# THE BIRTH OF A LEGAL INSTITUTION

*The Formation of the Waqf in Third-Century A.H. Hanafī Legal Discourse*

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## LIST OF DIAGRAMS

# ABBREVIATIONS

| | |
|---|---|
| *BSOAS* | *Bulletin of the School of Oriental and African Studies* |
| *EI*[1] | *Encyclopaedia of Islam* (Leiden: Brill, 1st edition, 1913–1936) |
| *EI*[2] | *Encyclopaedia of Islam* (Leiden: Brill, 2d edition, 1960–) |
| *EJ* | *Encyclopaedia Judaica* (New York: The Macmillian Company, 1971–1972) |
| *JAOS* | *Journal of the American Oriental Society* |
| *JESHO* | *Journal of the Economic and Social History of the Orient* |
| *JNES* | *Journal of Near Eastern Studies* |
| *JSAI* | *Jerusalem Studies in Arabic and Islam* |
| *IJMES* | *International Journal of Middle East Studies* |
| *ILS* | *Islamic Law and Society* |
| *ZDMG* | *Zeitschrift Der Deutschen Morgenländischen Gesellschaft* |

# INTRODUCTION

It is not an exaggeration to claim that the *waqf*, or pious endowment created in perpetuity, has provided the foundation for much of what is considered Islamic civilization.[1] The importance of the *waqf* has not gone unnoticed. Turn-of-the-century Orientalists undertook some of the earliest Western historical studies of the *waqf*,[2] while the survival of *waqf* deeds (*waqfiyyas*) from the Mamlūk dynasty and Ottoman empire has contributed to a sizable body of scholarship on the *waqf* in more recent times.[2] What has not been studied, however, are the earliest extant treatises on the *waqf*—the *Aḥkām al-Waqf* of Hilāl al-Raʾy (d. 245/859) and the *Aḥkām al-Awqāf* of al-Khaṣṣāf (d. 261/874).

By definition, a *waqf* is an inalienable trust. In creating the *waqf*, the founder/settlor[3] (*wāqif*) makes the principal (*aṣl*) of a revenue-producing property inalienable in perpetuity and assigns the usufruct or yields (*manfaʿa*) of the property to specified persons or institutions. The property is placed in possession of a fiduciary (*wālī* or *mutawallī*) who administers the trust for the benefit of a third party. Islamic law requires that the remainder interest be a charitable purpose. Although greatly curtailed in the twentieth century by both colonial and post-colonial governments, the *waqf* (pl. *awqāf*, and in North Africa, s. *ḥubs/ḥabs/ḥubus*,[4] pl. *ḥabūs/aḥbās*) still continues to exist within Islamic society.

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[1] David S. Powers' article "Orientalism, Colonialism, and Legal History: The Attack on Muslim Family Endowments in Algeria and India," *Comparative Studies in Society and History*, 31/3 (1989), 535–71, provides a nice survey of turn-of-the-century Orientalist scholarship on the *waqf*.

[2] The bibliography contains references to many of these works.

[3] The terms "founder" and "settlor" are synonymous with one another. I have used "founder" throughout this book since this term is more common in studies of the *waqf*.

[4] In modern usage, the word "*ḥubs*" signifies a pious endowment (*i.e.*, a *waqf*), while the word "*ḥabs*" refers to the act of sequestration. The *Lisān al-ʿArab* reveals, however, that during the early period of Islamic history these semantic differences were not drawn as sharply. As a result, it is not uncommon for modern historians of the *waqf* to use the term "*ḥabs*" to refer to a pious endowment. Jamāl al-Dīn Muḥammad b. Mukarram al-Anṣarī b. Manẓūr, *Lisān al-ʿArab* (Beirut: Dār Ṣādir, 1375/1956), 6: 44–46.

The most compelling form of the *waqf*, and the one most easily recognized, is the public endowment (*waqf khayrī*) in which the founder designates as the beneficiary of the usufruct an institution or the general Muslim community. Historically, *waqf*s *khayrī* were established for mosques, *madrasa*s, Qur'ān reciters, hospitals, and the acquisition of weapons for the Holy War. Many of the most compelling architectural structures within Islamic society—the towering minarets of the Friday mosques, the great *khānqāh-madrasa*s, and the crowded markets—owe their origin to this form of privately-initiated pious endowment.

The establishment of *waqf*s was not limited to the domain of large, public works, however. The *waqf* also permeated the private sphere by means of founders who transformed agricultural lands, small estates, and even single buildings or solitary date groves into what came to be called familial endowments (*waqf ahlī* or *waqf dhurrī*).[5] In contrast to the public *waqf*, the beneficiaries of the familial *waqf* generally consisted of individuals who had a lineal or personal relationship to the founder as well as the future descendants of these beneficiaries for as long as subsequent generations continued to exist. If the line of beneficiaries became extinct, then the usufruct reverted to the poor, the destitute, the Holy War, or some other charitable purpose or institution, in perpetuity.

The familial *waqf* became a preferred means of inter-generational wealth transmission because it conferred several advantages. Some

[5] It is important to note that the early Muslim community did *not* make a distinction between public and familial *waqf*s. In the *waqf* treatises of Hilāl al-Ra'y and al-Khaṣṣāf, no terminological distinction is made between a *waqf* dedicated to a mosque and one made for a family. Likewise, in the *Mudawwana* of Saḥnūn, Mālik b. Anas uses the term "*ḥubs*" to refer to endowments designated for the Holy War and those created for family members or slaves. Hilāl b. Yaḥyā b. Muslim al-Ra'y al-Baṣrī, *Aḥkām al-Waqf* (Madīna: Maṭba'at Majlis Dā'irat al-Ma'ārif al-'Uthmāniyya, 1355/1937), 13; Abū Bakr Aḥmad b. 'Amr al-Shaybānī al-Ma'rūf bi'l-Khaṣṣāf, *Kitāb Aḥkām al-Awqāf* (Cairo: Maktabat al-Thaqāfa al-Dīniyya, 1322/1904), 18; 'Abd al-Salām b. Sa'īd al-Tanūkhī (known as Saḥnūn), *Al-Mudawwana al-Kubrā* (Cairo: Maṭba'at al-Sa'āda, 1323–1342 A.H.), 15: 98–100. According to J. N. D. Anderson, the eventual differentiation between the *waqf ahlī* and *waqf khayrī* was "the result of a growing dissatisfaction with the *Waqf* system as it [had] developed." Monica M. Gaudiosi asserts that the emergence of these terms is relatively recent: "While the concepts of both religious and family endowments existed in the medieval period, the terminology distinguishing the two appears to be modern." Anderson, "The Religious Element in *Waqf* Endowments," *Journal of the Royal Central Asian Society* 38/4 (1951), 297; Gaudiosi, "The Influence of the Islamic *Waqf* on the Development of the Trust in England: The Case of Merton College," *University of Pennsylvania Law Review* 136 (1988), 1233, n. 13.



founders established *waqf*s believing that the endowment might make their property immune—in theory, at least—from unscrupulous rulers.[6] Others used the *waqf* as a legal fiction to prevent the revocation of a sale or to secure property whose ownership was contested.[7] More commonly, founders created familial endowments in order to retain a measure of control over their estates that was denied to them under the default rules for inheritance set forth in the Qur'ān. Under the rules of the Islamic inheritance system, upon entering one's final death-sickness, any property that a person owns is subject to the Qur'ānic *'ilm al-farā'id*, or "science of shares." Although a dying person is entitled to make a bequest of one-third of his property, the remaining two-thirds is divided and distributed according to the Qur'ānic forced-share system unless the heirs consent to a larger bequest. This forced-share system stipulates which relatives are entitled to shares and mandates that male heirs are to receive twice the share of their female counterparts. Experience showed that the application of this forced-share system tended to atomize land into small, economically unworkable tracts that were insufficient for the support of one's spouse or children.[8] With the *waqf*, founders could keep their property intact as well as define a descent strategy denied to them under the *'ilm al-farā'iḍ*.[9] The establishment of a *waqf* permitted founders to designate as beneficiaries categories of relations excluded under the *'ilm al-farā'iḍ*: distant kin relations (*qawm, qarāba,*

[6] "Jurist," "*Waqf*," *Muslim World* 4 (1914), 180; *EI*[1], *s.v.* "*Wakf*," W. Heffening, 4: 1100; Martha Mundy, "The Family, Inheritance and Islam: A Re-examination of the Sociology of *Farā'id* Law," in *Islamic Law: Social and Historical Contexts*, ed. Aziz al-Azmeh (New York: Routledge, 1988), 47; Powers, "Orientalism, Colonialism, and Legal History," 536.

[7] David S. Powers, "The Mālikī Family Endowment: Legal Norms and Social Practices," *IJMES* 25 (1993), 384.

[8] William F. Fratcher, "The Islamic *Wakf*," *The Missouri Law Review* 36 (1971), 161. See also Powers, "Orientalism, Colonialism, and Legal History," 536 (observing that the *'ilm al-farā'iḍ* "tends to fragment property into large numbers of small and awkward shares"); idem, "The Mālikī Family Endowment, 384–86; Christian Décobert, *Le mendiant et le combattant* (Paris: Éditions du Seuil, 1991), 22.

[9] S. E. Mohamed Aly Pacha, "Le *wakf* est-il une institution religieuse? Les conséquences des *wakfs ahli* sur l'intérêt général, les motifs de ces *wakfs*," *L'Égypte contemporaine* 18 (1927), 398–99; David S. Powers, "The Islamic Inheritance System: A Socio-Historical Approach," in *Islamic Family Law*, ed. Chibli Mallat and Jane Conners (London and Boston: Graham and Trotman, 1990), 22. Powers' article can also be found (without the author's permission) in *Arab Law Quarterly* 8 (1993), 13–29, esp. 23.

*banūn*), clients (*mawālī*), slaves (*riqāq*), and even neighbors (*jīrān*). And while the establishment of a *waqf* required founders to relinquish possession and control of the endowed properties during their mortal lives,[10] founders acquired *de facto* "dead hand" control over the distribution of the *waqf*'s yields "until God inherits the Earth and those on it."[11] Founders could specify that certain individuals should receive more than others, concentrate all the usufruct in the hands of a sole beneficiary, stipulate that males and females receive equally from the *waqf*, or conversely, remove one of the genders (usually the female)[12] from the endowment entirely. Although it is tempting to view the *waqf* as a cynical means for evading the *'ilm al-farā'iḍ*, it is clear that the Muslim community considered these endowments to be acts of piety, or at the very least, believed that the pious motives of the founders' actions justified circumventing the Qur'ānic inheritance verses.[13]

[10] Muslim jurists never reached a consensus as to whom these endowed properties were conveyed. Some jurists contended that the *waqf* properties passed into the possession of God, while other jurists held that they were ownerless. In either case, the net result was the same—the founder was not considered to be the owner of these properties, rendering the properties not subject to the *'ilm al-farā'iḍ*.

[11] Qur'ān 19.40. This Qur'ānic expression is frequently mentioned in *waqf* deeds. For example, it is found in a fourth-century A.H. *waqf* inscription from Ramla, the *waqf* deed in the *Kitāb al-Umm* of al-Shāfi'ī, and two *waqf* deeds mentioned in the *Aḥkām al-Awqāf* of al-Khaṣṣāf. Moshe Sharon, "*Waqf* inscription from Ramla, *c.* 300/912–13," *BSOAS* 60/1 (1997), 100; Muḥammad b. Idrīs al-Shāfi'ī, *Kitāb al-Umm*, ed. Muḥammad Zuhrī al-Najjār (Cairo: Maktabat al-Kulliyyāt al-Azhariyya, 1961), 4: 59; al-Khaṣṣāf, *Aḥkām al-Awqāf*, 14–15.

[12] It is a widely held assumption that *waqf*s were used to privilege agnatic relations over cognates. See, *e.g.*, Christian Décobert, *Le mendiant et le combattant*, 22, where the author asserts that founders employed the *waqf* as a means to "pass over cognates" and "disinherit women." Likewise, Aharon Layish, in his article on Mālikī family *waqf*s alleges that familial endowments were created primarily for a selected group of agnatic descendants in order to establish "a kind of '*patrimoine familial intangible*' for descendants of the male line." Layish, "The Mālikī Family *Waqf* According to Wills and *Waqfiyyāt*," *BSOAS* 46 (1983), 21–31, esp. 30–31. In his own study of Mālikī family endowments, however, Powers has reached the opposite conclusion. Based upon his examination of 101 *fatwā*s from the *Kitāb al-Mi'yār* of Aḥmad al-Wansharīsī (1430–1508 C.E.), Powers contends that Mālikī *waqf*s "frequently supplemented the rights of females," rather than subverted their inheritance shares. Powers, "The Mālikī Family Endowment," 385.

[13] The founder of a *waqf* existed within a social and moral economy in which there existed multiple claims on his wealth. In a world circumscribed by obligations to one's fellow human beings, the *waqf* emerged as the principal—and perhaps best—means for fulfilling these charitable duties. The relationship of the *waqf* to charity was discussed in more detail in the dissertation that preceded this book. See Peter Charles Hennigan, "The Birth of a Legal Institution: The Formation of the *Waqf* in Third-Century A.H. Ḥanafī Discourse," (Ph.D. diss., Cornell University, 1999), 232–47.



Due to the advantages of the *waqf vis-à-vis* the Qur'ān's forced-share system, the *waqf* became the dominant form of inter-generational wealth transmission in the Near East. By the beginning of the nineteenth century it was estimated that three-fourths of the real property within the Ottoman empire had been sequestered as *waqf* land,[14] and that one-half of the land in Algeria[15] and one-third in Tunisia[16] had been set aside as pious endowments.[17] Yacoub Hanki, an Egyptian lawyer in the early twentieth century, lamented that Egyptian land was rapidly reverting to *waqf* after a series of land reforms in the nineteenth century. Hanki observed that one-third of Cairo was already a *waqf*,[18] while new types of *waqf* deeds were accelerating the process of *waqf* formation. These new *waqf* deeds—in which the founder stipulated that a percentage of the *waqf* revenues were to be reinvested to purchase more *waqf* land—led Hanki to predict that "une portion très considérable de la fortune du pays" would soon be tied up in inalienable pious endowments.[19]

## *A Question of Legitimacy*

Because the *waqf* became so ubiquitous, the question of its legitimacy seems unnecessary. But imagine, for a moment, the following exchange, *circa* 150/767, in which a learned jurist poses the following question to his aspiring students:

[14] Heuschling, *L'Empire de Turquie*, 105. Cited in "Jurist," "*Waqf*," 173.

[15] Eugène Clavel, *Droit musulman. Le waqf ou habous d'après la doctrine et la jurisprudence (rites hanafite et malékite)* (Cairo: Diemer, 1896), 1: 3. Cited in "Jurist," "*Waqf*," 173.

[16] Clavel, *Droit musulman*, 1: 3. Cited in "Jurist," "*Waqf*," 173.

[17] John Robert Barnes, *An Introduction to Religious Foundations in the Ottoman Empire* (Leiden: E. J. Brill, 1986), 43–44, 83; Fuad Köprülü, "L'institution du *Vakouf*: Sa nature juridique et son évolution historique," *Vakiflar Dergisi* 2/3 (1942), French section; Powers, "Orientalism, Colonialism, and Legal History," 537.

[18] Aziz Bey Hanki, *Du wakf: Recueil de jurisprudence des tribunaux mixtes, indigènes et mehkémehs chariehs*, trans. from Arabic by Yacoub Hanki (Cairo: Imprimerie Menikidis Frères, 1914), 9.

[19] Hanki, *Du wakf*, 15; Powers, "Orientalism, Colonialism, and Legal History," 537–38. As Powers notes in his article, "[w]ere it not for Nasser's nationalization of public endowments and abolition of family endowments, Hanki's worst fears might have materialized." Powers, "Orientalism, Colonialism, and Legal History," 538, n. 11.

> We know that God has set forth a detailed forced-share system of inheritance in the Qur'ān that is binding on all believers. What then, do we make of a believer who establishes a pious endowment (*i.e.*, *waqf*) of all his property for his family, neighbors, slaves and the local mosque, but he does so in a manner that precludes application of the forced-share system that God has revealed in the Qur'ān? Can he do this?

Although the preceding narrative is fictional, the tension it addresses is not. With the benefit of hindsight we know that this question was ultimately answered in the affirmative, but the historical record indicates that there was no initial consensus on the question "Can he do this?"

That the legal status of pious endowments remained an open question within early Islamic law is evidenced in a *ḥadīth* from Shurayḥ b. al-Ḥārith (d. 78–99/697–717)[20] in which he asserted that the *waqf* (or *ḥubs*) constituted an evasion of the Qur'ānic *'ilm al-farā'iḍ*: "There is no *ḥubs* in circumvention of the shares of God, the Exalted" (*lā ḥubs 'an farā'iḍ Allāh ta'ālā*).[21] A *ḥadīth* present in the *Aḥkām al-Awqāf* of al-Khaṣṣāf reiterates Shurayḥ's concern that the establishment of *waqf*s interfered with the proper application of the inheritance verses. The *ḥadīth* relates that later Muslims—in contrast to the pious motivations of the Prophet's Companions—had begun to use *waqf*s (*ṣadaqa*s) as a means for disinheriting those who would have received shares under the *'ilm al-farā'iḍ*:

> 'Abd Allāh b. Ja'far—Umm Bakr bt. al-Miswar (sp.?)—[al-Miswar], her father, who said: I was present when 'Umar b. al-Khaṭṭāb read the document of his *ṣadaqāt* with the Emigrants around him. I kept quiet, but I wanted to say, "O Commander of the Believers!" You are doing things for the sake of good, and this is what you intend, but I fear that there will come men (belonging to the people) who do not do things out of the same desire for a reward in the world to come as you do, and who do not have the same intentions. They will adduce you as an example, and inheritances will be cut off. I was ashamed to give a legal opinion to the Emigrants, but if I had said it, I do not think that he ['Umar b. al-Khaṭṭāb] would have made any of it a *ṣadaqa*.[22]

[20] Aḥmad b. 'Alī b. Ḥajar al-'Asqalānī, *Tahdhīb al-Tahdhīb* (Hyderabad: Dā'irat al-Ma'ārif al-'Uthmāniyya, 1325/1906), 4: 327. The longevity of Shurayḥ's life appears to have taken on mythic proportions. One report in his biographical entry (*tarjama*) alleges that he was 120 years old when he died, while another tradition claims that he lived to be a truly remarkable 180 (!) years old. E. Kohlberg has argued that this latter claim is a typographical error and should read "108." *EI*², *s.v.* "Shurayḥ," E. Kohlberg, 9: 509.

[21] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 5–6; al-Shāfi'ī, *Kitāb al-Umm*, 4: 53.



Opponents of the *waqf* could also point to *ḥadīth*s in which the Prophet reportedly stated that there would be "no *ḥubs* after *sūrat al-nisā*'"[23] and that "*ḥubs* is forbidden" (*nahā 'an al-ḥubs*).[24]

Equally problematic for jurists such as Hilāl and al-Khaṣṣāf was the opposition of their school's "founder,"[25] Abū Ḥanīfa (d. 150/767), to almost all pious endowments. Abū Ḥanīfa disagreed with *waqf* proponents that the creation of a pious endowment created an "ownerless property." Citing another *ḥadīth* from Shurayḥ, in which it was reported that the Prophet allowed *ḥubs* to be sold, Abū Ḥanīfa contended that pious endowments remained in the control of their owners and were subject to the laws of inheritance and bequest upon their death.[26] Abū Ḥanīfa made an exception for mosques, presumably on the ground that ownership had passed to God.

If the arguments of those opposed to pious endowments had prevailed, there would have been no *waqf* and (presumably) no *waqf* treatises. Although the question of legitimacy dogged the earliest discussions of the *waqf*, these debates are largely absent from the two treatises discussed here. This absence is not altogether surprising. The resolution of fundamental questions—such as legitimacy—generally precede the production of legal treatises. Treatises emerge at a stage in the legal culture when the broad outlines of branches of law have stabilized and become recognizable, but the substantive law remains somewhat ill-defined. Thus, it would be incorrect to view Hilāl and al-Khaṣṣāf as *inventing* the law of *waqf*. Rather, their treatises were the product/culmination of a multi-generational effort to define the substantive law of this institution, and there is evidence that their legal reasoning was at least partially built on the shoulders

[22] Al-Khaṣṣāf, *Aḥkām al-Awqāf*, 7–8.

[23] Abū Bakr Aḥmad b. al-Ḥusayn b. 'Alī al-Bayhaqī, "*Kitāb al-Waqf*" in *Kitāb al-Sunan al-Kubrā* (Hyderabad: Dār Ṣādir, 1352 A.H.), 6: 162. *Sūrat al-nisā'* is the chapter of the Qur'ān in which the inheritance verses (Qur'ān 4.8, 4.11–12, 4.176) were revealed.

[24] Abū Ja'far Aḥmad b. Muḥammad al-Ṭaḥāwī, *Sharḥ al-Ma'ānī al-Āthār* (Cairo: Maṭba'at al-Anwār al-Muḥammadiyya, 1968–?), 4: 97.

[25] Whether Hilāl or al-Khaṣṣāf viewed themselves as members of a Ḥanafī "school" and followers of Abū Ḥanīfa will be discussed in chapter one.

[26] Hilāl al-Ra'y, *Aḥkām al-Waqf*, 1–16, esp. 5, 7, 12–13.

of earlier jurists.[27] Where the line between their original legal ideas and those of earlier jurists should be drawn may never be known, but external evidence indicates that the reason we call the institution a "*waqf*" is related to the terminological efforts of these treatise writers.

That said, the "birth" of the *waqf* as a legal institution required more than the explication of the substantive law in the legal treatises. It also required a legitmating superstructure. The *waqf* treatises provide evidence of a bifurcation between substantive law and legal legitimacy. While the substantive law of *waqf* was derived through what Norman Calder has termed the "discursive tradition"—non-exegetical legal reasoning often characterized by the *qultu/qāla* dialectic—the legitimacy of the institution depended on an exegetical, or "hermeneutic" superstructure that developed parallel to, and independent of, the discursive legal reasoning in the *waqf* treatises.[28] The emergence of the *waqf* as a legal institution was therefore dependent on these two different conceptions of legal authority, a somewhat ironic footnote to the tensions that typified the relationship between rationalist (non-exegetical) and traditionalist (exegetical) jurisprudents.

### *The Plan of This Study*

It is perhaps best to begin with stating what this study is not—it is not a comprehensive survey/analysis of the substantive law of *waqf* as presented in the *waqf* treatises of Hilāl and al-Khaṣṣāf. Such a study remains for another day. Instead, this study uses the *waqf* treatises to inform various debates and analyses within the study of Islamic law and society, including the nature of third-century A.H. legal culture, the role of treatises within that culture, the establishment of legal legitimacy, the development of the Islamic inheritance system, literary styles and conventions within early Islamic legal discourse, and the relationship between law and society as expressed through the law of *waqf*.

[27] For example, Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804) reportedly authored a treatise on the *waqf*—the *Kitāb al-Wuqūf wa'l-Ṣadaqāt*—and the *waqf* treatises of Hilāl and al-Khaṣṣāf also relate the opinions of Abū Ḥanīfa (d. 150/767) and Abū Yūsuf (d. 182/798), among others.

[28] Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 7–8.



The conclusions drawn in this work have been hampered, to some extent, by the current state of scholarship on the third century A.H. Until the publication of Wael Hallaq's 1993 article on al-Shāfiʿī,[29] it was generally assumed that al-Shāfiʿī's legal theory, as articulated in his *Risāla*, had a substantial impact on third-century legal discourse. By demonstrating that al-Shāfiʿī's theory had little impact until the fourth century,[30] Hallaq showed that we know very little about third-century legal culture. If it was not the age of al-Shāfiʿī, then what was it? This limited study of two *waqf* treatises and their authors cannot hope to answer to this broad question. Rather, similar to Jonathan Brockopp's work on early Mālikī law, this study seeks to illuminate a corner of third-century Islamic law in order to advance our knowledge of this era and inform debates within the field.

Chapter One examines the biographies of the treatise authors and argues for a reconceptualization of the values and norms of third-century Islamic legal culture. In contrast to the "scholars" model of this legal culture, al-Khaṣṣāf's life, in particular, suggests that jurists pursued political and administrative appointments in the ʿAbbāsid bureaucracy, and that the production of legal texts may have been a means of distinguishing oneself within this legal culture. The biographies also seem to provide support for the recent arguments of Hallaq and Brockopp that the third century was a "highly individualistic venture"[31] in which jurists sought to distinguish themselves as "Great Shaykhs" rather than as mere followers of older authorities.[32]

Chapters Two and Three turn to the texts of the *waqf* treatises. Chapter Two examines the attributes of third-century (proto)-Ḥanafī[33] discourse, focusing on literary conventions, forms of legal argumentation and the nature of legal authority among rationalists. Chapter Three examines aspects of substantive law addressed in the treatises.

[29] Wael B. Hallaq, "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?" *IJMES* 25 (1993), 587–606.

[30] Hallaq, "Was al-Shāfiʿī the Master Architect?" 600.

[31] Wael B. Hallaq, "From Regional to Personal Schools of Law? A Reevaluation," *ILS* 8 (2001), 1–26.

[32] Jonathan E. Brockopp, "Competing Theories of Authority in Early Mālikī Texts," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 3–22.

[33] For the problem of using the term "Ḥanafī" to describe third-century legal discourse, see the introduction to chapter one.

This chapter begins, however, with the question of whether the law of *waqf* might be derived from a foreign legal system. After examining the arguments for and against the various claims of foreign influence, I offer an alternative approach to the question of foreign borrowing. Instead of trying to identify "foreign" elements in *waqf* law, I argue that the question of foreign influence may be better explained by considering the development of *waqf* law from the perspective of the treatise writers. By the third-century A.H., Islamic society had become increasingly heterogeneous through both conversion and inter-marriage. Because Islamic law had not fully developed, it must be assumed that converts to Islam retained some of their former practices. Thus, the task confronting jurists such as Hilāl and al-Khaṣṣāf was how to bring order to what had become a wide range of trust practices and terminologies. That some of these practices likely had antecedents in non-Arabian legal systems may explain why so many theories for the origins of the *waqf* have been proposed. But their presence does not make the *waqf* a "borrowed" institution. Rather, I argue that the *waqf* is a distinctly Islamic institution that developed organically within an increasingly heterogeneous Muslim community.

The remaining two sections of Chapter Three examine the terminological birth of the signifier "*waqf*" as a distinct form of property conveyance within Islamic law. Section Two explores the terminological confusion surrounding pious endowments and how the signifier "*waqf*"—or, more correctly, the juxtaposition of "*ṣadaqa*" and "*mawqūfa*"—was used to differentiate pious endowments from other forms of charitable giving and simple gifts. Section Three examines how the treatise writers created a legal space for the *waqf* within the Islamic inheritance system. In this section I argue that the *waqf* constitutes the last piece of the puzzle that is the Islamic inheritance system, since the *waqf*'s substantive law is dependent on, and subordinate to, the doctrines of intestacy, testacy and death-sickness.

The final chapter of the book takes the reader outside the *waqf* treatises to examine the *waqf*'s legitimating hermeneutical superstructure. This movement away from substantive law and into the question of the *waqf*'s exegetical legitimacy is presaged by the collection of *ḥadīth*s that foreground al-Khaṣṣāf's treatise. This introductory collection of *ḥadīth*s highlights the bifurcated legal construction of the *waqf* within Islamic law: while the treatise writers would develop the substantive law of *waqf* from within a legal discourse



that paid scant attention to the past, the institution's legitimacy ultimately hinged on establishing exegetical/hermeneutical links to the Prophet and the early Muslim community. Relying on G. H. A. Juynboll's *isnād* analysis, I demonstrate that while these traditions cannot be considered historically authentic, they were nonetheless sufficiently "convincing" to confer legal legitimacy to the institution.

The threads that bind this wide-ranging discussion are both the treatises and the questions of (il)legitimacy that haunted the earliest discussions of pious endowments within Islamic legal discourse. The issues addressed in this book, however, have relevance beyond the narrow confines of trust law, for they touch upon styles of legal writing and argumentation, the values and norms of legal cultures, and the development of Islamic law in the third century. Of course, I am also mindful of Christopher Melchert's admonition in his review of Brockopp's *Early Mālikī Law* that writing on one or two texts raises the "inherent danger of . . . distortion of [their] place in history, [and] presenting as important and original what was actually commonplace of its time."[34] Melchert's concern is well-founded, but I also believe that narrowly focused studies can provide the building blocks for larger synthetic surveys of this period. The fact that there are meaningful differences between the *waqf* treatises discussed here and the Mālikī texts examined by Brockopp indicates that we still have much to learn about third-century legal discourse and culture.

[34] Christopher Melchert, "Review of *Early Mālikī Law: Ibn ʿAbd al-Hakam and His Major Compendium of Jurisprudence*," by Jonathan E. Brockopp, *ILS* 9 (2002), 273.

CHAPTER ONE

# THE BIOGRAPHIES OF HILĀL AL-RA'Y AND AL-KHAṢṢĀF

Making sense of the biographies of Hilāl and al-Khaṣṣāf is complicated by the limited state of our current understanding of early Islamic legal culture and its development during the second and third centuries A.H. Until recently, it was generally assumed that Hilāl and al-Khaṣṣāf were "Ḥanafīs"—an assumption supported by the Islamic tradition's recollection of this period. For example, Nurit Tsafrir classified Hilāl as an "unquestionable" Ḥanafī,[1] while Christopher Melchert asserted that the incorporation of earlier "Ḥanafī" jurists' opinions into works such as the *waqf* treatises was indicative of school consciousness: "Such works as these imply a specifically Ḥanafī school, both inasmuch as they collect the doctrine (*madhhab*) of one jurisprudent (and a few close to him) and inasmuch as they suggest that his doctrine (and theirs) is all one need know."[2]

The conclusion that second- and third-century jurists such as Hilāl and al-Khaṣṣāf were "Ḥanafīs" has been called into question in recent years. Wael Hallaq has argued that the typology of authority presented in the four schools of law—with legal authority descending from a single master-jurisprudent—was an *ex post facto* phenomenon, and that Abū Ḥanīfa was not even the most logical choice for the school that now bears his name.[3] Hallaq and Nimrod Hurvitz have also questioned long-held assumptions about the development of the schools of law in the second and third centuries. Both historians have challenged Schacht's (and more recently, Melchert's) conclusions that

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[1] Nurit Tsafrir, "Semi-Ḥanafīs and Ḥanafī Biographical Sources," *Studia Islamica* 84 (1996), 68 (defining "unquestionable" Ḥanafīs as those who "both studied under Ḥanafī teachers and had Ḥanafī students, and also those of whom we know that they wrote Ḥanafī law books.").

[2] Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries C.E.* (New York and Leiden: Brill, 1997), 33.

[3] Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 30–31.

the "ancient schools"[4] of law evolved from regional to personal schools, arguing instead that the early schools were distinctly personal and that master-disciple relationships provided the organizing framework.[5] For example, Hallaq has argued that legal scholarship was "a *highly individualistic venture* and one which rested on personal-*ijtihādic* effort" (emphasis in original).[6] This conclusion regarding the individualistic nature of early Islamic legal culture has been given support in a recent article by Jonathan Brockopp in which he argues that legal authority during the formative period was seen as residing in "Great Shaykhs"—individuals whose knowledge of the religious sources, wisdom and lineage gave their words legal authority.[7]

Given these recent historical revaluations of the schools of law it is not entirely clear that either Hilāl or al-Khaṣṣāf would have labeled themselves as "Ḥanafīs." And yet, the *waqf* treatises also reveal that Hilāl or al-Khaṣṣāf were operating within an intellectual milieu in which prominent "Ḥanafīs"—Abū Ḥanīfa, Abū Yūsuf, and Muḥammad b. al-Ḥasan al-Shaybānī—were considered legal authorities. In consideration of these historical debates, the use of the term "Ḥanafī" in this work implies something different than the traditional understanding of the term as a "follower of Abū Ḥanīfa." For the purposes of the period under study in this work, the term does not imply the hierarchy of legal authority traditionally associated with this term, but rather defines a legal culture in which an identifiable group of jurists—who were later (re)contextualized as "Ḥanafīs"—cited to and disputed with one another.

## *Hilāl al-Ra'y*

Of the two men, we know the least about Hilāl al-Ra'y. According to the sources, Hilāl's full name was Hilāl b. Yaḥyā b. Muslim al-Baṣrī.[8]

[4] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 6.

[5] Hallaq, "From Regional to Personal Schools of Law?" 37–64; Nimrod Hurvitz, "Schools of Law and Historical Context: Re-Examining the Formation of the Ḥanbalī *Madhhab*," *ILS* 7 (2000), 37–64.

[6] Hallaq, "From Regional to Personal Schools of Law?" 26.

[7] Brockopp, "Competing Theories of Authority in Early Mālikī Texts," 3–22.

[8] Abū Muḥammad 'Abd al-Qādir Ibn Abī al-Wafā', *Al-Jawāhir al-Muḍiyya fī Ṭabaqāt al-Ḥanafiyya* (Hyderabad: Dā'irat al-Ma'ārif al-Niẓāmiyya, 1332/1914), 2: 207; Khayr al-Dīn al-Ziriklī, *Al-A'lām*, 2d ed. (Cairo, 1954–59), 9: 95; Carl Brockelmann, *Geschichte der arabischen Litteratur*, original edition (Leiden: E. J. Brill, 1943–49), 1: 180.



His *kunya* (surname) was Abū Bakr,[9] but he acquired the eponym "al-Ra'y" due to his great knowledge (*'ilm*),[10] and/or his reliance on independent reasoning (*ra'y*),[11] and/or his use of analogical reasoning (*qiyās*).[12] He received his training from Zufar b. al-Hudhayl (d. 158/774) and Abū Yūsuf (d. 182/798),[13] two of Abū Ḥanīfa's most important students.[14] The initial encounter between Abū Yūsuf and Hilāl is described in the *Akhbār Abī Ḥanīfa wa-Aṣḥābihi* of al-Ṣaymarī (d. 436/1044). According to the report, Abū Yūsuf came to Baṣra and asked the *aṣḥāb al-ḥadīth* (traditionalists) and the *aṣḥāb al-ra'y* (rationalists) a legal question concerning compensation for destruction of a seal. When the *aṣḥāb al-ḥadīth* were unable to reach a single answer, Hilāl stood up from among the *aṣḥāb al-ra'y*, answered correctly, and received the praise of his future teacher.[15] In addition to writing the *Aḥkām al-Waqf*, Hilāl is credited with writing the first work on commercial transactions and contracts (*Kitāb Tafsīr al-Shurūṭ*),[16] a treatise on legal punishments (*Kitāb al-Ḥudūd*),[17] as well as a work on pleading at court (*Kitāb al-Muḥādara*).[18] Hilāl was also the teacher of Abū Khāzim (d. 292/905), and Bakkār b. Qutayba (d. 270/884),

[9] Muḥammad b. Isḥāq Ibn al-Nadīm, *Al-Fihrist li-Ibn al-Nadīm* (Cairo: Dār al-'Arabī li'l-Nashr wa'l-Tawzī', 1991), 1: 426.

[10] Ibn Abī al-Wafā', *Al-Jawāhir*, 2: 207; al-Ziriklī, *Al-A'lām*, 9: 95.

[11] Brockelmann, *Geschichte*, 1: 180; Fuat Sezgin, *Geschichte des arabischen Schrifttums* (Leiden: E. J. Brill, 1967–in progress), 1: 435–36.

[12] Al-Ziriklī, *Al-A'lām*, 9: 95.

[13] Ibn Abī al-Wafā', *Al-Jawāhir*, 2: 207.

[14] Zufar b. al-Hudhayl was the immediate successor to the "personal school" that coalesced around Abū Ḥanīfa. He was followed by Abū Yūsuf, who was then succeeded by Muḥammad b. al-Ḥasan al-Shaybānī. Melchert, *The Formation of the Sunni Schools of Law*, 34.

[15] Al-Ṣaymarī, *Akhbār Abī Ḥanīfa wa-Aṣḥābihi* (Beirut, 1985), 103.

[16] Ḥajjī Khalīfa (= Kâtib Çelebi), *Kashf al-Ẓunūn 'an Asāmī al-Kutub wa'l-Funūn*, ed. Gustav Flügel (New York and London: Johnson Reprint Corporation, 1964), 4: 45; al-Ziriklī, *Al-A'lām*, 9: 95.

[17] Ibn al-Nadīm, *Al-Fihrist*, 1: 426.

[18] There exists some confusion over the title of this book. The Arabic text of the *Fihrist* of Ibn al-Nadīm gives the title as *Kitāb al-Muḥāfira*, or the "*Book of Digging*." Ibn al-Nadīm, *Al-Fihrist*, 1: 426. Bayard Dodge, in his translation of the *Fihrist*, contends that "*al-muḥāfira*" is a scribal error and substitutes the word "*al-muḥādara*" (pleading). See Ibn al-Nadīm, *The Fihrist of al-Nadīm*, ed. and trans. Bayard Dodge (New York: Columbia University Press, 1970), 1: 507, n. 38. The *Kashf al-Ẓunūn* of Ḥajjī Khalīfa, however, states that the title of this work is the *Kitāb al-Muḥāwara*, or the "*Book of Disputation*." Ḥajjī Khalīfa, *Kashf al-Ẓunūn*, 5: 147.

both of whom later taught jurisprudence to Abū Ja'far al-Ṭaḥāwī (d. 321/933).[19] Hilāl was not reported to have been a transmitter of *ḥadīth*. To the contrary, there is a story relating that Hilāl was inattentive to the transmission of traditions because he could not provide an *isnād* for the *shahāda*.[20] Hilāl reportedly died in Baṣra during the year 245/859 or 249/863.[21]

## *Al-Khaṣṣāf*

By comparison, the person known as "al-Khaṣṣāf" appears to have been a more prominent figure within Ḥanafī legal circles and the 'Abbāsid administrative bureaucracy. Born Aḥmad b. 'Umar (or 'Amr) b. Muhayr al-Shaybānī, he was more commonly known as Abū Bakr al-Khaṣṣāf, or simply al-Khaṣṣāf.[22] There appears to be some confusion over how he acquired the eponym "al-Khaṣṣāf." One report suggests that "al-Khaṣṣāf" might have been a family name since his father was known as 'Amr b. Muhayr al-Khaṣṣāf.[23] Other reports allege that he received this appellation because he lived a life of piety and asceticism and ate only from the meager earnings he attained from repairing sandals (*yakhṣifu al-na'l*).[24] In addition to writing legal treatises, al-Khaṣṣāf apparently was a *qāḍī* in Baghdād as the following (unflattering) tradition attests:

> He [Ibn al-Najjā?] said: I heard Abū Sahl Muḥammad b. 'Umar, a *shaykh* from Balkh, say: When I came to Baghdād, there was a man on the bridge shouting for three days. The *qāḍī* Aḥmad b. 'Amr al-Khaṣṣāf was asked for a responsum on such and such question and gave such and such answer, but that is wrong! The answer is such and such, may God have mercy on whoever reports it to one who ought to know it.[25]

[19] Melchert, *The Formation of the Sunni Schools of Law*, 116, 118, 123 (citing al-Kaffawī, *Katā'ib a'lām al-akhyār min fuqahā' madhhab al-Nu'mān al-mukhtār* (East Efendi, Istanbul, 548 A.H.), 65b; al-Khaṭīb al-Baghdādī, *Ta'rīkh Baghdād aw madīnat al-salām* (Cairo: Maktabat al-Khānjī, 1931), 11: 63). Melchert has argued that either al-Ṭaḥāwī or Abū Khāzim could be considered the founders of the classical Ḥanafī school that formed in the fourth/tenth century.

[20] Melchert, *The Formation of the Sunni Schools of Law*, 11, 43 (citing al-Baghdādī, *Ta'rīkh*, 5: 409).

[21] Ḥajjī Khalīfa gives the common era dates of Hilāl's death as April 8, 859 or February 24, 863. Ḥajjī Khalīfa, *Kashf al-Ẓunūn*, 1: 175, 4: 46.

[22] Al-Ziriklī, *Al-A'lām*, 1: 178; Ibn al-Nadīm, *Al-Fihrist*, 1: 428; Ḥajjī Khalīfa, *Kashf al-Ẓunūn*, 1: 175.

[23] Al-Khaṣṣāf, *Kitāb Adab al-Qāḍī*, ed. Farḥāt Ziyāda (Cairo: The American University in Cairo Press, 1978), 3.

[24] Al-Khaṣṣāf, *Kitāb al-Nafaqāt*, ed. Abū al-Wafā' al-Afghānī (Beirut: Dār al-Kutub al-'Arabī, 1404/1984), 8; al-Ziriklī, *Al-A'lām*, 1: 178.



Unfortunately, nothing else is known about the length of al-Khaṣṣāf's tenure as *qāḍī* or the level of his position. Based upon these sources, it does not appear that al-Khaṣṣāf ever attained the position of "chief *qāḍī*" (*qāḍī al-quḍāt*) as the title page to the *Aḥkām al-Awqāf* alleges.[26]

As a jurist, al-Khaṣṣāf was known for his expertise in the calculation and division of inheritance shares (*kāna faqīhan fāriḍan*—or *fardiyyan*—*ḥāsiban*),[27] and as a prolific author of legal texts. Of the fourteen books he allegedly produced, only five remain extant: the *Aḥkām al-Awqāf*, a treatise on the decorum and practices of jurists (*Kitāb Adab al-Qāḍī*), a discussion of legal fictions (*Kitāb al-Ḥiyal*), a work on expenditures and maintenance (*Kitāb al-Nafaqāt*), and a treatise on wet-nurses and foster relationships (*Kitāb al-Riḍā'*).[28] The nine works which no longer exist covered areas of bequest law (*Kitāb al-Waṣāyā*), inheritance law (*Kitāb Iqrār al-Waratha*), taxation (*Kitāb al-Kharāj*), the maintenance provided for close relations (*Kitāb al-Nafaqāt 'alā al-Aqārib*), contracts (*Kitāb al-Shurūṭ al-Kabīr* and *Kitāb al-Shurūṭ al-Ṣaghīr*), court documents and records (*Kitāb al-Maḥāḍir wa'l-Sijillāt*), the rules for prayer (*Kitāb al-'Aṣr*[29] *wa-Aḥkāmihi wa-Ḥisābihi*), and a discussion of the holy sites in Mecca and Madīna (*Kitāb Dhar' al-Ka'ba wa'l-Masjid wa'l-Qabr*).[30]

The few records that mention al-Khaṣṣāf suggest that his life ended in disgrace and failure. Unlike Hilāl, who seems to have remained on the periphery of political power (perhaps voluntarily), al-Khaṣṣāf

[25] Ibn Abī al-Wafā', *Al-Jawāhir* (Hyderabad, second printing, 1408/1988), 1: 142; Taqī al-Dīn b. 'Abd al-Qādir al-Tamīmī, *Al-Ṭabaqāt al-Saniyya fī Tarājim al-Ḥanafiyya*, ed. 'Abd al-Fattāḥ Muḥammad Aḥmad al-Ḥilw (Riyad, 1983), 1: 419. Credit should be given to Patricia Crone for bringing these sources to my attention and providing me with their translation.

[26] Not only do none of the biographical entries make this claim, but al-Khaṣṣāf is also absent from the list of *qāḍī al-quḍāh* in the *Akhbār al-Quḍāh* of Wakī', 3: 294–324.

[27] Al-Khaṣṣāf, *Kitāb Adab al-Qāḍī*, 3; idem, *Al-Nafaqāt*, 7; al-Ziriklī, *Al-A'lām*, 1: 178; Ibn al-Nadīm, *Al-Fihrist*, 1: 428.

[28] These five works are the only ones mentioned in Sezgin, *Geschichte*, 1: 436–38.

[29] The *Fihrist* gives the spelling of this word as "*al-'Aṣīr*" which refers to the juice that is extracted from a grape. It is difficult to see how this meaning could pertain to the remainder of the book's title. The word "*al-'Aṣr*," on the other hand, provides a meaning more consistent with the rest of the title.

[30] Ibn al-Nadīm, *Al-Fihrist*, 1: 428.

became entangled in the turmoil of the ʿAbbāsid caliphate. Although al-Khaṣṣāf apparently became a *qāḍī* at some point in his life, the first recorded intersection of al-Khaṣṣāf's life with the ʿAbbāsid regime occurred during the caliphate of al-Muʿtazz (r. 252–55/866–69) when he failed to secure a judgeship. According to the account in the *Taʾrīkh* of al-Ṭabarī, Muḥammad b. ʿImrān al-Ḍabbī—al-Muʿtazz's teacher (*muʾaddib*)—had appointed al-Khaṣṣāf and seven other men as *qāḍī*s.[31] The letters of appointment had already been written when three of al-Muʿtazz's advisors warned the caliph that the eight men were followers of Ibn Abī Duʾād (d. 240/854)—the Muʿtazilī *qāḍī* who had persuaded al-Maʾmūn to enforce acceptance of the createdness of the Qurʾān during the *miḥna*—and members of various heterodox and Shīʿī groups: "Verily, they are among the followers of Ibn Abī Duʾād, and they are Rāfiḍa,[32] Qadariyya,[33] Zaydiyya,[34] and Jahmiyya."[35] Apparently afraid of appointing *qāḍī*s with allegedly

[31] Abū Jaʿfar Muḥammad b. Jarīr al-Ṭabarī, *Taʾrīkh al-Rusul waʾl-Mulūk*, ed. Muḥammad Abū al-Faḍl Ibrāhīm (Cairo: Dār al-Maʿārif, 1960–69), 9: 371.

[32] Christopher Melchert, in his gloss of this passage, writes that the term "Rāfiḍa" probably indicates those Shīʿa who preferred ʿAlī b. Abī Ṭālib to Abū Bakr and ʿUmar b. al-Khaṭṭāb. The term appears to have originated with the uprising of Zayd b. ʿAlī against the ʿUmayyads in 122/740. Some of the Kūfans who had joined Zayd's uprising eventually deserted (*rafaḍa*) him when Zayd refused to reject Abū Bakr and ʿUmar. Melchert, "Religious Policies of the Caliphs from al-Mutawakkil to al-Muqtadir, A.H. 232–295/A.D. 847–908," *ILS* 3/3 (1996), 332, n. 89; idem, "The Adversaries of Aḥmad Ibn Ḥanbal," *Arabica* 44 (1997), 236–37; *EI*², *s.v.* "*Al-Rāfiḍa*," E. Kohlberg, 8: 386–89.

[33] The term "Qadariyya" is commonly used to denote a group of theologians who advocated the principle of free will during the late first and second centuries A.H. They are considered precursors to the Muʿtazila of the third century A.H. *EI*², *s.v.* "*Kadariyya*," J. van Ess, 4: 368–72.

[34] Melchert states that the Zaydiyya consisted of those Shīʿa who preferred ʿAlī to ʿUthmān. The Zaydiyya were also reported to have believed in the created Qurʾān. The term "Zaydiyya" appears to have emerged in connection with the Rāfiḍa split from Zayd's uprising. Melchert, "Religious Policies of the Caliphs," 332, n. 89; idem, "The Adversaries of Aḥmad Ibn Ḥanbal," 238; *EI*², *s.v.* "*Al-Rāfiḍa*," E. Kohlberg, 8: 386–87.

[35] Al-Ṭabarī, *Taʾrīkh*, 9: 371. The chief view associated with the Jahmiyya was a belief in the createdness of the Qurʾān. Montgomery Watt, however, has concluded that the term "Jahmite" was a purely vituperative term meaning something like 'renegade' or 'quisling' and that there never was a body of men who were followers of Jahm b. Ṣafwān (d. 128/746) or who professed to be such. Rather, Watt argues that the "Jahmiyya" sect was a creation of heresiographers. Watt speculates that the doctrine of the createdness of the Qurʾān was placed on the sect's "founder," Jahm b. Ṣafwān, in order to dissociate the Ḥanafīs from the doctrine. W. Montgomery Watt, *The Formative Period of Islamic Thought* (Edinburgh: Edinburgh University Press, 1973), 147–48.



unorthodox viewpoints, al-Muʿtazz rescinded the appointments, demoted al-Ḍabbī, and ordered that the eight men be expelled from Sāmarrā and exiled to Baghdād. The appointment of al-Khaṣṣāf, in particular, seems to have enraged the populace of Sāmarrā, who reportedly attacked him while the others were able to flee to Baghdād unscathed.[36]

There may have been some truth to this polemical description of al-Khaṣṣāf. He was reportedly affiliated with the "Jahmiyya" sect,[37] and, according to Ibn al-Nadīm (d. 380/990), the people of ʿIrāq later associated al-Khaṣṣāf's appointment under the subsequent caliph al-Muhtadī (discussed below) with a revival of Ibn Abī Duʾād and, by extension, the *miḥna*.[38]

Al-Khaṣṣāf's hopes for advancement into the ʿAbbāsid elite were not entirely finished, however. His second brush with power came during the brief caliphate of al-Muhtadī (r. 255–56/869–70), when he apparently served in the caliph's administration. Ibn al-Nadīm reports that it was at the behest of al-Muhtadī that he wrote his no longer extant *Kitāb al-Kharāj*.[39] Al-Khaṣṣāf's brief interlude of success soon ended, however, when the Turkish military overthrew and assassinated al-Muhtadī in 256/870. The historical record provides indications that it was al-Muhtadī's vigorous promotion of rationalism and his hostility to the traditionalists that contributed to his downfall.[40] Al-Khaṣṣāf, perhaps on account of his strong association with the rationalists and/or the caliph, also appears to have been a target of this coup. It is reported that his home was ransacked following the assassination of al-Muhtadī, resulting in the loss of some of his books.[41] Whatever future hopes al-Khaṣṣāf might have had of returning to the inner administration of the ʿAbbāsid dynasty were cut short by his death four years later in 261/874.[42]

[36] Al-Ṭabarī, *Taʾrīkh*, 9: 371.

[37] Ibn al-Nadīm, *Al-Fihrist*, 1: 428; Al-Khaṣṣāf, *Kitāb Adab al-Qāḍī*, 4. See prior discussion on the lack of any true adherents to the Jahmiyya sect, *supra*.

[38] Ibn al-Nadīm, *Al-Fihrist*, 1: 428.

[39] Ibn al-Nadīm, *Al-Fihrist*, 1: 428.

[40] Melchert, "Religious Policies of the Caliphs," 338; al-Ṭabarī, *Taʾrīkh*, 9: 392–93, 459–61, 467.

[41] Ibn al-Nadīm, *Al-Fihrist*, 1: 428; al-Ziriklī, *Al-Aʿlām*, 1: 178. The ransacking of al-Khaṣṣāf's home may also account for the nine missing texts.

[42] Ḥajjī Khalīfa gives the common era date of al-Khaṣṣāf's death as October 16, 874. Ḥajjī Khalīfa, *Kashf al-Ẓunūn*, 1: 175.

### *Early Islamic Legal Culture*

As observed in the introduction to this chapter, the current state of the discipline indicates that we are still at the beginning stages of understanding the values of the legal culture in which Hilāl and al-Khaṣṣāf worked and lived, and what may have motivated them to pursue different career choices, such as seeking appointments in the ʿAbbāsid administration, writing legal treatises, memorizing *ḥadīth*s, etc.[43] This lacuna in our knowledge is partly the result of the hagiographical quality of the Islamic sources, which present these great authorities as motivated by little more than a pious and sincere love for God. This hagiographical presentation, however, has obscured the competitive nature of early Islamic legal culture both by downplaying the types of emotions present in any competitive arena (prestige, power, respect, jealousy, narcissism, a desire for immortality, etc.),[44] and concealing the means by which jurists ranked and measured themselves.[45] Although the Islamic sources provide very little

[43] Our knowledge about the third century has been limited by the fact that most historical studies of the schools of law have tended to skip over the era in which they were formed and begin in the fourth century A.H. See Hallaq *Authority, Continuity, and Change in Islamic Law*, xii, 171, n. 21; Hurvitz, "Schools of Law and Historical Context," 40. Melchert has observed that the Islamic tradition itself views the beginning of the fourth Islamic century "as a watershed, the dividing line between the ancients and the moderns." Melchert, "Traditionist-Jurisprudents and the Framing of Islamic Law," *ILS* 8 (2001), 406. We do, however, know something about the motivations and values of a later Islamic legal culture from the work of Michael Chamberlain on the learned elite of Damascus during the period 1190–1350 C.E. Chamberlain discusses how the acquisition of *ʿilm* (knowledge) led to monetary gain and granted a form of social honor known as *ḥurma*. Chamberlain argues that prestige itself became the "elusive prize" of the competitive struggle within the *ʿulamāʾ* class. Michael Chamberlain, *Knowledge and Social Practice in Medieval Damascus, 1190–1350* (Cambridge: Cambridge University Press, 1994), 64–66, 92, 153–56, 175–78.

[44] Consider, for example, the modern, printed editions al-Ṭabarī's two monumental works—his thirty volume *tafsīr* of the Qurʾān and his ten volume history of the world. The enormity of these works suggests an ego that sought to create a form of immortality for itself. And, to a large extent, al-Ṭabarī succeeded. His *tafsīr* is so enormous, and so all-encompassing, that no one has ever attempted to write anything similar to it. Likewise, the breadth of his *Taʾrīkh* not only brought to a close a genre of historical writing on the early Muslim community, but also appears to have discouraged the writing of universal histories for several centuries. As Claude Cahen observed, the *Taʾrīkh* could be described as a "swan-song" because "it was impossible for it to be pursued further." Cahen, "History and Historians," in *Religion, Learning and Science in the ʿAbbāsid Period*, eds. M. J. L. Young, J. D. Latham, and R. B. Serjeant (Cambridge: Cambridge University Press, 1990), 199.

[45] Zaman and Hurvitz are among the few scholars to see through the hagiographical shroud that has been placed over early Muslim jurists. Zaman has argued that jurists may have been motivated to seek employment in government bureaus "by purely economic exigencies, by some taste for prestige and power in society." Muhammad Qasim Zaman, *Religion and Politics Under the Early ʿAbbāsids: The Emergence of the Proto-Sunnī Elite* (Leiden: E. J. Brill, 1997), 153, 161. Hurvitz has observed that masters desired "status" within their circles, and that relationships with the caliphal court may have attracted disciples. Hurvitz, "Schools of Law and Historical Context," 46. *Cf.* David S. Powers, *Law, Society and Culture in the Maghrib, 1300–1500* (Cambridge: Cambridge University Press, 2002), 54, 92 (remarking that the "mocking jurist" Mūsā b. Yamwīn al-Haskūrī "climb[ed] the ladder of scholarly success" and that he may have been a victim of a plot hatched by "jealous colleagues").



information on this issue, it is unrealistic to assume that in a hierarchical legal culture,[46] where the rewards of the system would have correlated to one's position within the hierarchy, that jurists did not develop systems for ranking themselves and competed (fiercely) for prestige, patronage and prized positions.

The lacuna in our knowledge has also been shaped by a tendency to conceive of these early legal figures as "scholars"[47] instead of jurists and/or jurisprudents.[48] Although seemingly innocuous, the labeling of these jurists as "scholars" could be construed in a manner that inaccurately conveys the contours of this legal culture. First, the designation "scholars" suggests a certain disinterestedness with the political world. Second, this designation implies that the principal professional aspiration of these men was to be independent legal scholars as opposed to judges, administrators, advisors or other political functionaries. Thus, for example, when Brockopp observes that ʿAbd Allāh b. ʿAbd al-Ḥakam (d. 214/829), in the final years of his life, served as an advisor to the governor and to the chief judge of Egypt, Brockopp describes this political involvement not as the attainment of a prized position, but rather as "perpetuat[ing] a pattern

[46] It is an interesting question whether legal cultures are more hierarchically oriented than other professional cultures. Certainly, the nature of legal authority places a great emphasis on hierarchy. Hierarchy grants some courts jurisdiction to review the decisions of other courts, and the opinions of certain judges will carry more weight (and in some cultures will act as binding precedents on lower court judges) simply by virtue of the judge's position within the hierarchy.

[47] See, *e.g.*, Jonathan E. Brockopp, *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and his Major Compendium of Jurisprudence* (Leiden: Brill, 2000), 64.

[48] There is some overlap between the terms "jurist" and "jurisprudent." Jurisprudents generally take a philosophical approach to the law, whereas jurists are typically more interested in the law's practical and concrete details. Although both jurists and jurisprudents can be scholars, the term "jurist" encompasses a broader range of avocations—judging, the writing of legal manuals, and employment in government bureaus.