ISLAMIC LAW

Theory and Practice

EDITED BY

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Introduction: Theory and Practice in Islamic Law

While the dichotomy between theory and practice has been a favourite theme of Western writers on Islamic law since the time of Weber,[1] it remains a subject fraught with difficulties. One of these difficulties has been confusion regarding what constitutes Islamic law for a given time and place. Obviously, before one can postulate a contradiction between theory and practice, one must know what the theory is that governed the practice under consideration. Unfortunately, many studies of the this complex issue have not devoted sufficient attention to what constitutes the 'theory' against which practice should be judged. As a result, the contradictions that are asserted often rest on an implicit assumption of what constitutes the legal standard rather than what the local Muslim legal establishment considered to be the legal standard.

Likewise, not much consideration is given to defining what is meant by 'practice'. Is it the behaviour of individuals and groups within societies governed by Islamic law, or is it exclusively a problem of the administration of the law? While Weber discussed this theme mainly in regard to his concept of *Kadi*-justice, i.e., as an issue affecting the administration of the law, Orientalists have often confused the problematic of theory and practice with the behaviour of individuals and groups, a problem that is more properly termed the efficacy of the law.[2] Because of these ambiguities, rarely does the genre of 'theory versus practice' present us with the practice of Muslim legal authorities as they grappled with the issues identified by Western scholarship as legally problematic.

A single example should be sufficient to demonstrate the incomplete nature of previous studies. Coulson mentions that in West Africa a woman is free at any time during her marriage to return half of her dowry and gain a divorce without the agreement of her husband. According to Coulson this is a blatant violation of Islamic law which gives power to divorce exclusively to the husband. Furthermore, he says that any attempt to treat it as a *khul'*[3] divorce is mistaken, because this requires the husband's consent.[4] Coulson, in judging this divorce to be illegal, fails to enlighten us, however, in regard to the legal consequences of this act. Some of the more obvious questions that would need to be answered if Coulson's conclusion is true include the following:

1. If this is not a legitimate divorce in law, does this mean that a husband who does not consent to the divorce has no legal remedy protecting his interest in the marriage?
2. Could the wife who paid this money subsequently enter a claim for unpaid maintenance on the grounds that she was never legally divorced from her husband?
3. Do they each continue to enjoy rights of inheritance in the event of either party's death, or only during the wife's waiting period (*'idda*)?

In brief, Coulson, when recording this custom, enriches us anthropologically, but not legally. Most surprisingly, we are also left ignorant of the local juridical interpretation of this act. This is particularly ironic given Coulson's consistent criticism of Muslim jurisprudence as being only concerned 'with the law as it ought to be', and failing to produce a jurisprudence concerned with prediction of judicial acts.[5]

In contrast to the method outlined above, the basic premise of this paper is inspired by Legal Realism: the law is what its authoritative spokesmen declare it to be. From the perspective of Legal Realism, the relationship of theory to practice is a problematic common to any system that claims to follow rules. To the extent that external observers are able to predict the declarations of these authoritative spokesmen, one can say there is no contradiction between theory and practice.[6] The issue of theory versus practice is thus another way of posing the question of the efficacy of the ideal of a rule of law in a given society. For this reason, we shall try to study the extent to which legal officials in Muslim states could be said to be following the rules of Islamic law.

Ideally, a study of the efficacy of the rule of law in Muslim societies would concentrate on the practice of the two most important officials in the administration of Islamic law: the judge and the *muftī*. Given the fact that for the pre-Ottoman period, however, the sources do not preserve court decisions, any study will necessarily have to be limited to *fatwās*.[7] It is the action of *muftīs* then that will provide the 'practice' that will be judged against 'theory.' What, however, constitutes 'theory' for the Mālikī school of the eighth–ninth/fourteenth–fifteenth centuries? There can be no doubt that the most important statement of Mālikī law for the post-eighth Hijrī century was the *Mukhtaṣar Khalīl*. This work was the third in a series of *mukhtaṣarāt* written by Egyptian Mālikīs that represented the most important literary achievements of their school in the seventh–eighth/thirteenth–fourteenth centuries: *al-Jawāhir*, *Jāmi' al-ummahāt*, and *Mukhtaṣar Khalīl*.[8] Historians of the Mālikī school have regarded these works as representing successive generations' efforts to 'summarise' (*ikhtiṣār*) the school's doctrine.[9] The appearance and the rapid spread of these 'summaries' (*mukhtaṣars*), however, have conventionally been understood by Western and Arab historians of Islamic law as both a cause and an effect of the 'decline' of Muslim legal creativity in the post-fifth/eleventh century.[10]

Instead of viewing these works as signs of decadence, however, I propose to view them as the product of the legal system's need for a set of uniform rules. Since Islamic law was a jurists' law,[11] meaning that it was the product of the interpretive labours of succeeding generations of jurists, legal indeterminacy was a particularly acute problem.[12] Since the *mukhtaṣars*, as they appeared initially in the seventh/thirteenth century, preserved competing opinions of the law, they only partially resolved the problem of indeterminacy within the Mālikī school. *Mukhtaṣar Khalīl*, in contrast to these previous *mukhtaṣars*, provided an unequivocal rule in the vast majority of cases, even if that rule itself was actually controversial. Furthermore, if the genre of the *mukhtaṣar*, at least as it appeared in the seventh– eighth/thirteenth– fourteenth centuries, is taken to be representing a desire to codify the positions of the school, then the *mukhtaṣar* also appears as a logical development of issues raised by sixth/twelfth-century jurists such as Ibn Rushd the Grandfather (d. 520/1126) and al-Qāḍī Abū Bakr Ibn al-'Arabī (d. 543/1148) surrounding what kind of opinions may legitimately be used by a judge or a *muftī* who has not reached the rank of *ijtihād*.[13] Their resolution to the practical problem of legal indeterminacy and its deleterious effect on the legitimacy of

the law was essentially political: restrict the legitimacy of interpretation, even within the legal establishment, to a certain group of highly trained jurists. This was often represented in a tripartite division of the legal community into *muqallid*, *mujtahid-fatwā*, and *mujtahid-madhhab*.[14] The role of the *mukhtaṣar* within such a hierarchy would have been to promulgate the 'rules' of the school known as *naṣṣ* or *manṣūṣ* for the lowest ranking jurists whom Ibn al-'Arabī and Ibn Rushd wished to bind to explicit rules. Taking *mukhtaṣar*s to be the functional equivalent of a legal school's code, and therefore, the authoritative source of 'theory,' seems to be a plausible hypothesis. For the purposes of this paper, then, *Mukhtaṣar Khalīl* will be treated as representing authoritative Mālikī doctrine.[15]

Al-Ḥadīqa al-mustaqilla al-naḍra fi al-fatāwā al-ṣādira 'an 'ulamā' al-ḥaḍra[16]

Once the decision to use *fatwās* as data to test the theory/practice problematic is made, however, the researcher is faced with a series of problems relating to the selection of his sample. While collections such as *al-Fatāwā al-hindiyya*[17] and *al-Mi'yār al-mu'rib*[18] are both well known and published, their very size precludes them from analysis for several reasons. The first is that the researcher would have to develop some criteria which would guide his selection of *fatwās* so that he could not be accused of 'stacking the deck' in favour of his thesis. The second stems from the diachronic nature of these works which contain opinions from the most ancient authorities of the school to the most contemporary. The third is the lack of the geographical specificity which is necessary if the opinions analysed are to increase our understanding of a particular legal culture. Thus, it would be hazardous to assume that a fifth-century Mālikī *muftī* of Ifrīqiyya followed the same criteria in answering questions that his Cordovan contemporary followed simply because they were both Mālikīs. If we were to use the opinions of a single *muftī*, on the other hand, we would gain geographical and temporal specificity and insight into that *muftī*'s legal thought, but perhaps at the cost of a wider knowledge of the surrounding legal culture.

In choosing our sample we have attempted to steer a middle course. The collection we have chosen, *al-Ḥadīqa al-mustaqilla al-naḍra fi al-fatāwā al-ṣāḍira 'an 'ulamā al-ḥaḍra*, contains the responses of twelve *muftīs*, but at the same time is small enough that we were able to include all the opinions in our sample. However, for practical

reasons we chose to exclude all *fatwās* dealing with ritual law and its relationship to the doctrine elaborated in the *Mukhtaṣar*.[19] Likewise, we also chose to exclude questions 89–96 for formal reasons: the manuscript describes them as *ajwiba*, 'answers' (sing., *jawāb*). This signified to us that if they are formally distinguished from *fatwās*, they could possibly be misleading in regard to the practice of *fatwā*-giving. Another advantage of this collection is that all the *muftīs*, with the exception of one, are from one city – Granada. Additionally, the time frame of the opinions is approximately 100 years, from the mid-eighth/fourteenth to the mid-ninth/fifteenth century, which would place them all within the reign of the Naṣrid dynasty. Therefore, this collection gives us the opinions of a plurality of *muftīs*, while at the same time guaranteeing geographical and historical specificity. Another advantage of this collection regards its timing: it comes at the culmination of the efforts of codification in the Mālikī school and is contemporaneous to the introduction of *Mukhtaṣar Khalīl* into the Maghrib.[20]

Analysis of the *fatwās*

At the first level of analysis, we divided the *fatwās* into two categories – judicial and non-judicial. The basic difference between the two is that the subject of the latter does not allow for the initiation of judicial proceedings under any circumstances. A clear example of this would be *fatwā* 10, in which the questioner seeks to know the ruling regarding the validity of a particular act that the populace has introduced into the prayer for rain (*ṣalāt al-istisqā'*).[21] Other cases are not necessarily so clear. For example, the issue of the proper way of slaughtering animals for food is clearly a matter of ritual, and therefore should be clearly non-judicial. On the other hand, it involves property, and could conceivably lead to a lawsuit if a butcher failed to follow proper procedures and thus rendered the animal both inedible and useless for other purposes.[22] Because of the potential for a lawsuit arising from improperly following the law, we chose to consider cases of this type to be judicial.

The category 'judicial' was then further subdivided into two categories, judicial and quasi-judicial. The former is used for any *fatwā* that emerged in the course of a lawsuit. The latter category is reserved for cases for which, while there is no explicit evidence of an actual lawsuit, it seems likely that an actual event, or an intended event, prompted the petitioner's question. Furthermore, cases

classified as quasi-judicial inevitably involve legal rights which are potentially enforceable in a court of law. These cases are judicial in so far as they deal with a legal issue within the competence of a court, but they are only quasi-judicial in that they may or may not have been asked within the context of a dispute in front of a court.[23] The results have been summarised below in Table 1.

The last level of analysis is a comparison of the rules[24] used by the *muftīs* in their *fatwās* with the doctrine of the *Mukhtaṣar Khalīl*. We have divided the rules into four categories: (1) rules found in the *Mukhtaṣar*; (2) rules contrary to the rule provided by the *Mukhtaṣar*; (3) rules implicit in the *Mukhtaṣar*; (4) rules with no textual basis in the *Mukhtaṣar*. An example from the first category is *fatwā* 1, in which the petitioner wishes to know whether or not the person who was entrusted with something and then subsequently lost it, is liable or not. An example of a *fatwā* which contradicts the rule of the *Mukhtaṣar Khalīl* is *fatwā* 6, where the questioner wishes to know what the rule is regarding the purity of oil into which a dead mouse has fallen. By replying that the oil may be cleansed and then sold, the *muftī*'s opinion was directly opposed to the text of Khalīl which says, 'The sold item, [in order for the sale to be valid] must be pure, unlike dung and [unlike] oil which has been polluted.'[25] An example of a *fatwā* whose rule is implicit in the language of the code is *fatwā* 32. The question involves a man whose garden adjoins the land of another. The owner of the garden wishes to plant grapes in the *ḥarīm*[26] of his garden which lies in his neighbour's property. By replying that the neighbour can prevent the owner of the garden from doing this, the *muftī* declares that while the garden's *ḥarīm* provides protection to the garden from any adverse action by the neighbour, this does not mean that the owner of the garden can introduce positive changes to land which remains the property of his neighbour. That the *ḥarīm* provides only defensive rights is no more than implicit in Khalīl's discussion of this topic, however. An example of a *fatwā* which is not covered by the code is *fatwā* 16 in which there is a dispute between a government-owned bakery and a privately owned one regarding the division of customers in a village. The results are presented below in Table 2.

The next level of interpretation centered around identifying the extent to which particular *muftīs* exercised discretion in their opinions, and the extent to which they clung to the established doctrine of their school. The results are presented below in Table 3.

Table 1

Name of *mufti*	judicial	quasi-judicial	non-judicial	total fatwās
Muḥmmad b. 'Abd al-Malik al-Mantūri[1]	0	2	0	2
Abū al-Qāsim Muḥammad b. Sirāj[2]	23	73	49	145
Abū 'Abd Allāh Muḥammad b. Muḥammad al-Saraqusṭī[3]	16	30	6	52
Abū Isḥāq Ibrāhīm b. Fatūḥ[4]	3	5	1	9
Abū 'Abd Allāh Muḥammad b. Yūsuf al-Ṣannā'[5]	0	4	0	4
Abū 'Abd Allāh Muḥammad al-Ḥaffār[6]	17	23	16	56
Abū 'Abd Allāh Muḥammad b. 'Alī 'Allāq[7]	2	3	0	5
Abū 'Uthman Sa'd al-Albīrī[8]	1	3	2	6
Abū Isḥāq Ibrāhīm b. Mūsā al-Shāṭibī[9]	4	12	25	41
'Abd Allāh b. Muḥammad b. Mūsā al-'Abdūsī[10]	1	0	0	1
anonymous *mufti* al-ḥaḍra	2	0	1	3
Aḥmad b. Qāsim b. 'Abd al-Raḥmān al- Qabbāb[11]	0	0	1	1
Total	70	153	102	325

Note: these numbers include fatwās whose subject matter is ritual law.

1 d. 834/1430, Muḥammad b. Muḥammad Makhlūf, Shajarat al-nūr al-zakiyya (Beirut, 1930), 248.
2 d. 848/1444. He served as chief justice (qāḍī al-jamā'a) of Granada and wrote a commentary on Khalīl. His student, al-Mawwāq, quotes from Ibn Sirāj extensively in his own commentary on Khalīl. Many of Ibn Sirāj's opinions were transmitted in the Mi'yār.
3 d. 865/1460. Al-Mawwāq quoted some of his opinions in his commentary on Khalīl. Ibid., p.260.
4 d. 867/1462. Some of his opinions were transmitted in the Mi'yār. Ibid., p. 260–1.
5 Abū 'Abd Allāh Muḥammad b. Yūsuf al-Ṣannā'. He seems to have been of the same generation as Ibn Siraj although his death date is not known. Aḥmad Bābā al-Tumbuktī, Nayl al-Ibtihāj bi-taṭrīz al-dībāj (Tripoli, 1989), 527.
6 d. 811/1408. Some of his fatwās have been transmitted in the Mi'yār. Ibid., p.247.
7 d. 806/1403. He was one of the leading scholars of Granada, having served as qāḍī al-jamā'a. He also wrote a commentary on Ibn al-Ḥājib's Jāmi' al-ummahāt. Some of his fatwās have been preserved in the Mi'yār, and al-Mawwāq quotes from him in his commentary.
8 d. 750/1349, al-Tumbuktī, Nayl al-Ibtihāj, p.188.
9 d. 790/1388. He is best-known for his work in uṣūl al-fiqh, al-Muwāfaqāt. He also has many fatwās preserved in the Mi'yār. Ibid., p.231.
10 d. 847/1443 or 850/1446. He was the muftī of Fez. Ibid., p.255
11 d. 778/1376 or 779/1377. Ibid., p.235

Table 2

Rules found in the Mukhtaṣar	Rules contrary to those in the Mukhtaṣar	Rules implicit in the Mukhtaṣar	Rules with no text in the Mukhtaṣar
138	46	26	44

Table 3

Name of muftī	Rules in Mukhtaṣar	Rules contrary to Mukhtaṣar	Rules implicit in Mukhtaṣar	Rules with no text Mukhtaṣar	Total
al-Mantūrī	2	0	0	0	2
Ibn Sirāj	59	28	9	14	110
al-Saraqusṭī	32	5	6	8	51
Ibn Fatūḥ	5	0	2	1	8
al-Ṣannā'	2	2	0	0	4
al-Ḥaffār	22	4	3	6	35
Ibn 'Allāq	3	1	2	2	8
al-Albīrī	2	2	0	0	4
al-Shāṭibī	9	3	4	2	18
al-'Abdūsī	1	0	0	1	2
Anonymous	2	0	0	0	2
Total	138	46	26	44	254

Contradicting the Rules of the School: Justifications Used by the *muftīs*

Of the *muftīs* mentioned in Table 3, only four have enough *fatwās* to justify a closer look. The rules used by Ibn Sirāj, who has by far the most *fatwās* in the collection, are in accord with the explicit wording of the *Mukhtaṣar* approximately 54 per cent of the time, are in conflict with the explicit wording of the *Mukhtaṣar* 25 per cent of the time, are implied in the wording of the *Mukhtaṣar* 8 per cent of the time, and are outside of the *Mukhtaṣar's* scope 13 per cent of the time. Al-Saraqusṭī's opinions are in accord with the explicit rules of the *Mukhtaṣar* approximately 63 per cent of the time, are in conflict with the explicit wording of the *Mukhtaṣar* approximately 10 per cent of the time, are implied approximately 12 per cent of the time, and are outside of its scope approximately 16 per cent of the time. Al-Ḥaffār's

percentages are almost equivalent to those of al-Saraqusṭī: 63 per cent, 11 per cent, 9 per cent, and 17 per cent. Al-Shāṭibī's opinions break down approximately into 50 per cent, 17 per cent, 22 per cent, and 11 per cent. The overall percentages for the rules analysed are 54 per cent, 18 per cent, 10 per cent and 18 per cent.

At first glance, the preliminary results suggest that legal indeterminacy was a significant problem facing Granadian legal culture, as the answers for only slightly over one half of the cases represented could have been predicted from Khalīl's *Mukhtaṣar*. At the same time a significant percentage of the answers given are not even covered by the code. These facts require closer inspection, and it is to their analysis that we turn presently.

We have seen that in the *fatwās* analysed, there were forty-three instances where the *muftī* departed from the explicit rule given by the code. Twelve of the instances in which the *muftīs* contradicted the *Mukhtaṣar* occurred in the law of divorce and nine involved the ritual slaughter of animals. In these two cases, i.e., divorce and the slaughter of animals, the local Mālikī legal practice as recorded by the *Ḥadīqa* had departed from the established rule of the school as reported by Khalīl. There is no doubt, moreover, that in both of these instances, the *muftīs* were aware that they were contradicting established doctrine. Thus, Ibn Sirāj says in *fatwā* 101, in reply to a question regarding a man who said to his wife that she was as unlawful to him as the meat of the pig:

> The scholars have held different opinions in ancient and contemporary times regarding the one who says to his wife 'You are forbidden to me', and Ibn al-'Arabī mentioned fifteen opinions [on the matter], of which five are in the school. Mālik and Ibn al-Qāsim said in the *Mudawwana* that where the wife had been taken to her husband's home, it is a three-fold divorce, and his intention is of no effect. If she has not dwelled in her husband's home, then the husband's intention is effective, whether one or more ... Ibn Khuwayz Mindād transmitted that Mālik said it was one [divorce] of separation for both the wife who has been taken to her husband's home and the one who has not. One of the masters, may God have mercy on them, who had the authority to issue legal opinions in this our town, used to rely on this transmission and issue opinions based upon it. Moreover, he believed it to be in accord with the rule of the *Mudawwana* which has been mentioned previously because he (Mālik) distinguished in it (the *Mudawwana*) between the wife who had been taken to her husband's home and the one who had not because it was their (the Medinese) practice that separation did not occur without a three-fold divorce if the wife had been taken to her husband's home. As for us, she is separated from her

husband after [only] one divorce. Thus, the wife of today who has been taken to her husband's home is the equivalent of the wife at that time (the time of Mālik) who had not been taken to her husband's home. Therefore, the rule [governing them] is one. Al-Lakhmī referred to this in one of his discussions, and Ibn Rushd gave preponderance to the opinion accepting the [word] of the one who claims that he did not intend by this statement divorce, and declared it to be correct. There is a transmission to this effect in the 'Utbiyya. Thus, *a fortiori*, he (the husband) should be believed when he claims he intended other than a three-fold divorce. Therefore, whoever uses this last opinion is secure, God willing.[27]

Two things from Ibn Sirāj's *fatwā* especially deserve comment. The first is that despite the authoritative statement of the *Mukhtaṣar*, we learn that the school actually has five opinions on this case. The fact that the rule is itself controversial no doubt is important in giving the *muftī* greater freedom in abandoning the established rule. The second is that it is the change in social practice which necessitated the change in the legal rule.[28] It is for this reason that Ibn Sirāj quotes a Granadian predecessor to the effect that in reality the rule has not changed; it is only the practice of the people which has changed.

The claim of this unnamed jurist seems to be confirmed by the practice of the other *muftīs* in this collection: when faced with a similar question they all reply, contrary to Khalīl, that this type of statement has the effect of initiating one divorce of separation unless the husband intends more than one divorce. Likewise, al-Mawwāq mentions the same reasoning in his commentary on Khalīl.[29] For this reason, then, all divorce cases in the *Ḥadīqa* (a total of twelve) which are contrary to Khalīl's rule, are in fact instances of the local rule mentioned by Ibn Sirāj. For this reason they should not be considered instances of judicial discretion, or instances of *ad hoc* rule making. If we then included these cases under a more general category of rule following, as opposed to our original category of following rules found in the *Mukhtaṣar*, then the number of decisions governed by previously existing rules would increase from 138 to 150, or from 54 per cent to 59 per cent.

As for the cases involving ritual slaughter, four involve what is called *al-dhabīḥa al-mughalṣama*. The law requires a butcher, when slaughtering an animal, to cut the throat so that it remains entirely connected to the head of the slaughtered animal. When a part of the throat remains attached to the body, the slaughtered animal is called *mughalṣama*. The standard doctrine of the Mālikī school is that an

animal slaughtered in this manner is carrion (*mayta*), and therefore, its meat cannot be used as food nor can the carcass be used for any other purpose.[30] Once again we are faced with a local change in the rule recognised by the school. This case, however, is distinguished from that above in that in this instance, the controversy centres on the rule itself; the practice of the people is not an issue. Because the controversy is over which opinion is the correct rule, Ibn Sirāj does not hesitate to justify his reply solely on the basis of his own reasoning. His replies regarding the *mughalṣama*, then, represent a more clear-cut case of judicial rule making. Ibn Sirāj says in *fatwā* 62:

As for the *ghalṣama*, there has been much controversy regarding it in the school, and its prohibition has been attributed to Mālik. However, Ibn Waḍḍāḥ rejected the accuracy of this transmission. Ibn Rushd reported that the prevailing [opinion of the school] is that eating from it is forbidden. However, the correct position upon reflection is its permissibility.[31]

The other cases involving ritual slaughter of animals are similar to the *mughalṣama* in that they represent a shift of doctrine based on the *muftī*'s own evaluation of the strength and weakness of the different opinions. Thus, in *fatwā* 64 Ibn Sirāj explicitly contradicts the rule of the school that forbids eating from an animal which has had only one jugular vein cut, using the same reasoning quoted above.[32]

Ibn Sirāj, based on the evidence of the *Ḥadīqa*, is significantly bolder in relying on his own personal reasoning than the other *muftīs* represented in the collection. For example, al-Saraqusṭī, in *fatwā* 86, when asked the same question put to Ibn Sirāj in *fatwā* 64, says that if only one jugular vein is cut, then the animal cannot be eaten.[33] Again, in *fatwā* 68, when asked about a cow which had escaped while being slaughtered, he is content to remark that if it had been captured shortly after its escape, and the slaughter had been completed immediately, then the validity of eating from this cow is controversial (*ukilat bi-khilāf*), without expressly revealing his personal opinion. Ibn Sirāj, however, when asked about a similar case, allowed eating from it unhesitatingly.[34]

This manifests itself rather clearly in Ibn Sirāj's willingness to contradict the established doctrine of the school. While al-Ḥaffār and al-Saraqusṭī contradict established doctrine in only about 10 per cent of their replies, roughly a quarter of Ibn Sirāj's opinions conflict with established Mālikī doctrine. While al-Shāṭibī's answers also contain a significant number of opinions which contradict established

doctrine, a little more than one in five, his sample size is not large enough to justify any generalisations about his personality as a *muftī*. That is not the case, however, with Ibn Sirāj, whose opinions are well represented in the collection. Moreover, we find that he contradicted doctrine not just in matters of divorce and the slaughter of animals: he also offered opinions contradictory to the school's prevailing doctrine in partnership,[35] sale,[36] debts,[37] exchange of currency (*ṣarf*),[38] marriage,[39] pledge (*rahn*),[40] and loan.[41]

In most of these cases, Ibn Sirāj has elected to follow an already existing opinion within the school, but one that is contrary to established doctrine. At times he justifies his choice by simply saying that this contrary opinion has a sound basis (*hādhā al-qawl lahu wajh*), as he does in *fatwā* 6 regarding the sale of impure oil. In *fatwā* 8, which deals with the validity of a sale payable in installments where the purchaser stipulated that the installments are maintained even should he die before completion of payment,[42] he points out that since Mālik's opinion was not based on a revelatory text, it is permissible to contradict it. In *fatwā* 11, he chooses the rule which he considers to be sounder in reason (*al-ṣaḥīḥ min jihat al-nazar*). In *fatwā* 134, where a man married a woman before she completed the waiting period that follows fornication (*istibrā al-zinā*), he allows him to remarry her after she completes the legally prescribed waiting period, also because it is an opinion whose basis is sound (*qawl lahu wajh*). In 155, he based his *fatwā* allowing the mortgagee (*murtahin*) to stipulate that he has the right to sell the pawned item if the mortgagor (*rāhin*) fails to pay the debt at the agreed-upon date based upon a rule identified by Ibn Rushd as controversial.[43] In arguing in *fatwā* 274 that the unit of measurement to be used in the loan of fungible items (*qarḍ*) should be those used in sale, and not that which is used in barter (*mubādala*), he resorts to analogy. It is not, however, a strict instance of the extrapolation of a new rule, because in his *fatwā* he simply uses the analogy to support his *choice* of a rule against the prevailing opinion.

In *fatwā* 3, however, we do have an instance of true extrapolation. The question before Ibn Sirāj was the legitimacy of a partnership between two men for the manufacture of cheese from milk. According to the rule of the school, this was an invalid partnership because Mālik forbade partnerships whose capital was food.[44] What seemed to concern Mālik was the inevitable uncertainty attendant to the division of the manufactured product, since the output would differ depending on the quality of the foodstuffs used as capital. Hence, it would be difficult, if not impossible, to distribute the product equitably among the partners.[45] This objection is also true in the case of manufacturing cheese from milk: some milk will produce more cheese than others, and division based on the original contribution of milk would have to ignore this fact, with the subsequent cause of harm to one of the partners.

Ibn Sirāj, however, finds a precedent in the school for allowing this labour partnership. He notes that this case is the equivalent of the controversy regarding the permissibility of mixing olives and sesame seeds at an oil press (*maʿṣara*). Having made a connection based on the common factor of the uncertainty in assigning the shares of the product, in this case the oil produced from the olives and the sesame seeds, and in the case of the *fatwā*, the cheese from the milk, he extrapolates that this agreement is most likely permissible because of need. He adds, of course, that they must divide the cheese in accord to the quantities of milk contributed by each.[46]

Legal Controversy *(khilāf)* and the Administration of the Law

While Ibn Sirāj's wide use of personal discretion is no doubt important, his use of the expression '*lam yuʿtaraḍ*' or '*lam naʿtariḍhu*' also deserves comment. It seems that the purpose of this expression is to put a limit on state intervention (*ḥisba*) into the acts of individuals. When Ibn Sirāj says that selling impure oil after washing it is lawful, he is merely selecting among the opinions of the school. However, when he adds after that the statement '*fa-man qalladahu lam yuʿtaraḍ*', he is in all likelihood signalling that this case is outside the domain of the market inspector (*muḥtasib*). The same is true in *fatwā* 64, where the import of the statement is that those supervising the slaughter of animals should not intervene in cases where the butcher has cut only one of the jugular veins. Finally, in *fatwā* 134 the effect of his statement '*fa-man qalladahu lam naʿtariḍhu*' is to proclaim that such marriages will be outside the review powers of public authorities.

From these *fatwās* we can extrapolate that the legal machinery of the Naṣrid state was concerned to maintain and enforce the legal standards of the Mālikī school in regard at least to the purity of foodstuffs sold in the markets, the conditions for valid marriages, and the slaughter of animals. A possible unforeseen consequence of the positivisation of Mālikī rules was that it increased the powers of the *muḥtasib* by creating rules in areas of the law which, even within the

school itself, were controversial. It is possible that Ibn Sirāj wanted to decrease the regulatory powers of the state by pointing out that many of the rules in the school, although valid when applied within the context of a dispute or in giving legal advice prior to an act, were not valid grounds to justify the intervention of regulatory powers prior to the occurrence of a legal dispute. This policy of limiting the police powers of the state that we find in some of his *fatwās* seems to be in line with what his student, al-Mawwāq, attributes to his teacher in his commentary on the *Mukhtaṣar* :

> My master, Ibn Sirāj, may God have mercy upon him, in regard to this type of case [i.e. controversial cases] would not issue opinions based on them [rules contradictory to the established doctrine of the school] before an act, but he would not be critical of those acting in accord with them. All that can be said is that the individual who does it [acts using a rule contrary to the rule of the school] has abandoned the dictates of piety, and wherever controversy is well known, there can be no intervention, especially if there is a need justifying that action.[47]

Thus, it seems that the proper interpretation of Ibn Sirāj's *fatwās* which are contrary to the doctrine of the school is not to take them as representing a desire to change established doctrine. Rather, it was in all probability an effort to restrict the use of controversial but established rules to dispute situations, and to deny them the status of absolute rules, violation of which could invite state intervention.

In contrast to Ibn Sirāj, we find that al-Ḥaffār and al-Saraquṣṭī do not use expressions like '*lam yu'taraḍ*' in contexts where there are competing positions within the school. Al-Shāṭibī, however, does make a reference in one of his *fatwās* to the effect of legal indeterminacy on the enforcement of such a rule:

> The more appropriate course of action in every case for which the scholars of the school have two opinions and the people have followed one of these two, even though it (one of the two) may be considered weak upon reflection, is that they should be left alone, and treated as though they have followed it from ancient times, and that their practice had been governed by it. For, if they were forced to use the other rule, that would create confusion in [the minds of] the populace, and would encourage lawsuits.[48]

In this opinion al-Shāṭibī points to another difficulty involved in the attempt to apply the rules of the school uniformly. While it is possible that a current generation of jurists are able to reach agreement about what is the rule of the school regarding a particular case, that agreement cannot erase a *history* of disagreement and legal indeterminacy. In these cases, al-Shāṭibī argues, strict legality must

retreat in the face of material considerations, namely confusion of the populace, and the risk of increased law suits. This differs from the argument of Ibn Sirāj, who wished to use the history of controversy only to limit the regulatory powers of the state. He would still, however, rely on the established opinion of the school in other contexts. Al-Shāṭibī insists that a local legal tradition must be respected even if it is against the established doctrine of the school, implying that the *muftī* should base his *fatwā*, when faced with this situation, upon the local rule, and not the rule of the school.

This does not mean that al-Shāṭibī is a legal pragmatist. Indeed, the texts of his *fatwās* display the conservatism that is typical of all legal writing. Thus, he is usually much more careful than Ibn Sirāj in providing a reasoned argument justifying his diversion from the established doctrine of the school. A good example of this is *fatwā* 265. This is the same question – a partnership for the production of cheese from milk – that was put to Ibn Sirāj.[49] In contrast to Ibn Sirāj who answered in no more than two lines, al-Shāṭibī takes almost two pages of argumentation to justify his opinion. What is most revealing about his personality as a jurist, however, is that despite reaching his conclusion independently of any texts in the school, he refused to respond before coming across a text which he could use as a precedent:

> This [its permission] is what appeared to me without a text regarding this particular case upon which I could base it [my opinion]. For that reason I refrained from answering, although a number of people had asked me about it. Then, I found in the *'Utibyya* a case resembling it, and it is from the transmission of Ibn al-Qāsim from Mālik. He [Ibn al-Qāsim] said: 'I asked Mālik about oil presses, sesame oil and radish seed oil, this man comes with *arādib*,[50] and that one with others, so that when they meet at the press, they press [their seeds] together?' Mālik said: 'This is to be avoided [or: this is detested] because some of it will produce more than the other. However, if the people are in need of that action , I hope that it is a trivial matter, because the people must have what improves their condition. And the thing for which the people find no alternative or substitute, I hope that there is room for that, God willing, and I see no problem in it.' Ibn al-Qāsim said: 'Olives are like that above.' Ibn Rushd said: 'He deemed it to be a small matter because of the necessity involved, for it is impossible to press a small amount of sesame or radish seeds by themselves. Likewise, he also took account of the opinion of those scholars who permit unequal exchange of these things.' ... All of this is some of which points to the validity of what appeared to me in regard to milk, and God knows best.[51]

This opinion exhibits the traits of what Watson terms 'law making by interpreters'. Describing the structure of arguments made by legal interpretation, he says:

> Only some kinds of argument are respectable, above all argument by analogy from existing rules in a similar context, or from authority, such as precedent in one's own system or an opinion expressed for another system that is held in esteem. These arguments have in common that they are of necessity backward looking. Even if the interpreter is in fact bringing about a legal revolution he must justify it with such arguments. This can only reinforce conservative tendencies, and it is notorious that the pace of reform by interpretation is slow.[52]

Thus, we find al-Shāṭibī using each of the three elements mentioned by Watson: an analogy based on the mingling of orphans' property with the property of their guardians in his own attempt to reach a solution to the question, and then an analogy based on a similar ruling attributed to Mālik; for precedent, he quotes Ibn Rushd as approving this ruling; as for an outside opinion, he quotes Ibn Rushd as saying that Mālik ruled in this manner out of his regard for the opinion of other scholars who do not consider the unequal exchange of oil illegal.

Al-Shāṭibī also declares explicitly his allegiance to the basic principle which guided the creation of Khalīl's code – that in controversial cases, the *mashhūr* opinion is the default rule of the school.[53] The *Ḥadīqa*, in *fatwā* 276, preserves an explicit declaration of his fidelity to the rules of the school. Thus, when asked by a petitioner to explain the Mālikī methodological principle of taking cognizance of a weak opinion (*murā'āt qawl ḍa'īf*), he takes it as a pretext to scold his colleagues for not sticking to the doctrine of the school closely enough, saying:

> 'Taking cognizance' of other opinions, weak or otherwise, is the affair of *mujtahids* in the law, for 'Taking cognizance of the controversy' means nothing else than taking cognizance of the opponent's evidence ... and taking cognizance of the evidence or not doing so, O group of followers (*ma'shara al-muqallidīn*), is not our affair! Therefore, it suffices us to understand the opinions of the scholars, and issue opinions based on the prevailing of these [opinions]. And would that that be sufficient that we may escape with nothing for us and nothing against us![54]

After looking at more detail into the *fatwās* that contradict Khalīl, then, we discover that at the most these represent small divergences in the interpretation of the legacy of the Mālikī legal corpus, of

which the *Mukhtaṣar* is just one element, albeit the most authoritative.[55] These divergences from the doctrine of the *Mukhtaṣar*, moreover, are not done out of an anti-codification stance; rather, they represent the right of a *muftī* who is a *mujtahid-fatwā* to choose among the different positions within the school. By itself, this does not represent a challenge to the basic belief that permitted the Mālikī school to create positive rules in the first place: the *mashhūr* position of the school must be followed in cases of controversy.

The Limits of Codification: Cases and Rules not governed by *Mukhtaṣar Khalīl*

We have identified four types of rules which lie outside of the scope of the *Mukhtaṣar*:

1. Secondary rules associated with an existing rule in the code;
2. Rules dealing with the relationship of individuals to the government and other social institutions;
3. Rules governing novel cases;
4. Civil cases governed by no explicit rules in the code.

Category 1

Fatwā 21 presents a typical example of a case which only partially falls under the code. Ibn Sirāj is asked about the validity of a gift given by a father to his son on the occasion of the latter's wedding. The father, however, had the gift witnessed before the marriage contract had been completed by a few days. The *muftī* replied that the gift is valid, but becomes binding only if the son takes possession while the father is alive and healthy. If not, then the gift must be approved by the father's heirs. Up to this point in his *fatwā*, Ibn Sirāj is transmitting standard Mālikī doctrine regarding the conditions by which a gift becomes valid and binding. It is only the last part of the answer which adds a new rule to the doctrine. Ibn Sirāj, after explaining the law of gifts, then adds that had the father included the gift to his son as a part of the son's marriage contract, the gift would have been binding not only against the father, but also against his heirs had the father died before the son took possession of the gift:

> The gift is valid and binds the father if the son takes possession of it while the father is alive and healthy. If the father had died before the son takes possession of it, then the gift is not valid for the son without the permission

> of the heirs, because it preceded the marriage. [This is] in contrast to the situation had it been in the marriage contract, in which case he would not need [their permission].[56]

This last rule, while not mentioned in the *Mukhtaṣar*, does not appear to be a result of the *muftī*'s personal discretion. In all likelihood it is a case of a rule created by the document writers (*ahl al-wathā'iq, al-muwaththiqūn*). At least two other *fatwās* found in the collection support this conclusion. Al-Shāṭibī notes in *fatwā* 238 that a woman's wearing of clothes is sufficient to prove that the clothes are hers in the context of a dispute with the husband's heirs. In the next *fatwā* al-Shāṭibī attributes this rule to *ahl al-wathā'iq*.[57] Likewise, in *fatwā* 155, when Ibn Sirāj was asked if the mortgagee (*murtahin*), based on a stipulation in the contract, could sell the pawned item (*rahn*) without the permission of either the mortgagor (*rāhin*) or the approval of a judge, he replied that the mortgagee could do so only if the contract contained a clause making him the mortgagor's agent in life, and his executor on death in regard to the sale of the pawned item:

> If the mortgagor has made the mortgagee, in regard to the pawn's sale, his agent during his [the mortgagor's] life, and his executor after his death, then he [the mortgagee] has the right to sell it. If he did not do this in the mortgage contract, then he cannot sell it without consulting the mortgagor or the judge.[58]

Ibn Salmūn, however, mentions this clause explicitly, attributing it to 'one of the document writers', saying that 'One of the document writers said, 'It is not permissible for him to sell the pawned item without consultation or the [intervention] of the government ... unless he said in the document 'He made him his agent in his lifetime and his executor after his death.'''[59]

This circumstantial evidence gives us strong reason to suppose that what was true in *fatwās* 155 and 238 is also true in the other *fatwās* which mention a secondary rule associated with a subject in the *Mukhtaṣar*. For example, in *fatwā* 164 the *muftī* mentions that a sale by estimate of the quantity (*bi-l-taḥarrī*) is valid either if both the purchaser and the seller are skilled in estimation, or they bring in a professional estimator.[60] In all likelihood, the introduction of an estimator was probably introduced in social practice and then given legal recognition, first by those writing contracts, and then finally by *muftīs* and judges. This allows us to see the relationship between the legal genre of *wathā'iq* and the legal codes: while the latter provide a broad framework for the exercise of legal rights, the former's

function is to provide formulae which remove doubt as to the intention of the parties to the agreement as well as providing procedural steps for the exercise of the rights recognised by the law.[61]

Their relationship in this respect is dialectical, for through the exercise of legal powers, new rules are created to govern unanticipated contexts created by the very use of these same legal powers. This is implied in al-Mawwāq's discussion of Khalīl's rule regarding the validity of the mortgagee's sale of the pawned item.[62] On the one hand, Ibn 'Arafa (d.680/1281) is quoted as saying that when the mortgagor gives the mortgagee the right to sell the pawned item without stipulating that it be a good sale (*ṣawāb*), this has the effect of creating a relationship of agency (*maḥḍ tawkīl*). He adds that on the other hand when the mortgagor stipulates this right on the condition that he fails to pay the mortgagee on the agreed-upon date, this creates the possibility for a conflict regarding the fact of payment or non-payment. This possibility of conflict requires the intervention of a judge.

It is not difficult to imagine that the rule mentioned by the *muftī* was originally introduced by the document writers to remove the ambiguities involved in this type of sale. We can speculate regarding the development of the rule. At first there is the recognition of the right of the mortgagee to sell the pawned good if the mortgagor fails to pay on the agreed-upon date. As a result of this latter condition, mortgagors begin to challenge the validity of some sales on the grounds that they had made payment. Legal theory attempts to limit these disputes by requiring that the mortgagee can sell only after consulting a judge who will make sure that the mortgagor failed to pay the money at the due date. The mortgagees counter by requiring that the mortgagors appoint them to be their agents in the sale of the pawned good. This, which began in fact as nothing more than an attempt by mortgagees to avoid the hurdle of judicial intervention, ends as a general rule demanding from all mortgagees that if they wish to exercise the right to sell the pawned good in their possession, they must stipulate this relationship of agency explicitly in the contract. If they fail to do so, the sale cannot proceed without a judge's approval.

Category 2

It is not surprising that rules regarding the relationship between the individual and the state should not be codified. These issues require solutions based more or less entirely on substantive considerations

rather than on formal legal ones. This is not to say that legal knowledge is not important in the interpretation of these opinions; rather, it is to point out that in these cases a much fuller knowledge of the historical context of these questions is necessary for a meaningful interpretation of the opinions to be given. In other words, these *fatwās* are of possibly more significance to the social historian than the *fatwās* discussed above.

An example of a dispute involving an individual and a branch of the state occurs in *fatwā* 16. The questioner narrates what amounts to an economic dispute between a privately-owned bakery and a publicly-owned bakery. We are told that there is a village which has two bakeries (*furnān*), one controlled by a certain section of the town, and the other controlled by a mosque (*aḥaduhumā li-l-jānib wa al-ākhar li-l-masjid*). According to the questioner, there was a customary agreement between the two regarding which sections of the village each would serve: *li-kulli furn jiha ma'lūma min diyār al-qarya*. This did not mean that occasionally individuals from one section of the village did not use the facilities of the other section of the village. This, however, was limited to particular individuals and happened by chance: *'āriḍ ya'riḍ lahu*.

The conflict began when a group of people who customarily took their business to the bakery of the *jānib*, took their business to the endowed bakery controlled by the mosque (*furn al-aḥbās*). Somebody opposed this and said that this was not permissible. Furthermore, he added that if the Imām took the flour generated by those who transferred their business, his probity would be affected (*akhdhuhu li-dhālika al-daqīq ... qādiḥ fihi*). The *muftī* rejected these charges and said that this action was perfectly legal. That the *muftī* took the implications of these charges seriously, however, is revealed in the implied threat directed to those making the accusation:

> There is no violation of the law here either on the part of the Imām or any other person, and it is [entirely] legal. As for the one claiming that it is illegal, he is ignorant and making false claims about the law. He must repent from what he says [and cease and desist].[63]

Although the explicit issue in the question concerns the probity of the local prayer leader, it obviously also entails a conflict regarding the distribution of local economic resources. Likewise, the legitimacy of the established religious authority is at stake, and for that reason it seems that Ibn Sirāj responded to the accusations against the Imām sternly.

In *fatwā* 193, there is another case illustrating a conflict between an individual and an agent of the state. Al-Ḥaffār was asked about a sale in which the purchaser was to pay the vendor 100 dinars. On his way to deliver the cash, the purchaser was stopped by a government agent (*mushrif*), who forced him to pay a duty (*thiqāf*) of eleven dinars. The purchaser was seeking a rebate from the vendor in compensation for the duty paid, while the vendor was seeking his money in full. Al-Ḥaffār replied that the purchaser must pay the amount specified in the sale, and that the question of compensation for the purchaser was to be referred to the ruler.[64]

Category 3

At this point in our analysis we shall direct our attention toward solutions to novel cases. What, however, is the distinction between a novel case and any other case not explicitly falling under the province of the code? Often this is an ambiguous distinction. However, we have chosen to make a distinction between the novel cases which arise from the exercise of already existing rights, e.g., the secondary rules mentioned above, and cases which are *generically* a new topic for the law. Because of this distinction between a novel case and a case not governed by an explicit rule, we have not found many instances of novel cases in the *Ḥadīqa*. The one we do have, however, is extremely important as an example of how new social facts help to create new legal rules.

As is well known, the production of silk was a pillar of the economic success of the Naṣrid regime in Granada.[65] What may not be as well known is the extent to which this production depended upon labour partnerships which were irregular according to standard Mālikī doctrine. According to the evidence of the *Ḥadīqa*, the preferred mode of investment took the name of *'alūfa*. This arrangement entailed a partnership between the labourer and the owner of the mulberry trees (*tūt*). Once the mulberry leaves had matured to the point where they could be fed to silkworms, the owner of the tree would hire the labourer to harvest the leaves and feed them to the silkworms. The labourer would also contribute a portion of the silkworms to the partnership. The owner of the mulberry trees and the labourer would then divide the silk produced according to the proportions agreed upon at the outset of the partnership.

The legality of this arrangement was at the very least questionable. If it was viewed as a contract of hire (*ijāra*), then it would be invalid

due to the unknown nature of the labourer's wage. It could only be deemed a partnership, however, if it was made analogous to other contracts such as sharecropping (*muzāraʿa*). Yet, because this latter contract is itself based on a special dispensation (*rukhṣa*) which overrides the normal principles of the law, there was great reluctance to admit the legality of an arrangement which widened the scope of a dispensation.[66] Nevertheless, the five *fatwās* regarding the *ʿalūfa* all agree that this arrangement is legal, and therefore binding.

There are five *fatwās* in the collection whose subject is the permissibility of the *ʿalūfa* contract. These five *fatwās*, 127(g) and 139–42, were authored by three *muftīs*: al-Shāṭibī, al-Ḥaffār, and Ibn Sirāj.[67] Al-Shāṭibī, although he recognised the tenuous nature of the contract, suggests that an arrangement which is similar to 'the practice of the people' is permissible because of its similarity to the *muzāraʿa*.[68] Al-Ḥaffār's analysis did not differ too greatly from al-Shāṭibī's except that he made explicit the grounds on which the customary arrangement was invalid as well as noting that most contracts, since they followed customary arrangements, were invalid.[69]

Ibn Sirāj addressed this question in 127(g), 141, and 142. Of these three *fatwās*, the first two are both lengthy discussions regarding the validity of this contract. His discussion of the issues highlights the problematic nature of the case – on the one hand the *muftī* has a responsibility to be loyal to his legal tradition, while on the other hand he cannot ignore economic realities. In the first of the two, he is asked about the legality of the *ʿalūfa* as it has been practised by the people (*ʿalā mā jarat bihi ʿādat al-nās*).[70] It is clear from his response that he accepts the solutions of his predecessors, al-Shāṭibī and al-Ḥaffār, as representing the school's position on this matter. He is more explicit in revealing, however, that this solution was contrary to the practice of the people:[71]

> If a person can find someone who will agree with him to an acceptable arrangement, e.g., that the labourer inspects the leaves, he buys half of them from the their owner with his labour... if he finds someone willing to work [under these stipulations], then it is impermissible for him to act in the manner of the custom of the people according to the opinion of Mālik and the majority of scholars. It is permissible, however, according to the opinion of Aḥmad b. Ḥanbal and some scholars of the pious ancestors, by analogy to *qirāḍ* (commenda) and *musāqāt*.[72]

Ibn Sirāj is clearly concerned about the fact that a large number of these partnerships fell outside of the Mālikī legal norm which was to govern the case. His solution, in effect, is to limit the scope of this

rule to people who are willing to follow it, and legitimise the 'practice of the people' in all other cases. How does he do this? He provides two arguments, the first is taken from comparative jurisprudence (*ʿilm al-khilāf*). The effect of this argument is to show that although the 'practice' is contrary to Mālikī doctrine, and indeed is contrary to the doctrine of most of the scholars, it is, nevertheless, a valid arrangement in the eyes of a small, but important, minority of scholars. The second argument is taken from the principles of the Mālikī doctrine itself, and has the effect of overturning the old opinion and creating a new rule:

> If the person cannot find someone who will work [under these] terms, and [will accept] only the customary arrangements, and if not following that [the custom] leads to their [the trees] non-use, harm [to their owner], and the waste of [his] property, then it becomes permissible according to Mālik's statement allowing that thing which is needed by all.[73]

While he does not state explicitly what the custom of the people is, when this issue is read in the light of al-Ḥaffār's *fatwā* mentioned above, and al-Mawwāq's discussion of lease,[74] we can deduce that it probably entailed hiring the labourer for a wage to be taken from the output, i.e., the silk. Moreover, Ibn Sirāj's last argument implies that the owners of the trees are unable to find labourers willing to accept the terms of the partnership as outlined by Mālikī law.

To summarise, the eighth–ninth century Granadian legal establishment was faced by the novel case of partnership in the manufacture of silk. Investment in this type of partnership seems to have become so common that it required the creation of a specific rule governing it. This seems to have begun with al-Shāṭibī, was developed slightly by the time of al-Ḥaffār, and had become systematic legal doctrine by the time of Ibn Sirāj. The rule that was developed by the school to govern this case was based on a controversial mode of legal reasoning, but this was justified because of economic necessity. The extent to which this rule was followed by citizens of Granada, however, is questionable, for the evidence of the *fatwās* indicates that they had their own customary arrangement. Because this practice was recognised as being valid by at least some jurists in Islamic law, however, the customary arrangement was granted limited recognition.

Category 4

Our last category is defined negatively – we have reserved it for cases which we felt were neither secondary developments of already existing

rules, nor were they novel cases. At the same time, however, they are matters that must be considered civil, and therefore should have had a place in the code, but for one reason or another, they were not. Some of the cases, as we shall see, can be extrapolated from other sections of the code. Others, however, seem to be governed by well-established rules, but these rules are not part of the *Mukhtaṣar*.

The first two cases, 169 and 171, involve the economic relations of individuals in a family.[75] They represent actual lawsuits in which the children are suing the father for money owed to their deceased mother. In both cases the father, over the duration of the marriage, had exploited his wife's properties, apparently keeping the produce for himself. We are told that the marriage in the first case had lasted a long time, and in the second it had endured thirty years. The implicit claim of the father in both is that his wife had forgiven him these debts, while the children deny this. What is being contested then is the size of the estate. If the father wins his claim, the estate is essentially limited to the real property of the deceased wife. If the children win, the estate increases dramatically to include all the output of these lands from the moment the husband began farming them to the time of the mother's demise. Al-Ḥaffār, however, rejects the claim of the children, saying:

> If this marriage has endured for a long time, and the wife never claimed from the husband what she was owed of the crops during her lifetime, then her silence over such a lengthy time is cause for cancellation of her right. Thus, her son has no claim on that [money].[76]

In a similar question before Ibn Sirāj, however, he gives the children the right to sue their father for the rent owed to their mother with the exception of that from the domicile. At the same time, however, he gives the father the right to sue the estate for the unpaid wages stemming from his management and farming of his deceased wife's agricultural lands.[77]

The issue in these two cases before the judge is simple: does a wife's non-collection of rent from her husband really amount to a forgiveness of the assumed obligation? Al-Ḥaffār said yes, while Ibn Sirāj said no. Unfortunately, the *Mukhtaṣar* does not address the length of time necessary to pass before a debt is considered to be forgiven. While it does give the amount of time necessary for possession (*ḥiyāza*) to become property (*milk*), and distinguishes between the possession of a stranger (*ajnabī*) and a relative (*qarīb*), it provides no rule for our case. This does not mean that the *muftīs* quoted above were facing

entirely unprecedented cases, for there are a number of opinions in the school regarding length of time which must pass before a debt is taken to be forgiven. What seems strange, however, is that Khalīl made no reference to this issue at all.[78]

One reason for Khalīl's silence could be the numerous opinions expressed on this issue. In other words there was a failure to reach enough of a consensus that would allow for a rule to emerge. Thus, this issue was left to discretion, as we see in *fatwā* 298, where al-Ḥaffār was asked about a Jew who was owed some money by a Muslim from a transaction dating back eleven years. Despite the fact that the Jew had documents supporting his claim, al-Ḥaffār ruled that the Muslim was to be believed with his oath in his claim that the Jew had forgiven the debt based simply on the length of time between the debt and the claim.[79]

Our next cluster of questions deals with water law, questions 188–90,[80] a topic of obvious importance for an economy such as Granada's which depended heavily upon irrigated agriculture. Despite this, however, there is no chapter on this topic in the code. This does not mean that it is unregulated and left to the pure discretion of the *mufti*, however. In the three answers of Ibn Sirāj, we see that water law was governed by two basic principles: irrigation water is not subject to ownership, and its use is governed by the principle of prior usage. This meant that if anyone chose not to use his share of irrigation water for a given growing season, he could not 'sell' it to a neighbour. At the same time, however, those who invested in establishing the irrigation network had the exclusive right of determining the shares each person would take from that water. Therefore, if a village built a water wheel (*sāqiya*), they establish prior usage rights to that water, even if they are further away from the stream than another village.[81] Once they have satisfied their need for water, however, they cannot prevent others from using the remainder. Other than these two principles, then, the details of the law are left to the people themselves to work out. It is possible that this was not included in the *Mukhtaṣar*, then, because it is essentially a matter of customary law.

General Rules and Particular Rulings in the *Mukhtaṣar Khalīl*

The only category which we have not discussed at length is that category representing the opinions which are explicitly included in

the code. Perhaps this category deserves at least passing comment. It has been asserted that Islamic law, because of its casuistic method, is very 'concrete,' meaning that it provides very specific rules for specific acts. The price of this, however, was that it failed, or more charitably, was not interested in developing abstract rules of general applicability.[82] If one looks at the code of Khalīl, however, one realises that the two types of rules, the very specific and the very general, exist side by side. It would be very surprising indeed if one were to find a code that could be described as 'concrete.' Such a code would be obsolete upon its very completion. The very fact that *Mukhtaṣar Khalīl* survived hundreds of years in locations as different as Andalusia, sub-Saharan Africa and Egypt, indicates that it must have had sufficient generality to allow it to withstand changes in both time and place.

Indeed, one cannot accurately describe the 'concrete' rules in Khalīl as actually being rules: instead, Khalīl may cite concrete examples as instances of a general rule, especially if that example's inclusion within the general rule has been controversial, or if that case is likely to recur in front of a judge or *muftī*. A clear example of this is in the chapter of sale, where Khalīl says: 'The sold item, [in order for the sale to be valid] must be pure, unlike dung and [unlike] oil which has been polluted.'[83] As a matter of fact, this question came up several times in the course of the *fatwās*: is it permissible, and if so, under what conditions, to sell oil which has been polluted by the body of a dead mouse?

Another example should make this point clear. In the chapter on hire (*ijāra*), for example, Khalīl mentions explicitly that hiring a labourer to harvest olives for a percentage of what he picks, if the labourer is obligated to work for a certain time, is invalid. Thus, in *fatwā* 257 the *muftī* is presented with a case which is almost the exact equivalent of the example cited by Khalīl to illustrate his rule that any hire contract is invalidated if a *ju'l*[84] contract is appended to it. Khalīl states the rule, as is his custom, very succinctly, saying 'It [the hire] becomes invalid if ... like its inclusion of a *ju'l*.'[85] Upon mentioning that a *ju'l*, if included along with the hire contract, will invalidate it, he mentions several examples of hire contracts which were legally invalid because they also contained within it a *ju'l*. Of these examples provided by Khalīl, the fifth, which is a hire-contract whose '[wage is] what falls or is pressed from the harvest of an olive [tree],' is found in the collection of *fatwās*.[86]

A more accurate description of the language of the code, then, would be that it contains general rules illustrated by examples of particular rulings derived from those general rules.

Conclusion

Are we justified in making any general comments about the nature of Granadian legal culture based on our one collection of *fatwās*? To generalise based on this limited number of *muftīs* and *fatwās* would obviously be dangerous, especially given the fact that there are countless untapped *fatwās* which could be used to answer the same types of questions asked in this study. It goes without saying that the results for eighth–ninth/fourteenth–fifteenth century Granada cannot be, even if they were accepted with certainty, taken to be representative of Islamic legal culture as a whole, or even for that matter, Mālikī legal culture. In order to make these kinds of generalisations many more micro-studies similar to that presented in this study must be conducted. Only then will we have a solid empirical basis upon which we may make reliable statements regarding theory and practice as it affected the application of Islamic law.

Despite this caveat, however, we would like to offer some observations about the *muftīs* represented in our text, *al-Ḥadīqa*. The first is that they are conscious of the fact that they, despite being at the apex of their legal hierarchy, are still no more than interpreters of their legal tradition. On the one hand, this restricts the type of arguments they can deploy, for although they are not required to accept standard Mālikī doctrine in every case, they are bound to take it seriously and argue why the opinion they support is superior. The *fatwās* of the collection reflect this fact rather obviously in their length: almost inevitably, the longer a *fatwā*, the more likely it is to be either a departure from received doctrine, or an attempt to provide a new rule. The converse is also true: the shorter an opinion is, the more likely it is simply a recapitulation of standard doctrine. As a general rule a *muftī* only mentions a source when he is departing from the accepted rule in some way and is completely silent on the source of a rule when it is the standard doctrine of the school. Based on the conventions of these *fatwās*, then, there are no grounds for believing that the brevity of *fatwās*, and their lack of detailed justification, was a device used strategically by the jurists to change legal doctrine, as had been suggested by some writers on Islamic law.

Being a member of a *madhhab* was not just restricting, however. It also gave the jurist greater freedom in other respects because he was

freed from the need to justify every step in his argument according to the requirements of *uṣūl al-fiqh*. Instead, he could extrapolate rules directly from the rules developed by the school itself, a privilege none of the great founders of Islamic law enjoyed. To sum up, then, following a *madhhab*, at least at its upper echelons, did not mean that one accepted a mere body of rules; instead, it contained within it as well a series of concepts and principles that allowed for the revision of old doctrine as well as the creation of new. We saw this process at work in the course of a number of *fatwās* within the collection. In some ways, then, the presence of a *madhhab* acted more as a catalyst of legal change than as a hindrance to it.

Another important issue is the question of whether or not the jurists were faithful to a vision of law as being a means to a social Utopia, or as a means to best bring about justice in this world. If all we had to judge by was *al-Ḥadīqa*, we would have to settle decisively for the latter. Roughly two-thirds of the *fatwās* in this collection were either judicial or quasi-judicial. While it is possible that some of these questions were hypothetical, meaning that the question was not occasioned by a dispute, this does not mean the subject of the question was an implausible event. The stereotype that Muslim jurists, out of their lack of connection to the 'fallen world', amused themselves solving cases that never occurred is not supported by the opinions in this collection.

This brings us to the question of using *fatwās* as a source of social history. After this study, we have complete confidence that the vast majority of cases discussed were instanced by real individuals in need of legal advice to further their own private interests. Furthermore, it is relatively easy to distinguish what is an academic question from a question arising from a legal dispute. This does not necessarily mean that they can be used to reconstruct the social history of Granada for the period mentioned. This is due to the fact that these are essentially legal documents, very abstract and apersonal, with only rare references to actual quantities of money involved in financial disputes. This is a result of the fact that *muftīs* only had jurisdiction over law and not fact, and therefore, these quantitative figures were of little use to them. As a result, then, we are given much qualitative information about Granadian social life. For example, we know that children sued their father for debts owed to their deceased mother, or at least tried to, which indicates that at least some women owned significant amounts of agricultural land. We also know that the state tried to protect its share in estates when an individual died without

heirs, but we have no idea how often such an event occurred.[87] Beyond that, however, we cannot say much.

Perhaps the most important conclusion we can make about Granadian society based on these *fatwās* is that it had a sophisticated legal culture which took its obligation of administering the law seriously. That it suffered from a measure of legal indeterminacy should not cause us to doubt their commitment to an ideal of rule of law. In any case it is doubtful that the law as administered in Granada was any more indeterminate than the laws of any other advanced legal system. Nevertheless, it would be interesting to do a comparative study of Granadian legal decisions with decisions from the law courts of Castille and Aragon so that we could have a better empirical basis for judging the degree of legal indeterminacy in both societies. At the same time it is imperative to continue studies of other Muslim cities in different times and places using the methodology suggested here so that we can enrich our understanding of Muslim legal history as practised by its representatives.

Notes

1 Bryan S. Turner, *Weber and Islam* (London, 1974), 11. Orientalists subsequently have followed Weber on this point until it has become a recognised *topos* of Western studies on Islamic law: Aziz al-Azmeh, 'Islamic Legal Theory and the Appropriation of Reality', in *Islamic Law: Social and Historical Contexts*, ed. Aziz al-Azmeh (New York, 1988), 50. Udovitch half-jokingly refers to the Hurgronje–Goldziher–Schacht link as providing Western studies of Islamic law the 'golden *isnād*' for this theme: Abraham Udovitch, 'Theory and Practice of Islamic Law', *Studia Islamica*, 32 (1970), 89. Also, see R. Stephen Humphreys, 'Islamic Law and Islamic Society' in *Islamic History: A Framework for Inquiry* (revised ed., Princeton, 1991).

2 H. L. A. Hart, *The Concept of Law* (Oxford, 1961), 100. Hart notes that a rule can remain valid even if it is not efficacious, where efficacy is taken to mean more people obey it than not. However, this must be distinguished from 'a general disregard of the rules of the system. This may be so complete in character and so protracted that we should say, in the case of a new system, that it had never established itself as the legal system of a new group, or, in the case of a once-established system, that it had ceased to be the legal system of the group.'

3 *Khul'* is a type of divorce in Islamic law in which the wife pays a certain sum of money to her husband in exchange for a complete (*bā'in*) divorce. Subsequently, the wife can only return to her husband after a new contract is drawn up and a new dowry is paid.

4 N. J. Coulson, *A History of Islamic Law* (Edinburgh, 1964), 137–8. See also N. J. Coulson, 'Muslim Custom and Case-Law', *Die Welt des Islams* 6 (1959–61), 13–24.

5 Coulson, *A History*, p. 47. In fact, it is not so difficult to reconcile this practice with the Mālikī law of *khul'*. The first step is to recognise that the prevalence of this custom makes it necessarily an implicit condition in any marriage contracted among this group of people. If it were to be explicit, it would be something like, 'If you (the wife) pay me (the husband) half of your dowry, then you are divorced.' According to Mālikī doctrine as established by Khalīl, if the husband makes *khul'* conditional upon delivery of a certain amount of money, then that condition continues to apply into the future unless he restricts it to a certain period of time, either explicitly or implicitly. According to Khalīl, for a *khul'* divorce to take effect 'Simple exchange is sufficient and if he [the husband] makes [it] conditional on payment or delivery, it is not limited to the session unless there is evidence [to the opposite] (*wa kafat al-mu'āṭāh wa in 'allaqa bi-l-iqbāḍ aw al-adā' lam yakhtaṣṣ bi-l-majlis illā li-qarīna*)', Muḥammad b. Muḥammad al-Ḥaṭṭāb, *Mawāhib al-jalīl li-sharḥ Mukhtaṣar Khalīl*, 6 vols (Beirut, 1992/1412), vol. 4, 37. In short, if a man in West Africa seeks to deny his wife this option, the law would seem to oblige him to stipulate this condition expressly at the time of the contract. Unfortunately, we are unable to confirm the accuracy of this reconstruction of legal doctrine because Coulson neglected to tell us what the reaction of the legal community to this practice actually was.

6 Jerome Frank, *Law and the Modern Mind* (Gloucester, Ma., 1970), p.x.

7 For the relationship of *fatwās* to positive law, see Wael Hallaq, 'From *Fatwās* to *Furū'*: Growth and Change in Islamic Substantive Law', *Islamic Law and Society*, 1, 1 (1994), 29–65.

8 The author of the first work is Ibn Shās, d. 616/1219, and the second is Ibn al-Ḥājib, d. 646/1248. Both works remain in manuscript. The author of the third work is Khalīl b. Isḥāq al-Jundī, (d. 749/1348 or 767/1365).

9 Burhān al-Dīn Ibrāhīm b. 'Alī b. Muḥammad Ibn Farḥūn, *Kashf al-niqāb al-ḥājib min muṣṭalaḥ ibn al-ḥājib*, Ḥamza Abū Fāris and 'Abd al-Salām al-Sharīf eds, (Beirut, 1990), 38–9.

10 Coulson, *A History*, p. 84. Coulson's description of the jurisprudence of this period as slavish both in form and content is representative of the positions of the best-known Western historians of Islamic law. Schacht, however, vacillates on this issue, at times stating that Muslim legal thought basically ceased at the beginning of the fourth/tenth century, while on the other hand claiming that later jurists were just as creative as earlier ones: Joseph Schacht, *An Introduction to Islamic Law* (London, 1964), 70–3. The opinions of Muslim legal historians on this genre scarcely differ from those of Western historians. See, for example, Muḥammad b. al-Ḥasan al-Ḥajawī, *al-Fikr al-sāmī fī tārīkh al-fiqh al-islāmī*, 'Abd al-'Azīz b. 'Abd al-Fattāḥ al-Qārī ed. (al-Madīna, 1396), 12–13; 'Umar al-Jīdī, *Muḥāḍarāt fī tārīkh al-madhhab al-mālikī fī al-gharb al-islāmī* (al-Rabāṭ, 1407/1987), 133; and Muṣṭafā Aḥmad al-Zarqā, *al-Fiqh al-islāmī fī thawbihi al-jadīd: al-madkhal al-fiqhī al-'āmm, al-juz al-awwal* (6th ed., Damascus, n.d.), 122–3.

11 Schacht, *Introduction*, p. 209.

12 Take, for example, the issue known as 'the infallibility of the *mujtahid*' (*taṣwīb al-mujtahidīn*). While jurists differed in their answers regarding this question, in practice the result was a solipsistic view of legal reality. See Aron Zysow, 'The Economy of Certainty' (Ph.D. diss., Harvard University, 1984), 460–1.

13 al-Ḥaṭṭāb, *Mawāhib*, vol. 6, pp. 92–5.

14 See Aḥmad b. Muḥammad al-Ṣāwī, ed. Muṣṭafā Kamāl Waṣfī, *Bulghat al-sālik*, on the margin of *al-Sharḥ al-ṣaghīr* (4 vols, Cairo, 1986), vol. 4, 188.

15 It should also be noted that this is the claim made by Khalīl himself. He states in the introduction that his work was limited to those rules used in giving *fatwās* (*mā bihi al-fatwā*), al-Ḥaṭṭāb, *Mawāhib*, vol. 1, p. 4. Also, see Hallaq, 'From *Fatwās* to *Furū'*', p. 58.

16 *al-Ḥadīqa al-mustaqilla al-naḍra fī al-fatāwā al-ṣādira 'an 'ulamā al-ḥaḍra*, Arab League Manuscript Institute, Fiqh Mālikī, no. 5. This collection contains 298 separate questions. Some *fatwās* contain more than one question. In cases where there are more than one question, we have counted them separately using letters, e.g., 1(a), 1(b), etc., if the subsequent questions are thematically independent of the first question. I will refer to the *fatwās* by number in the text, and provide the folio citation in the notes. This collection of *fatwās* has been the subject of an article by José López Ortiz. The author, however, was more concerned in this article with questions of social history than with questions of legal history: José López Ortiz, '*Fatwās* Granadinas de los Siglos XIV y XV', *al-Andalus*, 6(1941), 73–127.

17 al-Shaykh al-Niẓām, *al-Fatāwā al-hindiyya* (6 vols, repr. Beirut, 1980).

18 al-Wansharīsī, Aḥmad b. Yaḥyā, *al-Mi'yār al-mu'rib wa-al-jāmi al-mughrib 'an fatāwā ahl ifriqiyyah wa-l-andalus wa-l-maghrib* (13 vols, Rabat, 1981–83).

19 There is no methodological reason, however, that would prevent someone from subjecting the *fatwās* dealing with ritual law to the same type of analysis.

20 According to al-Ḥajawī, the *Mukhtaṣar Khalīl* was introduced into the Maghrib in the year 805/1402. Muḥammad b. al-Ḥasan al-Ḥajawī, *al-Fikr al-sāmī fī tārīkh al-fiqh al-islāmī* (4 vols, Rabāṭ, 1340; completed at Fās, 1345), vol. 4, 76. We also have one explicit reference to the *Mukhtaṣar*, in *fatwā* 88, which refers to the powers of the unrestricted agent (*al-wakīl al-mufawwad*), 12a.

21 2a.

22 al-Qarāfī mentions the dual nature of slaughter. See Shihāb al-Dīn Aḥmad b. Idrīs al-Qarāfī, *al-Umniyya fī idrāk al-niyya* (Beirut, 1404/1984), 9. According to Mālikīs, an animal which is not slaughtered according to the standards of Islamic law is considered carrion (*mayta*). Under Mālikī *fiqh*, moreover, it is not only illegal to eat from a cow which had been incorrectly

slaughtered, it would also be illegal to use its hide or to sell it.

23 An example of what we have chosen to call quasi-judicial is *fatwā* 20, 4r. In this case, a farmer came to an agreement with a shepherd regarding compensation for crops of the farmer damaged by the shepherd's flocks. This agreement stipulated certain conditions that the *muftī* found to be invalid. It is quite likely that after having reached the agreement with the farmer, the shepherd learned that the agreement was illegal and could therefore be challenged. This *fatwā* was solicited in all likelihood, then, in the context of either the shepherd's attempt to gain more favourable terms from the farmer, or in a law-suit to have the agreement voided. It could have been asked either by the shepherd himself or by the judge hearing the case. Because of this ambiguity regarding the questioner and the context of the question, however, we were content to call it quasi-judicial. We have also chosen to classify many questions as quasi-judicial even if there is no suggestion of a dispute. Thus, if there is a question regarding the legally valid way to measure grain for sale, we have chosen to believe that the question was not asked by a disinterested seeker of knowledge. In all likelihood the question was asked so that the questioner could know the probable legal consequences of a certain act under contemplation. In fact, providing high-quality legal advice to lay persons as a guide to help them achieve their goals is an important function of any legal system. For that reason, many of the questions which seem to be 'hypothetical' have been classified by us as quasi-judicial simply on the basis of the question's subject: if it involves a potential legal right protected by a court, then it is quasi-judicial.

24 We are using the term 'rule' instead of '*fatwā*' because a single *fatwā* may turn on the application of several rules. Therefore, a *fatwā* may be made up of more than one rule, some of which may be taken from the text of the *Mukhtaṣar*, while others may only be implicit or non-existent in the text. It is also for this reason that the number of the rules analysed is not the same as the number of judicial and quasi-judicial *fatwās*.

25 *wa sharṭ al-ma'qūd 'alayhi ṭahāra lā ka-zabl wa zayt mutanajjis*, al-Ḥaṭṭāb, *Mawāhib*, vol. 4, pp. 258–9.

26 The *ḥarīm* of a plant is that area around a plant necessary for its well being. In Mālikī doctrine it is illegal for a third party to introduce anything which would harm the plant within the area of its *ḥarīm*.

27 *Qad ikhtalafa al-'ulamā' qadīman wa ḥadīthan fī man yaqūl li-zawjatihi 'anti 'alayya ḥarām' 'alā aqwāl kathīra dhakara ibn al-'arabī minhā khamsata 'asharata qawlan yataḥaṣṣal minhā fī al-madhhab khamsata aqwāl fa-qāla mālik wa ibn al-qāsim fī al-mudawwana hiya thalāth fī al-madkhūl bihā wa lā yunawwā wa fī ghayr al-madkhūl bihā lahu niyyatuhu min wāḥida aw ghayrihā … wa rawā ibn khuwayz mindād 'an mālik annahā wāḥida bā'ina fī al-madkhūl bihā wa ghayrihā wa kāna ba'ḍ al-ashyākh raḥimahum allāh mimman lahu al-fatwā fī-baladinā hādhā ya'tamid hādhihi al-riwāya wa yuftī bihā wa yarā anna dhālika jārin 'alā madhhab al-mudawwana al-mutaqaddim dhikruhu li-annahu innamā farraqa fihā bayna al-madkhūl bihā wa ghayrihā li-anna al-*

baynūna lam takun 'indahum illā bi-l-thalāth fī al-madkhūl bihā ammā 'indanā fa-innahā tabīnu bi-al-wāḥida fa-l-madkhūl bihā al-yawm nazīr ghayr al-madkhūl bihā idh dhāka fa-ḥukuhumā wāḥid wa qad ashāra ilā hādhā al-lakhmī fī ba'ḍ abḥāthihi wa qad rajjaḥa ibn rushd al-qawl bi-taṣdīq man yaz'am annahu lam yurid bi-l-ḥarām al-ṭalāq wa ṣaḥḥaḥahu wa jā'at bihi riwāya fī al-'utibyya wa min bāb awlā taṣdīquhu idhā za'ama annahu arāda ghayr al-thalāth fa-man akhadha bi-hādhā al-qawl al-akhīr fa-huwa mukhallaṣ in shā' allāh, 14r. The established rule of the school according to Khalīl is that any apparent figure of speech (*kināya ẓāhira*) used for divorce produces a three-fold divorce in the case of a wife who has been taken to her husband's home. The expression '*anti 'alayya ḥarām*', qualifies as a *kināya ẓāhira*, al-Ḥaṭṭāb, *Mawāhib*, vol. 4, p. 54.

28 Thus, al-Qarāfī says, 'The ruling of everything in the law that is subject to customs changes when the custom changes according to that required by the new custom. This is not new *ijtihād* on the part of the *muqallidīn*, so they do not have to meet the requirements of *ijtihād* [to make this kind of change]. Indeed, this is a rule which has resulted from the *mujtahids*' reasoning and to which they all agreed.' Shihāb al-Dīn Aḥmad b. Idrīs al-Qarāfī, *Kitāb al-iḥkām fī tamyīz al-fatāwā 'an al-aḥkām wa taṣarrufāt al-qāḍī wa al-imām* (Aleppo, 1387/1967), 231–2.

29 Muḥammad b. Yūsuf al-'Abdarī al-Mawwāq, *al-Tāj wa al-iklīl* on the margin of *Mawāhib al-jalīl* (6 vols, Beirut, 1412/1992), vol. 4, 54. If we take the statement of Ibn Sirāj in conjunction with Mawwāq's quotation of al-Muṭaytī (d. 478/1085), then the rule in Andalus changed some time between the time of the latter and a generation prior to Ibn Sirāj.

30 See 'Abd al-Bāqī al-Zurqānī, *Sharḥ al-zurqānī 'alā khalīl* (4 vols, Beirut, n.d.), vol. 3, 2–3.

31 *ammā al-ghalṣama [fa-qad] kathura fihā al-khilāf fī al-madhhab wa ruwiya 'an mālik man' aklihā wa ankara ibn waḍḍāḥ ṣiḥḥat hādhihi al-riwāya wa rawā ibn rushd anna al-mashhūr man' aklihā wa al-ṣaḥīḥ min jihat al-nazar jawāzuhu*, 9a. Al-Mawwāq attributes to Ibn 'Arafa the claim that for one hundred years in Tūnis the opinion given by the legal establishment had been its permissibility. Likewise, al-Mawwāq claims this as the position of his teachers. Al-Mawwāq, *al-Tāj*, vol. 3, p. 207.

32 'The rule of Mālik's school and his colleagues is that it is not eaten, but permission to eat it is attributed to Mālik, and it is the opinion of the majority of the scholars outside of the school. Therefore, whoever acts upon this opinion will not be opposed, because it is correct from the point of view of study and reflection (*inna al-mashhūr min madhhab mālik wa aṣḥābihi annahu lā yu'kal wa yurwā 'an mālik jawāz aklihi wa huwa qawl jumhūr al-'ulamā' khārij al-madhhab fa-man akhadha bi-hādhā al-qawl lam yu'taraḍ li-annahu ṣaḥīḥ min jihat al-baḥth wa-l-nazar*). 10r.

33 'The slaughtered animal, if one of its jugular veins has had nothing cut from it, then it [the animal] is not eaten (*inna al-dhabīḥa in baqiya wadj min wadjayhā lam yuqṭa' minhu shay lam tu'kal*). 12a.

34 al-Saraqusṭī said, 'If the cow is caught nearby, and the slaughter is

completed after having cut from the organs [required] for its [valid] slaughter at the time of the first [attempt] at slaughter that without which it could not continue living, then eating from it is controversial (*in udrikat al-baqaratu bi-l-qurb fa-utimmat dhakātuhā wa kāna qad quṭi'a min a'ḍā dhakātihā fi-l-dhabḥ al-awwal mā lā ta'īsh ma'ahu ukilat bi-khilāf*)', 10a. Compare his statement to Ibn Sirāj's *fatwā* 197: 'He was asked, may God have mercy upon him, about a man who was compelled to raise his hand [i.e. by implication his knife as well] while slaughtering [an animal], after he had cut one of its jugular veins, after which he returned his hand immediately and finished it. He answered 'It is controversial, but the correct opinion is the permissibility of eating from it, (*su'ila raḥimahu allāhu fiman irtafa'a yaduhu 'an al-dhabḥ maghlūlaban 'alayhi wa qad qaṭa'a ba'ḍ al-awdāj thumma a'āda yadahu fi al-fawr fa-ajhazahā fa-ajāba ukhtulifa fihā wa-l-ṣaḥīḥ jawāz aklihā*)." 27a.

35 *Fatwā* 3, 1r.

36 *Fatwā* 6, 1a.

37 *Fatwā* 8, 2r.

38 *Fatwā* 11, 2a.

39 *Fatwā* 134, 20r.

40 *Fatwā* 155, 23r.

41 *Fatwā* 274, 43a.

42 The established rule of the school is that all debts mature upon the death of the debtor. Thus, if an obligation is due at the first of the year, but the debtor dies prior to that date, death cancels the date at which the debt was to mature, and the obligation matures immediately, Aḥmad b. Muḥammad b. Aḥmad al-Dardīr, *al-Sharḥ al-ṣaghīr*, ed. Muṣṭafā Kamāl Waṣfī (4 vols, Cairo, 1986), vol. 3, 53.

43 al-Mawwāq, *al-Tāj*, vol. 5, p. 22. The fact that Ibn Sirāj did not seek to justify this latter opinion suggests, however, that this rule had become accepted by his legal culture.

44 Ibid. vol. 5, pp. 125–6.

45 This in turn would lead to the forbidden transaction of *ribā faḍl* – exchange of an unequal amount of one type of food.

46 *ammā al-mas'ala al-ūlā (al-sharika fi ikhrāj al-jubn min al-laban) fa-tajrī 'alā al-khilāf fi khalṭ al-julǰulān wa-l-zaytūn fi al-ma'ṣara wa alladhī yatarajjaḥ wa allāhu al-muwaffiq jawāzuhā li-l-ḥāja lākin bi-sharṭ an yukāla al-laban 'inda al-khalṭ wa yuqsama al-jubn 'alā ḥasabihi*, 1r.

47 *wa kāna sīdī ibn sirāj raḥimahu allāhu fimā huwa jārin 'alā hādhā lā yufti bi-fi'lihi ibtidā'an wa lā yushannī 'alā murtakibihi quṣārā amr murtakibihi annahu tārik li-l-wara' wa mā al-khilāf fihi shahīr lā ḥisba fihi wa lāsiyyamā in da'at li-dhālika ḥāja.* al-Mawwāq, *al-Tāj*, vol. 5, p. 390.

48 *al-awlā 'indī fi kull nāzila yakūn fihā li-'ulamā' al-madhhab qawlān fa-'amila al-nās fihā 'alā muwāfaqat aḥadihimā wa in kāna marjūḥan fi-l-nazar an lā yu'raḍa lahum wa an yujraw 'alā annahum qalladūhu fi-l-zamān al-awwal wa jarā bihi al-'amal fa-innahum in ḥumilū 'alā ghayri dhālika kāna fi dhālika tashwīsh li-l-'āmma wa fatḥ li-abwāb al-khiṣām*, 34a.

49 See above note 15.

50 A quantity used to measure grain and other foodstuff.

51 *hādhā (jawāzuhu) mā ẓahara lī fihā min ghayr naṣṣ fi khuṣūṣ al-mas'ala astanid ilayhi wa li-dhālika tawaqqaftu 'an al-jawāb fihā wa qad sa'alanī 'anhu jumla min al-nās thumma wajadtu fi al-'utbiyya mas'ala tushbihuhā wa hiya min samā' ibn al-qāsim min mālik qāla fihā: 'wa sa'altu mālikan 'an ma'āṣir al-zayt zayt al-julǰulān wa al-fijl ya'tī hādhā bi-arādib wa hādhā bi-ukhrā ḥattā yajtami'ū fihā fa-ya'ṣirūn jamī'an?' qāla (mālik): 'innamā yukrah hādhā li-anna ba'ḍahu yukhrij akthara min ba'ḍ fa-idhā iḥtāja al-nās ilā dhālika fa-arjū an yakūna khafīfan li-anna al-nās lā budda lahum mimmā yuṣliḥuhum wa-l-shay' alladhī lā yajidūn 'anhu buddan wa lā ghinan fa-arjū an yakūna lahum fi dhālika sa'a in shā' allāh wa lā arā bihi ba'san.' qāla (ibn al-qāsim) 'wa-l-zaytūn mithlu dhālika.' qāla ibn rushd: 'khaffafahu li-l-ḍarūra ilā dhālika idh lā yata'attā 'aṣr al-yasīr min al-julǰulān wa al-fijl 'alā ḥidatihi murā'ātan li-qawl man yujīz al-tafāḍul fi dhālika min ahl al-'ilm.' ... fa-hādhā kulluhu mimmā yadull 'alā ṣiḥḥat mā ẓahara lī fi-l-laban wa allāh a'lam*, 40a.

52 Alan Watson, *The Nature of Law* (Edinburgh, 1977), 95.

53 'Judicial practice, in controversial cases, should be governed by the prevailing opinion' (*al-'amal innamā yakūn fi al-masā'il al-khilāfiyya 'alā mā huwa al-mashhūr*), 41r.

54 *murā'āt al-aqwāl al-ḍa'īfa aw ghayrihā sha'n al-mujtahidīn min al-fuqahā' idh murā'āt al-khilāf innamā ma'nāhā murā'āt dalīl al-mukhālif ... wa murā'āt al-dalīl aw 'adam murā'ātihi laysa ilaynā ma'shara al-muqallidīn fa-ḥasbunā fahmu aqwāl al-'ulamā' wa al-fatwā bi-l-mashhūr minhā wa laytanā nanjū ma' dhālika ra'san lā lanā wa lā 'alaynā*, 45r.

55 At least one contradiction of the code, however, appears more in the nature of a mistake than a conflict of interpretation. Ibn Sirāj is asked in *fatwā* 154 what a wife whose husband dies before taking her to the marital home deserves. He replies she gets half of her advance dowry and half of her delayed dowry, 23r. According to Khalīl, however, she should get the entire dowry. See al-Mawwāq, *al-Tāj*, vol. 3, pp. 506–7. Ḥaṭṭāb attributes to Mālik another opinion, but it says she merely gets her share in the inheritance, and gets nothing from the dowry. See al-Ḥaṭṭāb, *Mawāhib*, vol. 3, p. 107. One must conclude that the opinion is either an error on the *mufti*'s part, or on the part of the copyist.

56 *al-niḥla ṣaḥīḥa lāzima li-l-ab in kāna ḥāzahā al-ibn fi ṣiḥḥat wālidihi wa ḥayātihi wa in kāna al-ab qad māta qabla an yaḥūzahā fa-lā taṣiḥḥ lahu illā bi-taslīm al-waratha li-annahā taqaddamat al-nikāḥ bi-khilāf mā huwa fi 'aqd al-nikāḥ fa-lā yaftaqir*, 4r.

57 al-Shāṭibī says: 'If one were to argue that the document writers have said in regard to the clothes which the husband dresses his wife, who then wears it and uses it for a year or less, that she has [by this use] become its owner, so he cannot ask her to return it ...', (*fa-in iḥtajja muḥtajj bi-anna ahl al-wathā'iq qālū fi al-thawb yaksūhu al-rajul zawjahu fa-talbasuhu wa tamtahinuhu 'āman aw aqalla annahā qad malakathu fa-lā yarji' bihi 'alayhā ...*), 34r.

58 *inna al-marhūn 'indahu in ja'ala lahu al-rāhin annahu aqāmahu fi bay'ihi maqām al-wakīl al-mufawwaḍ ilayhi fi al-ḥayāt wa al-waṣī ba'da al-mamāt kāna lahu bay'uhu wa in lam yaj'al lahu hādhā fi 'aqd al-rahn fa-lā yabī'uhu illā bi-mushāwarat al-rāhin aw al-qāḍī*, 23r.

59 *qāla ba'ḍ al-muwaththiqīn: lā yajūz lahu bay' al-rahn wa in ju'ila lahu dhālika dūna mushāwara wa lā sulṭān ... illā an yaqūla fi al-wathīqa 'aqāmahu maqām al-wakīl al-mufawwaḍ ilayhi fi al-ḥayāti wa al-waṣī ba'da al-mamāt'*, Abū Muḥammad 'Abd Allāh b. 'Abd Allāh b. Salmūn al-Kinānī, *al-'Iqd al-munazzam li-l-ḥukkām* (2 vols, Beirut, n.d.), vol. 2, 225.

60 'It is permissible ... by estimate if the buyer and seller are knowledgeable in estimation or they bring a knowledgeable estimator whose word they accept' (*yajūz taḥarriyan idhā kāna al-bā'i' wa al-mushtarī 'ārifayn bi-l-taḥarrī aw qaddamā 'ārifan yarkunān li-qawlihi*), 23a. Khalīl says that the validity of this sale (*bay' al-juzāf*) is conditional on the estimation of the parties to the sale, without mentioning the possibility of using a professional estimator. See al-Mawwāq, *al-Tāj*, vol. 4, pp. 285–7.

61 Wael Hallaq, 'Model *Shurūṭ* Works and the Dialectic of Doctrine and Practice', *Islamic Law and Society*, 2 , 2 (1995), 1–26.

62 al-Mawwāq, *al-Tāj*, vol. 5, p. 21.

63 *laysa 'alā al-imām junāḥ fi dhālika wa lā 'alā ghayrihi wa huwa ḥalāl wa man idda'ā taḥrīmahu fa-huwa jāhil mutaqawwil 'alā al-shar' yajib 'alayhi al-tawba min kalāmihi*, 3r.

64 'He delivers the price of the properties in its entirety to the heirs, just as it was testified to [in the document of sale]. The problem of the duty is referred to the ruler, may God give him victory. His opinion on this question is final' (*thaman al-amlāk yu'addīhi bi-jumlatihi li-l-waratha ḥasbumā waqa'a 'alayhi al-ishhād bihi wa qaḍiyyat al-thiqāf yarji' fihi li-l-mawlā naṣarahu allāhu yantahī fihi li-mā yamur bihi fi al-qaḍiyya*), 27a.

65 L. P. Harvey, *Islamic Spain 1250–1500* (Chicago, 1990), 13; Levi Provençal, 'al-Andalus', *EI2*.

66 For example, in his discussion of *commenda*, al-Dardīr notes that '*Commenda* is a special dispensation, so it (i.e., its stipulations) is limited to that which has been transmitted. As for [arrangements] other than these [that have been transmitted], they continue to be governed by the original rule prohibiting it', al-Dardīr, *al-Sharḥ*, vol. 3, p. 684.

67 Ibn Sirāj has three, 127(g), 19r, 141, 21r and 142, 21a. Al-Shāṭibī's *fatwā* is 140, 20a, and al-Ḥaffār's is 139, 20a.

68 'It appears that raising silkworms is not permissible in principle if it is a hire contract whose wage comes from that which is being produced. However, raising [them] does become valid under [other] arrangements, two of which Aṣbagh b. Muḥammad (d. 300/912) mentioned... . Another resembles that which is the practice of the people. That is when the owner of the mulberry tree contributes a part of the silkworms, for example, one half, and the labourer the other half. The owner of the tree hires the labourer after he (the labourer) views and inspects them for half of his (the owner's) [mulberry] leaves to gather the leaves, feed the silkworms, and prepare the tools needed until the work ends and they divide the silk according to the proportion [of ownership] of the silkworms, if the value of the labour approximately equals the value of half the [mulberry] leaves. This arrangement appears to be permissible, and it bears a resemblance to sharecropping (*yaẓhar anna tarbiyat dūd al-ḥarīr lā tajūz aṣlan 'alā an takūna al-ijāra mimmā yakhruj minhu lākin tajūz al-tarbiya 'alā awjuh dhakara minhā aṣbagh ibn muḥammad wajhayn ... . wa minhā wajh shibh mā yaf'aluhu al-nās wa dhālika an yukhrija ṣāḥib al-tūt juz'an min al-zirri'a ka-l-niṣf mathalan wa al-'āmil al-niṣf al-ākhar wa yasta'jira ṣāḥib al-tūt al-'āmil bi-niṣf waraqihi ba'da nazarihi wa taqlībihi 'alā jam' al-waraq wa al-qiyām 'alā 'alf al-dūd wa i'dād al-ālāt allatī yuḥtāj ilayhā ḥattā yantahiya al-'amal wa yaqtasimān lawz al-ḥarīr 'alā nisbat al-zirri'a idhā tasāwat qīmat niṣf al-waraq aw taqārabat fa-hādhā wajh yaẓhar annahu jā'iz wa fihi shabah min al-muzāra'a)'*. 20a.

69 20a.

70 19a.

71 *fa-in kāna yajid al-insān man yuwāfiquhu 'alā wajh jā'iz mithl an yuqallība al-'āmil al-waraq wa yashtariya niṣfahā mathalan min ṣāḥibihā bi-'amalihi ... fa-in wajada man ya'mal hādhā fa-lā yajūz lahu an ya'mala mā jarat bihi 'ādat al-nās 'alā madhhab mālik wa jumhūr ahl al-'ilm wa yujūz 'alā madhhab aḥmad ibn ḥanbal wa ba'ḍ 'ulamā' al-salaf qiyāsan 'alā al-qirāḍ wa al-musāqāt*, 19a.

72 *Musāqāt* is a type of agricultural partnership between the owner of land and a labourer. Instead of the labourer receiving a wage, however, he gets a percentage of the crop. See al-Dardīr, *al-Sharḥ*, vol. 3, p. 711.

73 *wa ammā in lam yajid al-insān man ya'maluhā illā 'alā mā jarat bihi al-'āda wa tarku dhālika yu'addī ilā ta'ṭīlihā wa laḥq al-ḥaraj wa iḍā'at al-māl fa-yajūz 'alā muqtaḍā qawl mālik fi ijāzat al-amr al-kullī al-hājī*, 19a.

74 al-Mawwāq, *al-Tāj*, vol. 5, p. 390.

75 24a.

76 *in kānat hādhihi al-zawjiyya qad ṭālat wa lam taṭlub al-zawja mā yajib lahā fi al-istighlāl fi ḥayāt al-zawj fa-sukūtuhā mūjib li-isqāṭ ḥaqqihā bi-ṭūl al-mudda wa laysa li-ibnihā min dhālika shay'*, 24a.

77 'The children can sue their father for the rent and the produce which he took from the properties [of the wife] with the exception of the domicile, if the wife owned a home. He, however, can seek the wage of his labour (*li-l-awlād ṭalab abīhim bi-l-kirā' wa bi-ghallat mā akhadha min al-amlāk mā dūna dār al-sukna in kānat li-l-zawja dār wa yarji' huwa bi-ijārat khidmatihi*), 24a.

78 See al-Ḥaṭṭāb, *Mawāhib*, vol. 6, pp. 28–30; al-Dardīr, *al-Sharḥ*, vol. 4, pp. 324–5.

79 *yuqḍā fi qaḍiyyat al-yahūdī an yahlifa al-muslim annahu khallaṣahu min dhālika al-ḥaqq fa-idhā ḥalafa usqiṭa ḥaqq al-yahūdī*, 48a. This decision was based on two considerations: the first that it is not customary for people to leave their money in the possession of strangers so long, and second, that Jews, because of their enmity to Muslims, consider Muslims' property to be lawful to them (*istiḥlāl*

amwāl al-muslimīn). This latter is an unfortunate entry of prejudice in the exercise of legal discretion.

80 26a–27r.

81 'The decision of the Prophet, may God bless him and grant him peace, regarding water, that it should be distributed to the highest, then the next highest [i.e. closest to the source of the water], this is in regard to water in which no person has a legal right nor is owned, like the water of a flood and other such things ... also not falling under that [rule] is the people of a village who raise a water wheel from the valley. Their rights are equal. Indeed, they water according to their custom, and in this case, the lower [i.e. the further] might water before the higher [the closer], and the higher before the lower, depending on their needs (*ḥukm al-nabī ṣallā allāhu 'alayhi wa sallama fi al-mā' an yusqā bihi al-a'lā fa-l-a'lā huwa fi al-mā' alladhī lā ḥaqq fih wa lā mutamallak li-aḥad ka-mā' al-suyūl wa shibhihā ... wa lā yadkhul fi dhālika ahl qarya yarfa'ūn sāqiya min al-wādī wa ḥuqūquhum fihā mustawiya bal yasqūn 'alā mā jarat bihi 'ādatuhum wa yasqī fi hādhihi al-mas'ala al-asfal qabla al-a'lā wa al-a'lā qabla al-asfal 'alā ḥasab ḥājatihim*)'. 27r.

82 See for example, Humphreys, 'Islamic Law and Islamic Society', p. 213.

83 *wa sharṭ al-ma'qūd 'alayhi ṭahāra lā ka-zabl wa zayt mutanajjis*, al-Mawwāq, *al-Tāj*, vol. 4, pp. 258–9.

84 A *ju'l* contract is similar to a hire contract except that it is non-binding, and the worker can cease whenever he wishes. However, he does not deserve his wage except upon completion of the agreed upon job. See al-Dardīr, *al-Sharḥ*, vol. 4, pp. 79–80.

85 Khalīl's text reads: *wa fasadat ... ka-ma' ju'l*, al-Mawwāq, *al-Tāj*, vol. 5, pp. 394–400.

86 Ibid., vol. 5, p. 400. The *fatwā* reads: 'The first case, and it is about harvesting olives for a share in the oil produced from it, is not permissible, and it is an invalid hire or *ju'l* contract, and it is not lawful to hire [someone] with it (this wage of oil) (*al-mas'ala al-ūlā wa hiya laqṭ al-zaytūn wa nafḍuhā wa taḥrīkuhā bi-juz' min al-zayt al-khārij minhu ghayr jā'iz wa hiya ijāra fāsida aw ju'l fāsid lā yaḥillu al-isti'jār bihi*), 37a.

87 *Fatwā* 113, 16r.

FOUR

Kafā'a in the Mālikī School: A *fatwā* from Fifteenth-Century Fez

AMALIA ZOMEÑO

Introduction

Generally, according to Islamic law, an adult male has complete freedom to choose his wife. However, the majority of jurists agree that a woman cannot choose her husband. They say that she should be assisted by her father or a male relative on her father's side who acts as her guardian (*walī*). Furthermore, if she has no guardian, she must ask for the *qāḍī*'s permission to marry.[1] The major task of the *walī*, usually the father, is to represent his daughter in her marriage contract, and to choose a suitable (*kuf'*) husband for her. The doctrine of *kafā'a* (equality in marriage) is intended to regulate the legal considerations which must be taken into account when declaring that a man is a suitable husband for a particular woman.

This doctrine was developed in different ways by the four *sunnī* schools.[2] In his study of the *kafā'a* doctrine in Islamic law, Farhat J. Ziadeh gave particular emphasis to the origin of the different accounts given by the Ḥanafi and Mālikī schools. According to Ziadeh, Abū Ḥanīfa (d.150/767) extensively developed the concept of *kafā'a* whereas Mālik (d.179/795) practically ignored it:

> Mālik's denial of the social distinctions upon which *kafā'a* is built is due to the fact that his milieu of Medina and Ḥijāz had not developed such distinctions, while that of Abū Ḥanīfa in Kufah and Iraq, which was more cosmopolitan and socially complex, had.[3]

Thus, he concluded that there is very little in the Arabian tradition, and much more in the Persian/Sasanian tradition, to constitute an origin for the doctrine of *kafā'a*.[4] Later, the doctrine spread to other localities, was adopted by the other schools and applied in other societies.

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