechanisms for establishing priority were put in place.

In the next chapter, I will show that there was no break in juristic attitudes towards the crossing of school boundaries in the modern period, when the same Ottoman authorities and arguments were invoked. I will also address the confusion among some historians over the distinction between *tatabbuʿ al-rukhaṣ* and *talfīq* and how this led to the absence of any discussion of *tatabbuʿ al-rukhaṣ* in Western legal historiography. Furthermore, I will discuss the types of techniques used in the codification of Islamic law in Egypt in the twentieth and twenty first centuries.

[445] Dār al-Wathāʾiq al-Qawmiyya (Cairo), the Court of al-Bāb al-ʿĀlī, register 254, document 92, p. 42.

Chapter 4

Tatabbu' al-Rukhaṣ and *Talfīq* in the Modern Period

In this chapter, I discuss the way *talfīq* and *tatabbuʿ al-rukhaṣ* were understood by modern historians, as well as nineteenth-century transformations in the role of Ḥanafism in the legal system. I then discuss attitudes towards *tatabbuʿ al-rukhaṣ* and *talfīq* in the nineteenth and twentieth centuries to show that there is continuity in the jurists' attitudes towards those techniques. Finally, I discuss twentieth-century codification and how those legal techniques were used. In my discussion of modern codification of the Sharīʿa, I focus particularly on marriage and divorce laws, in which those techniques had to be utilized on a large scale.

Modern historians' confusion over the meaning of *talfīq*

Layish and Hallaq's description of *talfīq* corresponds faithfully to the way it was understood by pre-modern jurists.[446] But other modern scholars have extended the meaning of the term to include within it any crossing of school boundaries, even if it is a simple picking and choosing from other schools, which Muslim jurists called *tatabbu' al-rukhaṣ.* For instance, Coulson holds there is confusion over the meaning of the term. He describes *talfīq* as any departure from the doctrine of one's school of law in order to draw legal rulings from other Sunni schools.[447] *Talfīq* becomes an all-encompassing

[446] Wael B. Hallaq; Aharon Layish, "Talfīḳ," *Encyclopaedia of Islam,* Edited by: P. Bearman , Th. Bianquis , C.E. Bosworth , E. van Donzel and W.P. Heinrichs. Brill, 2008.
[447] This definition is based on N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 197; for similar definitions, see Albert Hourani, *Arabic Thought in the Liberal Age 1798-1939*

term that includes within it the more general *tatabbu‘ al-rukhaṣ*, referred to in the modern literature as *takhayyur*.[448]

Coulson cites an example of *talfīq* in modern Egyptian law, which creates a mix of Ḥanafī and Mālikī laws regarding the inheritance of non-Muslims. Ḥanafī law stipulates that non-Muslims have no rights of inheritance when one of the parties of inheritance is the subject of a Muslim state and the other is the subject of a non-Muslim state, whereas Mālikī law does not bar inheritance based on the place of domicile. The Egyptian law sets no bar on inheritance when there is a difference of domicile provided the laws of the non-Muslim state in question permitted reciprocal treatment, but if those laws do not provide the same treatment, the Ḥanafī prohibition is placed.[449]

As mentioned in the introduction, there are two types of *talfīq*. To pre-modern Muslims who did not have codes in the modern sense, whether or not the above example can be called *talfīq* depends on the single case of adjudication rather than the discrete statute. In Islamic legal theory, the test that the jurists used to determine whether or not *talfīq* is used is to see whether the resulting ruling is something that is not acceptable in any of the schools. Thus, in the above example in which a subject of a different country comes to an Egyptian court to inherit a relative, s/he is brought only to the Mālikī school if that state permits reciprocal treatment. Since the resulting ruling is accepted in the Mālikī school, no *talfīq* has taken place. Rather, this is an

(Cambridge: Cambridge University Press, 2003), 152-153; See also, J. N. D. Anderson, Law Reform in the Muslim World (London: Athlone Press, 1976): 52; See also Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 210.

[448] See introduction.

[449] N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 197-199.

example of *tatabbu‘ al-rukhaṣ,* unless of course that person had conducted a related transaction under another school. In other words, viewed as a discrete, written law, modern scholars felt justified in calling this sewing together of two doctrines in the same law, *talfīq*. But a pre-modern Islamic jurist would call it *tatabbu‘ al-rukhaṣ*, looking at the case from the judicial perspective as a single legal transaction, not as a hybrid code.

Another example Coulson cites is the application of the Ḥanbalī doctrine of stipulations in marriage contracts preventing the husband from taking a second wife.[450] A pre-modern Muslim jurist will call this *talfīq* only if the same contract contained elements of other schools besides the Ḥanbalī school or if there were two related transactions under two different schools. But if the couple enters into a marriage contract under Ḥanbalī law only, this does not constitute *talfīq*. Perhaps this understanding of *talfīq* among some modern western scholars springs from the nature of modern codes, where there is a discrete, written law that could combine elements of different schools. But to pre-modern jurists, modern Family Law in a country like Egypt crosses school boundaries, which means that it could be either *talfīq* or a simple *tatabbu‘ al-rukhaṣ* depending on the judicial perspective of the legal system, rather than the codification perspective.

[450] Fāṭima al-Zahrā ʿAbbās Aḥmad and Hilmī ʿAbd al-ʿAẓīm Ḥasan, *Qānūn al-Aḥwāl al-Shakhṣiyya lī al-Muslimīn wa al-Qarārāt al-Munaffidha lī Aḥkāmih wa Baʿḍ Aḥkām al-Maḥkama al-Dustūriyya al-ʿUliyā al-Ṣādira Bī Sha’nih* (Cairo: Al-Maṭābiʿ al-Amīriyya, 2009), 38.

Another example that Coulson cites, which is in fact an example of synchronic *talfīq*, is the case of inheritance between non-Muslims. Egyptian law allows a Jewish person domiciled in a non-Muslim state to inherit from a Christian relative living in a Muslim state. This would not be possible under Ḥanafī law because of the different domiciles of the relatives; nor would it be allowed under Mālikī law because the difference of religion would be a bar to inheritance.[451] Unlike the previous examples, this is a clear example of traditional *talfīq* because neither the Mālikīs nor the Ḥanafīs would allow this one case to be adjudicated in this manner. In classical legal theory, the Jewish person would not be granted inheritance by the Mālikī judge because his relative has a different religion. Neither will he be granted his inheritance under the Ḥanafī judge because of the different domicile, but he is granted his inheritance under Egyptian Family Law.

Similarly, Hourani states that *talfīq* is a legal concept that refers to permitting the judge to choose an interpretation of the law that best fit the circumstances, regardless of whether or not this interpretation came from his own legal school. He states that Abduh's *talfīq*, was a systematic comparison of all four schools of law.[452] Kerr, describes two types of *talfīq*, one "according to which an individual might follow one school in marriage procedure, another in determining inheritance, and still another in establishing a *waqf* or in performing prayers." The other type was performed in a single process, as is the case of a marriage where the Ḥanafī rules of consent and the Shāfiʿī

[451] N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 197-199.
[452] See Albert Hourani, *Arabic Thought in the Liberal Age 1798-1939* (Cambridge: Cambridge University Press, 2003), 152-153.

rules on the dowry are observed in the same contract.[453] Again, Kerr's first type is the pre-modern *tatabbu' al-rukhaṣ*, whereas the second type is *talfīq*. This begs the question: Did the two technical terms evolve in the writings of modern reformists such as Abduh and Riḍā, leading to this new conflation of the two terms? To my surprise, there is no evidence in the juristic literature that I have seen from the nineteenth and twentieth centuries that Muslim jurists used the terms interchangeably. The difference seems clear in Rashīd Riḍā's writings. When sent the following *fatwā*, Riḍā understands it as an example of *talfīq*:

> I performed my ritual ablution, but before I prayed I had bleeding in my mouth that was more than my saliva. Thus my ritual ablution was invalidated because I follow the school of the great *imām* (al-*Imām* al-A'ẓam) [Abū Ḥanīfa]. I wanted to pray according to the school of al-Shāfi'ī because that does not invalidate the ablution in his school. Can I do that? Also, what if this happened to me while I was entering into the mosque to pray and there was not enough time for redoing my ritual ablution or if I was only able to redo my ablution at home for health reasons. Will I then be allowed to pray following the school of al-Shāfi'ī? And what if I touched a woman?[454]

Riḍā defines *talfīq* as following several jurists in the same transaction.[455] When he is asked the following *fatwā*, he considers it an example of *tatabbu' al-rukhaṣ.*

> It is said that the layperson has no school. Is it permitted for him/her to follow each school in its *rukhaṣ*, even if that is motivated by a weak excuse?[456]

In the above *fatwā*, where Riḍā is asked about *tatabbu' al-rukhaṣ*, he never mentions *talfīq*. Instead, he refers to pursuing *rukhaṣ al-madhāhib*. His *fatwā* is that the

[453] Malcolm Kerr, Islamic Reform: The Political and Legal Theories of Muḥammad Abduh and Rashīd Riḍā (Berkeley: University of California Press, 1966), p.216-217.
[454] Muḥammad Rashīd Riḍā, *Fatāwā al-Imām Muḥammad Rashīd Riḍā* (Beirut: Dār al-Kitāb al-Jadīd, 1970), 1: 69.
[455] Riḍā, *Fatāwā,* I: 69.
[456] Riḍā, *Fatāwā,* 1: 239.

person can follow the easier path when there is a need, but otherwise he/she should not follow it.[457] In the above examples, one cannot sense any evolution in the meaning of those terms in Riḍā's discourse.

Riḍā even invokes a typical example of *talfīq*, which is cited in pre-modern sources, namely the endowment of moveable items to oneself. The Ḥanafī school allows the endowment of moveable items to oneself, which is a *talfīq* of Abū Yūsuf's opinion, which allows giving endowments (*waqf*) to oneself, but not in moveable items, and Muḥammad al-Shaybānī's opinion which allows the endowment of moveable items, but not to oneself.[458]

Similarly, later modern Muslim authors such as al-Hifnāwī, a twentieth-century jurist, seems to understand *talfīq* as the bringing together of a rule of law that no *mujtahid* teaches (*al-ityānū bi-kayfiyyatin lā yaqūlū bihā mujtahidun*), in the same way pre-modern scholars described the term. He cites the playful verses of Abū Nawwas as an example of *talfīq.*[459]

أحل العراقي النبيذ وشربه وقال حرامان المدامة والسكر

قال الحجازي الشرابان واحد فحلت لنا بين اختلافهما الخمر

The Iraqi had permitted date wine and its consumption

Forbidding only constant partaking and inebriation

The one from Hijāz said the two [drinks] are but one

[457] Riḍā, *Fatāwā,* 1: 69.

[458] See Muḥammad Rashīd Riḍā, "al-Muḥāwara al-Tāsi'a Bayna al-Muṣliḥ wa al-Muqallid," *al-Manār* 4 (1907-8): 84-131.

[459] See for instance, Muḥammad Ibrāhīm al-Ḥifnāwī, *Tabṣīr al-Nujabā'bī Ḥaqīqat al-Ijtihād wa al-Taqlīd wa al-Talfīq wa al-Iftā'* (Cairo: Dār al-Ḥadīth, 1995), 218, 262; see also Birgit Krawietz, "Cut and Paste in Legal Rules: Designing Islamic Norms with *Talfīq*," *Die Welt des Islams* 42, 1 (2002), 3-40.

Because of their disagreement, we are able to drink wine [460]

Abū Nawwās plays on the differences between the Ḥanafī and Shāfi'ī schools on *nabīdh* (date wine). Abū Ḥanīfa argued that it is not forbidden unless intoxication occurs. Al-Shāfi'ī said that *khamr* (grape wine) and *nabīdh* are the same, which makes both of them permissible for Abū Nawwās through *talfīq*. In other words, Abū Nawwās takes the Ḥanafī view that date wine is permitted, sews it together with the Shāfi'ī view that date wine is the same as grape wine. Thus, they are both permitted. Similarly, writing in 1964, Mohamed Aḥmad Faraj El Sanhouri and Abdul-Rahman Al-Qalhud describe it as "eclecticism in the same transaction."[461]

By drawing the distinction between *talfīq* and the simple crossing of school boundaries, known as *tatabbu' al-rukhaṣ*, we are able to better trace the evolution of the pragmatic use of legal pluralism in the legal system. After all, there are many scholars, especially in the late Ottoman period who accepted *tatabbu' al-rukhaṣ*, but were still unflinchingly opposed to *talfīq*. Disentangling those terms is important for understanding areas of continuity and discontinuity between the modern and pre-modern periods.

Modern attitudes towards utility: continuity or discontinuity

[460] Ḥifnāwī, *Tabṣīr*, 262, 282.
[461] Abdul-Rahman al-Qalhud, "Al-Talfeek and its Rules in Jurisprudence," *The First Conference of the Academy of Islamic Research* (1964): 75; Mohammad Ahmad Farag El Sanhouri, "Talfeek: Eclecticism in Rules of Rites," *The First Conference of the Academy of Islamic Research* (1964): 57-71.

The Ḥanafization efforts under Mehmed Alī did not affect legal theory. Jurists' attitudes mirrored the same divisions that we saw among Ottoman jurists. They continued to cross school boundaries, despite nineteenth-century Ḥanafization. On the theoretical level, a perusal of some of the legal works of the nineteenth and twentieth centuries shows continuity with the pre-modern period, as *tatabbuʿ al-rukhaṣ* and *talfīq* remained issues of debate.

The North African jurist ʿAbd al-Qādir al-Shafshawīnī, who died in Cairo in 1313/1895, argues that changing schools for the pursuit of the *rukhaṣ* in some transactions is permitted for people who do not have strength (*ahl al-quwwa*) and as long as there is no *talfīq*. People of strength are not supposed to change schools. This reference to people's strength is again reminiscent of Shaʿrānī's "*al-Mizān.*" Although strength is not explained by the author, it usually refers to physical and spiritual strength.[462] The idea is that a person in a town has a *muftī* that s/he consults with legal and spiritual matters. S/he is expected to follow that *muftī* in all transactions, whether they are harder or more lenient than the other schools. If that person has a weakness of heart or body, s/he can switch schools in pursuit of an easier ruling lest they should cease to follow the *Sharīʿa* altogether. This strand of thought, which supported *tatabbuʿ al-rukhaṣ* but not *talfīq*, was not uncommon among Ottoman jurists.

Even jurists who were opposed to *talfīq* presented it as subject to debate. The Shāfiʿī Abī Bakr Ibn al-Sayyid Muḥammad Shatā al-Dimyāṭī (d. 1310/1892), who was

[462] Muḥammad Saʿīd al-Bānī, *ʿUmdat al-Taḥqīq fī al-Taqlīd wa al-Talfīq* (Damascus: Maṭbaʿat Ḥukūmat Dimashq, 1923), 83.

opposed to the practice of *tatabbu‘ al-rukhaṣ* and *talfīq*, discusses the whole spectrum of views on the subject. He says that al-Ramlī described those who practice *tatabbu‘ al-rukhaṣ* as committing a smaller error (*ithm*), rather than a sin (*fisq*). Another view he presents allows *tatabbu‘ al-rukhaṣ* for people who have doubts. He also presents the view of Ibn al-Jamāl, which permits people to change their schools even if that is based on following their whims (*tashahhī*), as long as that did not lead to *talfīq*.[463] Similarly, the nineteenth-century Ḥanafī jurist Muḥammad al-ʿAbbasī al-Mahdī (d. 1315/1897), who held the position of *Muftī* of Egypt for no less than 49 years, argues that *talfīq* is forbidden, but does not fail to mention that there were other views that supported it.[464] His views are very similar to a dominant strand of thought in Ottoman jurisprudence, which allowed *tatabbu‘ al-rukhaṣ*, but not *talfīq*.

Al-Mahdī is asked for a *fatwā* about a layperson, who divorces his wife using the *ḥarām* formula, which is revocable in Shāfiʿī law, but not in Ḥanafī law. The layperson approaches a Shāfiʿī *muftī*, who issues the desired ruling, thus allowing them to return to the marriage. [465]

> Then he had an argument with her and divorced her using the triple-divorce formula. He had already sought a *fatwā* in the first forbidden divorce formula from someone who believes in the validity of the return to the marriage. Thus is he not allowed to change his *taqlīd* and pursuit of *fatwās*

[463] Abī Bakr Ibn al-Sayyid Muḥammad Shatā al-Dimyātī, *I‘ānat al-Tālibīn ‘alā Fatḥ al-Mu‘īn bi-Sharḥ Qurrat al-‘Ayn* (Cairo: Maktabit Muṣtafā al-Bābī al-Ḥalabī, 1938), IV: 216-218.
[464] Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and Fatwas of the Dār al-Iftā* (Leiden: Brill, 1997), 106-111.
[465] *Ḥarām* is a divorce formula, in which the husband tells his wife that she is *ḥarām* to him, which the Shāfiʿīs consider a *kināya* (metaphor) for divorce and therefore allow the person to return to the marriage if he intended it to be an irrevocable divorce. The Ḥanafīs, on the other hand, do not allow the husband that option. They consider this divorce irrevocable regardless of his intention. See ‘Abd al-Raḥmān al-Jazīrī, *al-Fiqh ʿalā al-Madhāhib al-Arbaʿa* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2006), 4: 865-7.

> because this has become his school in this transaction? Is the divorce effective and his wife cannot be in a marriage with him until she had taken another husband?[466]

The question gets more complicated when the husband later divorces her using the triple-divorce formula. Can the husband now switch to the view that considers the triple-divorce formula as one divorce, in order to avoid having his wife remarry someone else?[467] While al-Mahdī takes no issue with the first act, namely switching to the Shāfiʿī school to avoid the first irrevocable divorce, he disallows a second change of school because that would lead to *talfīq*.[468]

"He is not permitted to change after this incident because this would constitute *talfīq*, which is not permitted, although Ibn al-Humām and others allowed it," he adds.[469] Al-Mahdī has also on a different occasion ruled that *fatwā*s issued by non-Ḥanafī *muftī*s had no effect because only Ḥanafī law was applicable.[470] Perhaps one way to reconcile this discrepancy in al-Mahdī's views is to argue that the reason *muftī*s are not allowed to issue such *fatwā*s is attributed to *siyāsa Sharʿīyya*,[471] in which the ruler limits what otherwise would be permitted. In other words, while he believes that *tatabbuʿ al-rukhaṣ* is permitted, he believes that the extra-*Sharīʿa* limitations imposed by the ruler are

[466] Muḥammad al-Abbāsī al-Mahdī, *al-Fatāwā al-Mahdīyya fī al-Waqā'iʿ al-Miṣriyya* (Cairo: al-Maṭbaʿa al-Azharīyya, 1883), 1: 216.
[467] The view that the triple divorce formula is not a triple divorce if uttered in the same session is only held by some Companions and some of the *tabiʿīn* generation (the generation following the Prophet's). None of the four school shares this view. In the modern period, some jurists went outside of the four schools to count such formula as a revocable divorce. See Muḥammad al-Abbāsī al-Mahdī, *al-Fatāwā al-Mahdīyya fī al-Waqā'iʿ al-Miṣriyya* (Cairo: al-Maṭbaʿa al-Azhariyya, 1883), 4: 867.
[468] Al-Mahdī, *al-Fatāwā*, 1: 216.
[469] Al-Mahdī, *al-Fatāwā*, 1: 216.
[470] See Rudolph Peters, "Muḥammad al-ʿAbbāsī al-Mahdī (D. 1897), Grand Muftī of Egypt, and his al-Fatāwā al-Mahdiyya," *Islamic Law and Society* 1, 1 (1994): 80.
[471] This refers to rules based on extra-*Sharīʿa* justifications.

binding. This description of the status of *talfīq* as subject to debate is evidence that the Ottoman jurists' efforts were fruitful in changing the status of *talfīq* as an issue of *ikhtilāf.*

One way the supporters of *tatabbu' al-rukhaṣ* explained away the opposition of the early scholars is by focusing on the motivation behind pursuing the easier paths. The Shāfiʿī jurist Aḥmad al-Ḥusaynī (d. 1271/1914) presents both sides of the debate. Then he singles out the forbidden type as when the choice is motivated by frivolity (*talahhī*), such as the case of a Ḥanafī who follows al-Shāfi'ī in the permission of playing chess or a Shāfi'ī who follows Abū Ḥanīfa in the drinking of *muthallath.*[472] The reason for forbidding picking those views is that frivolity itself is forbidden. In other words, whether *tatabbu' al-rukhaṣ* is permitted or not depends on the issue in question. To him, Ibn Ḥanbal's general opposition to *tatabbu' al-rukhaṣ* only refers to this type.[473] He argues that the person who follows the easier paths is not sinful. In the manner of the Ottoman jurists, he explains away Ibn Ḥazm's anti-pragmatic views by saying that he was referring to those who follow the easier rulings in their *ijtihād*, not in *taqlīd.*[474] Muḥammad Munīb al-Hāshimī (d.1334/1915) engages the same pre-modern authorities

[472] A drink that is brewed until two thirds of its volume evaporates, which refers to drinks that become intoxicating when concentrated in this manner.
[473] Aḥmad al-Ḥusaynī, *al-Qawl al-Sadīd fī Ḥukm al-Ijtihād wa al-Taqlīd.* MS 507 Uṣūl Fiqh, folio 23, microfilm # 38422.
[474] Al-Ḥusaynī, *al-Qawl*, folio 25-26.

in his argument for the validity of *talfīq* and *tatabbu‘ al-rukhaṣ*, showing a lack of consensus on the subject.[475]

The *Muftī* of Egypt, 1914-1920, Muḥammad Bakhīt (d. 1354/1935) issued a *fatwā* in 1919, in which he presents *talfīq* as subject to *ikhtilāf* among jurists from all the schools. He focuses in his defense of the practice of *talfīq* on the issue of whether or not it is permitted to break the multiple *ijmāʿ* (consensus) of a period. In other words, when there are two opinions on one issue in a generation of scholars, is it possible to come up with a third view, thus breaking this multiple consensus? He sees no harm in coming up with a third view, that is, the ruling composed of the two schools together known as *talfīq*. For example, when a Mālikī performs his/her ritual ablution according to the Mālikī school, but washes only part of his head, which is only permitted in the Shāfiʿī school, this mixing of the two schools represents a third opinion, which Bakhīt allows as long as the resulting third ruling does not breach well-established regular consensus.[476] As we saw above, two *muftī*s had contradictory views on *talfīq*, which is evidence that the issue was never really resolved one way or another, even in the modern period.

In 1923, the twentieth-century Syrian jurist Muḥammad Saʿīd al-Bānī (d. 1351/1933) published a book entitled *ʿUmdat al-Taḥqīq fī al-Taqlīd wa al-Talfīq*, in which he discusses views on the two pragmatic approaches. In his discussion of those

[475] Muḥammad Munīb al-Hāshimī, *al-Qawl al-Sadīd fī Aḥkām al-Taqlīd.* MS Dār al-Kutub, 197 Uṣūl Taymūr, folio 4a-6b, microfilm # 23224.
[476] Muḥammad Bakhīt, *Fatāwā al-Azhar wa Dār al-Iftā' fī Alf ʿĀm* (accessed online 3/5/2011) http://www.kl28.com/fat1r.php?search=3169

approaches, he draws on al-Shaʿrānī's *Mizān,* discussed in chapter I. He cites many examples of contradictory Prophetic rulings, which he says do not constitute contradictions because the Prophet treated people according to their abilities. The Companions were also sensitive to different levels of strength along the continuum of *tashdīd* (strictness) and *takhfīf* (leniency). He invokes Shaʿrānī's argument that many former Shaykhs had issued *fatwā*s based on the four schools of law in the manner that suits the state of the *fatwā* seeker. After all, laypeople are not bound by a school because they do not understand the texts and rules of the different schools. Al-Bānī makes the case for *tatabbuʿ al-rukhaṣ* by saying that the schools represent different Sharīʿas that the Prophet was sent with, which are equally valid.[477]

In his discussion of *talfīq*, al-Bānī admits that there has been a disagreement among jurists over its status, referring to the Ottoman controversy over the topic. He says that one is allowed to follow the view of the *mutaʾakhkhirīn* (later authorities), who permit the practice of *talfīq*. Although he respects the *salaf* (earlier authorities), he is put off by the views of Ibn Taymya and his student Ibn al-Qayyim and prefers the views of the *mutaʾakhkhirīn*. He invokes the same Ottoman arguments in support of *talfīq* such as the story about al-Shāfiʿī praying with hair on his clothes and Abū Yūsuf being informed after praying about a rat found in the water with which he performed his ritual ablution.[478] He also argues that if we outlawed the practice of *talfīq*, we would be judging the rituals and *muʿāmalāt* (legal transactions) of laypeople as invalid since

[477] Muḥammad Saʿīd al-Bānī, *ʿUmdat al-Taḥqīq fī al-Taqlīd wa al-Talfīq* (Damascus: Maṭbaʿat Ḥukūmat Dimashq, 1923), 14-38.
[478] For a detailed discussion of those episodes used in support of *talfīq*, see chapter 2.

almost all of them exercise *talfīq*. He adds that women use *talfīq* more than men, especially in their ritual ablutions in public bathrooms, where, for instance, they use combs made out of bones, which is an issue of disagreement among the four schools. They even sometimes reuse water that falls in the bath to perform their ritual ablution.[479] We can see similarities between his approach and that of the seventeenth-century view expressed by the Ḥanbalī Marʿī al-Karmī al-Maqdisī (d. 1033/1623). They both engage people's practice, but while al-Bānī validates *talfīq* in order not to render people's practice invalid, al-Maqdisī uses practice as evidence of the validity of *talfīq*.[480]

Al-Bānī then quotes the Damascene jurist Jamāl al-Dīn al-Qāsimī (d. 1332/1914) as saying that the term *talfīq* was not used in the early period. It did not appear until the fifth century A.H. Al-Qāsimī argues that there is nothing wrong with mixing different rulings in the same transaction or ritual. It is permitted to perform major ritual ablution (*ightisāl*) with an amount of water measuring less than two jars (*qulla*), and with a drop of wine in it according to the Mālikī school and without rubbing according to the Ḥanafī school. It is also permitted to wash only some of the hair during ritual ablution according to the Shāfiʿī school, even if the person bleeds a little bit and prays according to the Ḥanafī school, in which such bleeding does not invalidate the ablution. He concludes "many jurists of all schools have permitted *talfīq*."[481]

[479] Muḥammad Saʿīd al-Bānī, *ʿUmdat al-Taḥqīq fī al-Taqlīd wa al-Talfīq* (Damascus: Maṭbaʿat Ḥukūmat Dimashq, 1923), 91-106.
[480] See chapter 2 of this study.
[481] Al-Bānī, *ʿUmdat*, 94-7.

In his book published in 1923, al-Bānī also addresses modern legislation. He does not object to the contemporary attempts coming out of Egypt in the early 1920s that are aimed at unifying the schools into one legal system, in which the most suitable opinions are selected from the four schools in matters of personal status.[482] This Egyptian attempt at selection from the different schools is aimed at human happiness and the welfare (*maṣlaḥa*) of the family, he argues. To him, the use of *talfīq* by mixing together the different schools is also permitted to enable weak people in their legal transactions. Otherwise, if they are left with stricter rulings, they might give up their *sharīʿa* obligations altogether.[483]

Al-Bānī was even supportive of exercising *taqlīd* of jurists other than the four *imām*s for the welfare of society. He believes that the political authority should call on scholars to find the best laws that suit the times. It is permissible for them to come up with laws that lie outside of the four schools of law and aim at human happiness. Then scholars should explain the reasons for their choice of this opinion and this view becomes the law and *fatwā*. Other views should be rejected lest there should be chaos. He then argues against school fanatics (*mutaʿaṣṣib li-madhhab*) who wish to abide by their own schools and would never dare go outside of the realm of the four schools. He takes his argument a step further by contending that the choice of opinions from outside of the four schools would be better than resorting to man-made laws.[484]

[482] This is a reference to Law 25 of 1920, Law 31 of 1910 and perhaps also to Law 56 of 1923.
[483] Al-Bānī, *ʿUmdat*, 44-70.
[484] Al-Bānī, *ʿUmdat*, 85-90.

Those fanatics that al-Bānī was referring to, will some years later launch an attack on the Egyptian government for passing the Family Law of 1929. Three Azharī scholars jointly wrote a treatise outlining their objections to the new law. The three scholars were opposed to the use of *talfīq*, but not to *tatabbu' al-rukhaṣ*.[485] Another objection is the new law used the weak opinions of the schools and drew opinions from outside the four schools, all of which are views that were supported by some of the modern jurists of the time. They cited Article 25 of the law, stipulating that the mother can keep the custody of her children beyond the seven years prescribed by the Ḥanafī school as one example. In this law, legislators found their authority in some peripheral view within the Ḥanafī school.[486] In article 6 of the new law, a divorce counts as one divorce even if the husband states a higher number. The legislators cited some companions of the Prophet as holding this view, including ʿAlī Ibn Abī Tālib, Ibn Masʿūd, and ʿAbd al-Raḥmān Ibn ʿAwf. The Azharī scholars did not object to the *tatabbu' al-rukhaṣ* involved, but to completely avoiding the four schools, even if the opinions belonged to the companions of the Prophet.[487] The contradictory views of both al-Bānī and the three Azharī scholars have their intellectual roots in the Ottoman period, traceable to debates about crossing school boundaries.

[485] Maḥmūd al-Dīnārī et al, *Mudhakkira Bī al-Radd 'Alā Mashrū' al-Qānūn al-Khāṣ bī Ba'ḍ Aḥkām al-Aḥwāl al-Shakhṣiyya* (Cairo: Maṭba'it al-Taḍāmun al-Akhawī, 1929), 6, 7. The three scholars are Maḥmūd al-Dīnarī, Muḥammad al-'Anānī and Ḥusayn al-Bayyūmī.
[486] Al-Dīnārī et al, *Mudhakkira,* 56.
[487] Al-Dīnārī et al, *Mudhakkira,* 33. This view is again similar to a popular strand of thought within Ottoman legal theory, in which following the opinions of Companions over that of one of the four schools was rejected. See for example, Yūsuf al-Ardabīlī, *al-Anwār lī A'māl al-Abrār* (Cairo: Mu'assasat al-Ḥalabī wa Shurakāh, 1970), 2: 609.

Muḥammad Rashīd Riḍā, one of the leaders of the Ṣalafiyya movement,[488] (d. 1354/1935) presents the differences of opinion over *talfīq* in his *fatāwā*, siding with the supporters whose evidence he finds stronger. He goes as far as saying that *talfīq* is part and parcel of the Ḥanafī school where opinions often consist of more than one jurist's view.[489] He presents *talfīq* as subject to debate (*ikhtilāf*) among jurists, arguing that it is essential for *taqlīd*.

More recently, other opponents of the pragmatic use of the quadruple system, such as the contemporary Ḥanbalī jurist 'Abd al-'Azīz Ibn Ibrāhīm al-Dukhayyil, present the issue as subject to *ikhtilāf* among earlier jurists.[490] Al-Dukhayyil follows one of the dominant trends in the Ottoman period, by forbidding *talfīq*, while allowing *tatabbu' al-rukhaṣ* when there is a need (*ḥaraj*). In the case of need, people are permitted to search in the *fatāwā* of scholars for a way out (*makhraj*) of their problem. He invokes the same pre-modern arguments, for instance, by trying to explain away the story of Abū Yūsuf finding out that there was a rat in the water he used for ritual ablution, yet he did not repeat his prayer. Abū Yūsuf opted for following the school of al-Shāfi'ī, under which his ablution is valid. Al-Dukhayyil argues that Abū Yūsuf did not exercise *taqlīd* in following the Shāfi'ī school, but it was rather his own *ijtihād*. Therefore, it is not an

[488] One of the important characteristics of the Ṣalafiyya movement in the nineteenth century is that there was no shying away from the use of *talfīq* even in matters of theology. Muḥammad ʿAbduh (1849-1905), for instance, not only incorporates some of the positions of Maturidism in his predominantly Ashʿarī theology, but he even draws on Muʿtazilism. Muḥammad ʿAbduh, *Risālat al-Tawḥīd* (Cairo: Dār al-Hilāl, 1980); See also L. Gardet "ʿIlm al-Kalām," *Encyclopaedia of Islam*. Edited by: P. Bearman , Th. Bianquis , C.E. Bosworth , E. van Donzel and W.P. Heinrichs. Brill, 2008.

[489] Muḥammad Rashīd Riḍā, *Fatāwā al-Imām Muḥammad Rashīd Riḍā* (Beirut: Dār al-Kitāb al-Jadīd, 1970), 3: 385.

[490] 'Abd al-'Azīz Ibn Ibrāhīm al-Dukhayyil, *al-Taḥqīq fī Buṭlān al-Talfīq Naṣṣ 'Alā Futyā lil-Shaykh Mar'ī al-Ḥanbalī* (Riyadh: Dār al-Ṣumay'ī, 1998), 7-9, 136.

example of *talfīq*.[491] Those same arguments are identical to the juristic writings of the Ottoman period, as discussed in the first two chapters.

The contemporary Turkish scholar Fethullah Gulen permits *tatabbuʿ al-rukhaṣ* but not *talfīq,*[492] whereas the contemporary Saudi jurist ʿAbd al-ʿAzīz ʿAbd Allāh al-Rājiḥī cites the two views on *tatabbuʿ al-rukhaṣ*, siding with the opponents. He extensively quotes Ibn Taymya's opposition to it, but adds that some later scholars (*muʾakhkhirīn*) permitted it. Despite his personal opposition to the practice, he admits that it is subject to disagreement.[493]

Not only did jurists from the nineteenth and twentieth centuries understand the distinction between *talfīq* and *tatabbuʿ al-rukhaṣ* in the same manner as seventeenth and eighteenth-century jurists, the same spectrum of views was present in both periods. Nineteenth and twentieth-century scholars invoked the same arguments used by their earlier counterparts, with both supporters and opponents invoking mostly Ottoman authorities on the subject. They did not present the issue as a break with the juristic past, but as continuous with the Ottoman period. This continuity on the theoretical level was contradicted with a rupture in juristic practice in the nineteenth century under the rule of Mehmed Alī, followed by a return to legal pluralism in the

[491] ʻAbd al-ʻAzīz Ibn Ibrāhīm al-Dukhayyil, *al-Taḥqīq fī Buṭlān al-Talfīq Naṣṣ ʻAlā Futyā lil-Shaykh Marʻī al-Ḥanbalī* (Riyadh: Dār al-Ṣumayʻī, 1998), 8, 57.
[492] Ihsan Yilmaz, "Inter-Madhhab Surfing, Neo-Ijtihad, and Faith-Based Movement Leaders," in *The Islamic School of Law: Evolution, Devolution and Progress*, ed. Peri Bearman, Rudolph Peters and Frank E. Vogel (Cambridge, Massachusetts, Harvard University Press, 2005), 201.
[493] ʿAbd al-ʿAzīz ʿAbd Allāh al-Rājiḥī, *al-Taqlīd wa al-Iftāʾ wa al-Istiftāʾ* (Riyadh: Kunūz Ishbīliya, 2007), 165-168.

codification of personal status law, as I will show in the next section dealing with modern legal practice.

Legal transformations in the nineteenth and twentieth centuries

Mehmed Alī initiated policies in the nineteenth century intensifying state control and intervention into the lives of the population.[494] His policies, which resulted in widespread modernization, affected institutions such as the army and the judiciary.[495] As we saw above, Ḥanafism had a default status in the seventeenth and eighteenth centuries, with most cases being brought to Ḥanafī judges unless there is a pragmatic reason to bring them to other judges. In the practice of nineteenth-century Egypt, this situation was changing rapidly under Mehmed Alī, as he embarked on a process of Ḥanafization,[496] in which there was an increasingly rigid adherence to the Ḥanafī school. This represented clear departure from the legal pluralism of the seventeenth and eighteenth centuries. This was partly the result of Ottoman decrees requiring Egyptian judges to issue rulings in conformity with Ḥanafī law and also the

[494] Mine Ener, "Prohibitions of Begging and Loitering in Nineteenth-Century Egypt," *Die Welt des Islams* 39, 3 (1999): 319-339. For more on the centralization efforts of Mehmed Alī, see Khaled Fahmy, *All the Pasha's Men: Mehmed Alī, his Army, and the Making of Modern Egypt* (Cairo; New York: American University in Cairo Press, 1997).

[495] For a discussion of how reforming the army, through different laws, regulations and manuals, helped modernize Egypt, see Khaled Fahmy, *All the Pasha's Men: Mehmed Alī, his Army, and the Making of Modern Egypt* (Cairo; New York: American University in Cairo Press, 1997).

[496] The term Ḥanafization was used by Amira Sonbol to refer to the wide utilization of Ḥanafī law in modern Egyptian personal status and family laws. See Amira Sonbol, "Women in Shariʿah Courts: A Historical and Methodological Discussion," *Fordham International Law Journal* 27, 1 (2003): 238. Kenneth Cuno of the University of Illinois has extended this term, in private conversations, to refer to Mehmed Alī's efforts in the nineteenth century. I believe that the term can only be used to refer to Mehmed Alī's process of homogenization, but not to the modern codification of personal status law because it mplies (1) moving closer towards the Ḥanafī school as compared to the prior period (2) Minimizing the role of the other schools in the new system. Neither of those is true for the codification of Sharīʿa. As I will show in the rest of this chapter, the twentieth century saw a return to Ottoman legal pluralism, after Mehmed Alī's experiment with Ḥanafization.

influence of modern perceptions of the unity of law. Throughout the nineteenth century, there was a strong tendency to exclude non-Ḥanafīs from judgeships. A Ministry of Justice decree from December 10, 1891 requires all judges, *muftī*s and employees of the Public Prosecution to be Ḥanafīs.[497]

Prior to Mehmed Alī's Ḥanafization, Mālikī and Shāfiʿī *muftī*s attended cases in the court and any *fatwā* issued according to one of the four schools by a trustworthy *muftī* was accepted. Mehmed Alī gradually transformed the legal system rendering it such that there was one Ḥanafī state *muftī* resident in the court, whose *fatwā* had to be observed. The culmination of this narrowing of the pluralistic Sunni legal system occurred in 1839, when the Turkish governor of the Qina province sent a letter to the Mālikī *muftī* in Isna indicating that *fatāwā* should only be issued by the Ḥanafī *muftī* resident at the court and that there was no need to bring non-Ḥanafī *fatāwā* to court since the official judge was Ḥanafī and ruled only according to his own official school.[498]

In addition to Mehmed Alī's Ḥanafization efforts, he engaged in efforts to centralize and rationalize the government apparatus through extra-*Sharīʿa* legislation. In 1829-1830, for instance, he issued his first criminal legislation, as well as the

[497] Baber Johansen, "The Constitution and the Principles of Islamic Normativity Against the Rules of Fiqh: A Judgement of the Supreme Constitutional Court of Egypt," In *Dispensing Justice in Islam: Qādīs and their Judgments,* ed. Muhamamd Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 171; Ron Shaham, "Shopping for Legal Forums: Christians and Family Law in Modern Egypt," In *Dispensing Justice in Islam: Qādīs and their Judgments,* ed. Muhamamd Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 454-7.

[498] Zeinab A. Abul-Magd, *Empire and its Discontents: Modernity and Subaltern Revolt in Upper Egypt 1700-1920* (PhD Dissertation, Georgetown University, 2008), 133-4. But even as early as 1802, after the expulsion of the French troops from Egypt, non-Ḥanafī judges were said to have been removed from courts in Egypt. See Rudolph Peters, "What does it Mean to be an Official Madhhab?" in *The Islamic School of Law: Evolution, Devolution and Progress*, ed. Peri Bearman, Rudolph Peters and Frank E. Vogel (Cambridge, Massachusetts, Harvard University Press, 2005), 157.

Agricultural Code (Qānūn al-Filāḥa) of 1830 and the Penal Code of 1945 (Qānūn al-Muntakhabāt).[499] After Mehmed Alī's reign, there was a continuation of reforms of what was called in nineteenth-century France the "moral order," which referred to the introduction of a European legal system in the modern sense of "a community's code of rules." This is the realm of meaning, as distinct from the material world, or the strctrure that exists in the world-as-exhibition.[500] Not long after Mehmed Alī's reforms, the Ottoman Empire introduced its own "moral order" reforms during the Tanzimat period (1826-1878), in which new national courts were established and western style codes were adopted in commercial law (1850), penal law (1858), and commercial procedure (1861).[501] In the post-Mehmed Alī period, the Egyptian legal system also went through important developments, in which Islamic law was restricted to the realm of personal status law. In 1876, the mixed courts were created, followed by the national courts in 1883. In the period betwen 1880 and 1897, modern *Sharīʿa* courts were established to deal with litigation in family matters.[502] This system remained effective until the *Sharīʿa* courts were abolished in 1956.[503]

[499] Rudolph Peters, "'For His Correction and as a Deterrent Example for Others': Meḥmed ʿAlī's First Criminal Legislation (1829-1830)," *Islamic Law and Society* 6, 2 (1999): 164-192; Mine Ener, "Prohibitions of Begging and Loitering in Nineteenth-Century Egypt," *Die Welt des Islams* 39, 3 (1999): 319-339.
[500] Timothy Mitchell, *Colonising Egypt* (Berkeley and Los Angeles, California: University of California Press, 1988), 100-102.
[501] David Bonderman, "Modernization and Changing Perceptions of Islamic Law," *Harvard Law Review* 81, 6 (1968): 1177.
[502] See for instance, Amira Sonbol, "Women in Shariʿah Courts: A Historical and Methodological Discussion," *Fordham International Law Journal* 27, 1 (2003): 230.
[503] David Bonderman, "Modernization and Changing Perceptions of Islamic Law," *Harvard Law Review* 81, 6 (1968): 1182.

The Ottomans were able to codify the *Sharīʿa* in a civil code known as the Majelle (1869-1876), while in Egypt, the *Sharīʿa* remained uncodified until the twentieth century. There was an attempt in Egypt by Muḥammad Qadrī Pasha to introduce an Egyptian *Sharīʿa* code similar to the Ottoman Majelle in the nineteenth century, but it never attained an official status.[504] It was not until the twentieth century that a partial codification of the *Sharīʿa* was achieved as discussed below, with a new role for Ḥanafism, quite different from Mehmed Alī's Ḥanafization efforts.

The role of Ḥanafism in twentieth-century Egyptian codification

After Mehmed Alī's Ḥanafization, a partial return to seventeenth and eighteenth-century pragmatic legal pluralism was achieved through the modern codification of *Sharīʿa* in the twentieth century. According to Article 280 of Law 31 of 1910, all family legal rulings should be based on the *rājiḥ* of the school of Abū Ḥanīfa, except in cases where there is a stipulation otherwise.[505] That "stipulation otherwise" refers to the targeted amendments of Ḥanafī law that drew upon the other schools pragmatically to deal with specific social problems. As an explanatory memorandum presented by the Ministry of Justice states, there are some rulings that are not based on the *rājiḥ* of the Ḥanafī school, or do not belong to that school at all. One finds many

[504] Aharon Layish, "The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt des Islams* 44, 1 (2004): 89-92.

[505] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad and Hilmī ʿAbd al-ʿAẓīm Ḥasan, *Qānūn al-Aḥwāl al-Shakhṣiyya lī al-Muslimīn wa al-Qarārāt al-Munaffidha lī Aḥkāmih wa Baʿḍ Aḥkām al-Maḥkama al-Dustūriyya al-ʿUliyā al-Ṣādira Bī Shaʾnih* (Cairo: Al-Maṭābiʿ al-Amīriyya, 2009), 23; Aḥmad Naṣr al-Jundī, *Mabādiʾ al-Qaḍāʾ al-Sharʿī fī Khamsīna ʿĀman* (Cairo: Dār al-Fikr al-ʿArabī, 1978), 378, 770.

such examples of those rulings, which fall in the realm of *tatabbuʿ al-rukhaṣ*.[506] Since Ḥanafism was the official school, the choice of easier rulings meant either the choice of a weak view within Ḥanafism other than the *rājiḥ* view or the choice of a view from a completely different school. Both these techniques were accepted in the modern period in the same way *tatabbuʿ al-rukhaṣ* was accepted in Ottoman courts. Egyptian legislators wrote personal status laws with a view to solving specific social problems, as we will see below.

Law No. 25 of 1929

In an explanatory memorandum delineating the motivation behind the enactment of law No. 25 of 1929, the Ministry of Justice explains that Muslim women are constantly threatened with divorce. Sometimes neither the husband nor wife knows when the divorce might occur, as in the example when the husband uses the conditional divorce formula. This was caused by the views of the majority of jurists who accept conditional and triple divorce. Thus, the Ministry decided to narrow down the space for divorce as exercised by the man, even if it had to follow jurists from outside of the four schools of law. There is no *Sharʿī* reason, the Ministry argued, not to take the opinions of jurists from outside of the four schools.[507]

[506] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad and Hilmī ʿAbd al-ʿAẓīm Ḥasan, *Qānūn al-Aḥwāl al-Shakhṣiyya lī al-Muslimīn wa al-Qarārāt al-Munaffidha lī Aḥkāmih wa Baʿḍ Aḥkām al-Maḥkama al-Dustūriyya al-ʿUliyā al-Ṣādira Bī Sha'nih* (Cairo: Al-Maṭābiʿ al-Amīriyya, 2009), 23.

[507] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad and Hilmī ʿAbd al-ʿAẓīm Ḥasan, *Qānūn al-Aḥwāl al-Shakhṣiyya lī al-Muslimīn wa al-Qarārāt al-Munaffidha lī Aḥkāmih wa Baʿḍ Aḥkām al-Maḥkama al-Dustūriyya al-ʿUliyā al-Ṣādira Bī Sha'nih* (Cairo: Al-Maṭābiʿ al-Amīriyya, 2009), 16.

The modern view of the centrality of the nuclear family and the need to preserve it led modern legislators to find ways to limit the husband's power of divorce, which they saw as sometimes reaching the level of frivolity. This was done through *tatabbuʿ al-rukhaṣ*, from within and without the four schools. For instance, divorce uttered under the influence of alcohol is not valid. This was based not on the official Ḥanafī school, but on the opinion of Aḥmad Ibn Ḥanbal and some of the companions. Similarly, a divorce issued under duress is not valid. This was based on the views of the Shāfiʿīs, Mālikīs and Ḥanbalīs. Conditional divorce is not valid, based on the views of ʿAlī Ibn Abī Ṭālib, Shurayh and al-Ḥakam Ibn ʿUtayba.[508] Art. 3 of law 25 of 1929 stipulates that a double or triple divorce counts as only one. This is not the *rājiḥ* of the Ḥanafī school nor any other school for that matter. Rather, it is based on the opinion of some companions such as Ibn Masʿūd, ʿAbd al-Raḥmān Ibn ʿAwf and is a peripheral view in the Mālikī, Ḥanbalī and Ḥanafī schools.[509]

There are situations in which *tatabbuʿ al-rukhaṣ* leads to *talfīq* as in Art. 4 regarding the *kināyāt al-ṭalāq* (divorce metaphors).[510] These metaphors refer to utterances that have a double meaning, one of which signifies divorce. The law follows the view of the Shāfiʿīs and Mālikīs that divorce in such cases is not valid unless the

[508] Conditional divorce is a type of divorce in which the husband makes the divorce conditional upon a certain action or state. An example is when a man tells his wife that if she leaves the house, she is divorced. Fāṭima al-Zahrāʾ ʿAbbās Aḥmad and Hilmī ʿAbd al-ʿAẓīm Ḥasan, *Qānūn al-Aḥwāl al-Shakhṣiyya lī al-Muslimīn wa al-Qarārāt al-Munaffidha lī Aḥkāmih wa Baʿḍ Aḥkām al-Maḥkama al-Dustūriyya al-ʿUliyā al-Ṣādira Bī Sha'nih* (Cairo: Al-Maṭābiʿ al-Amīriyya, 2009), 16-17.

[509] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad, *Qānūn*, 17; Aḥmad Naṣr al-Jundī, *Mabādi' al-Qaḍā' al-Sharʿī fī Khamsīna ʿĀman* (Cairo: Dār al-Fikr al-ʿArabī, 1978), 662.

[510] An example of divorce metaphors is when the husband tells his wife, "I have no desire for you," or "we are through," without explicitly using the *ṭalāq* (divorce) term.

person intends the utterance to signify divorce. However, the definition of what constitutes *kināya* is based on the Ḥanafī school, leading to *talfīq*.[511] In other words, an utterance that is not a *kināya* in the other schools, not only will be considered a *kināya*, but also will restrict divorce to the intention of the husband, rather than the utterance itself.

In addition to limiting the husband's frivolous use of divorce, modern legislators saw the need to give women some power over their own destiny. In the early twentieth century, before wife-initiated divorce known as *khulʿ* was recognized by law as an accepted form of divorce in modern legislation, an Egyptian woman's rights to divorce were surprisingly fewer than her Ottoman counterparts. This gave rise to the occasional abandonment of Ḥanafī rules in favor of widening the grounds for divorce for women, a social need that the law recognized. One of the common ways for a woman to seek a divorce against the husband's will was through a claim of *ḍarar* (harm) caused by the husband toward his wife.[512] However, the Ḥanafī school is perhaps the least beneficial to women in this regard. The Mālikī definition of *ḍarar* is the widest out of all the schools, hence the use of Mālikī law to facilitate divorce. Following the Mālikī school, the grounds for divorce are widened in Art. 6 of law 25 of 1929, which gives women the right to divorce against the husband's will in the case of *ḍarar*. This *ḍarar* ranges from verbal abuse to refusing to talk to the wife to homosexuality.[513] In a case

[511] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad, *Qānūn*, 17.
[512] See for instance, Aḥmad Naṣr al-Jundī, *Mabādiʾ al-Qaḍāʾ al-Sharʿī fī Khamsīna ʿĀman* (Cairo: Dār al-Fikr al-ʿArabī, 1978), 189-196.
[513] Al-Jundī, *Mabādiʾ*, 190-8.

brought to a Cairo court in 1930, a woman, seeking a divorce against her husband who had verbally abused her, was able to obtain it.[514] Similarly, a case was brought to the Court of Karmūz in which the husband was caught in an uncompromising position with a man. The court granted the wife the divorce, based on the Mālikī principle that if the husband prefers another woman over his wife, she can seek a divorce. The court argued that, by analogy, preferring a man over her also represents *ḍarar.*[515]

Art. 12, 13, 14 are also based on the Mālikī school, in which the definition of *ḍarar* also includes the husband's absence for a long period of time without providing maintenance. But even if he provided her with maintenance, his abandonment of their spousal bed (*hajr fī al-maḍjaʿ*) is sufficient for her to be in *ḍarar*. A memorandum issued by the legal establishment further explains that what matters is not whether the husband is to blame for his absence, but the establishment of the occurrence of *ḍarar* regardless of whether the husband had any control over his absence.[516]

Art. 15, Law 25 of 1929 also departs from the official Ḥanafī school, which allows the attribution of paternity to a late or divorced husband if the couple had been separated for no more than two years. This Ḥanafī view assumes that the period of gestation can be up to two years. The legal establishment decided to follow the view of modern doctors, but also be cautious, eventually setting the period at 365 days. This

[514] Al-Jundī, *Mabādi'*, 202-5, Case No. 1414.
[515] Al-Jundī, *Mabādi'*, 202-5, Case No. 364.
[516] Al-Jundī, *Mabādi'*, 215-6; Fāṭima al-Zahrāʾ ʿAbbās Aḥmad, *Qānūn*, 18-19.

departure from the Ḥanafī school was not done in favor of another school but based on modern medical knowledge.[517]

As we saw in the previous chapters, the very use of different school rulings in the same law does not necessarily by itself constitute *talfīq*. It only occurs when a ruling in litigation is based on two schools. Consider the following example from a case brought to the Court of Asyūṭ in 1944. A wife gives up her rights to the delayed dower and the *ʿidda* maintenance in exchange for a divorce. The husband divorces her accordingly. The question is will this divorce still be valid if there is no evidence of the sum of money given up by the wife? The court takes the Shāfiʿī view that such a divorce is valid even in the absence of such evidence.[518] This same couple were married under Ḥanafī law and therefore their divorce under a different school constitutes diachronic *talfīq*. If, hypothetically, the husband then uttered a triple divorce, the law, which is based on the peripheral view of some Ḥanbalīs and Mālikīs, would count this as one divorce. This would constitute synchronic *talfīq* between this Shāfiʿī view and the peripheral view of the Ḥanbalīs and Mālikīs because the three schools would have been used in those linked transactions.

Another example of *talfīq* can be found in Art. 16, Law 25 of 1929, which stipulates that if the husband does not have enough financial resources, the maintenance is reduced to basic necessities.[519] This is based on Shāfiʿī law, even though

[517] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad, *Qānūn*, 19-20.
[518] Al-Jundī, *Mabādiʾ*, 666-8.
[519] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad, *Qānūn*, 8-9.

the other articles are based on Mālikī law. In the case that a woman goes to court asking for a divorce because he did not provide her with basic necessities, the judge under modern Egyptian law would divorce her, using the Shāfiʿī definition of maintenance and the Mālikī law that allows for such a divorce for lack of maintenance. Thus, in the single instance of divorce, two schools were used.

Although *talfīq* was used in the courts, albeit on a limited scale, we still see examples of jurists' aversion to it. There is a sense that once a law is based on one school, all future cases not covered in the law should be referred to the same school. This was the view of the judges of a case in the neighborhood of Sayyida Zaynab in Cairo in 1933, Case No. 3558, in which a woman argues that her husband's imprisonment represents *ḍarar*, invoking Art. 6, Law No. 25 of 1929. The judges argue that since this law was based on the Mālikī school, any incident related to it should be based on the same school. Mālikism does not consider imprisonment by itself to constitute *ḍarar,*[520] and therefore no divorce should be granted on these grounds alone.

This desire for consistency, and hence the reluctance to resort to *talfīq,* is also clear in Case No. 20 of 1960, in which the husband's lawyer challenged the decision of the court to divorce the wife on the grounds of failure to provide maintenance to the wife because there was only one witness to his inability to provide such maintenance, which is not sufficient under the school of Abū Ḥanīfa. The court decides that since the law was based on the Mālikī school, it rather than the Ḥanafī school should be followed

[520] Al-Jundī, *Mabādi',* 212.

in the requirements for witnesses.[521] Consistency was cited as the reason for choosing the Mālikī school, rather than examining who has the priority of forum. This not only shows a desire for consistency, but also a shying away from *talfīq* when there was no pressing social need.

Law 48 of 1946

One other area where modern laws have utilized *tatabbuʿ al-rukhaṣ* in a way that is similar to the pre-modern use of this technique is in the case of *waqf*. The Egyptian law permitted temporary endowments based on the Mālikī school. In Ḥanafī law, endowments cannot be temporary. A temporary endowment raises another question: who owns the endowment after it ends? The law did not directly discuss the issue of ownership of the endowment. In Art. 17, Law 48 of 1946, when the endowment expires, the property returns to the endower if he is alive, but if he is not alive, it returns to the beneficiaries of the endowment. The first part of the article agrees with the Mālikī school, whereby the endower maintains ownership. However, the second part is based on the Ḥanbalī school. Thus, when the endowment expires after the endower had died, the law would terminate the endowment according to the Mālikī school, but transfer ownership to the endowed according to the Ḥanbalī school, which represents *talfīq* in the same transaction.[522]

Law No. 44 of 1979 and Law No. 100 of 1985

[521] Al-Jundī, *Mabādi'*, 221-2.
[522] Muḥammad Abū Zahra, *Muḥāḍarāt fī al-Waqf* (Cairo: Dār al-Fikr al-'Arabī, 2005), 98-102.

Since 1929, no law promoting women's rights was advanced until 1979 when Sadat decided to legislate some of the demands of Egyptian feminists. In order to speed up the process, Sadat issued an emergency legal decree, which was approved by parliament. Law No. 44 of 1979 was controversial. It was known as Jihan's law, in reference to Jihan Sadat, who was thought to be behind it. The following year Case no. 29 of 1980 was referred to the High Constitutional Court for a ruling on the constitutionality of Law No. 44 of 1979. But it was not until 1985 that a ruling by the highest court was released, establishing the unconstitutionality of the law on the ground that the initial emergency decree promulgating it was issued in the absence of a real emergency.[523]

Two months later, the Mubarak regime introduced a similar law (No. 100 of 1985), which was identical to Jihan's law, with one exception, which was seen as a compromise with the traditional religious establishment. Under the new legislation, a wife's right to divorce in the case the husband takes a second wife is not automatic. She now has to prove in court that his second marriage constitutes *ḍarar* to her.[524] Furthermore, Art. 11b of law 100 of 1985 requires the husband to acknowledge his marital status in his marriage certificate. If he is married, he must mention the name of his wife and her place of residence. Then the notary must inform her of the new marriage by registered mail. The law also gives the first wife up to a year to sue for

[523] Dawoud S. El Alami, "Law no. 100 of 1985 Amending Certain Provisions of Egypt's Personal Status Laws," *Islamic Law and Society* 1 (1994): 116-8.
[524] El Alami, *Law no.*, 116-8.

divorce on the grounds of *ḍarar.*[525] While the expansion of the meaning of harm was based on the Mālikī school, the requirement to notify his wife through registered mail is obviously a modern novelty that does not have its roots in traditional jurisprudence.

Art. 18, Law 100 of 1985 also stipulates that a woman is entitled to a *mutʿa* payment if she is divorced against her will. This payment was estimated at the equivalent of two years' maintenance. This was explicitly based on the Shāfiʿī view, as well as the view of Aḥmad Ibn Ḥanbal.[526] The exercise of *tatabbuʿ al-rukhaṣ* went beyond the four schools of Sunni law to draw on Zaydism. Legislators added doctor fees and the cost of medicines to the maintenance of the wife, departing from all four Sunni schools.[527]

Art. 20, Law No. 1 of 2000

The latest attempt made by modern legislators to grant women more rights of divorce came in the form of Art. 20 of Law No. 1 of 2000, which allows women a divorce through *khulʿ*,[528] even if the husband does not agree to it, in which case the court is required to issue such a divorce. The court's ruling in that case is not subject to appeal.[529] In 2001, the constitutionality of the law was challenged by a husband who was forced to divorce his wife against his will after the passage of the law. His argument was that in Islamic law, *khulʿ* was contingent upon the consent of the husband. He added

[525] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad, *Qānūn,* 32-33.
[526] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad, *Qānūn*, 34-5.
[527] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad, *Qānūn*, 49.
[528] For a definition of *khulʿ*, see above.
[529] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad, *Qānūn*, 71-2.

that any law that contradicts Islamic law is unconstitutional since Art. 2 of the constitution, amended in 1980, states that Islamic Sharīʿa is the main source of legislation. The High Constitutional Court responded by explaining that jurists were divided over whether or not *khulʿ* could be granted by the judge against the will of the husband. It added that the legislator chose the Mālikī view that does not restrict *khulʿ* to the consent of the husband.[530] The case was rejected and the constitutionality of the law was established.

The legitimacy of *khulʿ* goes back to a prophetic tradition in which the wife of Thābit Ibn Qays, Jamīlah Bint ʻAbd Allāh, came to the Prophet saying that she does not reproach Thābit Ibn Qays regarding his character or religion, but she does not want to be guilty of showing disrespect to him. The prophet asked her what she received from him, she replied a garden. He asked if she would give him back his garden. She replied that she would. The prophet then told Thābit "Accept the garden and make one declaration of divorce."[531] The majority of jurists from all the four schools interpret the command by the prophet to be for advice and guidance, but modern legislators treat it as obligatory in the prophet's capacity as a judge, thus enabling the court to force the husband to divorce.

The legislators' reference to the Mālikī school was challenged by many. Shortly after the passing of the law, an article published in Al-Azhar's *Al-Muslim* magazine by

[530] Fāṭima al-Zahrāʾ ʿAbbās Aḥmad, *Qānūn*, 193-202.
[531] Abū ʿAbd Allāh Muḥammad Ibn Ismāʿīl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Riyadh: Darussalam, 1997), 7: 132-133, Hadith No. 5273.

Azhar University professor Muḥammad Muhannā challenged it. He called the new legislation "the personal whims law," (*qanūn al-ahwā' al-shakhṣiyya*) which sounds like personal status law in Arabic. To him, the law was a clear example of Westernization. While *khulʿ* is valid in Islamic law, he opposes imposing such an arrangement on the husband against his will. He adds that there is no school that permits the judge to force the husband to divorce his wife. To him, it is like any other contract. It must be accepted by the two parties. He points out that the legislators conflated the Mālikī judicial divorce on the grounds of *ḍarar* with *khulʿ*. While Mālikīs allow the judge to divorce a woman who has proven that she had been subject to *ḍarar* by her husband, he cannot force the husband in a *khulʿ* to divorce, since there is no *ḍarar*. After arguing that the standard view in the four schools is that the husband's consent is essential for a *khulʿ* to be valid, he adds that one can find an anomalous view in any of the thousands of books of jurisprudence, but we cannot accept all of them. He opines that allowing the judge to have this power of divorce can lead to adultery.[532]

Although modern legislators claimed a Mālikī authority to the *khulʿ* legislation, the authoritative view within Mālikism is that the husband's consent is essential. They based the law on a peripheral view through *tatabbuʿ al-rukhaṣ*, rather than a choice of the *rājiḥ* (preponderant) view in another school. This type of *tatabbuʿ al-rukhaṣ* was subject to debate in the pre-modern period. It was clearly a way to close the gap that was left to the discretion of judges. If the wife is unable to convince the court of the occurrence of *ḍarar*, she at least can give up her dower and other financial rights in

[532] Muḥammad Muhanna, *Al-Muslim Magazine* (Cairo: March 2000), 32-33.

exchange for a divorce. The new law does not require the wife to explain the reasons for why she wants a *khulʿ*. In the Ottoman court records examined in the previous chapter, we did not see cases of *ḍarar* in the courts, using Mālikī law, perhaps because women had more access to *khulʿ*, a divorce that was very widespread in seventeenth and eighteenth-century courts.

The use of Ḥanafism as the default school in the modern period had its detractors. In 2002, an Egyptian man by the name of Magdī ʿAllām M. Saʿīd challenged the constitutionality of Art. 3, Law 1 of 2000, which states that wherever there are no legal provisions, judges should choose the *rājiḥ* of the school of Abū Ḥanīfa. He argued that this provision contradicts the *Sharīʿa* because it restricts the law to one school and one view, thus closing the door of *ijtihād*. He added that *ijtihād* is *wājib* (obligatory) for Muslims of all times.[533] Although he lost his case, the question he raised presents a concern with modern legislation: the abolition of legal flexibility, through the narrowing of the definition of *Sharīʿa* as the dominant view of one school.

Choice of legal opinions in the absence of codification

For areas not covered by legislation, judges were not allowed to exercise *ijtihād*. They had to follow the *rājiḥ* of the school of Abū Ḥanīfa. A judge's decision that strays from the school of Abū Ḥanīfa is overruled.[534] The legislators themselves exercised *tatabbuʿ al-rukhaṣ*, which the contemporary Islamic thinker Qaradawi calls *ijtihād intiqā'ī*

[533] Fāṭima al-Zahrā' ʿAbbās Aḥmad and Hilmī ʿAbd al-ʿAẓīm Ḥasan, *Qānūn al-Aḥwāl al-Shakhṣiyya lī al-Muslimīn wa al-Qarārāt al-Munaffidha lī Aḥkāmih wa Baʿḍ Aḥkām al-Maḥkama al-Dustūriyya al-ʿUliyā al-Ṣādira Bī Sha'nih* (Cairo: Al-Maṭābiʿ al-Amīriyya, 2009), 214-8.
[534] Aḥmad Naṣr al-Jundī, *Mabādi' al-Qaḍā' al-Sharʿī fī Khamsīna ʿĀman* (Cairo: Dār al-Fikr al-ʿArabī, 1978), 378.

(selective *ijtihād*), where the most appropriate views within the four Sunni schools are chosen. The other type is what he calls *ijtihād inshā'ī* (innovative *ijtihād*). This refers to deriving new rules from the primary sources to meet new needs.[535]

The Ḥanafī school has sometimes had two competing opinions, where neither one has claimed an exclusive *rājiḥ* status. In this situation, the jurist has to exercise *tarjīḥ*, which traditionally refers to the choice of an opinion over another, usually based on the inherent strength of the reasoning behind that opinion as we saw earlier.[536] In modern legislation, the choice between two opinions within Ḥanafism was another tool in which the choice was motivated by social utility, rather than the strength of the arguments forwarded for that choice.

Within the Ḥanafī School, a woman is not entitled to maintenance by the husband if she works outside of the marital home. This is challenged by another competing opinion within the same school giving working women the right to maintenance. In the absence of a stipulation in the law, al-Jundī, a practicing judge from twentieth-century Egypt (1930s-1970s), gives preference to the second Ḥanafī view because it is "more suitable for the developments of our age." Case No. 184 brought to the court of Asyūt in 1946 led to a ruling the following year that a woman who works outside of the marital home is still entitled to maintenance allowance. In 1953, a court in Maghāgha goes even further (Case No. 753) deciding that a husband

[535] Dawoud S. El Alami, "Law no. 100 of 1985 Amending Certain Provisions of Egypt's Personal Status Laws," *Islamic Law and Society*, 1, 1994, p. 130.
[536] See Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 91-3.

cannot stop his wife from working as long as her work does not interfere with his rights to her. Also, in Aṣyūt, a man who has already agreed that his wife should work cannot then withdraw his consent.[537] In practical terms, a woman who wants to protect her right to work can also use the Ḥanbalī acceptance of drawing marriage contracts with conditions in adding a stipulation to that effect in the marriage contract. Once the marriage is concluded, not only does the husband have no right to stop her from working, but he also has no right to withdraw her maintenance.

Another question not covered by legislation is whether a woman is entitled to a wage for breastfeeding a child for the period before an agreement is drawn between her and the baby's custodian. This issue presented a challenge to judges because there are two contradictory views within Ḥanafism that are almost at the same level of strength. The first view is that of Ibn Nujaym, in which he argues that a woman is entitled to a wage for breastfeeding during the period before a contract is drawn up. The other view, which is supported by al-Maqdisī,[538] is that she is not entitled to a wage for the period preceding such an agreement. In the end, the courts followed the opinion of Ibn Nujaym. But what about the wage for the custody of a child during the period preceding an agreement? The *Muftī* of Egypt, Al-Shaykh al-Mahdī (d. 1897), issued a *fatwā* following the opinion of al-Maqdisī, denying the woman a wage for custody of the period prior to drawing up a contract. Some courts in the 1930s followed the *fatwā* of al-Mahdī, but others did not wish to have two standards for very similar

[537] Aḥmad Naṣr al-Jundī, *Mabādi' al-Qaḍā' al-Shar'ī fī Khamsīna ʿĀman* (Cairo: Dār al-Fikr al-ʿArabī, 1978), 88-91.
[538] ʿAlī Ibn Ghānim al-Maqdisī al-Ḥanafī (d. 1004/1595).

situations, i.e. the treatment of breastfeeding wages as opposed to custody wages prior to entering into a contract. In his discussion of this issue, the practicing Judge al-Jundī adds that women should be granted a wage in both those situations for the sake of consistency. In 1936, case No. 410, which was brought to the court of Atsa prompted the judges to grant the woman such a wage, establishing a legal principle which brought about the desired consistency by equating breastfeeding wages with custody wages.[539]

Conclusion

We saw how feminists' calls for more women's rights were partially served through crossing school boundaries in the law of 1929. Not only did the crossing take place within the four schools, but sometimes it even went beyond them to include opinions of the Companions of the Prophet where necessary. *Tatabbuʿ al-rukhaṣ* was drawn upon more often than *talfīq*. The more complex pragmatic sibling was not needed as much as simple *tatabbuʿ al-rukhaṣ*.

Those twentieth-century attempts at the codification of Islamic law were mirrored in the theoretical literature. The debate over the permissibility of crossing school boundaries continued throughout the nineteenth and twentieth centuries. In the modern period, the issue was still subject to debate as it was in the Ottoman period. The tension between the two camps in legal theory continued well into the modern period, building mostly on Ottoman debates, which provided modern reformers like

[539] Aḥmad Naṣr al-Jundī, *Mabādi' al-Qaḍā' al-Sharʿī fī Khamsīna ʿĀman* (Cairo: Dār al-Fikr al-ʿArabī, 1978), 337-9.

Riḍā, al-Ḥusaynī, al-Hifnāwī, al-Bānī and others with the ammunition to justify modern codification through traditional authorities.

Those modern debates in the theoretical literature, and the way in which the modern codification of personal status laws utilized existing school differences reinforce that sense of continuity both in the theoretical literature and, to a lesser degree, in the courtrooms. The fixing of Islamic law in the form of modern codes represents an evolutionary process, but that is not to say that codification itself did not change Islamic law. On the contrary, Islamic law would never be the same again. One major difference is that while in the Mamluk and Ottoman periods, subjects of the law and/or the legal establishment made the choice of school themselves on a case by case basis. In the modern period, that choice was plugged into the system by the modern state before entering the court.[540] Although the reformers had the welfare of society in mind when they wrote those laws, in a way they restricted the leeway subjects of the law had in the Ottoman period.

Perhaps part of the reason that there was confusion over the status of *talfīq* in the pre-modern period was caused by a conflation of two distinct legal terms: *tatabbuʿ al-rukhaṣ* and *talfīq*. As we saw both in chapters 1 and 2 and in this chapter, the two terms were treated as different legal concepts both in the Ottoman and modern periods.

[540] In the case of criminal law, Mehmed Alī issued the first criminal legislation that complemented *Sharī'a* rules. See Rudolph Peters, "'For His Correction and as a Deterrent Example for Others': Meḥmed ʿAlī's First Criminal Legislation (1829-1830)," *Islamic Law and Society* 6, 2 (1999): 164-192.

Conclusion

> When the traditional authorities had to be manipulated in this fashion to yield the required rule, any claim that this process constituted *taqlīd* had become nothing more than a thin veil of pretence, a purely formal and superficial adherence to the established principles of jurisprudence, which masked the reality of an attempt to fashion the terms of the law to meet the needs of society as objectively determined.[541]

The above view regarding the use of *talfīq* and *tatabbuʿ al-rukhaṣ* is commonly-held. There is an assumption that using the law to meet the needs of society is a novelty of modern legislation, a manipulation of a pure *taqlīd*. This claim assumes that historical *taqlīd* was not fashioned to meet the needs of society in the pre-modern period as it was in the age of modernity. The above statement denotes a break between the "modern" and "pre-modern" periods. While many historians such as Coulson support those "modern" developments, as they grant women for instance more rights of divorce, they deny that those changes have roots in the theory and practice of Islamic law in the pre-modern period. The claim that those changes are not faithful to traditional *taqlīd* needs to be revised. We did not see such rupture neither in the seventeenth and eighteenth-century courts, nor in the theoretical literature.[542] The reason for Coulson's assessment of a rupture partly springs from a perception that Islamic law prior to codification did not respond to the needs of society and that eclecticism was not a tool used by the legal authorities to meet those needs.[543]

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[541] N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 201.
[542] Coulson, *History*, 201.
[543] See also David Bonderman, "Modernization and Changing Perceptions of Islamic Law," *Harvard Law Review* 81, 6 (1968): 1177.

I hope that this study has succeeded in showing the falsehood of this understanding of the evolution of the Islamic legal system. In light of these newly studied sources, it becomes clear that the pragmatic choice of schools, whether in the form of *tatabbuʿ al-rukhaṣ* or *talfīq*, was as much a part of pre-modern *taqlīd* as it was a part of modern *taqlīd*. Contrary to the views of Layish and Hallaq, *talfīq* was not outright forbidden in the pre-modern period. There was a clear line of continuity on this aspect of legal modernization, which was far more important in the modern Egyptian codification of *Sharīʿa* than *ijtihād*. We see some jurists such as the eighteenth-century Mālikī al-Dasūqī permitting those practices. Then we see his student Ḥasan al-ʿAttār following his teacher, with the line of continuity going right into the modern Arab renaissance, of which al-ʿAttār's student, al-Tahtāwī becomes an important figure. Throughout the modern period, we see jurists from the nineteenth and twentieth centuries divided over the pragmatic choice of schools in the same way Ottoman jurists were. The same Ottoman authorities are invoked in these discussions, which shows a striking discursive continuity.

I have discussed juristic attitudes towards the pragmatic choice of legal opinions both within and outside the four Sunni schools, showing that they underwent radical changes in Islamic legal theory due to the court practice of accommodating social needs. The strong opposition to the pragmatic choice of the legal opinions of different scholars, which dominated legal theory in the early period, was followed by increasingly permissive attitudes after the stabilization of the Sunni schools of law and the institutionalization of *taqlīd*.

Prior to the thirteenth century, there was no mention of the term *talfīq* since the more general selection of easier opinions, known as *tatabbuʿ al-rukhaṣ*, was itself forbidden by most. With the growing acceptance of *tatabbuʿ al-rukhaṣ*, some jurists singled out *talfīq* as the only type of pragmatic choice of legal opinions that is forbidden. It was used by pragmatists as a foil for *tatabbuʿ al-rukhaṣ*, with almost unanimous agreement that *talfīq* is forbidden. But in the Ottoman period, voices supporting *talfīq* started emerging. By the seventeenth century, the issue became the subject of a very heated debate, causing discord within the juristic community. What emerges from those debates is an acceptance of *talfīq* as an issue of debate, rather than one over which a consensus had been formed, as was the case prior to the thirteenth century.

The Ottoman period also saw the rise of a strand of thought within legal theory, which permitted *muftīs* to choose weak legal rulings from within their schools, but also to cross school boundaries in pursuit of easier rulings. Some tried to circumvent the strong opposition to *muftīs* crossing school boundaries by claiming a difference between giving *fatwā* which should be restricted to the *muftī*'s school and narration. To them, narration is simply legal advice given to a layperson in which the source must be quoted. This distinction practically gave *muftīs* some of the functions of modern lawyers. Those religious figures were able to provide legal advice about the vast laws of the four schools with the help of a new Ottoman *ikhtilāf* literature, which focused on narrow topics of debates among the schools. This new literature was succinct and even presented in verse to be memorized by legal professionals in order to provide legal

advice. Discussions in the theoretical literature regarding whether or not *muftī*s can be paid for their legal advice shows the professional nature of this function of the *muftī.*

The debate over the prohibition of the pragmatic choice of legal opinions is essentially a struggle between legal consequentialists and deontologists. Legal consequentialists considered the consequences of actions as the basis for determining their acceptability, supporting the choice of school based on legal results. Legal deontologists, on the other hand, wished to assess actions/legal rulings not by their consequences, but by their inherent soundness through *ijtihād* or through the *taqlīd* of the *ijtihād* of others, namely a school or a *muftī.*

The rise of the consequentialist camp and its serious challenge to the deontologists can be situated squarely within the context of the evolution of *taqlīd* and *ijtihād*. The rise of *taqlīd* came about to serve a social function, that is, to create a more stable and predictable legal system. People expected *muftī*s and judges to exercise *taqlīd*. With the establishment of *taqlīd* as the dominant force, the flexibility that *ijtihād* afforded to the legal process, was no longer available. This necessitated an opening in the legal system to allow for some flexibility in the repertoire of available rulings. The narrower interpretive powers granted to judges and *muftī*s under a system of *taqlīd* motivated the legal establishment to engineer a system of legal pluralistic pragmatism.

This did take place in the courts, leading some jurists, who were aware of such practices, to try to accommodate legal theory accordingly. Despite the efforts of many jurists to bridge that gap, no consensus to legitimize the practice was reached. It was

hard for the theory to completely turn its back on the classical doctrine, resulting in the persistence of tension between theory and practice into the modern period. However, the voices supporting the pragmatic use of Sunni legal pluralism were stronger in the late Ottoman period than ever before. The important contribution of those increasing dissenting voices is that they challenged the consensus claimed by classical theorists over the subject, thus negating the earlier accusation of sin leveled against those practicing *talfīq* and *tatabbuʿ al-rukhaṣ*. Thus, change in Islamic law in the age of *taqlīd* was brought about through a readjustment of the relationship between the four schools, in addition to Jackson's legal scaffolding.

This newer view revising legal theory in the classical period became more dominant overtime, partly because legal theory gave more weight to those later layers of interpretation. This phenomenon of preferring the views of later authorities over earlier authorities was clear in the choices of authoritative texts during the process of establishing the dominant views within the schools. This process, which according to Peters took place between the twelfth and seventeenth centuries, found most of its substantive rulings in later doctrine, as evidenced by the prominence of Ottoman books of substantive law over their Mamluk counterparts. Specific Ottoman authorities and works were being consistently invoked. One sees works such as *al-Baḥr al-Rā'iq* or *al-Ashbāh wa al-Naẓā'ir* of the Ḥanafī Ibn Nujaym (d. 970/1563), *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj* of the Shāfiʿī Shams al-Dīn al-Ramlī (d. 1004/1595), and *Ghāyat al-Wuṣūl Sharḥ Lubb al-Uṣūl* by the Shāfiʿī Zakariyya al-Anṣārī (d. 926/1519) being repeatedly mentioned in the courts to the extent that it becomes clear that judges had access to those texts. It

would not be far-fetched to speculate that those texts were available inside the courts, but no such evidence has been found yet.

There was even an awareness of this phenomenon in which later authorities are given priority over their earlier counterparts. Thus, the views of Ibn Ḥajar al-Haythamī, al-Ramlī, and Zakariyya al-Anṣārī are taken over the opinions of al-Nawāwī and al-Rāfi'ī. Earlier on, al-Nawāwī and al-Rāfi'ī's authority was given priority over *al-Umm* of al-Shāfi'ī himself. The justification is that they are more knowledgeable about the texts. Some even argue that there must be a good, unknown reason for why they seem to contradict *al-Umm*.[544] This invocation of the views of the *mut'akhkhirīn* (later jurists) over those of the earlier authorities is ironic since there is a strong strand of thought within the Islamic tradition, which is often cited by scholars of Islam, that the earlier generations are more pious and knowledgeable due to their temporal proximity to the prophet.[545]

This historical change of the locus of authority helped the *mut'akhkhirīn* contribute to the change of legal theory. Even the commentators of the later jurists (*Arbāb al-Ḥawāshī 'alā Kutub al-mut'akhkhirīn*), who came after al-Ramlī and Ibn Ḥajar are acceptable as sources of *fatāwā* because they followed them in most of their views.[546]

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[544] Muḥammad Ibn Sulaymān al-Madanī al-Shāfi'ī al-Kurdī, *al-Fawā'id al-Madaniyya fī Bayān Ikhtilāf al-ʿUlamāʾmin al-Shāfi'iyya* (Diyār Bakr, Turkey: al-Maktaba al-Islāmiyya, n.d.), 14-22, 220.

[545] For a discussion of the competition between different generations of authority, see Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 24-56, 149-151.

[546] Muḥammad Ibn Sulaymān al-Madanī al-Shāfi'ī al-Kurdī, *al-Fawā'id al-Madaniyya fī Bayān Ikhtilāf al-ʿUlamāʾmin al-Shāfi'iyya* (Diyār Bakr, Turkey: al-Maktaba al-Islāmiyya, n.d.), 232.

This ability of legal theory to update its authorities was one of the main mechanisms that allowed for a change of juristic attitudes towards *talfīq* and *tatabbuʿ al-rukhaṣ*.

On the practical level, the two techniques were used in the Ottoman and modern periods in similar ways. An Ottoman Cairene such as Riḍā would end up with the judge whose school can facilitate her legal transaction. She could go to a Shāfiʿī judge in order to avoid an irrevocable divorce as we saw in chapter II, even though her marriage was concluded under a Ḥanafī judge. But if she were to perform a sale of a religious endowment, known as *istibdāl*, she would most certainly go to a Ḥanbalī judge. If we were to track down each individual throughout their entire life and write her/his litigation history, we would be faced with what resembles a code, with a high level of consistency between the types of cases adjudicated and the school affiliation of the judge. This consistency is achieved in the modern period by freezing specific legal rulings in the form of a code, whereas in the Ottoman period, it was performed informally through Sunni legal pluralism, but with a potential for future flexibility. This was brought about through a shift in choices rather than legislative action. For this reason, seventeenth and eighteenth-century legal pluralism made for more flexibility than the modern codification of *Sharīʿa*.

The Ottoman authorities in the seventeenth and eighteenth centuries permitted people, regardless of their social status, to cross school boundaries pragmatically to facilitate the sale of *waqf* properties against the strict rules of Islamic law. In order to achieve such flexibility, the Ḥanbalī school, which has the smallest number of followers

in Egypt, completely monopolized the sale of *waqf* known as *istibdāl*. The economic and social significance of such a move cannot be overemphasized, since the share of this institution of the overall economy was exceedingly significant. Marsot, for instance, estimates that 20% of all Arable land in eighteenth century Egypt was in the form of *waqf*. Due to legal pluralism's ability to circumvent the stringent conditions imposed on the sale of religious endowments, we need to reevaluate our view of the role this system played in the economic decline of the Middle East. Through legal pluralism, endowment properties functioned, for all intents and purposes, like private property.

In the nineteenth century, Mehmed Alī undertook a process of Ḥanafization, which saw systematic restrictions on the other three schools. This process created legal problems that did not exist in the seventeenth and eighteenth centuries. It placed, for instance, restrictions on women's ability to get a divorce against their husband's will. The attempts of twentieth-century *Sharīʿa* codifiers to draw upon legal pluralism in their new codes through already existing *Sharīʿa* tools such as *tatabbuʿ al-rukhaṣ* and *talfīq* created a rupture, not between the seventeenth and eighteenth centuries, but during the Mehmed Alī period. The pragmatic use of legal pluralism in the codification of the *Sharīʿa* in the modern period does not, therefore, represent a break with the juristic past. This is not to argue that the codification did not change the way the law functioned in Islamic societies. It is to argue that modern legislators tapped into an already existing system of *taqlīd* to accomodate their modern needs.

In the modern period, the debate over legal reforms did not center around the codification process,[547] i.e. the legislature setting a uniform legal code, but mostly on how choices in that code were made. The points of contention in religious circles were mostly related to an older discussion with which jurists were already familiar. What was striking is not only the continuity in the crossing of school boundaries between the pre-modern and modern periods, but also the continuity in juristic attitudes in the age of modern codes up to the present time. This debate has now been reignited with the new Saudi government's plan to codify the *Sharīʿa* in the form of a compendium of legal rulings. The online blogosphere is replete with discussions of what such a code would mean for *ijtihād* and whether Saudi Arabia would use the same pragmatic *taqlīdic* tools that Egypt used to accommodate modern social and economic needs.

[547] Nathan Brown, "Sharia and State in the Modern Muslim Middle East," *International Journal of Middle East Studies* 29 (1997): 359-76.

Tables

Types of Cases and Schools of Presiding Judges for the Court of Miṣr al-Qadīma							
		Ḥanafī	Ḥanbalī	Mālikī	Mālikī + Ḥanafī	Shāfiʿī	Shāfiʿī + Ḥanafī
Marriage		66	0	2	0	0	0
Wife-initiated divorce (*khulʿ*)		29	0	0	4	0	0
Divorce		6	0	0	0	0	1
Claim of Non-Payment of dower		0	0	0	0	1	0
Rental contracts	Long rent of *waqf*	0	5	0	0	0	0
	Short period/non-*waqf*	5	1	0	0	0	0
Isqāṭ of *waqf*		0	0	15	0	0	0
Non-*waqf* sale	Unconditional	78	0	0	0	0	0
	Conditional	0	0	3	0	0	0
Establishment of ownership of a *waqf* property through renovations and physical control		0	0	0	0	3	0

Figure 1

Types of Cases and Schools of Presiding Judges for the Court of Bulāq								
		Ḥanafī	Ḥanbalī	Mālikī	Mālikī + Ḥanafī	Shāfiʿī	Ḥanbalī + Mālikī + Ḥanafī	Ḥanbalī +Ḥanafī
Isqāṭ of *waqf*		0	0	20	4	0	0	0
Short rental contracts		12	3	0	0	0	0	0
Renting *waqf* in exchange for renovations		0	0	2	0	0	0	0
Establishing a *waqf*	On the use of a property	0	3	0	0	0	0	0
	On the property and its use	5	0	0	0	0	0	0
Manumission of slaves		4	0	0	2	0	0	0
Conditional Sale		0	0	1	1	0	0	0
Annulling *waqf*/*waqf* of use of a place		0	0	0	0	0	1	1
Establishment of ownership through physical control		0	0	0	0	2	0	0
Loan + interest through *nadhr*		0	0	0	0	3	0	0

Figure 2

Types of Cases and Schools of Presiding Judges for the Court of Bāb al-ʿAlī						
	Ḥanafī	Ḥanbalī	Mālikī	Ḥanbalī + Mālikī	Mālikī + Ḥanbalī wa-Ittisāl al-Ḥanafī	Mālikī + Ḥanafī
Isqāṭ of *waqf*	0	0	34	0	0	0
Istibdāl al-*waqf*	0	85	0	0	0	0
Long rental contracts on *waqf*	0	31	0	0	0	0
Change of *waqf*	1	0	6	0	0	1
Establishing *waqf*	3	0	5	0	2	0
Establishing debt on *waqf* for renovations	0	1	0	0	0	0
Establishing property rights through *waḍʿ al-yad*	0	0	1	0	0	0
Renting *waqf* for renovations	0	0	0	1	0	0
Establishing *waqf* is in ruins	1	0	0	0	0	0

Figure 3*

* Types of cases consistently handled by the Ḥanafī judge alone are not included in the table.

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